2012 IL App (5th) 090397-U

NO. 5-09-0397

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JONATHAN BRAVEMAN, Plaintiff-Appellant, v. DAVID HURSEY, BIG DOG ENTERPRISES LOGISTICS, LLC, d/b/a FREIGHT HAULING LOGISTICS, and THE HURSEY GROUP, LLC, Defendants, and EVERETT C. KING, Defendant-Appellee.	)	Appeal from the Circuit Court of St. Clair County. No. 07-L-87 Honorable Patrick M. Young, Judge, presiding.

PRESIDING JUSTICE DONOVAN delivered the judgment of the court.
Justices Spomer and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in striking plaintiff's pleading and dismissing the case with prejudice where plaintiff deliberately and contumaciously defied multiple orders directing plaintiff to answer discovery requests propounded by defendant.

¶ 2 Upon being notified that plaintiff, Jonathan Braveman, had chosen to stand on his objections to certain discovery requests, thereby defying three separate orders directing him to answer the discovery requests, the circuit court struck Braveman's pleadings and dismissed with prejudice all claims against defendant, Everett C. King. On appeal, Braveman contends that he should not have been compelled to answer

"contention" interrogatories and requests for production where the discovery requests called for the disclosure of his lawyer's mental processes, impressions, conclusions, and opinions and the marshaling of testimony and evidence for trial in violation of the work-product doctrine. Braveman also challenges the propriety of court orders directing him to answer discovery that he claims is irrelevant to any issue remaining in the case. We affirm.

¶ 3 Jonathan Braveman filed a complaint in the circuit court of St. Clair County, against defendants, David Hursey, Big Dog Enterprises Logistics, LLC, doing business as Freight Hauling Logistics (Big Dog), Everett C. King, and The Hursey Group, LLC. The lawsuit arose from alleged breaches of an asset-purchase agreement and a separate employment contract. In count I, Braveman alleged that he agreed to sell the assets of his logistics company to Big Dog, a wholly owned subsidiary of The Hursey Group, and that Big Dog failed to pay the $75,000 balance of the purchase price due under the agreement. In count II, Braveman claimed that Big Dog and The Hursey Group failed to pay portions of the base salary, benefits, and severance owed to him under an employment agreement. In counts III and IV, Braveman claimed that David Hursey, who was the chief executive officer of both The Hursey Group and Big Dog, intentionally, wrongfully, and without just cause conspired to interfere with Braveman's contractual relationships with Big Dog. In counts V and VI, Braveman claimed that Everett C. King, who was the president of both The Hursey Group and Big Dog, intentionally, wrongfully, and without just cause conspired to interfere with Braveman's contractual relationships with Big Dog.

¶ 4 The corporate defendants failed to answer or appear. On Braveman's motion, the trial court entered a default judgment against the corporate defendants and in favor of Braveman. King and Hursey answered the complaint and asserted a number of

defenses. As a defense to the employment contract claim, each asserted that Bravemen had been terminated for just cause, in part, because he had viewed, downloaded, and distributed explicit pornographic images from his work computer. During the pretrial discovery period, Hursey sought protection in the bankruptcy court, and this action against him was stayed. Months later, Hursey was granted a discharge in bankruptcy. King was the remaining defendant in the case.

¶ 5 In June 2008, King served interrogatories and requests for production on Braveman. Some interrogatories and document requests were directed toward the pornographic images and materials which Braveman allegedly viewed, downloaded, and distributed from the work computer and which led to his termination. Other interrogatories and document requests were "contention" requests. Typically, "contention" interrogatories ask a party to identify all facts or evidence that supports a specific allegation in a complaint or a defense. So, as examples here, one interrogatory asked Braveman to state all facts and to identify all documents that support his contention that King wrongfully interfered with the asset purchase agreement, and another asked Braveman to state all facts and to identify all documents that support his contention that King fired him without just cause and contrary to the terms of the employment agreement. In August 2008, Braveman submitted responses to King's discovery requests. Though Braveman answered a few questions, his responses consisted mostly of objections. Braveman claimed that the "contention" requests sought disclosure of the mental impressions, opinions, conclusions, and legal theories of Braveman's attorney, and thereby violated the work-product doctrine. Braveman also claimed that the requests for production relative to the pornographic materials he allegedly downloaded from his work computer were irrelevant to any issue in the case and would not lead to the discovery of relevant

information.

¶ 6 On August 15, 2008, King filed a motion to compel discovery responses. Following a hearing on September 17, 2008, the trial court overruled Braveman's objections and directed Braveman to answer the "contention" requests and the requests for the downloaded pornographic materials within 30 days. Braveman did not comply with the discovery order. On January 15, 2009, King filed a motion to compel pursuant to Supreme Court Rule 219(c) (eff. July 1, 2002) and asked the court to enter an order that is "just" for Braveman's failure to comply with the September 17, 2008, discovery order. On February 3, 2009, Braveman filed a response to King's motion. Braveman stated that he recently provided amended responses and that he believed he had answered the "contention" interrogatories and production requests. He attached his amended responses. The amended responses show that Braveman restated the objections he raised in the original responses in August 2008, but he added the following: "Notwithstanding Plaintiff's objection, he has no documents relevant to this request to produce that have not been already produced by the parties and are Bates stamped."

¶ 7 The trial court held a hearing on the motion to compel on February 4, 2009. After hearing the arguments of the parties, the court entered an order overruling Braveman's objections to the contention interrogatories and the requests for production of the downloaded pornographic materials. The court specifically directed Braveman to produce for inspection and copying any responsive documents in his possession even if copies of the documents had been produced by the defendant. The court noted that King's motion to compel did not request specific relief or any specific sanction, and it granted King leave to file a motion for attorney fees and costs pursuant to Supreme Court Rule 219(c).

¶ 8 On February 9, 2009, King filed a motion for attorney fees and costs pursuant to Supreme Court Rule 219(c). On February 11, 2009, Braveman filed a response to the trial court's order compelling discovery. Therein, Braveman stated that he provided to King all documents (40 copies) relevant to the case that were in his possession and that were not stamped by King. Braveman also notified the court that he stood on his objections to the contention interrogatories and the requests for production of the pornographic materials. On February 20, 2009, Braveman filed a response in opposition to King's motion for attorney fees and costs. Braveman objected to the imposition of the requested sanction. Braveman also asked the court to find him in contempt for failing to comply with the court's discovery orders and to impose a modest fine so that he could immediately appeal the discovery orders.

¶ 9 In an order entered on April 2, 2009, the trial court found that Braveman had chosen

to stand on his objections and to disregard the court's orders of September 17, 2008, and February 4, 2009, and it directed Braveman to pay $3,835 in attorney fees to the defendant as a sanction. The court further ordered Braveman to respond to the interrogatories and production requests within 14 days. The court specifically stated that it would strike Braveman's pleadings and dismiss the case if Braveman failed to comply.

¶ 10 On April 15, 2009, Braveman filed a motion asking the trial court to amend its April 2, 2009, order by: (a) adding findings pursuant to Supreme Court Rule 308 (eff. Feb. 1, 1994) that the order involved a question of law as to which there was a substantial ground for difference of opinion and that an immediate appeal would materially advance the termination of the litigation and (b) identifying the question of law as whether the contention interrogatories at issue require the plaintiff's counsel to reveal his mental impressions and work product. On April 20, 2009, King filed a motion in which he asked the court to strike Braveman's pleadings and dismiss the case with prejudice under Supreme Court Rule 219(c). King noted that Braveman had failed to pay the attorney fees as previously ordered, that Braveman failed to answer the discovery as previously ordered, and that Braveman had disobeyed three orders of the court. In a separate pleading, King objected to Braveman's request for the entry of a Rule 308 finding.

¶ 11 On June 23, 2009, the trial court found that Braveman had chosen to disregard its orders of September 17, 2008, February 4, 2009, and April 2, 2009, and accordingly, the court struck all of Braveman's pleadings, counts, and claims against King and dismissed with prejudice the case against King. The court, *sua sponte*, vacated its prior order directing the plaintiff to pay attorney fees. The court denied Braveman's requests for a finding pursuant to Rule 308 and other requested modifications to its order of April 2, 2009.

¶ 12 On appeal, Braveman contends that he should not have been compelled to answer the "contention" interrogatories and production requests because they sought disclosure of the mental impressions and legal theories of his attorney, and thereby violated the work-product doctrine. Though Braveman has attempted to narrow our focus to his objections to the "contention" interrogatories and production requests, the threshold issue is whether the trial court abused its discretion in striking Braveman's pleadings and dismissing with prejudice his case against defendant King.

¶ 13 The discovery orders at issue in this case and the plaintiff's refusal to comply with them fall within the purview of Supreme Court Rule 219. *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 651 N.E.2d 1071 (1995). Under Rule 219(c), the imposition of sanctions is within the discretion of the trial court and will not be disturbed on review unless the imposition of the sanctions constitutes a clear abuse of discretion, such as where the sanction itself is unjust or where the sanctioned party's conduct was not unreasonable. *Sander*, 166 Ill. 2d at 67, 651 N.E.2d at 1081; *Hartnett v. Stack*, 241 Ill. App. 3d 157, 172, 607 N.E.2d 703, 714 (1993). The purpose of imposing sanctions is not to punish, but to effectuate compliance with discovery rules and orders. *Sander*, 166 Ill. 2d at 68, 651 N.E.2d at 1081. Once a sanction has been imposed for noncompliance with a discovery rule or order, the sanctioned party has the burden to establish that his noncompliance was reasonable and justified by extenuating circumstances or events. *Hartnett*, 241 Ill. App. 3d at 173, 607 N.E.2d at 714. In considering whether a sanction was just, a court looks to the conduct that gave rise to the sanction and to the effect of that conduct on the parties. *Hartnett*, 241 Ill. App. 3d at 173, 607 N.E.2d at 714.

¶ 14 Supreme Court Rule 219(c)(v) provides in pertinent part that where a party refuses to comply with discovery rules or court orders relating to them, the court may

dismiss with or without prejudice the offending party's action. Ill. S. Ct. R. 219(c)(v) (eff. July 1, 2002); *Sander*, 166 Ill. 2d at 67-68, 651 N.E.2d at 1080-81. Dismissal is a drastic sanction that should only be employed when the dismissed party has shown a deliberate and pronounced disregard for the court's authority and when it appears that all other enforcement efforts of the court have failed to advance the litigation. See, *e.g.*, *Koppel v. Michael*, 374 Ill. App. 3d 998, 871 N.E.2d 888 (2007); *Clymore v. Hayden*, 278 Ill. App. 3d 862, 663 N.E.2d 755 (1996).

¶ 15 This case was filed in February 2007. Two years later disputes over initial interrogatories and production requests remained at issue. The record shows that in the first instance, Braveman failed to timely respond to discovery requests as required under our discovery rules, thereby necessitating the filing of a motion to compel; that Braveman stood on his objections and refused to answer the discovery requests, thereby defying three separate court orders directing him to do so and leading to the imposition of attorney fees as a sanction for noncompliance; that Braveman failed to pay the defendant's attorney fees as ordered; that Braveman belatedly sought a friendly contempt citation and offered no reasonable justification for the delay; and that Braveman sought a Rule 308 finding only after the trial court clearly stated that it would impose the ultimate sanction of a dismissal of the case for further noncompliance.

¶ 16 In this case, Braveman refused to answer the "contention" requests on the ground that they sought disclosure of the mental impressions and legal theories of his counsel, and thereby violated the work-product doctrine. We note that privileges are strongly disfavored and are strictly construed as an exception to the general duty to disclose. *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 196, 579 N.E.2d 322, 330 (1991). The party asserting the protection of

the work-product doctrine has the burden to show that it applies. *Lawndale Restoration Ltd. Partnership v. Acordia of Illinois, Inc.*, 367 Ill. App. 3d 24, 32, 853 N.E.2d 791, 798 (2006). Here, Braveman did not meet that burden. He did not file a privilege log, seek an *in camera* review, or otherwise establish the applicability of the doctrine. Instead, he merely stood on his objections to both the "contention" discovery and the production of downloaded pornographic materials. And while a request for a contempt finding is an accepted method to test an underlying discovery order, the record demonstrates that Braveman sought to utilize this tool far too late in the proceedings. This is likewise true for the requested Rule 308 finding.

¶ 17 The record shows that the trial court entered an order, striking Braveman's pleadings and dismissing his case with prejudice as to defendant King, only after Braveman repeatedly defied its orders to answer discovery, not just the "contention" requests, and failed to pay the defendant's attorney fees as ordered. The trial court gradually increased the level of enforcement, initially entering orders directing Braveman to comply, proceeding to an award of attorney fees as a sanction and an accompanying warning that the next consequence would be a dismissal of the case with prejudice, and finally a dismissal of the case. Lesser enforcement efforts by the trial court failed to advance the litigation or procure even minimal compliance. Braveman displayed a deliberate and contumacious defiance of the trial court's orders and authority. Braveman did not establish that the noncompliance was justified and reasonable. Where it is apparent that a party has wilfully defied the court, and that such defiance is likely to continue, the interests of that party must bow to the interests of the opposing party in an orderly disposition of the case. *Sander*, 166 Ill. 2d at 69, 651 N.E.2d at 1081; *Clymore*, 278 Ill. App. 3d at 868-69, 663 N.E.2d at 758-59. The trial court's decision to strike Braveman's pleadings and to dismiss the case with

prejudice as to defendant King is supported by the record and is not an abuse of discretion.

¶ 18 Accordingly, the judgment of the circuit court of St. Clair County is affirmed.

¶ 19 Affirmed.