Court of Appeals, State of Michigan

ORDER

Darrell Christopher v Liberty Mutual Insurance Company, et al.

Docket No. 308568

LC No. 10-010286-NI

Cynthia Diane Stephens
Presiding Judge

David H. Sawyer

Patrick M. Meter
Judges

Consistent with the analysis in the accompanying opinion we assess $2,000 as sanctions against plaintiff's attorney, Steven Reifman, because plaintiff's reply brief is "grossly lacking in the requirements of propriety" in violation of MCR 7.216(C)(1)(b), and is therefore vexatious.

Reifman shall pay the sanction amount to the Clerk of the Court of Appeals within 60 days of the Clerk's certification of this order. See *McCarthy v Sosnick*, 491 Mich 941; 815 NW2d 491 (2012).

Sawyer, J., would not assess sanctions.

A true copy entered and certified by Larry S. Royster, Chief Clerk, on

JUN 25 2013
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

DARRELL CHRISTOPHER,

Plaintiff-Appellant,

v

LIBERTY MUTUAL INSURANCE COMPANY, INDIANA INSURANCE COMPANY, PEERLESS INSURANCE COMPANY, BRITTANY GREEN, and SHEILA GREEN,

Defendants-Appellees.

UNPUBLISHED
June 25, 2013

No. 308568
Wayne Circuit Court
LC No. 10-010286-NI

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order dismissing his case for failure to participate in discovery. For the reasons set forth below, we affirm. Additionally, pursuant to the authority granted us by MCR 7.216(C)(1)(b), we deem plaintiff's reply brief vexatious and assess $2,000 in sanctions against the author of the brief, attorney Steven Reifman.

I. BASIC FACTS

On September 3, 2009, plaintiff was involved in an automobile accident, causing him injury. On September 3, 2010, plaintiff filed suit against defendants seeking benefits under Michigan's No-Fault Act, MCL 500.3101 *et seq*. Eventually plaintiff's case was consolidated with that of a second plaintiff, Todd Williams, who was in the car with plaintiff during the accident. Williams is not a party on appeal.

On October 20, 2010, defendants served plaintiff with a set of interrogatories. Plaintiff has never responded to those interrogatories. Nor has he signed an authorization to release his medical records despite a request for such an authorization on January 28, 2011. There were numerous motions brought regarding plaintiff's failures to provide discovery and orders to compel were issued. Nonetheless, even after multiple extensions of the scheduling order and an order to be deposed, plaintiff failed to appear for his own deposition on August 23, 2011.

On August 26, 2011, defendants filed motions to dismiss plaintiff's case pursuant to MCR 2.313, citing plaintiff's failure to participate in discovery. These motions were filed three days after plaintiff violated the lower court's order by failing to appear at his own deposition.

On September 13, 2011, plaintiff filed his response to the motions to dismiss. The response did not offer any explanation regarding plaintiff's failure to attend his deposition, and admitted that plaintiff had not responded to discovery requests. Williams also filed a response to the motion to dismiss, arguing that his absence from the August 23, 2011, deposition was justifiable because he was incarcerated on that date.

On September 26, 2011, plaintiff's counsel filed a motion to withdraw from representing plaintiff, citing a breakdown in the attorney-client relationship. On September 30, 2011, the trial court granted the motion to withdraw, and ordered "that there is a stay in this case until the status conference on October 28, 2011 at 10:30 a.m. Failure to appear on that date will result in a dismissal with prejudice."

On October 28, 2011 at 10:30 a.m., the court heard the motion to dismiss and granted it. At the time the case was called no one responded for the plaintiffs. The trial court heard defendants' arguments regarding their motions to dismiss, and granted each motion. Shortly thereafter, Attorney Steven Reifman identified himself as plaintiff's counsel and the court went back on the record. Reifman argued that the trial court should not grant to motions to dismiss. The trial court disagreed and reiterated that the motions were granted.

On November 18, 2011, plaintiff filed a motion to reconsider. The motion asserted that the plaintiffs themselves were present when the case was called and that Reifman had left the court room to obtain the court file and was delayed in returning by matters outside of his control. The motion argued that the motions to dismiss were improvidently granted because at the time of the hearing the stay was still in effect. The motion compared the proceeding to a hanging, and argued that the trial court entering the dismissal orders without Reifman present constituted a violation of due process and made a mockery of justice.

The trial court denied the motion to reconsider and this appeal followed.

II. DISCOVERY SANCTIONS

The trial court's findings of fact in a discovery dispute are reviewed for clear error. *Traxler v Ford Motor Co.*, 227 Mich App 276, 282; 576 NW2d 398 (1998). This Court reviews a trial court's decision to assess discovery sanctions for an abuse of discretion. *Id*. at 286. A trial court abuses its discretion when its decision results in an outcome falling outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co.*, 476 Mich 372, 388; 719 NW2d 809 (2006).

As an initial matter, defendants note that only plaintiff, and not Williams, filed a claim of appeal in this matter. Therefore, defendants assert in their statement of jurisdiction that this Court's review of the issues on appeal is limited only to those raised by plaintiff. Defendants are correct that Williams is neither an appellant nor a party in the case on appeal, and to the extent plaintiff's brief raises claims or arguments relevant to Williams or his claims, we decline to address them.

The trial court did not err by dismissing plaintiff's case. MCR 2.313(D)(1) provides, in relevant part:

> If a party . . . fails
>
> (a) to appear before the person who is to take his or her deposition after being served with a proper notice;
>
> (b) to serve answers or objections to interrogatories . . . after proper service of the interrogatories . . .
>
> on motion, the court in which the action is pending may order sanctions as are just. Among others, it may take an action authorized under [MCR 2.313](B)(2)(a), (b), and (c).

In turn, MCR 2.313(B)(2)(c) authorizes trial courts to enter "an order . . . dismissing the action or proceeding . . . ." Defendant does not dispute that he failed to appear at his deposition, scheduled for August 23, 2011, despite an order of the trial court to appear. Plaintiff does not dispute that he has failed to answer the interrogatories, nor does he assert that the interrogatories were improperly served. Instead, plaintiff argues that the sanction of dismissal for his non-compliance was improper.

Dismissal is the harshest sanction available. *Schell v Baker Furniture Co*, 232 Mich App 470, 475; 591 NW2d 349 (1998). Thus, a court should impose the sanction of dismissal only where "there has been a flagrant and wanton refusal to facilitate discovery, and where the failure has been conscious or intentional, rather than accidental or involuntary." *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 396-397; 484 NW2d 718 (1992). In *Bass v Combs*, 238 Mich App 16, 26-27; 604 NW2d 727 (1999), overruled on other grounds in *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 752 NW2d 37 (2008), this Court explained that the following factors apply when determining whether dismissal is an appropriate sanction for discovery violations:

> (1) [W]hether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the [other party]; (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such actual notice; (5) whether there exists a history of [the party's] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions of the court's order; (7) an attempt by the [party] to timely cure the defect[;] and (8) whether a lesser sanction would better serve the interests of justice.

We conclude that the sanction of dismissal was appropriate. Plaintiff argues in his brief on appeal that his failure to appear at his August 23, 2011, deposition, which was ordered by the court in response to a motion to compel, was somehow excusable because his co-plaintiff, Williams, was incarcerated. Plaintiff admits, without explanation, that he never answered any interrogatories. Plaintiff relies largely on *Dean v Tucker*, 182 Mich App 27; 451 NW2d 571 (1990) to support his argument that dismissal was unwarranted. In *Dean*, this Court reversed a trial court's dismissal for failure to comply with discovery where this Court concluded that the discovery violation at issue was an "inadvertent mistake" that was corrected by the plaintiff's counsel as soon as it was discovered. *Id*. at 34. *Dean* is therefore distinguishable from this

case—as discussed, plaintiff's discovery violations were not "inadvertent mistake[s]." Rather, they were part of a yearlong pattern of repeated refusals to participate in his own case. We conclude that plaintiff's failure to participate in discovery was willful and not accidental.

Additionally, plaintiff's refusal to at any point participate in discovery over the course of a year establishes a pattern on his part. See *Bass*, 238 Mich App at 34-35. Indeed, plaintiff's "disregard of [his] discovery obligations over the course of one year," and his failure to offer a justification for his disregard, "warranted the ultimate sanction of dismissal." *Id*. at 35.

Finally, Defendants have been prejudiced by plaintiff's actions. At the close of discovery they had no sworn testimony regarding the facts surrounding the accident where fault is at issue. They had no medical records upon which to evaluate proximate cause or damages. They faced a classic "trial by ambush." Plaintiff suggests in his brief on appeal that his discovery violations were really the fault of his original counsel. This may in fact be the case. However, this claim was not raised nor argued, and there is an insufficient record below to review it even if it had been raised.

Plaintiff also argues that the dismissal was improper and violated due process because, on October 28, 2011, when plaintiff finally did personally appear in court, the trial court entered the orders dismissing plaintiff's case before counsel was present. Indeed, plaintiff argues that "at all times pertinent, the matter was stayed by the specific language of this Court's[1] Order dated September 30, 2011, allowing plaintiffs time to hire a lawyer which they did." By that order's own terms, the stay expired at 10:30 a.m. on October 28, 2011. Plaintiff's counsel admits he was not present at 10:30 a.m. The court allowed him the opportunity to be heard when he returned to courtroom and his argument was unavailing. Had he even made even the argument made in the motion to reconsider or on appeal, dismissal would still have been appropriate because plaintiff has no excuse for a year's worth of non-compliance.

III. VEXATIOUS PROCEEDINGS

Plaintiff's counsel, Reifman, filed a reply brief in this appeal. That reply brief cites no substantive law. Disturbingly, the brief contains numerous instances of invective. For example, the brief refers to the October 28, 2011, proceedings in the trial court as a "lynching" and a "sneak attack on Pearl Harbor." It accuses defendants' counsel of "stealing" the case and accuses the trial court of complicity with the theft. It describes the trial judge as "brutal" and her actions as "illegal." In the brief's closing paragraph, Reifman writes: "Counsel for the Defendants should be horsewhipped and reprimanded and the trial judge deserves a bit of a procedural lashing herself."

[1] This sentence and much of this argument in plaintiff's appellate brief, was copied, unedited, directly from the motion to reconsider, which is why the brief refers erroneously to "this Court." This Court did not issue an order on September 30, 2011. Similarly, this section of the brief refers erroneously to "plaintiffs" in the plural, despite the fact that only Christopher appealed.

MCR 7.216(C) governs vexatious proceedings. The rule authorizes this Court, "on its own initiative" to "assess actual and punitive damages or take *other disciplinary action*" when it determines that "an appeal or any of the proceedings in an appeal was vexatious . . . ." MCR 7.216(C)(1) (emphasis added). In turn, the rule explains that an appeal is vexatious when, inter alia, "a . . . brief . . . was grossly lacking in the requirements of propriety . . . ." MCL 7.216(C)(1)(b). "Propriety" is defined as "conformity to established standards of good or proper behavior or manners." *Random House Webster's College Dictionary* (1991). This Court has held that sanctions under MCR 7.216(C)(1) may be assessed against a party's attorney as well as the party itself. See *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 269; 548 NW2d 698 (1996).

We conclude that plaintiff's reply brief is "grossly lacking in the requirements of propriety." MCR 7.216(C)(1)(b). The reply brief does not advance any legal theory, counter an argument raised by opposing counsel or clarify any issue of law. Accordingly, under the authority granted us by MCR 7.216(C)(1), we assess $2,000 as sanctions for the reply brief. These sanctions are awarded against plaintiff's attorney, Reifman. Reifman shall pay these sanctions to the Clerk of Court. See *McCarthy v Sosnick*, 491 Mich 941; 815 NW2d 491 (2012). The sanction amount shall be separate from taxable costs under MCR 7.219.

Affirmed. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219(A).

/s/ Cynthia Diane Stephens
/s/ Patrick M. Meter

STATE OF MICHIGAN

COURT OF APPEALS

DARRELL CHRISTOPHER,

Plaintiff-Appellant,

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Defendants-Appellees.

UNPUBLISHED
June 25, 2013

No. 308568
Wayne Circuit Court
LC No. 10-010286-NI

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

SAWYER, J. (*concurring in part and dissenting in part*).

I concur with the majority in the result but dissent on the issue of the imposition of sanctions for a vexatious reply brief. Whereas I agree that the reply brief was lacking in content and civility, it did not cause the other parties to incur further expenses in this litigation.

/s/ David H. Sawyer