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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-210

NOVEMBER TERM, 2003

Sarah Jackson, Stephen Jackson and Robin Jackson v. Dean Powers, Ronald Powers, Honoree Fleming and Shawn Pomainville	}	APPEALED FROM: Addison Superior Court DOCKET NO.115-6-01 Ancv Trial Judge: Helen M. Toor

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

Plaintiffs B a young woman injured in an automobile accident and her parents B filed this lawsuit against defendants B the teenage driver of the vehicle, the driver= s parents, and the individual who allegedly supplied the driver with alcohol B seeking damages under a number of legal theories. The driver and his parents moved to dismiss the complaint based on plaintiffs= failure to file timely responses to interrogatories, and the court granted the motion when plaintiffs failed to oppose the motion to dismiss. The court later denied plaintiffs= motion for relief from judgment under V.R.C.P. 60(b). On appeal, plaintiffs contend the court erred in failing to grant relief from judgment. We reverse.

Plaintiff Sarah Jackson was injured when a vehicle in which she was a passenger ran off the road into a cluster of trees. Jackson, then age 15, and the driver of the vehicle, defendant Dean Powers, age 16, had been attending a party at defendant Shawn Pomainville= s house in Shoreham. Both allegedly consumed drugs and alcohol at the house before leaving in Powers= car, which his parents defendants Ronald Powers and Honoree Fleming had allegedly entrusted to him for the evening.

Plaintiffs filed suit against defendants, stating a number of causes of action. As to defendants Ronald Powers and Honoree Fleming, plaintiffs stated claims for negligent entrustment and negligent supervision, alleging that they had been informed prior to the accident of their son= s propensity for reckless driving, and were aware of his abuse of alcohol and drugs. Defendants denied the allegations in their answer to the complaint, and propounded interrogatories seeking more specific information about the factual basis of plaintiffs= allegations that they had been previously informed of their son= s history of reckless driving and substance abuse. Receiving no response to the interrogatories, defendants sent a second set of interrogatories and requests to produce.

Again receiving no responses, on November 22, 2002, defendants filed a motion for sanctions or dismissal under V.R.C.P. 37(b)(2) (failure to obey discovery order may result in order limiting evidence at trial or dismissing the action or proceeding or any part thereof). The motion referenced A defense counsel= s recollection that during the November 8, 2002 status conference, plaintiffs= counsel represented to the Court that answers to the February 28, 2002, interrogatories would be served on or before November 15, 2002.@ The motion further indicated that the Court had A directed@ the answers to be A completed@ by November 15th. On the same day that defendants filed their motion to dismiss, plaintiffs= counsel conveyed unsigned responses to the interrogatories (according to counsel, plaintiffs were then away on vacation), together with a cover letter explaining that counsel had been called away the prior week to assist his mother in moving to a nursing home. Defendants= counsel objected to the responses as insufficiently responsive. A series of letters and conversations between counsel followed in which plaintiffs= counsel sought to explain the reasons for the delay in obtaining and providing certain information in response to the interrogatories. The

record contains a second, more complete set of responses signed by plaintiffs and dated December 30.

Plaintiffs filed no response or opposition to the November 22 motion for sanctions or dismissal. On December 20, the court issued a brief entry order, stating, A [a]s no opposition has been filed, the motion is granted. The claims against Ronald Powers and Honoree Fleming are hereby dismissed.@ Shortly thereafter, plaintiffs moved for reconsideration under V.R.C.P. 60(b), explaining that plaintiffs= counsel had been unable to comply with the A November 15 deadline@ because of his mother= s situation, that unsigned responses were initially provided on November 25 because plaintiffs were away on vacation, and that counsel= s failure to respond to the motion to dismiss was inadvertent and attributable to his focus on providing the belated responses to interrogatories. The court denied the motion for relief, without hearing, in a brief entry order, which stated: A Forgetting to file a response to a motion is not excusable neglect under Rule 60(b). Accord, Margison v. Spriggs, 146 Vt. 116, 120 (1985).@ Thereafter, the court entered a final judgment in favor of defendants Ronald Powers and Honoree Fleming. This appeal followed.

The trial court= s ruling on a Rule 60(b) motion is committed to the sound discretion of the court and will not be disturbed on appeal absent a showing that the discretion was withheld or abused. Bingham v. Tenney, 154 Vt. 96, 99 (1990). Similarly, absent an abuse of discretion, a trial court= s use of sanctions for violating a discovery order will be upheld. White Current Corp. v. Vt. Electric Coop., 158 Vt. 216, 223 (1992). Nevertheless, the imposition of sanctions for discovery violations under V.R.C.P. 37(b) B particularly the ultimate sanction of dismissal B must be strictly in accord with the procedural requirements. These include a motion to compel accompanied by an affidavit by counsel for the moving party certifying that he or she has conferred with counsel for the opposing party in a good faith effort to resolve the issue without court intervention, V.R.C.P. 26(h), and an order directing compliance with the requested discovery. See In re R.M., 150 Vt. 59, 63 (1988) (only if there has been A a failure to comply with a specific discovery order would sanctions . . . be appropriate@). Dismissals for failure to comply with a discovery order must also be accompanied by findings that noncompliance with the discovery order was willful or in bad faith and resulted in prejudice to the aggrieved party, or that other less severe sanctions were unavailable. See C.C. Miller Corp. v. Ag Asset, Inc., 151 Vt. 604, 606-07 (1989) (reversing dismissal for failure to file sworn, timely responses to interrogatories where court failed to find that defendants= noncompliance was willful or in bad faith); John v. Med. Ctr. Hosp. of Vt., 136 Vt. 517, 519 (1978) (ultimate sanction of dismissal requires findings that there has been bad faith or willful disregard of court= s orders, and prejudice to party seeking dismissal).

Although defendants= efforts to obtain responses to interrogatories were apparently discussed at the November 8 status conference, the record does not contain the requisite affidavit from counsel certifying the efforts to confer in good faith to resolve the issue without court intervention, as required under V.R.C.P. 26(h). Similarly, while the parties= pleadings allude at various points to a November 15 A deadline@ and a trial court A directive,@ this is insufficient to show the existence of a A specific discovery order@ which is the essential predicate to an order imposing sanctions under V.R.C.P. 37(b). In re R.M., 150 Vt. at 63. The references in the parties= pleadings are ambiguous, and may refer merely to a deadline to which the parties agreed and the court approved. The docket entry for the November 8 status conference where the matter was allegedly brought to the attention of the trial court makes no reference whatsoever to any order requiring plaintiffs to file responses by November 15, and the docket entries are elsewhere entirely silent on the matter. The record, in short, contains no evidence that the court issued a specific discovery order requiring plaintiffs to file responses by November 15, 2002.

It follows, accordingly, that there was no factual or legal basis for the motion to dismiss for failure to comply with the purported discovery order. Thus, plaintiffs= failure to file an opposition to the motion to dismiss cannot form a basis for granting it. Because dismissal was improper, we conclude that the court erred in denying plaintiffs= motion for reconsideration. The judgment must therefore be reversed, and the matter remanded for further proceedings.

Reversed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Denise R. Johnson, Associate Justice

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Paul L. Reiber, Associate Justice