

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

COUNTY OF LYCOMING,	:	
Plaintiff	:	
	:	
v.	:	98-00,717
	:	
JOHN I. BOWER, ANNA M. BOWER,	:	
JOHN I. BOWER, JR., BRENDA L.	:	
BOWER, MATTHEW BOWER, and	:	
NORTH BRANCH TRANSFER, INC.	:	
Defendants	:	

OPINION and ORDER

In this case the court is asked to enter default judgment against the defendants for refusing to provide discovery material to the plaintiff despite repeated requests and court orders. Without the requested information the plaintiff will be seriously hindered in proving its case. As the date for trial approaches and the Bowers show no signs of ever complying with this court's orders, our patience and our options have run out. We have already tried kinder, gentler approaches, but they have failed. We now have no choice but to protect the integrity of the adjudication process and sanction the defendants' flagrant disregard for this court by entering default judgment against them. The court is well aware of the seriousness of this sanction, and we do not impose it hastily or without regard for its ramifications. Rather, we enter default judgment because these defiant defendants so richly deserve it.

Factual Background

The Bower family has a less than honorable history in Lycoming County. From June 1990 through April 1996, John I. Bower Sr. operated a garbage hauling and transfer station business, with the aid of his two sons. They hauled the garbage they collected to the Lycoming County landfill, where John Bower Sr. had a credit account. Business was evidently booming, because he accumulated a debt of \$152,587.16, which he failed to pay. Lycoming County then sued him and won a judgment for that amount on 28 October 1998. Lycoming County docket number 96-02,003.

Meanwhile, the Bower Boys were growing well acquainted with the criminal justice system. After a lengthy investigation, the Pennsylvania Attorney General's Office charged them with hatching and carrying out a scheme to defraud the county by falsifying the amount of waste they disposed of in the landfill. All three pled guilty to several counts of fraud and conspiracy. The court ordered John Bower Sr. and John Bower Jr. to pay restitution of \$449,134.02. Matthew Bower was ordered to pay \$320,000.00.

While all of these gloomy clouds were gathering on the horizon, it began to dawn on this patriarch and his two sons that they might at some point be compelled to actually pay the county what they owed. Around that point, they apparently began transferring more than garbage.

On 12 May 1998, Lycoming County filed the instant suit for fraudulent conveyance, alleging that in anticipation of the impending civil and criminal judgments against him John Bower Jr. transferred various personal assets to family members for no value or inadequate consideration with the intent to hinder, delay, or defraud the County and that the defendants,

members of his kin, actively concealed the transfers. The defendants denied everything, which was to be expected. What was unexpected, however, was their complete refusal to obey the discovery rules.

On 10 September 1998 David W. Marcello, Esq., counsel for all defendants, accepted service of the County's Request for Production of Documents and Interrogatories, but did not respond within thirty days, as required by Pa.R.C.P. 4005 and 4009. On 11 November 1998 counsel for the County sent a letter to defendants' counsel informing him that the County would seek appropriate court action if the defendants did not comply, and made several other efforts to seek compliance. On 21 December 1998 the County filed a Motion to Compel Answers to Plaintiff's Request for Production of Documents and Interrogatories. On 23 February 1999, after argument, this court granted the motion and ordered the defendants to file full and complete answers to the outstanding discovery within 15 days of the date of the order. The defendants failed to comply, and on 19 March 1999 the County filed a petition for contempt of court. On 20 April 1999, after argument, the court found the defendants in contempt for failing to comply with the order and ordered them to pay \$350.00 for the cost to the County of filing the contempt petition. The court also prohibited the defendants from presenting in their defense any information that should have been included in the Answers to Interrogatories or provided under the Request for Production of Documents. The court also ordered them to answer Interrogatories numbers 1, 3(a)-3(c), 5, 9, 15, 16(a)-16(f), 17(a)-17(d), and 18(a)-(e) and to respond to Request for Production of Documents numbers 1(a), 1(c), 1(e), 1(i), 1(o), 1(p), 1(q), and 1(r), by 10 May 1999. Once again, the defendants did not comply. The County then fired its last

shot: the petition for contempt and sanctions that is currently before the court, asking for a default judgment and attorney fees for costs incurred in preparing and arguing the motion.

Argument was held on 24 May 1999.

Discussion

The decision whether to impose discovery sanctions is left to the sound discretion of the trial court. Miller Oral Surgery, Inc. v. Dinello, 416 Pa. Super. 310, 611 A.2d 232 (1992). However, in exercising that discretion and formulating an appropriate sanction the court must select a punishment that fits the crime. Hein v. Hein, 717 A.2d 1053 (1998).

The dismissal of a complaint as a discovery sanction is authorized under Pa.R.Civ.P. 4019(c)(3). Fox v. Gabler, 534 Pa. 185, 626 A.2d 1141 (1993); Stewart v. Rossi, 452 Pa. Super. 120, 681 A.2d 214, 217 (1996). However, since dismissal is the most severe sanction possible, it should be imposed only in extreme circumstances. Stewart, supra, at 217. The court must carefully balance the equities of the particular case and dismiss only where the violation of the discovery rules is willful and the opposing party has been prejudiced. Croydon Plastics v. Lower Bucks Cooling, 698 A.2d 625, 629 (Pa. Super. 1997), citing Stewart, supra, at 217. The court's evaluation should include consideration of the following factors: (1) the nature and severity of the discovery violation, (2) the defaulting party's willfulness or bad faith, (3) prejudice to the opposing party, (4) the ability to cure the prejudice; and (5) the importance of the precluded evidence in light of the failure to comply.

Nature and Severity of the Discovery Violations

Certainly the nature and severity of the discovery violations are great. The defendants repeatedly refused to comply with the plaintiff's request to produce the information and with two of this court's orders to do the same. Never did they file a motion for a protective order or other document objecting to the discovery requests.

The integrity of the civil adjudication process requires that all parties respond to discovery requests promptly and thoroughly. When one party refuses to play by the rules, that not only disrupts the orderliness of the system, but acts as an injustice to the other side. The discovery process is designed to be self-executing, with as little court involvement as necessary. When violations occur, however, court interference is necessary to force the recalcitrant party to comply. When that party refuses to follow even the explicit direction of a court, the process grinds to a halt and the discovering party is completely thwarted. The defendants, in disobeying two orders of this court, have not only committed a severe discovery violation, but have also flaunted their disrespect for this court and for our civil justice system.

The Defaulting Party's Willfulness or Bad Faith

The defendants' conduct is certainly willful and in bad faith. At the argument, counsel for defendants advanced no plausible explanation for the failure to follow the court orders. He simply stated that the defendants had trouble getting some of the information, namely tax returns, because some of the defendants had not filed 1998 returns until recently. However, at no time prior to the hearing did the defendants formally set forth why they

could not provide tax returns at the present, nor when they would be able to provide them. Moreover, that weak excuse does not explain why they did not provide the other information requested, such as the financial obligations they had incurred since 1993; the names, addresses, and phone numbers of all officers, directors, and employees of North Branch Transfer; the property owned from 1990 to the present which was registered with an agency or subdivision of the Commonwealth and the transfers made; the names and addresses of all institutions where they had accounts; or a list of the financial institutions where they had applied for loans. Counsel for the defendants also offered the lame excuse that the defendants had not provided any of the requested information because they had hoped to provide it all at one time.¹ Lastly, counsel mentioned that some of the requests might be considered onerous, although he wisely did not venture to develop that argument.

Most tellingly, counsel did not even attempt to mitigate the defendants' transgressions by assuring the court that they will now follow the direction of the court and provide the information. *See Croydon, supra*, at 630 (holding that failing to assure the court of compliance supported the trial court's finding of willful failure to comply). Based on this conduct, the court cannot do otherwise but conclude that the defendants' failure to comply with the court's orders was willful and in bad faith.

¹ In response to the court's question of why the documents have not been provided, counsel for defendants stated: "Primarily because we had hoped to provide all of them at the same time. . . . The short answer to your question is that they haven't been provided and they should have been provided and one reason why they weren't provided is that the hope was to present a package to the Plaintiffs." Transcript, pp. 12-13.

Prejudice to the Opposing Party

Prejudice for purposes of discovery results when there is a substantial diminution of a party's ability to properly present its case. Rossi, supra, at 219 (citing cases). The court finds that the defendants' discovery violations have substantially prejudiced the County. At argument, plaintiff's counsel explained that without the requested information the plaintiff would be severely hindered in its ability to prove the elements of fraudulent transfer.² Specifically, without the bank records of the defendants, the County cannot prove that the individuals who received the transfers did not have the financial ability to pay fair market value for them, or had the money but did not pay fair market value. Without a list of the officers, directors, and shareholders of North Branch Transfer, the County cannot determine whether there was a transfer of corporate stock. Without a list of personal property, the County cannot demonstrate that certain assets were owned by one of the defendants and transferred to another. In short, without the information the County will have a difficult time demonstrating that assets were transferred without the payment of fair

² The Uniform Fraudulent Transfer Act, 12 Pa.C.S.A. § 5104 states:

(a) General rule.--A transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation:

- (1) with actual intent to hinder, delay or defraud any creditor of the debtor; or
- (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

- (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

- (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

market value or that the recipients were incapable of paying fair market value.

Ability to Cure the Prejudice

This factor almost need not be considered in this case because the defendants, even after all that has transpired, have not given this court any reason to believe they will ever comply with its orders. Surprisingly, at argument counsel for the defendants never assured the court that the information would be provided. He merely argued that the County could go forward with their case without the information.

Nonetheless, assuming the defendants, like Paul on the road to Damascus, were smitten by the bright light of the law and decided to comply, the County would still be prejudiced because the transformation would have occurred virtually on the eve of trial. Jury selection is scheduled for 14 June 1999, and the case is expected to be tried shortly thereafter. Assuming the County received the discovery information instantly, it would have less than three weeks to process the material and incorporate it into its case. There are six defendants, each of whom would be providing extensive records of finances, liabilities, and assets for a number of years. The new information could very well shed new light on the evidence the County has already accumulated on the various defendants and transfers, and could necessitate hastily re-vamping its entire case. In light of these circumstances, the County would still suffer prejudice from the defendants' discovery violation.

The Importance of the Excluded Evidence in Light of the Failure to Comply

Although the sanction at issue in this case is default judgment, the court has

previously precluded the defendants from presenting in their defense any information that should have been included in the Answers to Interrogatories or provided under the Request for Production of Documents, so the court will briefly address that issue.

The defendants have not asserted that there is any evidence they would have introduced had the sanction not been imposed, or that they are in any way prejudiced by its exclusion. Therefore, the court does not consider this factor to be important in the instant case. *See Hein, supra*, at 1056. Moreover, it is likely that the excluded information is more beneficial to the County than to the defendants. Even if the information was crucial to the defense, however, the sanction would not be inappropriate given the defendants' failure to follow the rules of civil procedure and the orders of this court. Had they not disobeyed both, they would not have been deprived of the opportunity to introduce the evidence. They have no one to blame but themselves.

Conclusion

In our civil litigation system, defendants are given the opportunity to use each and every available legal tool to enable them to prevail. They can assert a wide range of defenses, and can fully inform themselves about the other party's case against them by obtaining any non-privileged information that could lead to discovery of relevant evidence to introduce at trial. They must, however, play by the rules. They cannot win by defying court orders and hindering their opponent in prosecuting its case.

The defendants have stubbornly refused to provide the discovery information which the plaintiff was fully entitled to under our civil rules of court, have ignored explicit orders of

this court, and have given no indication whatsoever that they will ever comply. The few excuses they have given amount to garbage. At this point, therefore, the court has no choice but to enter default judgment against them. If we do not, our orders are not worth the paper they are printed on.

ORDER

AND NOW, this _____ day of May, 1999, for the reasons stated in the above opinion, the plaintiff's Motion for Contempt and for Sanctions is granted and it is ordered that:

- (1) Pursuant to Pa.R.Civ.P. 4019(c)(3), judgment is entered against the defendants and in favor of the plaintiff.
- (2) John I. Bower, Sr. is enjoined from transferring, selling for inadequate consideration, or otherwise dissipating any assets.
- (3) John I. Bower, Sr. is ordered to account, within 30 days of the date of this order, for all assets transferred, sold, or otherwise dissipated since April 24, 1996.
- (4) All transfers of assets associated with the garbage hauling business made from John I. Bower, Sr. to Brenda L. Bower and/or North Branch Transfer, Inc. are declared valid and of no effect.
- (5) Any transfer of ownership in North Branch Transfer, Inc. from John I. Bower, Sr. is declared valid and of no effect.
- (6) Brenda L. Bower and North Branch Transfer, Inc. are enjoined from conveying, transferring, selling, or otherwise dissipating assets received from John I. Bower, Sr.

- (7) Brenda L. Bower and North Branch Transfer, Inc. are ordered to reconvey all personal property transferred to them from John I. Bower, Sr. since April 24, 1996.
- (8) The defendants are ordered to pay the plaintiff's attorney fees in the amount of \$300 within 20 days of the date of this order.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell, Esq., Law Clerk
Hon. Clinton W. Smith
Robin Reed, Esq.
David Marcello, Esq.
Gary Weber, Lycoming Reporter