RENDERED: DECEMBER 28, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000390-MR

JAMES O. GOFF — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 97-CI-004299 & 99-CI-001840

JERRY L. ROGERS — APPELLEE

AND NO. 2000-CA-000482-MR

JERRY L. ROGERS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 97-CI-004299 & 99-CI-001840

JAMES O. GOFF — APPELLEE

AND NO. 2000-CA-001210-MR

JAMES O. GOFF
AND WORLDWIDE GRAPHICS CORPORATION — APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NOS. 97-CI-004299 & 99-CI-001840

JERRY L. ROGERS
AND WORLDWIDE, INC. APPELLEES

OPINION
AFFIRMING IN PART, REVERSING AND REMANDING IN PART
** ** ** ** **

BEFORE: BARBER, EMBERTON, AND KNOPF, JUDGES.

BARBER, JUDGE: Appellant, James Goff ("Goff"), and Appellee, Jerry Rogers ("Rogers"), were partners and co-owners of Worldwide Graphics for fourteen years. Goff and Rogers were the sole members of the Board of Directors. Goff alleges that in 1997, while he was ill and unable to work, Rogers called a board meeting without notifying Goff and unilaterally removed Goff as President of Worldwide Graphics and as a member of the Board of Directors. At the meeting, Rogers appointed himself President of the company and the sole director of Worldwide Graphics.

Goff alleges that, at the same time, Rogers formed a separate company, Worldwide, Inc., which would compete directly with Worldwide Graphics. Goff asserts that Worldwide, Inc. used Worldwide Graphics' customer list, proprietary methods, prospective customer contacts, and other privileged information in starting up. Goff states that Rogers informed the customers of Worldwide Graphics that the company was going out of business and that Worldwide, Inc. would satisfy their business needs. After Worldwide, Inc. was incorporated, Rogers resigned as

President of Worldwide Graphics and went into business as Worldwide, Inc., taking many of Worldwide Graphics' customers with him.

Upon his return to work, Goff discovered what had taken place. Goff filed a complaint in circuit court, alleging unfair competition, breach of fiduciary duty, misappropriation of trade secrets and trade name. Goff asserted that Worldwide Graphics had suffered substantial financial loss as a result of Rogers' wrongful action.

The trial court bifurcated the action, dividing the tort and breach of contract claims from the issues regarding ownership of Worldwide Graphics. The trial court ordered the dissolution of the corporate entity Worldwide Graphics and held that the company's assets be divided between Goff and Rogers. Goff objects to the valuation of the assets of Worldwide Graphics made by the trial court, which required Goff to pay Rogers the sum of $109,839.00.

The trial court found that the Worldwide Graphics inventory was worth $42,145.00. Goff argues that the inventory of Worldwide Graphics was properly valued at $12,767.00 as it was old or obsolete. Goff also asserts that Worldwide Graphics had no work in progress at the date when the action was filed. The trial court found a work in progress value of $37,942.00. The trial court held that there was no future warranty expense for the company. Goff testified that the anticipated warranty expense was $28,000.00. Goff claims that the trial court also overvalued the worth of the office furniture by $12,500.00 and

the deposit to be returned to Goff by almost $2,000.00. The trial court also stated that Worldwide Graphics had prepaid $1,241.00 in taxes. Goff objected and stated that no taxes had been prepaid by the company. Goff asserts that the trial court's errors resulted in the overvaluing of the business by $115,446.00.

It is the province of the trial court to determine the credibility of the witnesses before it. The reviewing court must give great latitude to the trier with regard to deciding which witness to believe. Bowling v. Nat. Resources & Environ. Protection Cabinet, Ky. App., 891 S.W.2d 406, 410 (1994). Similarly, the trier of fact must determine the credibility of conflicting evidence placed before it. Gorman v. Hunt, Ky., 19 S.W.3d 662, 671 (2000). We find no reversible error in the trial court's determination of the credibility of the witnesses and valuation evidence; therefore, we affirm the trial court's determination in that matter.

Goff was deposed twice during the early stages of the litigation. On November 4, 1999, the second deposition of Goff was discontinued due to inappropriate statements made by Goff to Rogers and his attorney. The trial court ordered the deposition to continue in front of the court administrator. The deposition was continued on November 17, 1999. The deposition was not concluded on that date due to counsel's scheduling conflicts. After Goff failed to attend the continuation of his deposition, the trial court granted Rogers' motion to dismiss the action.

In the order dismissing Goff's tort and contract claims, the trial court stated that:

> Although Mr. Goff's original complaint was filed in August of 1997 a bench trial was had on Mr. Goff's initial complaint in September of 1998 and a jury trial scheduled on all remaining claims for March 21st, 2000, it appears that Goff has pursued little, if any, discovery, and has developed no proof to support his claims. Furthermore, Mr. Goff has resisted giving his deposition, has made the process as difficult as possible necessitating the Court's intervention and ultimately, despite a specific court order (entered December 8th, 1999), refused to appear for the conclusion of his deposition. Dismissal of his complaints pursuant to CR 37.04(1) is appropriate.

Goff's attorney withdrew from the action with the trial court's consent on December 8, 1999. At that time, the trial court informed Goff that he would be required to appear at the conclusion of his deposition whether or not he had retained new counsel. Goff was unable to reach an agreement with new counsel prior to January 13, 2000, the date unilaterally set by Rogers' counsel for completion of Goff's deposition. The attorneys he had met with advised Goff not to attend the deposition without counsel. Goff provided his affidavit stating that the attorneys had advised him that they would attempt to continue the deposition date. Goff did not attend the scheduled deposition date. As a result of his failure to appear, the trial court dismissed the entire action.

Goff asserts that the dismissal of the action was an abuse of discretion and should be reversed. Although CR 37.02(2)(c) authorizes dismissal of an action as a sanction for

discovery abuse, dismissal should only be applied as a last resort. Bridewell v. City of Dayton ex. rel. Urban Renewal & Community Development Agency, Ky. App., 763 S.W.2d 151, 152 (1988). The sanction imposed must bear some reasonable relationship to the seriousness of the defect. Id. at 153. Goff cites Searock v. Stripling, 736 F.2d 650, 653 (11th Cir. 1984) as holding that misunderstanding of a discovery order is not grounds for dismissal of an action. Rogers argues that Goff had acted in an improper fashion during the course of the action, requiring the trial court to warn him repeatedly that his behavior would not be tolerated and providing grounds for the imposition of the sanction.

Kentucky law holds that dismissal of a party's claims is warranted only where the party has a history of discovery abuses and the evidence indicates a wilful failure to comply with the discovery procedure. Nowicke v. Central Bank & Trust Co., Ky. App., 551 S.W.2d 809, 811 (1977). The court must consider three factors in determining whether dismissal of an action is an appropriate sanction. The trial court must evaluate:
"(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 considered before dismissal was ordered." Greathouse v. American National Bank & Trust Co., Ky. App., 796 S.W.2d 868, 870 (1990).

The trial court found the dismissal warranted because Goff had conducted very little discovery and had violated the

court's order by failing to appear for the conclusion of his deposition. The record contains no showing that Goff had failed to cooperate in the discovery process other than with regard to the final scheduled deposition. Goff had responded to discovery requests and complied with the orders of the trial court regarding readiness for trial. Goff's behavior with regard to preparation of his case for trial did not constitute grounds for dismissal of the action.

Rogers argues that the trial court did try less drastic methods of curtailing improper action in that it had previously ordered that Goff not provide information regarding this action to business clients and had ordered that Goff's adult son cease contacting Rogers. The prior orders of the court, however, were unrelated to the discovery process. The record does not show that the trial court considered or attempted less drastic sanctions for abuse of the discovery process prior to dismissal of the action.

Counsel for Goff withdrew from the action two months prior to trial with the consent of the court. Goff was left without representation in complex litigation. It is understandable that it might take time to find an attorney willing and able to assume representation. It was unreasonable for the trial court to insist that he attend his own discovery deposition without a lawyer. Dismissal of the action due to his failure to attend the deposition was too drastic a sanction and must be reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Scott P. Zoppoth
Louisville, Kentucky

BRIEFS FOR APPELLEE:

W. David Kiser
Ackerson, Mosley & Yann
Louisville, Kentucky