STATE OF MICHIGAN

COURT OF APPEALS

KDIAN FAMILY GROUP, INC. and MOHAMMED KAMALADIN,

Plaintiffs-Appellants,

v

MONROE BANK & TRUST, MICHAEL IRVIN and BRENT BESHEARS,

Defendants-Appellees.

UNPUBLISHED
June 6, 2013

No. 308653
Wayne Circuit Court
LC No. 11-003622-CK

Before: CAVANAGH, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Plaintiffs, Kdian Family Group, Inc. and Mohammed Kamaladin, appeal the trial court's dismissal of their complaint against defendants, Monroe Bank & Trust, Michael Irvin, and Brent Beshears. For the reasons set forth below, we affirm.

On September 14, 2010, plaintiffs purchased a building from Monroe Bank at 10530 Tuxedo in Dearborn. Beshears acted as the real estate agent for the transaction and plaintiffs were represented by attorney Gregory Reed. On January 12, 2011, plaintiffs filed a complaint alleging that defendants should be held liable for breach of the warranty deed, fraud and misrepresentation, and civil conspiracy. Plaintiffs asserted, among other claims, that defendants failed to disclose the condition of the property and failed to give plaintiffs a city inspection report that documented various building defects. The trial court ultimately dismissed the action because plaintiffs disobeyed the court's discovery orders.

Plaintiffs maintain that the trial court erred when it dismissed their case. "A trial court's decision to dismiss an action is reviewed for an abuse of discretion." *Donkers v Kovach*, 277 Mich App 366, 368-369; 745 NW2d 154 (2007). Pursuant to MCR 2.313(B)(2)(c), if a party fails to obey a court order to provide or permit discovery, the court "may order such sanctions as are just" including dismissal of the action. In *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86-87; 618 NW2d 66 (2000), this Court quoted from our Supreme Court's opinion in *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled on other grounds *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618 (2008), as follows:

> The Michigan Court Rules at MCR 2.313(B)(2)(c) explicitly authorize a trial court to enter an order dismissing a proceeding or rendering a judgment by default

> against a party who fails to obey an order to provide discovery. *Thorne v Bell*, 206 Mich App 625, 632; 522 NW2d 711 (1994). The trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451; 540 NW2d 696 (1995). Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary. *Traxler* [*v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998).] The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990).

"Among the factors that should be considered in determining the appropriate sanction are: (1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice." *Dean*, 183 Mich App at 32-33 (citations omitted).

Here, the trial court clearly acted within its sound discretion to dismiss plaintiffs' case. Notwithstanding defendants' repeated requests and motions, as well as court orders directing her to appear, Azzia Abdullahi, president of plaintiff Kdian Family Group, failed to appear for a deposition in Michigan. On August 26, 2011, the trial court ordered both Abdullahi and Kamaladin to appear for depositions in Michigan within 30 days. Defendants noticed the depositions for September 26, 2011. Kamaladin arrived too late on the 26th to be deposed on the scheduled date, and Abdullahi made no effort at all to make the trip from California. At his deposition on the rescheduled date, Kamaladin explained that Abdullahi did not appear for her deposition because Kamaladin had authority to speak for Kdian Family Group, notwithstanding Abdullahi's position as president of the plaintiff company and that she signed the complaint and amended complaint, verifying her knowledge of the facts as alleged in the pleadings. Furthermore, at his deposition, Kamaladin was clearly uncooperative and declined to answer various questions posed by defense counsel.

On November 4, 2011, the trial court again ordered Abdullahi to appear for her deposition in Michigan within 30 days, and ordered Kamaladin to appear to answer additional questions. Plaintiffs' counsel initially took the position that he did not represent Abdullahi and that she had other counsel, but the trial court reminded him that, as counsel for the corporation, he also represented Abdullahi as its president, and that her presence was required to litigate the corporation's claims. Plaintiffs' counsel declined to dismiss Kdian Family Group as a party in the action and was well aware that both Kamaladin and Abdullahi must appear for depositions. The trial court also ordered that, by November 12, 2011, plaintiffs must produce various documents referenced in Kamaladin's first deposition, as well as phone records, verified answers to interrogatories, and four years of tax returns. The record reflects that plaintiffs failed to produce many of the required documents. Moreover, and despite continuing efforts by defense

counsel to schedule Abdullahi's deposition and Kamaladin's continued deposition, plaintiffs' counsel failed to secure their presence in Michigan within the required 30 days.[1]

The record reflects that plaintiffs were wilfully uncooperative with providing discovery necessary to litigate their claims, they repeatedly failed to comply with discovery requests and orders, and defendants were unable to obtain necessary information to defend the action because of plaintiffs' persistent failure to comply. Moreover, even after defendants filed their first motion to dismiss, plaintiffs were given opportunities to comply, but failed to afford defendants information essential to the case. Some evidence in the record suggests that plaintiffs' counsel had difficulty with promptly corresponding with his clients. However, notices and orders were timely served, counsel was well aware of the discovery required, including the presence of his clients in Michigan, and, regardless whether it was precipitated by plaintiffs or their counsel, the result was the same—the repeated, conscious failure to provide or permit discovery. The order of dismissal was the correct sanction to serve the interests of justice. *Dean*, 183 Mich App at 33.

Plaintiffs argue that they filed a motion for protective order and that it should have shielded Abdullahi from having to appear and should have prevented dismissal of the case. However, plaintiffs filed the motion only after Abdullahi disregarded court orders to appear for her deposition and after the final deadline passed for her compliance. Defendants' assertion is well taken that plaintiffs' "*post hoc* objections" were correctly rejected by the trial court. Abdullahi either signed the purchase agreement for the property or gave Kamaladin the authority to sign her name and she verified that she read and had knowledge of the facts and allegations in the complaint. She was clearly a party with knowledge necessary to the litigation. We also reject plaintiffs' argument, raised for the first time on appeal, that the trial court should have *sua sponte* applied the apex-deposition rule to prevent Abdullahi's deposition. "[T]he apex-deposition rule provides that before a [party] may take the deposition of a high-ranking or "apex" governmental official or corporate officer, the [party] must demonstrate both that the governmental official or corporate officer possesses superior or unique information relevant to the issues being litigated and that the information cannot be obtained by a less intrusive method, such as by deposing lower-ranking employees." *Alberto v Toyota Motor Corp*, 289 Mich App 328, 333-334; 796 NW2d 490 (2010). Again, plaintiffs never raised this argument in the trial court, and only moved for a protective order on other grounds after disregarding repeated orders to appear. And, again, Abdullahi is the president of a plaintiff in the action, her signature appears on documents central to the litigation, and she attested to knowledge of the facts of the case. We hold that the apex-deposition rule is simply inapplicable in this context.[2]

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[1] After the deadline passed, plaintiffs' counsel wrote to defense counsel stating that Kamaladin could appear for a deposition several days later. He made no reference at all to scheduling Abdullahi's deposition, and merely asserted that she would need an interpreter.

[2] Plaintiffs assert, without argument or explanation, that the trial court erroneously granted defendants' motion to dismiss because it was done through an ex parte request and in violation of Supreme Court Administrative Order 2011-1. Plaintiffs have waived this argument for failure to adequately brief the claim. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 260; 776

For the reasons stated, the trial judge did not abuse her discretion in imposing the sanction of dismissal under these circumstances.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Michael J. Riordan

NW2d 145 (2009). Regardless, the record reflects that defendants properly filed their motion to dismiss, with a proposed order, plaintiffs responded in writing and at a full hearing, and the trial court properly signed and entered the order. Nothing in the record suggests any improper conduct by defendants or the trial court.