

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-272

FEBRUARY TERM, 2008

Franklin Volvovitz	}	APPEALED FROM:
	}	
v.	}	Rutland Superior Court
	}	
High Ridge Owners Association, Killington, Ltd.,	}	DOCKET NO. 310-6-02 Rdcv
Richard Chappo and James J. Odorisio, Jr.	}	

Trial Judge: Nancy S. Corsones

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

Plaintiff appeals from the trial court's order, awarding approximately \$11,000 in attorney's fees and costs to defendants High Ridge Owners' Association (HOA), Richard Chappo, and James Odorisio, Jr., pursuant to Vermont Rule of Civil Procedure 37(b)(2).¹ He argues that the court abused its discretion in issuing its order. We agree, and we therefore reverse and remand for additional proceedings.

Because a discovery sanction is at issue, we recount the procedural history of this litigation in some detail. The record indicates the following. In June 2002, plaintiff filed a breach-of-contract suit against defendants. Plaintiff's attorney withdrew in March 2004, and plaintiff proceeded pro se for the remainder of the proceedings. In May 2004, defendants HOA, Chappo, and Odorisio served plaintiff with a second set of interrogatories and requests to produce. Among other things, defendants requested that plaintiff identify any damages that he claimed to have incurred, the value of those damages, how the amount was determined, the amount of compensation that he was seeking, and how he determined the amount of compensation. In September 2004, HOA filed a motion to compel discovery responses under V.R.C.P. 37(a), complaining that plaintiff had failed to respond to its second set of interrogatories, and particularly, that he failed to identify any fact or expert witnesses for trial. Shortly thereafter, Chappo and Odorisio moved for summary judgment.

Trial was scheduled for September 28, and at a pretrial conference in late September 2004, the court indicated that it would address discovery issues at trial. Before trial, however, the parties indicated that they had settled the case, and a stipulation for dismissal was placed on the record. In June 2005, defendant Killington moved to enforce the settlement, and plaintiff

¹ Killington, Ltd. was granted summary judgment, and it is not a party to this appeal.

moved to compel settlement. The court denied both motions and set the matter for a status conference. At the status conference, an attorney for HOA requested a stay of the case, pending the completion of a foreclosure case against plaintiff. Counsel for defendants argued that resolution of that case would essentially dispose of the issues raised in plaintiff's complaint. The court granted HOA's request to stay the proceedings, indicating that for the duration of the stay, no further proceedings or submissions of any kind would be permitted, including discovery proceedings, pleadings and/or motions. The foreclosure proceeding apparently became final in December 2005.

In January 2006, HOA, Chappo, and Odorisio, moved for summary judgment, and the court granted their request in part in April 2006. The court found that defendants Chappo and Odorisio were immune from suit, and it also found that HOA was entitled to judgment on two of plaintiff's claims. The only claim that survived was plaintiff's assertion that HOA breached its duty to make proper repairs and that plaintiff's residential unit was diminished in value as a result. After a September 2006 status conference, the court ordered plaintiff "fully and completely [to] respond" to HOA's second set of interrogatories, which were initially propounded in 2004. Plaintiff requested an extension of time, which the court granted, indicating that plaintiff must respond fully and completely by January 2, 2007, and stating that if he failed to comply, dismissal would at least be considered as a sanction. Plaintiff filed his responses to HOA's second set of interrogatories and requests to produce, apparently on January 2. On January 12, HOA moved to dismiss under V.R.C.P. 37 and 41 and/or for summary judgment. It also sought an award of attorney's fees pursuant to Rule 37(b)(2). HOA asserted that plaintiff's responses were not "full and complete," and asserted that they also demonstrated that plaintiff could not support his remaining claim against HOA. Plaintiff opposed the motion, asserting that he had, in fact, fully and completely responded to the discovery request.

In a March 2007 entry order, the court granted defendant's motion to dismiss/motion for summary judgment. It first found that plaintiff failed to comply with its order "fully and completely" to respond to all outstanding discovery requests. It cited as an example plaintiff's response that he had "not yet determined" the amount of damages he suffered. The court also found plaintiff's assertion that he would "substantiate his claim and establish money damages at trial" to be in complete derogation of the discovery process. It also concluded that the undisputed facts, including those deemed admitted by plaintiff's failure to respond properly to the motion for summary judgment, showed that HOA was entitled to judgment as a matter of law.

In a March 13, 2007 entry order, the court entered final judgment, indicating that HOA was entitled to recover its costs of action and attorneys' fees from plaintiff. It ordered HOA to submit an affidavit of attorneys' fees and costs within thirty days. Defendants did so, requesting attorney's fees of \$27,549.30 for the entire case. Plaintiff objected to the request as unreasonable, and he requested a hearing. He also sought an extension of time to respond, indicating that he was trying to obtain counsel. The court did not appear directly to respond to plaintiff's request for a hearing. It did hold, however, in a May 2007 entry order, that HOA

could not recover attorney's fees for the entire case under Rule 37(b). It directed HOA to file a supplemental affidavit that pertained only to discovery matter against plaintiff. Defendants filed a new affidavit on May 25, 2007, seeking approximately \$11,000 in fees and costs.

On June 5, before it received plaintiff's response and without holding a hearing, the court granted HOA's request in full. The court found the affidavit filed by HOA's counsel to be thorough and complete, and further stated that plaintiff's noncompliance with discovery orders was well-documented. The court explained although the total amount of fees appeared high, they encompassed almost a three year time-frame, with travel, court time, preparation time, and drafting of various motions. The court also found that plaintiff had displayed an extraordinary resistance to responding to HOA's discovery requests. On June 8, plaintiff filed his opposition to HOA's supplemental affidavit, asserting in part that HOA was requesting costs and fees unrelated to discovery. On June 13, the court issued its final judgment order, ordering plaintiff to pay the fees and costs above. The court also stated that it had reviewed plaintiff's objections to the fee request, and thus denied them. Plaintiff then obtained counsel and filed a notice of appeal.

On appeal, plaintiff argues that the court abused its discretion in ordering him to pay approximately \$11,000 in fees and costs. He asserts that the bulk of the award of fees and costs did not comply with Rule 37(b)(2), because they were not "caused by" plaintiff's failure to comply with the court's discovery order. Moreover, he maintains that even assuming that his discovery response violated the court's order, the court should not have awarded any fees and costs incurred prior to the compliance deadline of January 2, 2007. Finally, he argues that the court should not have awarded any fees at all because HOA failed to comply with V.R.C.P. 26(h) after it deemed plaintiff's discovery response insufficient.

We agree that the court's exercise of discretion in awarding approximately \$11,000 in fees and costs to HOA cannot be sustained. See In re R.M., 150 Vt. 59, 64 (1988) (trial court has discretion in awarding sanctions for failure to comply with discovery requests, and Supreme Court will overturn trial court's decision "only when it is shown that there has been an abuse of discretion or that discretion has been withheld"). Rule 37(b), entitled "Failure to Comply with Order," identifies specific sanctions that may be imposed if a party fails to obey a court order to provide or permit discovery. The rule provides that in addition to the specific sanctions listed or lieu of them, the court

shall require the party failing to obey the order . . . to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

V.R.C.P. 37(b)(2).

In this case, the trial court improperly awarded fees and costs that were not, and could not have been, “caused by” plaintiff’s failure to comply with the court’s September 22, 2006 order.² The court order at issue required plaintiff “fully and completely” to respond to HOA’s discovery requests by January 2, 2007. No sanctions were warranted under Rule 37(b) unless plaintiff violated the court’s order, and he could not have violated the order before January 2. It necessarily follows that there could be no expenses “caused by” plaintiff’s failure to obey the court’s order, within the meaning of Rule 37(b), before this date. Neither HOA nor the trial court offered any legal support for the proposition that a party is entitled to recover expenses incurred before a violation of a court order, and we find none. See 7 Moore’s Federal Practice § 37.51[9][d], at 37-119 (trial courts do not have unlimited discretion to award fees and costs under Rule 37(b); rather, they must honor the basic premise that the amount of the sanction may not exceed the expenses that are reasonably attributable to the violation; any compensatory monetary sanctions awarded as a result of a party’s failure to comply with a discovery order must be sufficiently related to the particular disobedience); and compare V.R.C.P. 37(a)(4) (party who files and obtains motion to compel discovery may recover reasonable expenses incurred in obtaining the court order); 8A C. Wright & A. Miller, § 2289, at 674 (noting that Rule 37(a)(4) allows party to recover expenses incurred in obtaining order, unlike Rule 37(b) which applies only if there is already a court order; and explaining that the expenses that may be recovered under Rule 37(b) are those “caused by the failure” to obey the existing order, and therefore do not include the expense of obtaining the order itself). In this case, HOA requested and was awarded fees and costs incurred between April 2004 and December 2006, including expenses for such things as preparing a second set of interrogatories to be served on plaintiff. Obviously, even aside from the fact that this work preceded plaintiff’s violation of the court’s order by more than two years, this was a cost that HOA would have incurred regardless of plaintiff’s behavior. It was in no way “caused by” plaintiff’s violation of the court’s order. See Tollett v. City of Kemah, 285 F.3d 357, 368 (5th Cir. 2002) (reaching similar conclusion under analogous federal rule). We conclude that the trial court abused its discretion in ordering plaintiff to pay HOA for fees and costs incurred before January 3, 2007.

We are also troubled by the court’s issuance of its order without holding a hearing as requested by plaintiff, and without allowing plaintiff an appropriate amount of time to respond to HOA’s request for expenses. While the court indicated that it had reviewed the substance of plaintiff’s opposition motion, the award of fees and costs nonetheless appears to include many items that plainly do not fall within Rule 37 and that are unrelated to “discovery,” as plaintiff argued in his motion. We note, moreover, that Rule 37 should not be used to circumvent the general rule that the parties are responsible for their own attorney’s fees. See, e.g., Harsch Properties, Inc. v. Nicholas, 2007 VT 70, ¶ 11. Because we cannot determine which fees and expenses, incurred after January 2, were “caused by” plaintiff’s failure to comply with the court’s discovery order, we remand for additional proceedings, including a hearing.

² We note that, contrary to HOA’s assertion, plaintiff did preserve this argument. He asserted in his opposition motion that HOA was requesting fees and costs unrelated to discovery.

Finally, we reject plaintiff's assertion that further compliance under V.R.C.P. 26(h) was required before the court could impose discovery sanctions against him. See V.R.C.P. 26(h) (stating that no motions pursuant to Rule 37 shall be filed unless counsel making motion has conferred with opposing counsel or has attempted to confer about the discovery issues between them in detail in a good faith effort to eliminate or reduce the area of controversy, and to arrive at a mutually satisfactory resolution). When plaintiff failed to comply with the court's order, the court had authority to impose sanctions pursuant to the terms of Rule 37(b)(2). Even if that were not the case, plaintiff took the position that his response to the discovery request was sufficient, and thus, it appears that any further conference with defense counsel would have been futile.

Reversed and remanded.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice