

STATE OF MICHIGAN
COURT OF APPEALS

UV HOSTING, L.L.C.,
Plaintiff,

UNPUBLISHED
January 22, 2013

and

DAVID SZOSTEK, ASSIGNEE,
Plaintiff-Appellant,

v

DIGITAL VENTURES, L.L.C.,
Defendant-Appellee.

No. 307370
Kent Circuit Court
LC No. 10-007163-CZ

Before: GLEICHER, P.J., and O'CONNELL and MURRAY, JJ.

MEMORANDUM.

Plaintiff David Szostek appeals by right the dismissal of his case on proceedings supplementary to judgment. Because the trial court appears to have dismissed the case as a sanction against Szostek, and because record before this Court is insufficient to support dismissal as a sanction, we reverse and remand for further proceedings.

This case arose out of a default judgment that plaintiff UV Hosting, L.L.C. obtained against defendant Digital Ventures, L.L.C. UV Hosting obtained the default judgment in 2010 and then began proceedings supplementary. For reasons unclear from the record, UV Hosting's attorney appears to have ceased representing UV Hosting at some point in the proceedings. In 2011, UV Hosting attempted to assign its interest in the judgment to Szostek, who is the sole owner of UV Hosting. Szostek, acting pro se, then filed a motion to restrain defendant from transferring any assets and from disposing of any property. The trial court denied Szostek's motion on the ground that Szostek had not established the assignment was valid.

Szostek then filed a renewed motion to restrain defendant from transferring assets. In a single order, the trial court denied the motion and dismissed the case. Szostek filed a motion for reconsideration, which the trial court denied. Szostek also filed a document purporting to reassign his interest in the judgment back to UV Hosting. Subsequently, UV Hosting sought and obtained additional garnishment orders. One of the garnishees filed a motion to quash, which the

trial court granted. In the order on the motion to quash, the court stated, “Because [Szostek] is attempting to revive the dismissed case through the subterfuge of reassigning his interest back to UV Hosting, the collection efforts must cease.”

The trial court’s orders indicate that the court dismissed the case as a sanction.¹ We review for abuse of discretion a trial court’s sanction orders. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A trial court may sanction a party by dismissing a case if the party fails to comply with court rules or with a court order. MCR 2.504(B)(1); *Maldonado*, 476 Mich at 388 (trial court has inherent authority to sanction litigants). However, before imposing the drastic sanction of dismissal, the trial court must make a record of its determination that dismissal is the appropriate sanction for a party’s behavior. *Brenner v Kolk*, 226 Mich App 149, 163; 573 NW2d 65 (1997), citing *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). The trial court must consider several factors, including,

(1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 631; 750 NW2d 228 (2008), quoting *Vicencio*, 211 Mich App at 507.]

In this case, the trial court made no record of any argument regarding dismissal, or of the court’s consideration of the requisite factors. Although the conduct of Szostek or UV Hosting, or both, may have supported dismissal as a sanction, the record before this Court is insufficient to allow a meaningful review. Similarly, although the trial court may have conducted the requisite analysis of sanctions off the record, the lack of a record compels us to conclude that the sanction of dismissal was an abuse of discretion.

Dismissal reversed, proceedings supplementary reinstated, and case remanded for further proceedings, including possible reconsideration of dismissal as a sanction. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O’Connell
/s/ Christopher M. Murray

¹ In the first paragraph of the trial court’s dismissal opinion, the court stated that it could “punish actions filed in bad faith.” In the same opinion, the court found that Szostek was attempting to “circumvent” the rule that requires corporate entities to appear by counsel. In the subsequent opinion on the garnishee defendant’s motion to quash, the court found that Szostek was engaging in “subterfuge.”