

RENDERED: April 17, 1998; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 96-CA-2053-MR

SUNSET MANAGEMENT, INC. and  
J. R. MULLINS

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JOHN R. ADAMS, JUDGE  
ACTION NO. 94-CI-001933

LOIS TACKETT JACKSON

APPELLEE

OPINION  
AFFIRMING

\* \* \*

BEFORE: KNOX, MILLER, AND SCHRODER, JUDGES.

KNOX, JUDGE: This is an appeal from an action on a lease agreement involving commercial real property.

The appellee, plaintiff below, filed this action in June of 1994, alleging rents due under a commercial lease agreement entered into by the parties. The appellants proposed to use the leased property as a commercial lot for the sale and display of antique automobiles. The lease, which was for a term of five years, provided for monthly rent installments of \$3,025.00 beginning April 1, 1993.

The appellants thereupon filed their counterclaim, claiming loss of use of the property because the appellee had failed to disclose to them that construction taking place on an adjoining property would impede entry for a period of time upon the property leased by the appellants.

In February 1995, the trial court sustained the appellee's motion for summary judgment on her claim of breach of the lease agreement, and reserved the issues raised by the appellants' counterclaim. Over one year later, in April 1996, the trial court, citing the appellants' failure to appear at a court-ordered deposition, dismissed the appellants' counterclaim. In June 1996, the trial court entered summary judgment for the appellee, awarding her the sum of \$40,258.68 for rent up to May 3, 1995, the date a new tenant began to occupy the property.

The appellants argue that the trial court erred in dismissing their counterclaim, and improperly awarded judgment to the appellee for rents which had not accrued and which were not claimed by the appellee in her pleadings.

The trial court's order dismissing the appellants' counterclaim was based upon that court's observation that the appellants had not offered sufficient justification for failing to appear at a court-ordered deposition. The history of this case reflects that the parties had vied over several discovery disputes. On September 2, 1994, the appellee served upon the appellants Interrogatories, Requests for Production of Documents, and Requests for Admissions. Appellants failed to provide any

responses to those requests. On December 12, 1994, the appellee, taking the position that all matters in the requests for admissions should be deemed admitted, moved for summary judgment on her complaint. The trial court entered summary judgment on the appellee's complaint in February 1995, and reserved the issues raised by the appellants in their counterclaim.

In May 1995, the appellee moved the trial court for an order compelling the appellants to respond to her first set of discovery requests, which appellee had served over eight months earlier. The trial court entered an order directing that, if the appellants had not responded to those discovery requests by June 9, 1995, the court would impose sanctions. The appellants did not respond to the discovery requests by the court's deadline.

On May 23, 1995, the appellee served a second set of discovery requests upon the appellants, which again went unanswered. In July 1995, the appellee moved the trial court for an order sanctioning the appellants by dismissing their counterclaim. On August 7, 1995, the trial court entered an order directing the appellants to respond to all discovery requests by August 29, 1995, directing that the appellants pay the appellee an attorney's fee in the amount of \$500.00, and further providing that failure to comply with that order could constitute grounds for dismissal of the appellants' counterclaim.

The appellants made no response to those discovery requests, and again failed to meet the court's deadline. In January 1996, the appellee moved to dismiss the appellants'

counterclaim for failure to prosecute. Meanwhile, the appellee noticed Mr. Mullins's deposition for March 8, 1996. After Mr. Mullins moved for a protective order seeking to delay his deposition to any date between March 25th and March 29th, the trial court entered an order directing Mr. Mullins's deposition to be taken on March 25, 1996, at the hour of 10:00 a.m. Although we note statements in the record by appellants' counsel that he attempted to contact appellee's counsel to rearrange the deposition date, Mr. Mullins neither appeared at that deposition nor moved for a protective order.

On March 27, 1996, appellee again moved to dismiss the appellants' counterclaim for refusal to permit discovery. In response, Mr. Mullins filed an affidavit stating that, on the date of the scheduled deposition, he made a business decision to travel to Florida for the purpose of negotiating the sale of a \$300,000.00 boat to a prospective buyer who wanted to conduct a "sea trial" on the boat. Mr. Mullins emphasized the financial importance of the sale to him. He further emphasized his effort to contact his counsel to rearrange the deposition and his willingness to submit to a deposition at a later date. Nonetheless, on April 18, 1996, the trial court entered its order dismissing the appellants' counterclaim.

The appellants argue that, in view of the critical choice forced upon them on the date the March 25th deposition was scheduled, and in view of Mr. Mullins's expressed willingness to submit to a deposition at a later date, the trial court abused

its discretion by dismissing their counterclaim. However, we do not agree that the trial court so abused its discretion.

CR 37.02(2)(c) provides for dismissal of a claim as a sanction for violation of an order to compel. The same sanction is provided in CR 37.04(1) for failure to attend one's own deposition.

The standard of review in determining whether the trial judge erred in dismissing the appellants' counterclaim is whether the trial judge abused his discretion by doing so. Nowicke v. Central Bank And Trust Co., Ky. App., 551 S.W.2d 809 (1977). As noted in Greathouse v. American Nat'l Bank And Trust Co., Ky. App., 796 S.W.2d 868, 870 (1990) (citing Nowicke, 551 S.W.2d at 810), that discretion ". . . is not unbridled, but must rest upon a finding of willfulness or bad faith on behalf of the party to be sanctioned."

In Greathouse, 796 S.W.2d at 870, the court, citing Taylor v. Medtronics, Inc., 861 F.2d 980 (6th Cir. 1988), noted the following factors to be considered in determining whether the trial court's imposition of sanctions constituted an abuse of discretion:

(1) whether the adversary was prejudiced by the dismissed party's failure to cooperate in discovery, (2) whether the dismissed party was warned that failure to cooperate could lead to dismissal, and (3) whether less drastic sanctions were imposed or considered before dismissal was ordered.

Here, the appellants were warned, in the trial court's August 1995 order, that dismissal as a sanction might be

considered in the event the appellants did not comply with the appellee's discovery requests. Further, the trial court had previously imposed lesser sanctions upon the appellants for their failure to comply with discovery. We believe that the difficulty experienced by the appellee in obtaining discovery hampered her efforts to proceed with her claim and defend against the appellants' counterclaim. For those reasons, we do not believe that the trial court abused its discretion in dismissing the appellants' counterclaim.

Next, appellants argue that the trial court erred in awarding the appellee rents which had not accrued and which were not pled. The record reflects that the appellee's complaint alleged that the parties executed the lease agreement on April 7, 1993, with the lease term to commence on April 1, 1993. The appellee alleged lost rent payments for the months of April, May, and June of 1994, for a total of \$9,276.66.

On December 12, 1994, the appellee moved for summary judgment on her claim. In that motion, she also requested judgment for rent due and not paid for the months of October, November, and December of 1994. On January 3, 1995, the trial court entered an order granting the appellants additional time within which to respond to the appellee's motion for summary judgment, and further providing, at paragraph 3:

The Plaintiff's Complaint herein is hereby amended in conformity with her Motion for Summary Judgment to include any and all claims for rent and damages arising under the terms of the Lease which is the subject of this action.

The appellants take the position that the appellee cannot recover for rents which accrued from February 1995 to May 1995, since the appellee had not amended her pleadings to include rent for those months. However, we believe that the language of the trial court's order dated January 3, 1995, provides sufficient notice that the appellee's claim included all rents accruing up to the date of the trial court's judgment. Further, to the extent that the appellants argue that the trial court's June 21, 1995 judgment included rents that had not accrued, we note that the judgment only awarded recovery of rent up to May, 1995, rather than any period of time after the date of the judgment.

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Steven F. Vicroy  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Judge B. Wilson, II  
Bruce R. Smith  
Lexington, Kentucky