2014 IL App (4th) 130360-U

NO. 4-13-0360

FILED
April 22, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ERIC HJERPE,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
ROLAND J. THOMA,	)	Nos. 11L224
Defendant-Appellant,	)	12L43
and	)	
DONNA M. THOMA,	)	
Plaintiff-Appellant,	)	
v.	)	Honorable
ERIC HJERPE; and THOMA and HJERPE, CPAs,	)	Charles M. Feeney,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in sanctioning appellants for failing to comply with a discovery order.

¶ 2 Appellants, Roland and Donna Thoma, appeal the March 2013 order granting sanctions for appellees, Eric Hjerpe and Thoma & Hjerpe, certified public accountants (T&H), as a result of appellants' failure to comply with a discovery order. In the sanctions order, the trial court awarded appellees $5,484 in attorney fees and $230 in expenses. The Thomas appeal, arguing the court abused its discretion. We affirm as modified.

¶ 3 I. BACKGROUND

¶ 4 A. The Pleadings and Motions To Dismiss

¶ 5 Roland Thoma and Eric Hjerpe were the principal members of T&H, an accounting firm in Bloomington, Illinois. In January 2010, Roland and Hjerpe signed a document entitled "Integrated Business Acquisition and Employment Agreement" (Agreement), which governed their business relationship.

¶ 6 On December 7, 2011, Hjerpe filed a complaint against Roland, with claims of breach of contract and tortious interference with a business relationship. Hjerpe alleged Roland was joining a competitor and, using false statements, attempted to lure T&H customers to Roland's new employer. Hjerpe filed a motion for a temporary restraining order and preliminary injunction.

¶ 7 On December 22, 2011, the trial court found the Agreement entered by the parties governed. The court further determined mediation followed by binding arbitration was required.

¶ 8 Two additional complaints followed. In January 2012, Roland filed a counter-complaint, in which he sought payments owed under the Agreement. In March 2012, Roland and his wife Donna Thoma filed a complaint against Hjerpe and T&H. According to this complaint, Donna worked for T&H and its predecessors for over 20 years. In November 2011, Donna's position was terminated. Donna alleged Hjerpe and T&H failed to compensate Donna for her unused vacation. Donna and Roland also set forth claims of common-law retaliatory discharge, a violation of the Whistleblower Act (740 ILCS 174/1 *et seq.* (West 2010)), and false light invasion of privacy.

¶ 9 In April 2012, Hjerpe moved to dismiss Roland's countercomplaint and Donna and Roland's complaint. The trial court denied the motion to dismiss in regard to Donna's claims but granted the motion on the counts related to Roland. The court noted the parties had mediated

their disputes and the next step was binding arbitration.

¶ 10 B. Discovery

¶ 11 On September 11, 2012, the trial court signed an agreed discovery schedule. Written discovery requests were to be served by September 17, 2012. All answers to written discovery were due October 31, 2012. The depositions of Jennifer Mitzelfelt and Emily Tower, employees of T&H, were scheduled for September 14, 2012. The depositions for Donna, Hjerpe, Roland, and "additional depositions of additional witnesses to be coordinated by the parties" would occur on those dates "or on other dates as agreed between counsel for the parties and the deponents." Supplemental discovery was due by January 15, 2013. Discovery disputes were to be brought to the court.

¶ 12 The record indicates the depositions of Mitzelfelt and Tower were held as scheduled and the parties submitted written discovery requests.

¶ 13 C. Appellees' Motion To Compel and for Sanctions

¶ 14 On December 4, 2012, appellees filed a motion to compel and for sanctions. In the motion, appellees maintained the following:

¶ 15 On September 21, 2012, as agreed by the parties, appellees served interrogatories and a request to produce on the Thomas. The Thomas did not serve their written discovery requests until six days later. Appellees' counsel later sent an e-mail to Dawn Wall, counsel for the Thomas, to request the status of discovery responses. Wall, on October 30, 2012, sent an e-mail that stated the following: "[I] t occurred to me that [appellees' counsel, William M. Anderson IV] and I need to do an agreed protective order for the mutual benefit of both of our clients. I will draft a proposed protective order and get it over to [Anderson] for his

consideration and review. If it is acceptable to [Anderson,] then I will present it to the Court ***."

¶ 16 Pursuant to the discovery order, the depositions of Tower and Mitzelfelt were held on September 14, 2012. After these depositions, Roland sent letters to T&H clients, Hjerpe's friends, and parents of students coached by Hjerpe, disclosing matters discussed during Tower's deposition. The depositions of Donna, Roland, Hjerpe, and other witnesses were to be conducted on November 6, 7, 19, and 20. Because discovery was incomplete, the parties agreed to cancel the November 6 and 7 depositions. After that time, Wall refused to provide discovery responses until a protective order was entered.

¶ 17 On November 16, 2012, Anderson called Wall to ask about discovery and the depositions scheduled for Monday, November 19, and Tuesday, November 20. Wall informed Anderson she did not intend to allow her clients to testify or provide responses until a protective order was entered. Anderson advised Wall the depositions were set by court order and, unless he received a written confirmation from her stating she was refusing to tender her clients for depositions, he would be at her office for those depositions. By the close of business on November 16, 2012, Anderson had not received such confirmation. Anderson prepared for the depositions over the weekend of November 17 and 18. At 7:47 a.m. on November 19, Anderson received a letter attached to an e-mail, confirming Wall would not consent to producing discovery responses or her clients for depositions without a protective order. A copy of the letter was attached and it stated the following, in part:

"This will confirm our phone conversation on Friday,

November 16, 2012, regarding the depositions scheduled for today

and tomorrow. As you know, previously we had a series of depositions set on November 6 and November 7. Those depositions were canceled by agreement due to pending discovery issues. Thereafter, we both agreed to exchange written discovery by November 12, 2012. As of this date, we still have not exchanged written discovery. I understand your issues for withholding your production, and I have explained my issues as well. With respect to my clients, *** I continue to insist that a protective order is necessary given the continued explosive and exploitive nature of the issues between the parties. ***

I indicated that without the protective order in place, I do not believe that we can proceed with the depositions as there will be portions of the deposition testimony that I will likely assert to be confidential and proprietary. In any event, given that issue with the protective order and given that I also do not yet have Eric Hjerpe's written discovery responses, I determined that it was best to cancel the production of my parties for their depositions until we can get the discovery issues ironed out.

I understand that you have a Motion to Compel set for hearing in late December. I will be filing a Motion as well. Additionally, on Friday morning I received copies of Subpoenas for the depositions of various individuals who have been

> cooperating with the Department of Justice in the civil investigation. Due to the fact that the civil investigation remains pending and due to the fact that there are other attorneys involved in that matter that would have to determine whether those folks are allowed to be questioned and[/]or ordered to produce documents, I am not consenting to proceeding with those subpoenaed witnesses' depositions set tomorrow."

¶ 18 Hjerpe refused to enter into a protective order. Appellees asserted the attempt to gain a protective order was an attempt by the Thomas to withhold information from the Department of Justice. Appellees argued the failure to comply with discovery without a protective order and the later actions by Wall and her clients were not taken in good faith.

¶ 19 D. The Motion for a Protective Order and Subsequent Hearing

¶ 20 On February 21, 2013, appellants filed a motion for a protective order to impound filings and discovery. A hearing was held on this motion and on appellees' motion to compel on March 1, 2013.

¶ 21 At the hearing, the Thomas' counsel, Wall, told the court she had prepared a motion to compel because appellees had not responded to written discovery. Wall stated neither party responded to written discovery due in October because of the protective-order issue. Wall was concerned about third parties receiving confidential information, and she asserted that was her concern since October 2012 and Anderson knew since early November of her objection.

¶ 22 Anderson stated the first time he saw a copy of the Thomas' proposed protective order was when it was delivered to him at a hearing before another judge who determined she

had a conflict of interest. The record indicates this hearing occurred on December 27, 2012. Anderson stated, at that time, a motion for a protective order was not on file.

¶ 23 According to Anderson, Wall had been raising the protective-order issue for some time. Anderson referenced his own motion to compel and motion for sanctions. Anderson summarized the court had repeatedly ruled the litigation belonged in arbitration. The court remained involved to enforce discovery in the case. The first round of the depositions involved Anderson's "people," and those were timely conducted. After the initial depositions were completed, Roland sent the aforementioned letters to clients, banks, fellow accountants, and parents of children on the softball team coached by Hjerpe. In the letter, Roland mentioned a T&H employee who had been convicted of felony theft performed payroll services. Roland also mentioned the civil investigative demand (CID) and the unemployment-benefit lawsuit. Roland mentioned other matters, including payments into pensions and Department of Labor disputes.

¶ 24 In response, Wall informed the court she learned from the two deposed witnesses that Hjerpe was publishing the CID to clients, which led her to request the protective order. Wall asserted she requested a protective order for the information that would be exchanged between the parties during discovery. Wall indicated surprise Anderson was saying he did not want a protective order, because he agreed a protective order served everyone's interests. Wall emphasized Anderson had not responded to interrogatories or requests to produce that had been due since October.

¶ 25 Anderson replied, stating there had been two rounds of discovery in the litigation. In the first round, the parties agreed to postpone the written discovery. Anderson stated he sent his out, but did not receive discovery from Wall for another week. In the second round,

Anderson did not want to give his discovery until they could exchange it: "I'm tired of giving mine and not getting theirs."

¶ 26 Anderson further stated the demands for a protective order did not begin until Roland sent his letter. Anderson initially responded he believed that would be a good idea. Later, Anderson concluded a protective order was not in his clients' best interests because "[a]ll that would do would be tie our hands and we are clean."

¶ 27 The trial court denied the Thomas' motion for a protective order. The court found the letter written by Roland "somewhat shocking." The court concluded it did not "know what the truth is in this case," but believed "people who have chosen to air dirty laundry should not object to other people's ability to defend themselves against that." The court refused to rule on the Thomas' motion to compel because it was not before the court. The court set a date of April 24, 2013, for written discovery responses. The court granted appellees' motion to compel. The court postponed the issue of sanctions to give Wall until March 16, 2013, to prepare a written response.

¶ 28 E. Sanctions Hearing

¶ 29 On March 27, 2013, a hearing on sanctions was held. At the hearing, the trial court stated it would not relitigate the motion to compel. The court began by asking questions regarding Anderson's affidavit of attorney fees, ruling it would not be appropriate to grant sanctions for costs not due to the delay. The court stated Wall, once she had a dispute, was not "free to just blow things off and say, I'm not going to comply because we have this dispute."

¶ 30 Wall then reported to the trial court her records indicated the issue of a protective order arose after Anderson called her on September 27, 2012. On September 28, 2012, both

spoke specifically about the need for the order. From that date on, Wall relied on Anderson's assurance they could work something out. At some point, he changed his mind. Wall emphasized Anderson conceded the issue of a protective order was ongoing since mid-October. Wall stated she raised the issue not to ask the court to change its mind regarding the protective order, but she believed it was relevant to the issue of whether her client had a justifiable reason not to respond to discovery based on what she believed to be an agreed protective order. Wall further stated she mentioned the matter in her November 19 letter, indicating she wanted to work it out. Wall stated she sent a proposed protective order twice to Anderson. Wall agreed she should have had a motion for a protective order on file before the December hearing. Wall indicated she had one with her on December 27, 2012, when in Judge Foley's courtroom, but was told the case would be reassigned. The next available date for a hearing was March 1, 2013. Wall concluded the issue of whether sanctions were appropriate involved consideration whether there was "some substantial justification for delaying response." Wall believed there was, given Anderson's agreement.

¶ 31 Wall further stated the parties agreed to reschedule Roland's deposition for November 19. She called Anderson on November 16 about the November 19 depositions. Wall asserted Anderson specifically agreed on November 16 she could notify the court reporter and there would be no depositions. Anderson asked Wall to confirm this in writing. Wall stated she dictated a letter on November 16, 2012, and it was sent out by e-mail on Monday, November 19, 2012, at 7:28 a.m.

¶ 32 The trial court responded by calling Wall's argument a "my-way-or-the-highway argument." The court further stated the following:

"It is, you either agree to this protective order, or I don't care what the Court order is regarding discovery, we're not going to—I've told my client—my client's going to rely on what I say. So I'm telling my client to not do this, because we have a good faith—we want this protective order. So since I told my client to do that—I mean, it's bootstrapping. It's like, now your client's reasonable, because your client's relying on you, and you're asserting that your client has this basis, when—and quite honestly, I turned it down, because your client was the one who was creating the need for all of this, in my opinion, anyway."

¶ 33 The trial court concluded it wished to compensate appellees for the lost time due to unreasonable delay. The court did not award fees for any time attributable to the dispute regarding the Thomas' motion for a protective order. The court awarded $5,484 in attorney fees and $230 in expenses.

¶ 34 This appeal followed.

¶ 35 II. ANALYSIS

¶ 36 A trial court may sanction a party who unreasonably fails to comply with discovery rules or orders. Ill. S. Ct. R. 219(c) (eff. Jul. 1, 2002). The imposed sanction is to encourage compliance with discovery orders, not to punish the offender. *In re Marriage of Barnett*, 344 Ill. App. 3d 1150, 1153, 802 N.E.2d 279, 281 (2003). The party disputing the propriety of a sanctions order must establish the "noncompliance was reasonable or justified under the circumstances." *In re Estate of Andernovics*, 197 Ill. 2d 500, 510, 759 N.E.2d 501, 507

(2001). One's failure to comply is unreasonable if the failure is a " 'deliberate, contumacious, or unwarranted disregard of the court's authority.' " *Barnett*, 344 Ill. App. 3d at 1153, 802 N.E.2d at 281 (quoting *Blott v. Hanson*, 283 Ill. App. 3d 656, 662, 670 N.E.2d 345, 349 (1996)).

¶ 37 Trial courts have discretion in imposing a sanction. Sanctions orders will not be reversed absent a clear abuse of discretion. *In re Marriage of Booher*, 313 Ill. App. 3d 356, 359, 728 N.E.2d 1230, 1232 (2000). Factors this court will consider when deciding whether a sanctions order is an abuse of discretion include: "(1) the surprise to the adverse party, (2) the prejudicial effect of the proffered evidence or testimony, (3) the nature of the evidence or testimony, (4) the diligence of the adverse party in seeking discovery, (5) the timeliness of the adverse party's objection to the evidence or testimony, and (6) the good faith of the party offering the evidence or testimony." *Id*. at 359-60, 728 N.E.2d at 1233.

¶ 38 The Thomas contend the sanctions order is an abuse of discretion. The Thomas first argue the sanctions order is improper because the appellees also failed to comply with the September 2012 discovery order. The Thomas point to Anderson's acknowledgment he had not produced his discovery responses by the deadline of October 31, 2012. The Thomas maintain our decision in *Booher* is analogous and reversal is required.

¶ 39 *Booher* is not dispositive. This court in *Booher* did not hold a sanction cannot be imposed when the movant has also violated the discovery order, but, at best, held that fact could be a factor. In *Booher*, the *pro se* husband failed to file a pretrial affidavit. At a hearing, the husband explained he went to the county clerk to get a form and was told he had the upcoming hearing and could discuss it then. The trial court struck the husband's pleadings and barred him from presenting any evidence on the issues of custody and visitation. *Id*. at 358, 728 N.E.2d at

1231. This court found the sanction erroneous, concluding "[c]ustody and visitation are too important for the trial court to prevent [the husband] from presenting *any* evidence on these issues." (Emphasis in original.) *Id.* at 360, 728 N.E.2d at 1233. This court also found the wife would not have been surprised by the information that would have been added to the affidavit. *Id.* The court's language regarding the wife's failure to comply with the court's order was one sentence following the above reasons for the reversal and not a key reason for its finding. *Id.* at 361, 728 N.E.2d at 1233 ("We note [the wife] asked the trial court to strike [the husband's] petition and to not allow him to present evidence because he failed to comply with the court's order when she also failed to comply with the court's order.").

¶ 40 While the Thomas' failure to produce the written discovery according to the terms of the discovery order is relevant to the analysis, we find it does not necessitate a reversal. Anderson explained to the trial court his reason for withholding the discovery. Anderson stated in an earlier round of discovery Wall failed to produce her clients' requests until one week after he did. Anderson told the court he did not want to put himself in a similar position again. Wall did not contradict Anderson's explanation regarding the earlier discovery. Given these circumstances, the Thomas' failure to produce discovery does not undermine the propriety of the sanctions order. However, both parties had the obligation to seek timely guidance from the court regarding discovery disputes that appeared to arise in September.

¶ 41 In their reply brief, the Thomas contend all parties failed to comply with the discovery order as a result of a legitimate discovery dispute regarding Anderson's about-face on the issue of the protective order. This contention is unconvincing. In their opening brief, the Thomas stated the parties discussed the protective-order issue "up to and through October 30,

2012." The Thomas were the parties refusing to produce discovery absent a protective order. The Thomas should have, at this point, filed their motion for a protective order. Instead, the Thomas continued to refuse to produce discovery or consent to depositions as required by the discovery order and waited until February 21, 2013, to file a motion for a protective order. While the dispute may have been legitimate, it should have been timely brought to the trial court's attention, as specified in the discovery order.

¶ 42 The Thomas next argue, because counsel for the parties discussed entering an agreed protective order through October 30, 2012, appellees were not prejudiced by the delay or diligent in seeking the Thomas' compliance.

¶ 43 We disagree. Appellees may not have been prejudiced in what evidence they will be able to produce at arbitration or use for the depositions, but appellees suffered financial harm in the cost of attorney fees and expenses in their efforts to make the Thomas comply with the discovery order. On November 19, 2012, appellees' counsel received written confirmation discovery would not progress absent a protective order. A motion for a protective order had not yet been filed. Appellees filed their motion to compel and for sanctions approximately two weeks later.

¶ 44 The Thomas further contend the sanctions order is an abuse of discretion because they did not have the ability to produce the subpoenaed witnesses, Darrel Thoma, Chad Thoma, Amy Thoma, and John J. Dowson, for the depositions. In support, the Thomas rely on the Second District's decision in *Blott*. *Blott* is distinguishable. In *Blott*, the Second District found no evidence to support the finding the sanctioned party deliberately impeded compliance with the discovery request or willfully disregarded the court's discovery orders. *Blott*, 283 Ill. App. 3d

at 662, 670 N.E.2d at 349. The court emphasized the difficulties the sanctioned party had in contacting the deponent. *Id.* Here, however, the record presents no evidence of any difficulties by the Thomas in securing the deponents. The evidence on record is the letter from Wall indicating she "determined it was best to cancel the production of my parties for their depositions until we can get the discovery issues ironed out" and she was "not consenting to proceeding with those subpoenaed witnesses' depositions set tomorrow [(November 20, 2012)]."

¶ 45 Wall, however, disputes the conclusion she alone canceled the depositions, arguing Anderson agreed to do so during the November 16, 2012, telephone call. The letter contradicts this argument.

¶ 46 The Thomas last argue their conduct was justified. They emphasize Anderson's initial agreement to a protective order and contend their conduct was not unreasonable in that it did not reach the standard enunciated in *Barnett*, 344 Ill. App. 3d at 1153, 802 N.E.2d at 281.

¶ 47 As stated in *Barnett*, a party's failure to comply with a discovery order is unreasonable "if it is a 'deliberate, contumacious, or unwarranted disregard of the court's authority.' " *Id.* (quoting *Blott*, 283 Ill. App. 3d at 662, 670 N.E.2d at 349). While the record does not support a conclusion the disregard was contumacious or even deliberate, it supports a finding the disregard was unwarranted. We find no abuse of discretion in the order for sanctions, but we find the amount of fees is excessive.

¶ 48 The amount of fees is excessive and appears designed to punish the Thomas more than to encourage compliance with the discovery orders. We find the fees awarded were an abuse of discretion, and we reduce the attorney fees to $2,411.50, representing efforts expended in December 2012 and March 2013 by appellee, and award no expenses.

¶ 49 III. CONCLUSION

¶ 50 We affirm the trial court's judgment as modified.

¶ 51 Affirmed as modified.