

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-029

MAY TERM, 2003

John Desautels	}	APPEALED FROM:
	}	
	}	Chittenden Superior Court
	}	
v.	}	
	}	DOCKET No. S0072-01 CnC
Howard Center for Human	}	
Services	}	Trial Judge: Matthew I. Katz
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals from a judgment of the Chittenden Superior Court dismissing his complaint for failure to comply with discovery orders. Plaintiff contends: (1) the court improperly disregarded another judge's prior ruling on the discovery dispute; (2) the motion to dismiss was untimely; and (3) the court failed to make necessary findings. We affirm.

Plaintiff alleges that he was injured in the course of his employment with defendant Howard Center for Human Services. The Department of Labor and Industry denied his claim for workers' compensation benefits, and he appealed pro se to the superior court. In February 2001, defendant through its two insurers propounded interrogatories and requests to produce. In June, having received no response, defendant moved to compel. Following a hearing in July, the court (Judge Jenkins) ordered plaintiff to respond to the outstanding discovery requests and warned that failure to do so could result in sanctions, including the limitation of evidence at trial or dismissal.

In October, confronted with plaintiff's continued non-response, defendant moved to dismiss. At a hearing on the motion in November, plaintiff argued that defendant had already been provided with all of the requested information during the administrative proceedings before the Department. The trial court (Judge Teachout) explained to plaintiff that he might be able to respond to some of the interrogatories by indicating that the information sought was the same as that presented at the administrative hearing, but otherwise ordered plaintiff to file his response by November 30. She also suggested that defendant could seek to limit the evidence at trial to that which it had already received in connection with the administrative proceeding. The court further ordered defendant to file any motions by the end of December.

Plaintiff provided a handwritten response to interrogatories in late November, stating "same as last trial" in answer to most of the questions. In mid-December, defense counsel sent a letter to plaintiff, indicating that many of the questions propounded in the interrogatories sought information that had not been disclosed at the administrative hearing, and warning that a failure to submit detailed and responsive answers could result in another motion for sanctions, including dismissal of the action. Plaintiff filed a supplemental response consisting of a witness list of five witnesses.

Some six months later, in June 2002, defendant filed a second motion to compel. Plaintiff thereafter obtained counsel, and in September, following a chambers conference, the court (Judge Katz) ordered plaintiff within thirty days "to answer (factually) any written discovery." Shortly before the deadline, plaintiff's counsel unsuccessfully sought an extension from defense counsel. Plaintiff then filed a motion for protective order or to continue, together with additional responses to interrogatories. Defendant opposed the motion and filed a renewed motion for sanctions.

At a hearing on the motions in January 2003, the court reviewed the tortured history of the dispute, and explained that it

considered plaintiff's responses to date to be inadequate, particularly plaintiff's failure to state specifically the experts he planned to call at trial, their opinions, and the evidence on which they relied. The court then ordered the case dismissed for failure to comply with discovery orders. A final judgment of dismissal was entered in late January. This appeal followed.

Plaintiff first contends the trial court (Judge Katz) improperly overruled Judge Teachout's prior ruling, thereby providing defendant a "horizontal appeal" prohibited by Economou v. Economou, 133 Vt. 418, 421-22 (1975). Although Judge Teachout suggested that plaintiff might be able to answer certain questions by indicating that defendant had already received the information requested, she also ordered plaintiff to provide a full and complete response to all of the questions propounded by defendant. Defendant's subsequent motion to compel noted that plaintiff had failed to provide basic information concerning evidence and witnesses that might be presented at trial beyond what had already been presented at the administrative hearing, and the trial court's dismissal order was based largely on these omissions. Accordingly, we discern no conflict with Judge Teachout's prior ruling.

Plaintiff next contends that the motion to compel was untimely because it was filed after the December deadline for defense motions imposed by Judge Teachout. This argument was not raised below, and therefore is not cognizable on appeal. See Human Rights Comm'n v. LaBrie, Inc., 164 Vt. 237, 252 (1995) (where issue is not raised before trial court, this Court will not address it on appeal).

Finally, plaintiff contends the court abused its discretion in dismissing the appeal because it failed to make the requisite findings. The imposition of sanctions for failure to comply with discovery requests is vested in the sound discretion of the trial court. In re R.M., 150 Vt. 59, 64 (1988). Where the "ultimate sanction of dismissal" is ordered, we have held that "it is necessary that the trial court indicate by findings of fact that there has been bad faith or deliberate and willful disregard for the court's orders, and further, that the party seeking the sanction has been prejudiced thereby." John v. Medical Center Hosp. of Vt., Inc., 136 Vt. 517, 519 (1978); accord C.C. Miller Corp. v. Ag Asset, Inc., 151 Vt. 604, 606 (1989); Goshy v. Morey, 149 Vt. 93, 97 (1987). Here, the record shows that the trial court carefully reviewed the procedural history of the case, noting plaintiff's numerous delays in responding to defendant's discovery requests and continued failure to provide full and complete responses to defendant's interrogatories in violation of several court orders. At the conclusion of the hearing, the court characterized plaintiff's tactics as a "mockery" of the discovery process and found that plaintiff had not taken the case "seriously." While the court's ruling may not be worded in the precise language of the case law, a finding of willful disregard for the court's prior orders is unmistakably implicit. Additionally, in noting that the case was more than two years old and that "on the eve of trial" plaintiff had still failed to provide even basic information concerning his trial evidence "the court's implicit finding of prejudice was apparent. Hence, we discern no error.

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned