2019 IL App (1st) 181499-U

No. 1-18-1499

Order filed September 12, 2019

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PATRICK E. O'HERN,	)	Appeal from the
	)	Circuit Court of
Plaintiff and Counterdefendant-Appellant,	)	Cook County
	)	
v.	)	No. 16 L 4197
	)	
MEECH LAKE GENERAL PARTNER LLC, a Delaware	)	
Limited Liability Company,	)	Honorable
	)	Margaret A. Brennan,
Defendant and Counterplaintiff-Appellee.	)	Judge presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not abuse its discretion by dismissing plaintiff's lawsuit with prejudice as a sanction for violating a production order, where the violation was not plaintiff's first and the court determined that he had been untruthful at various times during the litigation.

¶ 2 Plaintiff and counterdefendant Patrick E. O'Hern appeals the circuit court's dismissal with prejudice of his lawsuit against defendant and counterplaintiff Meech Lake General Partner

LLC, a Delaware Limited Liability Company (Meech Lake), as a sanction for violating an order to produce various attorney-client communications, providing a false affidavit and for numerous other discovery violations. On appeal, O'Hern contends that the circuit court abused its discretion where it did not specify its reasons for the dismissal in writing and because the dismissal itself as a sanction was too severe given the circumstances of the case. For the reasons that follow, we affirm the circuit court's dismissal with prejudice of O'Hern's lawsuit.

¶ 3 I. BACKGROUND

¶ 4 The litigation in this case stemmed from an investment portfolio manager services agreement between O'Hern and Meech Lake that became effective on August 1, 2013, whereby O'Hern agreed to provide various investment-related services for an initial three-year term. According to their agreement, Meech Lake guaranteed O'Hern a compensation package for the first 18 months of the initial term "except in the case of breach of contract, dishonesty, disloyalty, fraud or malfeasance by [O'Hern] or insolvency, bankruptcy or termination of operations by [Meech Lake]." However, the compensation for the second 18 months of the initial term was not guaranteed to be the same as the first 18 months. The agreement provided that:

> "After the first 18 months of the Initial Term, [O'Hern's] Services will be formally reviewed with [Meech Lake] and if approved by [Meech Lake] will be guaranteed for the remainder of the Initial Term (the Second 18 months) of this Agreement. If [Meech Lake] does not perform a formal review with [O'Hern] within sixty days after the Second 18 month period, [O'Hern's] performance will be considered approved."

Once approved, O'Hern would be guaranteed the same compensation package he received during the first 18 months of the initial term.

¶ 5 Relevant here is O'Hern's five-count amended complaint against Meech Lake filed in September 2016, which included counts for breach of contract, unjust enrichment, breach of the duty of good faith and fair dealing, fraud and conversion. In O'Hern's breach of contract count—which ultimately would be the only count remaining for a scheduled jury trial—he alleged that, following the first 18 months of the initial term, Meech Lake failed to formally review his work performance or reviewed his work performance and found it satisfactory. According to O'Hern, either way, this resulted in his work performance being considered approved and guaranteed him the same compensation he received during the first 18 months of the initial term for the second 18 months of the initial term. Yet O'Hern claimed that, in November 2015, Meech Lake breached the agreement when it refused to compensate him accordingly.

¶ 6 Meech Lake answered with several affirmative defenses and three counterclaims against O'Hern, which were breach of fiduciary duty, breach of contract and unjust enrichment. As the scheduled jury trial came near, only Meech Lake's breach of fiduciary duty and breach of contract counterclaims would remain. In its breach of fiduciary duty counterclaim, it alleged that O'Hern took unilateral actions against the economic interests of Meech Lake and prioritized his own interests over Meech Lake's. In its breach of contract counterclaim, it alleged that O'Hern failed to provide the services contemplated by their agreement and spent "his working time taking unauthorized unilateral actions."

¶ 7 Also in September 2016, Meech Lake propounded requests for the production of documents on O'Hern, which included "[c]opies of all postings [O'Hern had] made to any social media platforms since the date" of the parties' agreement. In response, O'Hern objected because the request was overbroad and ambiguous, and the records themselves not relevant.

¶ 8 In January 2017, pursuant to a motion to dismiss filed by Meech Lake, the circuit court dismissed O'Hern's counts for breach of the duty of good faith and fair dealing, and conversion. Several months later, pursuant to a partial motion for summary judgment filed by Meech Lake, the court dismissed O'Hern's fraud count.

¶ 9 The parties' litigation continued, and in February 2018, Meech Lake filed a motion to compel seeking the social media records of O'Hern that he had objected to being discoverable. In the motion, Meech Lake asserted that the records were relevant because it had a social media policy and believed that some of O'Hern's postings may have posed regulatory risks. Additionally, Meech Lake alleged that, many months earlier, O'Hern's previous attorney had admitted that the records were relevant and agreed to produce them. But since then, according to Meech Lake, O'Hern had changed attorneys twice and "each new lawyer has employed a combination of stall tactics and outright non-responsiveness to avoid producing the records." As such, Meech Lake sought "all records regarding the content of [O'Hern's] Twitter account and other social media accounts (including public and private posts and direct messages) from the outset of his engagement by Meech Lake through the present." Later in the month, the circuit court granted Meech Lake's motion to compel and in a written order, directed O'Hern to produce the "[d]ocuments."

¶ 10 On March 7, 2018, one of O'Hern's attorneys, Jonathan Herpy, produced two "re-tweets" from Twitter by O'Hern.[1] In an e-mail accompanying the production of the re-tweets, Herpy stated that, "[d]uring the relevant period, [O'Hern's] only involvement with publishing in social

[1] A "re-tweet" is where a Twitter user republishes another Twitter user's tweet. See *Knight First Amendment Institute at Columbia University v. Trump*, No. 18-1691-CV, 2019 WL 2932440, at *1 (2d Cir. July 9, 2019).

media went through his Twitter account." The next day at a court appearance, the circuit court did not believe the production of two re-tweets was sufficient. In a written order, it informed O'Hern that, "for purposes of [his] production, social media means Facebook, Twitter, Instagram, LinkedIn and all similar platforms. Production to include public, private and direct posts and messages from execution of his investment portfolio manager services agreement through present." Additionally, the court instructed O'Hern to produce an affidavit of completeness "that he has produced all communications and posts from all of his social media accounts."

¶ 11 The following week, Herpy e-mailed Meech Lake's attorneys with a supplemental production as well as O'Hern's affidavit of completeness. In the supplemental production, O'Hern produced screenshots of a Facebook page purportedly belonging to O'Hern, but taken from the account of someone named "Jonathan," who was not Facebook friends with O'Hern, meaning the Facebook records were only the publicly available information from O'Hern's Facebook page. O'Hern also produced posts from his Instagram page. In the affidavit of completeness, which was not notarized, O'Hern asserted that he had made reasonable efforts to comply with the discovery request for social media records by searching and reviewing all of his social media accounts, including, but not limited to, Facebook, Twitter, Instagram and LinkedIn. And based on his search, he had produced all records in his possession "relevant and responsive" to the request.

¶ 12 Based on this supplemental production, one of Meech Lake's attorneys, Seth Stern, e-mailed Herpy, alleging that O'Hern's affidavit of completeness was insufficient to comply with the circuit court's order and that the production was simply Herpy printing publicly available information from O'Hern's Facebook and Instagram pages, and not from O'Hern's own search

for the records, as he stated in his affidavit. In response, Herpy provided an amended affidavit of completeness from O'Hern that was notarized and further production of social media records, including posts and messages from Facebook, Instagram and LinkedIn. In the amended affidavit of completeness, O'Hern maintained that he had produced copies of "any and all documents in [his] possession relevant and responsive."

¶ 13 On March 19, 2018, immediately after O'Hern's new production of social media records, Stern wrote Herpy, highlighting that, based on a screenshot from Twitter, O'Hern had tweeted 79 times yet only the two re-tweets had been produced. Stern therefore requested the full production of Twitter records. Herpy responded later in the day that a "further production of Twitter content is completely inconsistent with both our conversations regarding such content as well as previous written communications regarding the production." Nevertheless, Herpy stated that O'Hern had agreed to "turn over all Twitter content," and the records would be available the next day.

¶ 14 Later in the night of March 19, 2018, Meech Lake filed a motion for sanctions against O'Hern pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002), based on O'Hern's alleged failure to comply with discovery, alleged disobedience of multiple court orders on discovery and alleged submission of "two affidavits of completeness that were demonstrably false." Meech Lake asserted that O'Hern and Herpy had "ignored their discovery obligations and engaged in numerous bad faith tactics throughout this litigation" and had faced no adverse consequences from it. Meech Lake argued that sanctions were now appropriate despite Herpy's promise that all Twitter records would be produced.

¶ 15 Two days later, the circuit court granted the motion for sanctions and ordered that O'Hern "make a payment of $500" to Meech Lake. Although there is nothing in the record about whether, and if so when, O'Hern paid this, he claims in his brief that he did so "immediately."

¶ 16 In April 2018, both O'Hern and Meech Lake filed motions for summary judgment on the remaining two counts of O'Hern's amended complaint (breach of contract and unjust enrichment) and all three of Meech Lake's counterclaims. In O'Hern's response to Meech Lake's motion for summary judgment, he attached several exhibits for support, but primarily relied on a "Certification," which provided his chronological narrative of events that led to him initiating his lawsuit against Meech Lake. Three of the other exhibits attached to the response—Exhibit C, Exhibit GG and Exhibit KK—included attorney-client e-mails.

¶ 17 Exhibit C contained an e-mail thread, beginning with an e-mail sent by O'Hern on September 17, 2014, regarding Meech Lake's business with a company named Novartis. Over the course of that day, O'Hern forwarded the e-mail to two other e-mail accounts of his. The last e-mail in the thread was an e-mail O'Hern sent Herpy on August 3, 2016, in which he told Herpy: "Feel free to forward to Bill for some context re: good dealings, faith, and fiduciary complaints. I'll be including hyperlinks that will address and contradict their statements." It is unclear who "Bill" is, but William Bolotin was one of Meech Lake's attorneys.

¶ 18 Exhibit GG contained an e-mail thread, beginning with an e-mail sent by O'Hern on January 23, 2015, to his mother, Kelley O'Hern, and David Wentworth. Although some of the e-mail involved O'Hern's issues with Meech Lake, another part of it detailed that Bernard Kane, the chief investment officer of Meech Lake, "lost his temper and became verbally abusive" toward O'Hern. He continued and provided additional information about the altercation with Kane, including that Kane "grabbed [O'Hern's] glasses and threw them down the hallway." Several months after sending the initial e-mail, O'Hern forwarded the e-mail to himself and, in May 2018, forwarded the e-mail to Herpy and another attorney of his, Joe Gentleman. In response, Herpy wrote to O'Hern and Gentleman that he would "be remiss if [he] didn't bring up

the physical altercation that happened during your tenure. Didn't have a chance to mention this to Joe, but this did happen." O'Hern replied that "[t]here were other occurrences of verbal harassment" and "[i]f there is anything we can do immediately to bring this to light I would be in favour [*sic*]." Gentleman responded to O'Hern's e-mail by attaching a draft of the certification that would be attached to O'Hern's response to Meech Lake's motion for summary judgment. Gentleman remarked that the certification would be used "as a roadmap for [O'Hern's] trial testimony." Later in the e-mail thread, Herpy, Gentleman and O'Hern discussed Meech Lake's social media policy. Gentleman stated that, according to the Meech Lake's compliance manual, the policy only covered "employees," which he did not believe O'Hern was technically, thus rendering the policy inapplicable to him. O'Hern responded that Gentleman was "[c]orrect."

¶ 19 Exhibit KK contained an e-mail sent by O'Hern to Herpy on October 22, 2015, stating that Kane as well as Ben King, another individual associated with Meech Lake, had attended a conference in Europe where both were panelists at different events. O'Hern included the biography that Kane had used for the conference, which O'Hern alleged showed that Kane was attempting to "omit" him from business opportunities.

¶ 20 After O'Hern filed his response to Meech Lake's motion for summary judgment, Stern e-mailed Herpy and Gentleman alerting them that they had included attorney-client communications in the response, thereby waiving the attorney-client privilege. As such, Stern requested additional attorney-client communications, a request that was broad in scope. Gentleman responded and asserted that there had been no waiver of the attorney-client privilege, but in any event, requested that Stern identify each document he believed contained privileged communications and explain why the privilege had been waived. Stern replied, highlighting the pages of O'Hern's response to Meech Lake's motion for summary judgment that contained the

privileged communications. As for an explanation, Stern refused and remarked that he did not need to provide legal arguments in an e-mail and once again demanded that Herpy and Gentleman turn over the additional attorney-client communications. Gentleman responded "[t]here is no privilege waiver" and refused to provide any additional communications.

¶ 21 On May 16, 2018, after additional e-mails back and forth between Stern and O'Hern's attorneys, Meech Lake filed a motion to compel the production of additional attorney-client communications due to O'Hern's waiver of the attorney-client privilege. Meech Lake highlighted the e-mails between O'Hern and his attorneys that were attached to his response to its motion for summary judgment and noted that, because O'Hern provided an exhibit index that explicitly referenced the e-mails, there was no "doubt" that the inclusion of them was "intentional." And further, according to Meech Lake, O'Hern had not "claimed inadvertence" for the inclusion of the communications. Meech Lake argued that, because O'Hern chose to waive the attorney-client privilege, it was entitled to all communications "relating to the subject matter of [Exhibit C, Exhibit GG and Exhibit KK], including the subject matter of [O'Hern's response to its motion for summary judgment] and the Certification (which encompasses the entire case)."

¶ 22 O'Hern responded and argued that the attorney-client communications were "inadvertently attached" to his response to Meech Lake's motion for summary judgment, but also that the e-mails did "not involve the rendering of legal advice so they do not involve attorney client privileged communication."

¶ 23 On June 5, 2018, the circuit court resolved all open motions. Concerning Meech Lake's motion to compel, the court granted it and ordered "O'Hern to produce all drafts, all communications with his counsel (Mr. Herpy and Mr. Gentleman and their firms) relating to any issues discussed in the certification and the other attorney-client e-mails filed with the court"

within three days. Concerning the motions for summary judgment, the court granted O'Hern's motion as it related to Meech Lake's counterclaim of unjust enrichment, but denied his remaining requested relief. The court granted Meech Lake's motion as it related to O'Hern's count for unjust enrichment, but denied its remaining requested relief. As a result, following the court's orders, the parties were scheduled to proceed to trial on June 18, 2018, on O'Hern's breach of contract count and Meech Lake's counterclaims of breach of fiduciary duty and breach of contract.

¶ 24 On June 8, 2018, Gentleman e-mailed Stern the communications purportedly required by the circuit court's production order. The communications were approximately 200 pages worth of e-mails and documentation from mid-April 2018 until mid-May 2018. In response to the production, Stern noted that the e-mails were all from April and May 2018 and "[s]urely there were attorney client communications relating to subjects discussed in the certification (i.e. every issue in the case) before that." Stern reminded Gentleman of the scope of the circuit court's production order and remarked that the court "expressly told [him] in open court in response to [his] own inquiry that the production was not limited to correspondence regarding the drafting of the certification but to all correspondence relating to its subject matter." As such, Stern requested a more thorough production of documents as well as an affidavit of completeness. Gentleman replied that he produced what he "believe[d]" was required by the court's order. Gentleman and Stern exchanged additional e-mails, which showed them to be at an impasse over the scope of the court's production order.

¶ 25 On June 11, 2018, Meech Lake filed a motion for sanctions seeking the dismissal of O'Hern's breach of contract count pursuant to Illinois Supreme Court Rule 219 (eff. July 1, 2002). Meech Lake asserted that, despite the circuit court's production order directing O'Hern to

produce all communications related to the issues discussed in the certification, his attorneys provided only e-mails regarding the preparation of the certification. Meech Lake highlighted that the communications produced failed to include any e-mails from Herpy's inbox and while many of the e-mails contained attachments, those attachments had not been included in the production. Meech Lake argued that O'Hern and his attorneys were acting in bad faith and openly defying the court's production order. Meech Lake further observed this was not the first time that O'Hern or his attorneys had committed "flagrant discovery violations" and referenced the earlier court-ordered monetary sanction against O'Hern as well as his actions of "repeatedly submitting false affidavits." Meech Lake concluded that the monetary sanction did "not appear to have had any effect on [O'Hern's] conduct." Because of the previous violations and in light of the scheduled jury trial the following week, Meech Lake contended that neither a production order nor a monetary sanction could remedy the "irreparable and substantive prejudice" caused by O'Hern's defiance. Meech Lake therefore requested the dismissal of his breach of contract count with prejudice or, at the very least, an order precluding O'Hern from presenting any evidence at trial on any of the issues discussed in his certification.

¶ 26 Alternatively, in Meech Lake's motion, it noted that it had become insolvent during the course of litigation and was no longer conducting any business, a fact that it claimed to have communicated to O'Hern's attorneys previously and which it included in its own response to O'Hern's motion for summary judgment. Meech Lake further stated that, due to the expense of a jury trial, it was "unable to obtain funds necessary to continue with this litigation." Meech Lake asserted that its witnesses and representatives could not "afford the personal expense to travel or take time away from their current ventures to appear at trial on behalf of an insolvent entity." As

such, Meech Lake instructed its attorneys that, if O'Hern's breach of contract claim was not dismissed, they "should withdraw from this litigation and not proceed to trial."

¶ 27 O'Hern subsequently filed a motion to strike all of Meech Lake's pleadings and its motion. In direct response to Meech Lake's motion, O'Hern asserted that he complied with the circuit court's production order. Additionally in his motion, O'Hern observed that Meech Lake had failed to submit the required pretrial materials and that Meech Lake only indicated that it was insolvent a month before the scheduled trial. Because Meech Lake indicated that it could not proceed to trial or present any evidence, O'Hern argued that the court should strike Meech Lake's pleadings and motion.

¶ 28 On June 15, 2018, the circuit court held a hearing to resolve the parties' various motions. After the parties' argument, the court remarked that it was "somewhat [at] a loss as to where to begin with untangling this mess of a case." With respect to Meech Lake's motion, the court observed that O'Hern had "repeatedly violated court orders to the point that where I get basically a false affidavit presented by Mr. O'Hern mother [*sic*] who doesn't know beans about anything with regards to this case to the point that I have to have then Mr. O'Hern brought in here."[2] The court continued that O'Hern's credibility had been "so grossly strained" based on his conduct throughout the litigation and he "would [not] know the truth if it came up and smacked him in the nose. And that is how I believe that he would testify [at a trial]. And that is what he has demonstrated repeatedly throughout this case." The court noted that it had given O'Hern multiple opportunities to conduct himself appropriately, but he had failed to do so every time, including

[2] It is unclear from the record on appeal when O'Hern's mother provided an affidavit to the circuit court, and the record does not contain such an affidavit. However, it is possible this reference was to an affidavit submitted on behalf of Nature's Grace & Wellness LLC, a medical marijuana venture that O'Hern and his family were a part of and of which O'Hern's mother was the registered agent. Some of the allegations of Meech Lake's counterclaims concerned this side venture of his.

by failing to comply with the recent production order. The court further observed that it had already imposed a monetary sanction against O'Hern for a discovery violation and "it's gotten to the point where it is such a gross prejudice to the defendants after what [O'Hern] has dragged them through to try and get what they were entitled to from the get-go." The court equally assuaged the conduct of O'Hern's attorneys, finding it "appalling" and remarking that they had "condoned" O'Hern's "refusal to turn over" various documents. After noting that the case was set for trial and O'Hern had not been "forthright" or "complied with court orders," the court concluded that "the only sanction available at this point is a dismissal" and accordingly dismissed the remaining count of O'Hern's amended complaint.

¶ 29 The circuit court also found the conduct of Meech Lake's attorneys' deficient, noting that they had a duty to continue complying with court orders until the court granted them leave to withdraw from the case. The court found that they, too, had failed to comply with various court orders, including submitting various pretrial materials. The court accordingly dismissed Meech Lake's counterclaims as well as denied its attorneys' motion for leave to withdraw.

¶ 30 In addition to its remarks in open court, following the hearing, the circuit court entered a written order stating that it "strikes and dismisses both O'Hern's complaint and Meech Lake's counterclaims pursuant to Supreme Court Rule 219 for the reasons stated on the record."

¶ 31 O'Hern subsequently appealed the dismissal of his lawsuit.

¶ 32 II. ANALYSIS

¶ 33 On appeal, O'Hern contests the propriety of the circuit court's sanction, which dismissed his breach of contract claim—the only remaining count of his amended complaint—against Meech Lake.

¶ 34 Under Illinois Supreme Court Rule 219(c) (eff. July 1, 2002), "[i]f a party, or any person at the instance of or in collusion with a party, unreasonably fails to comply with" the discovery rules "or fails to comply with any order entered under these rules, the court, on motion, may enter" a variety of sanctions. These sanctions include: a stay of the proceedings until the offending party complies with the order or rule; precluding the offending party "from maintaining any particular claim, counterclaim, third-party complaint, or defense relating to that issue;" barring a witness from testifying about a particular issue; and dismissing the offending party's lawsuit with or without prejudice. *Id.* Additionally, the court can impose a monetary sanction against the offending party or his attorneys. *Id.* When the court imposes a sanction under Rule 219(c), it "shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." *Id.*

¶ 35 Although sanctions serve the dual purpose of "combat[ing] abuses of the discovery process and maintain[ing] the integrity of the court system," they should be imposed to "promote discovery, not punish a dilatory party." *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, ¶ 27. When imposing a sanction, the "trial judge must consider the importance of maintaining the integrity of our court system." *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 68 (1995). But the sanction must be proportionate to the gravity of the violation. *Buehler v. Whalen*, 70 Ill. 2d 51, 67 (1977). The circuit court has broad discretion in deciding whether to sanction a party, and if so, what sanction to impose. *Shimanovsky v. General Motors, Corp.*, 181 Ill. 2d 112, 120 (1998). As such, the decision to impose a particular sanction may only be reversed when there has been a clear abuse of discretion (*id.*), which occurs when the court's decision is unreasonable or arbitrary such that no reasonable person would agree. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009).

¶ 36 Before addressing O'Hern's specific contentions of error, we note that Meech Lake has not filed a brief as the appellee in this matter. However, in light of the record being simple and O'Hern's contentions of errors being straightforward, we can resolve this appeal without the aid of an appellee's brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 37 A. Lack of Specificity in Written Order

¶ 38 Turning now to O'Hern's contentions, we begin with his contention that the circuit court failed to properly follow Illinois Supreme Court Rule 219(c) (eff. July 1, 2002) when it sanctioned him by dismissing his lawsuit where it did so without setting forth its reasons and basis for the sanction with specificity in a written order.

¶ 39 As noted, when the circuit court imposes a sanction pursuant to Rule 219(c), it "shall set forth with specificity the reasons and basis of any sanction so imposed either in the judgment order itself or in a separate written order." *Id.* The purpose of the specificity requirement "is to allow the reviewing court to make an informed and reasoned review of the decision to impose sanctions." *Kellett v. Roberts*, 276 Ill. App. 3d 164, 172 (1995). However, despite the language of Rule 219(c), Illinois courts "have upheld sanctions under Rule 219(c) even where a circuit court has failed to specifically set out any of its findings" in a written order. *Peal v. Lee*, 403 Ill. App. 3d 197, 206 (2010); see also *Glover v. Barbosa*, 344 Ill. App. 3d 58, 63 (2003) (finding "a court's failure to set out the grounds for sanctions is not *per se* reversible error").

¶ 40 In this case, while the circuit court did not explicitly specify its reasons or basis for dismissing O'Hern's breach of contract claim in its written order, the order referred to its "reasons stated on the record." And we have a transcript of that hearing and thus, the court's reasons and basis for imposing a sanction that dismissed O'Hern's amended complaint.

Moreover, even without the transcript, we could sufficiently deduce the court's rationale based on Meech Lake's motion requesting sanctions. See *Jackson v. Mount Pisgah Missionary Baptist Church Deacon Board*, 2016 IL App (1st) 143045, ¶ 61 (where the circuit court imposed a sanction "pursuant to defendants' written motion" and the sanction was supported by the record, the court's failure to specify its reasons for the sanction in a written order was not reversible error); *Glover*, 344 Ill. App. 3d at 63 (finding that, because a sanction was imposed pursuant to a plaintiff's written motion, the reviewing court could "assume that the reasons for the [sanction] are those set out in [the] plaintiff's motion, absent contrary evidence of record"). Because we can review the reasons and basis for the court's sanction based on the transcript of the hearing and from Meech Lake's motion requesting sanctions, the circuit court did not commit reversible error by failing to explicitly specify its reasons for dismissing O'Hern's lawsuit in its written order.

¶ 41 B. The Sanction Itself

¶ 42 O'Hern next contends that the circuit court's sanction of dismissing his breach of contract count, and in turn, his amended complaint with prejudice, was too harsh a sanction under the circumstances, especially where the defiance of the production order for attorney-client communications was due to his own trial attorneys and he had not previously been warned that the failure to comply with a production order could result in the dismissal of his lawsuit.

¶ 43 As noted, under Rule 219(c), when a party fails to comply with discovery or a court production order, the circuit court may dismiss the offending party's lawsuit with prejudice. Ill. S. Ct. R. 219(c)(v) (eff. July 1, 2002). Generally, before imposing a sanction, the court should consider various factors, such as: (1) the nature of the evidence being sought; (2) the diligence of the adverse party in seeking discovery; (3) the timeliness of the adverse party's objection to the evidence; (4) the surprise to the adverse party; (5) the prejudicial effect of the evidence in

question; and (6) the good faith of the party offering the evidence. *Locasto*, 2014 IL App (1st) 113576, ¶ 26. No single factor is determinative, as each scenario presents its own set of unique facts. *Id.*

¶ 44 Additionally, because dismissing an offending party's lawsuit with prejudice is arguably the most severe sanction the circuit court can impose, reviewing courts have suggested that the circuit court consider four additional factors before imposing such a drastic sanction. *Id.* ¶¶ 28, 35. Those are: (1) the degree of personal responsibility of the party for the noncompliance; (2) the previous level of compliance with discovery and sanctions orders; (3) whether less severe measures are available or, based on the record, would be futile; and (4) whether the offending party has been previously warned about the possibility of a dismissal with prejudice. *Id.* ¶ 35. When considering these factors, the court must also keep in mind that a "[d]ismissal of a cause of action for failure to abide by court orders is justified only when the party dismissed has shown a deliberate and contumacious disregard for the court's authority." *Sander*, 166 Ill. 2d at 68.

¶ 45 In the present case, the circuit court dismissed O'Hern's breach of contract count, and thus his amended complaint, based on two general reasons. The first was that O'Hern's noncompliance with the production order for the attorney-client communications was not his first act of defiance, as he had already defied multiple production court orders, which necessitated the imposition of a monetary sanction against him for his failure to produce the required social media records. See *Harris v. Harris*, 196 Ill. App. 3d 815, 824 (1990) (where the offending party continued to show "noncompliance after the imposition of the first sanction," the appellate court was "not convinced, nor should the trial court have been, that her conduct would have been different in the future" and her "pronounced pattern of deliberate and blatant disregard of discovery rules" warranted a judgment of default being entered against her). The second reason

was that, in the eyes of the court, O'Hern had completely lost credibility based on the repeated violations of court orders, the submission of a "false affidavit" and the other conduct of his that "grossly strained" its consideration of anything put forward by him. See *Koppel v. Michael*, 374 Ill. App. 3d 998, 1007 (2007) (holding that the circuit court properly sanctioned the defendants by entering a default judgment against them where they "repeatedly ignor[ed] the court's orders" and filed what the circuit court found to be "a 'seemingly false affidavit' "). In essence, the court determined that O'Hern's behavior throughout the litigation showed a deliberate and contumacious disregard of its authority and his behavior would likely continue. See *Sander*, 166 Ill. 2d at 69 (finding that, "[w]here it becomes apparent that a party has willfully disregarded the authority of the court, and such disregard is likely to continue," the circuit court is justified in dismissing a lawsuit with prejudice as a sanction).

¶ 46 We note that the circuit court referenced a false affidavit with regard to O'Hern's mother when explaining its reasons for dismissing his lawsuit, and no affidavit from his mother was included in the record on appeal. Thus, the specifics of this affidavit are unclear. However, what is clear is that, based on the court's comments after referencing this affidavit, the court believed that O'Hern himself had procured the false affidavit or, at the very least, was involved in its submission. Furthermore, we highlight the untruthfulness of O'Hern during Meech Lake's attempts to obtain his social media records. While ultimately he produced records from Facebook, LinkedIn, Instagram and Twitter, it was only because of the extreme persistence of Stern, one of Meech Lake's attorneys. Notably, in conjunction with O'Hern's first production of social media records—the two re-tweets of his from Twitter—Herpy remarked that this was O'Hern's "only involvement with publishing in social media." Yet clearly based on what was ultimately produced, this was untrue. When the circuit court found O'Hern's initial production of

social media records insufficient and explicitly ordered him to turn over "public, private and direct posts and messages" from "Facebook, Twitter, Instagram, LinkedIn and all similar platforms," he produced only publicly available information from his Facebook and Instagram pages. Concurrently, he provided an affidavit of completeness, wherein he claimed that he produced everything called for by the court's production order based on his own searches of his social media. Yet based on what was ultimately produced, this, too, was untrue. Generally, when the circuit court has made a credibility determination, a reviewing court is in no position to disagree. See generally *Eychaner v. Gross*, 202 Ill. 2d 228, 270-71 (2002) (noting that credibility determinations are uniquely within the purview of the circuit court). This is especially true here where the circuit court oversaw this case from its inception and interacted with O'Hern and his attorneys on multiple occasions. But, nevertheless, based on our review of the record, in particular O'Hern and Herpy's conduct with respect to the social media records, the circuit court's finding that O'Hern lacked credibility was abundantly supported.

¶ 47 It was against the backdrop of this conduct that the circuit court simply had enough of the games being played by O'Hern and his attorneys when they once again failed to comply with a production order, this time regarding the production of the attorney-client communications. Given O'Hern and his attorneys' apparent disagreement with the production order, the proper procedure to challenge the order was not to willfully disobey the order by producing less than what was required, but rather to file a motion to reconsider supported by legal arguments or facilitate appellate review of the production order.

¶ 48 To do the latter, O'Hern could have failed to comply with the order and concurrently asked the court to find him in friendly civil contempt, something O'Hern himself highlights on appeal, notably with the representation of counsel different than he had in the circuit court. In

turn, O'Hern could have appealed the court's finding of contempt under Illinois Supreme Court Rule 304(b)(5) (eff. Mar. 8, 2016), which provides for the appeal of contempt findings. And when a party appeals a contempt finding based on a discovery violation, the underlying discovery order becomes subject to appellate review. *Harris v. One Hope United, Inc.*, 2015 IL 117200, ¶ 6. Although O'Hern suggests on appeal that the circuit court could have *sua sponte* found him in "friendly contempt" based on his failure to produce all of the attorney-client communications, he ignores that he himself (through counsel) was responsible for facilitating that type of finding. See *Daley v. Teruel*, 2018 IL App (1st) 170891, ¶ 18 (where a party did not agree with a court's production order, it refused to comply and "requested that the court find it in 'friendly contempt' in order to facilitate appellate review"); *Cutler v. Northwest Suburban Community Hospital, Inc.*, 405 Ill. App. 3d 1052, 1071 (2010) ("Under the circumstances, the trial court should have granted the request for the contempt finding rather than dismissing the plaintiff's complaint with prejudice."). Rather, in this case, O'Hern simply chose only to comply with part of the court's production order and willfully ignore full compliance.

¶ 49 Still, despite O'Hern's conduct in the circuit court, he argues that the court failed to consider any of the additional factors discussed in *Locasto* that courts should consider before dismissing a lawsuit with prejudice as a sanction. While the circuit court never explicitly referred to these factors, it is clear based on the court's reasoning that it considered at least two of them implicitly. In its ruling, the court clearly considered O'Hern's prior level of compliance with discovery and sanctions orders, as demonstrated by its discussion of the previous monetary sanction imposed against him and its remark that O'Hern had "repeatedly violated court orders." Additionally, the court undoubtedly considered whether less severe measures were available or, based on the record, would be futile. In particular, the court stated that: "I have given

opportunities, and I have given a long, long open path for [O'Hern] to try and come up and do the right thing. And what do I get? I entered an order last week, and it's still not complied with. It is still not complied with once again." Given this statement and others by the court, it believed that a less severe sanction would have been futile.

¶ 50 Regarding the other two factors discussed in *Locasto*, we agree with O'Hern that the defiance of the court order to produce the attorney-client communications was likely in large part due to his attorneys' actions, as they would necessarily be in possession of the relevant documents, and thus he does not bear full responsibility for the noncompliance. Yet, we cannot ignore, and the circuit court did not as well, that he was actively involved in a pattern of noncompliance throughout the litigation. Because of this, the court could properly infer that he was involved to some degree with the latest noncompliance. Furthermore, although the court did not warn O'Hern about the possibility of a dismissal with prejudice for further noncompliance, there is no requirement that the court must do so before dismissing an action with prejudice. And, more importantly, based on the court's findings, particularly its finding that O'Hern had lost any credibility based on his conduct throughout the litigation, it was apparent that he willfully disregarded the authority of the court, which justifies a dismissal without warning. See *Sander*, 166 Ill. 2d at 69 (finding that "[w]here it becomes apparent that a party has willfully disregarded the authority of the court, and such disregard is likely to continue," the circuit court is justified in dismissing a lawsuit as a sanction).

¶ 51 Lastly, O'Hern compares his circumstances to those in *Locasto*, 2014 IL App (1st) 113576, ¶¶ 41-42, where the appellate court reversed the circuit court's entry of a default judgment against the defendants as a sanction because the "court never warned [them] that their failure to comply could result in the sanction of 'last resort.' " However, in *Locasto*, the

defendants' transgressions were dilatory discovery practices, and critically, they never provided false information to the court and had not previously been sanctioned by the court, as the plaintiff's request for a default judgment was the first time the court was aware of the defendants' dilatory discovery practices. *Id.* ¶¶ 38-40, 45. In contrast, here, O'Hern was sanctioned previously, the court had given him and his attorneys multiple opportunities to conduct themselves appropriately, which they failed to do, and according to the court, O'Hern himself was involved in the submission of false information to it. Whereas the circumstances in *Locasto* did not warrant a default judgment without prior warning, the same cannot be said for this case, where a dismissal without warning was justified.

¶ 52 Given the history of this case, in particular O'Hern's untruthfulness on multiple occasions and his repeated violations of court orders, we cannot say that the circuit court acted unreasonably when it dismissed his amended complaint with prejudice as a sanction. Accordingly, the circuit court did not abuse its discretion in sanctioning O'Hern.

¶ 53 III. CONCLUSION

¶ 54 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 55 Affirmed.