STATE OF MICHIGAN

COURT OF APPEALS

BIRMINGHAM ROYAL OAK MEDICAL GROUP, P.C.,	UNPUBLISHED July 16, 2013
Plaintiff-Appellant,	
v	Nos. 308994, 311708 Wayne Circuit Court
INTERMEDCORP, INC.,	LC No. 10-008437-CK
Defendant-Appellee.	

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

This case involves two consolidated appeals from the same lower court file. In Docket No. 308994, plaintiff appeals as of right from an order awarding attorney fees and costs as case evaluation sanctions against plaintiff and in favor of defendant. In Docket No. 311708, plaintiff appeals by leave granted[1] an order dismissing its claims with prejudice as a discovery sanction for violating a stipulated order compelling discovery. We reverse and remand for further proceedings consistent with this opinion.

In both appeals, plaintiff argues that the trial court abused its discretion in dismissing plaintiff's claims as a discovery sanction for violating a stipulated order compelling discovery. We agree. This Court reviews for an abuse of discretion a trial court's decision regarding sanctions for discovery violations. *Jilek v Stockson (On Remand)*, 297 Mich App 663, 665; 825 NW2d 358 (2012). An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes. *Id.*

MCR 2.313(B)(2) provides that if a party fails to obey an order to provide discovery, the court may order "such sanctions as are just," including: an order refusing to allow the disobedient party to support or oppose certain claims or defenses or prohibiting the party from introducing designated matters into evidence; an order striking pleadings, staying further proceedings until the order is obeyed, dismissing the action, or rendering a default judgment; or

[1] *Birmingham Royal Oak Med Group, PC v Intermedcorp, Inc*, unpublished order of the Court of Appeals, entered March 1, 2013 (Docket No. 311708).

an order treating as contempt of court the failure to obey an order. In addition to or in lieu of such sanctions, the court must award reasonable expenses, including attorney fees, caused by the failure to provide discovery, unless the failure was substantially justified or other circumstances render an award of expenses unjust. MCR 2.313(B)(2). In addition, MCR 2.504(B)(1) states that if a party fails to comply with a court order, the court may enter a default or dismissal.

"[T]he court's chosen discovery sanction must be proportionate and just." *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 662; 819 NW2d 28 (2011) (internal quotation marks omitted). "Dismissal is a drastic step that should be taken cautiously. Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper." *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995) (citation omitted). "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." *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), overruled on other grounds by *Dimmitt & Owens Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008). Before imposing the sanction of dismissal, a court should consider:

> (1) whether the violation was wilful 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. [*Vicencio*, 211 Mich App at 507.]

These factors are not exclusive. *Id.* A trial court's dismissal of a case without evaluating on the record other available options constitutes an abuse of discretion. *Id*. at 506-507; *Thorne v Bell*, 206 Mich App 625, 635; 522 NW2d 711 (1994).

Here, the trial court failed to evaluate on the record other available options and to consider all of the relevant factors in determining whether dismissal was an appropriate sanction. The court acknowledged the availability of lesser sanctions, expressly referring to the imposition of monetary fines and prohibiting items from coming into evidence. Other than merely listing two possible lesser sanctions, however, the court failed to carefully evaluate the available options on the record or to explain why the severe sanction of dismissal was just and proper in lieu of a lesser sanction. *Vicencio*, 211 Mich App at 506. As discussed below, a lesser sanction is more appropriate in the circumstances of this case.

Notably, the trial court erroneously described the history of this case when it stated that "this is not the first violation of a discovery order. Previously this Court issued an order that was not complied with and imposed a sanction of $500 as a result of a discovery order violation." In truth, plaintiff was never previously found to have violated a discovery order. The $500 sanction was imposed when the court granted defendant's first motion to compel and ordered plaintiff to fully answer defendant's first interrogatories and requests for production of documents; plaintiff did not violate a discovery order in connection with that motion. Likewise, a stipulated order compelling the deposition of plaintiff's president did not involve a violation of a discovery order. And a $3,000 sanction against plaintiff for making incorrect allegations in the complaint

regarding the insurance forfeiture period did not reflect a violation of a discovery order; on the contrary, the court expressly denied defendant's request for discovery sanctions that were sought at that time.[2] The record also reflects that defendant itself was compelled to provide discovery in this case.

In dismissing the case, the trial court also failed to evaluate on the record whether plaintiff's failure to comply with the stipulated order to produce a database by December 5, 2011, was willful or accidental and whether plaintiff made efforts to cure the defect. *Vicencio*, 211 Mich App at 507. We find no indication in the record that plaintiff flagrantly and wantonly refused to facilitate discovery. *Bass*, 238 Mich App at 26. At most, the evidence suggests that plaintiff's discovery violation was negligent rather than flagrant and wanton. Cf. *Hardrick*, 294 Mich App at 662 (upholding a determination that a default judgment would be too severe a sanction where the "discovery violation was not flagrant and wanton, but more likely negligent."). Plaintiff does not dispute that it failed to produce the database on December 5, 2011, as required by the stipulated order entered on December 6, 2011.[3] Beginning December 6, 2011, however, plaintiff made numerous attempts to provide the database to defendant, although technical difficulties prevented defendant from accessing the database until December 12, 2011.

In particular, plaintiff provided a flash drive containing electronic data to defendant on December 6, 2011, but the flash drive apparently did not contain the correct database. Although defense counsel asserted in an email to plaintiff's counsel that this flash drive was produced only to create the impression that plaintiff was complying with the court's order, there is no evidence to support this speculative assertion regarding plaintiff's motive in producing the flash drive. Indeed, over the next several days, plaintiff continued to make efforts to produce the required database. Plaintiff invited defendant to come to plaintiff's office to retrieve the database from

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[2] Indeed, in denying defendant's request for a discovery sanction made at the same time as the motion regarding the incorrect allegations in the complaint, the court suggested that each party had abused discovery by making unnecessary requests for documents that it then failed to review; the court was apparently referring in part to plaintiff's assertion that defendant had at that point examined and taken possession of only four of the 25 bankers boxes of documents that plaintiff's staff had assembled in response to defendant's discovery requests. In particular, the court stated:

> *THE COURT:* You know, discovery really can be abused in a lot of ways, by parties in a business, representing business clients, corporations and that kind of thing. You know insisting and demanding on a whole bunch of documents never even looked at or paid much attention to.
>
> And that goes both ways. And I really see some discovery almost I would characterize unnecessary discovery on part of both sides.

[3] Although this order was entered on December 6, 2011, i.e., one day *after* the order required plaintiff to produce the database, the parties stipulated to entry of the order on December 1, 2011, and defendant represents that the order was submitted for entry on December 2, 2011.

plaintiff's computer, but defendant declined this opportunity. Plaintiff indicated that it lacked the technical knowledge to produce the data and was awaiting the availability of its third-party information-technology (IT) vendor.[4] Then, on December 8, 2011, plaintiff's IT vendor placed the database on a website and provided file names and a password for use in accessing the information, and plaintiff provided this information to defendant. After defendant indicated on December 9, 2011, that the password provided did not work, plaintiff provided further information from its vendor to defendant on the next business day, December 12, 2011, which allowed defendant to access the database.

At most, this evidence suggests that plaintiff was negligent in failing to ensure the prompt availability of its IT vendor to make the database available to defendant by December 5, 2011, as required by the stipulated order compelling production by that date. The failure to provide the proper technical information to access the database also reflects no more than negligence, and plaintiff made repeated attempts to remedy the defects in production. There is no indication that the failure to produce in a timely manner was flagrant and wanton, particularly given plaintiff's offer to share the database on its own computer, which defendant declined. Accordingly, we conclude that the sanction of dismissal was too severe in these circumstances. *Hardrick*, 294 Mich App at 662.

The trial court also failed to address prejudice, at least explicitly. The court did state that the database was relevant to the issue of damages, which defendant had "been trying to get [its] arms around" since the case had begun. However, it appears that any prejudice arising from the delay in acquiring information regarding damages is partially attributable to defendant.

In particular, on October 5, 2011, when responding to defendant's request for the database, plaintiff's counsel informed defense counsel that the database could not be produced without a protective order to protect information regarding plaintiff's patients and proprietary information. Defendant did not respond until November 22, 2011, when it provided a proposed protective order and demanded an assurance of production by a particular date to avoid a motion to compel. Given that trial was scheduled for December 14, 2011, defendant's one and one-half month delay in responding to plaintiff's October 5, 2011, request for a protective order contributed to some of the delay in production of the database. Cf. *Thorne*, 206 Mich App at 635 (concluding that the prejudice suffered by the defendants arising from the plaintiffs' failure to file witness and exhibit lists was reduced by "the fact that defendants could have moved sooner to compel the information from plaintiffs.").

It is also notable that, in its October 5, 2011, response to defendant's request for the database, plaintiff indicated that a copy of the database created on July 21, 2011, was already available for defendant to pick up from plaintiff's office "upon prior confirmation of date and

[4] Defendant suggests that plaintiff's lack of technical knowledge rendered meaningless the invitation to obtain the database from plaintiff's computer. But the fact that plaintiff lacked the technical expertise to produce or transmit the database does not preclude the possibility that plaintiff's computer contained the database, which could have been shown to defendant or which defendant could have retrieved from plaintiff's computer if defendant had the expertise to do so.

time." Defendant apparently made no effort to obtain this copy, which could have at least given defendant some information regarding plaintiff's claimed damages through July 21, 2011. Defendant's failure to obtain this earlier database copy further contributed to any prejudice arising from the delay in the production of the updated version.

Finally, given that this case was proceeding as a bench trial, the court could have alleviated any prejudice by delaying defendant's cross-examination of witnesses on damages issues to accommodate any further review by defendant of the database necessitated by plaintiff's untimely production. To the extent that this delay would have caused an inconvenience for the trial court's docket, the proper remedy in these circumstances may have been to hold plaintiff in contempt of court for failing to produce the database on the date required by the stipulated order. See MCR 2.313(B)(2)(d); *Hardrick*, 294 Mich App at 663.

Accordingly, we conclude that the trial court abused its discretion in dismissing plaintiff's case as a discovery sanction. The court failed to carefully evaluate on the record the available options short of dismissal. Further, the relevant factors militate against imposing the severe sanction of dismissal. On remand, the trial court may impose a lesser sanction on plaintiff for violating the discovery order, after the court carefully considers what sanctions are just under the circumstances. *Hardrick*, 294 Mich App at 664.

In light of our resolution of the above issue, we need not address the other issues raised on appeal in Docket No. 308994, all of which pertain to the award of case evaluation sanctions. Because we reverse the dismissal order, the award of case evaluation sanctions premised on that dismissal is also reversed.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.[5]

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause

[5] We note for the trial court's benefit that federal bankruptcy proceedings have been pending regarding defendant. On April 24, 2013, the bankruptcy court entered an order lifting the automatic bankruptcy stay with respect to the proceedings in this Court. The order provided that if this Court reverses the trial court's dismissal of plaintiff's claims and remands the case to the trial court for a trial of those claims, the trial court proceedings against defendant shall be stayed until further order of the bankruptcy court.