STATE OF MICHIGAN

COURT OF APPEALS

PAUL H. GILLETT,

Plaintiff/Appellant-Cross Appellee,

v

MICHIGAN FARM BUREAU, PAT BLANCHETT and TOM WISEMAN,

Defendants/Appellees-Cross Appellants.

UNPUBLISHED
December 22, 2009

No. 286076
Eaton Circuit Court
LC No. 07-001044-CK

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

PER CURIAM.

Plaintiff appeals by right the trial court's dismissal of plaintiff's lawsuit with prejudice as a sanction for plaintiff's spoliation of evidence. Defendants cross-appeal the trial court's denial of defendants' request for attorney fees. We affirm both the dismissal and the denial of attorney fees.

I. Basic Facts and Proceedings

Plaintiff's lawsuit arose out of alleged sexual harassment by defendants in his workplace. Plaintiff resigned from the workplace, then retained an attorney to pursue possible causes of action against defendants. His attorney wrote a demand letter to defendants, and shortly thereafter defendants' attorney responded with a notification that plaintiff should preserve his personal e-mails. Plaintiff's attorney acknowledged defendants' notification, and informed defendants that plaintiff would submit his personal e-mails and his personal laptop computer hard drive for defendants' inspection.

Subsequently, in plaintiff's deposition, plaintiff acknowledged that he had deleted e-mails from his personal account after receiving the notification from defendants. In addition, a forensic analysis of plaintiff's computer indicated that he had deleted massive numbers of files from the hard drive shortly before plaintiff submitted his computer for defendants' inspection. The forensic analyst determined that the deleted files were not recoverable, and opined that the deletions were intended to interfere with the discovery process. The analyst also noted that although plaintiff claimed the deletions were due to his uninstallation of problematic software, that software was still installed on plaintiff's computer.

II. Dismissal

On appeal, plaintiff contends that the trial court abused its discretion by imposing the drastic sanction of dismissal. Plaintiff specifically claims that the trial court failed to consider other less draconian sanctions, and failed to determine whether the deleted electronic evidence was relevant.

A. Standard of Review

We review the trial court's decision for clear abuse of discretion. *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 242-243; 635 NW2d 379 (2001). A trial court abuses its discretion if the court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

B. Analysis[1]

Initially, we note that the newly-adopted MCR 2.313(E), which in part provides that "a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system" is not applicable because it was not in effect at the time the trial court issued the order of dismissal.

Nonetheless, trial courts have inherent power to impose sanctions upon parties for failing to preserve evidence that the parties knew or should have known was relevant to pending or potential litigation. *Bloemendaal v Town & Country Sports Ctr, Inc*, 255 Mich App 207, 211; 659 NW2d 684 (2002).[2] As this Court has explained, "[i]n cases involving the loss or destruction of evidence, a court must be able to make such rulings as necessary to promote fairness and justice." *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). Inherent power is distinct from the trial court's authority under the MCR 2.313 to sanction parties for failure to comply with discovery orders. *Id*. at 158-159. However, dismissal is a drastic sanction that is suitable when a party engages in egregious conduct. *Id.*, at 163. A trial court considering spoliation sanctions must evaluate all potential sanctions before ordering a dismissal. *Bloemendaal*, *supra* at 214.

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[1] We note that the newly-adopted MCR 2.313(E), which in part provides that "a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system" is not applicable because it was not in effect at the time the trial court issued the order of dismissal.

[2] "The phrase 'inherent powers' is used to refer to powers included within the scope of a court's jurisdiction and that a court possesses irrespective of specific grant by constitution or legislation." *Brenner v Kolk*, 226 Mich App 149, 158; 573 NW2d 65 (1997), citing 20 Am Jur2d, Courts, § 43, p 363.

Here, plaintiff acknowledged that he deleted e-mails, but maintained that the deletion was a result of his routine procedures rather than a deliberate attempt to destroy evidence. Plaintiff submitted an affidavit stating "I . . . have never intentionally deleted any electronic information from my personal computer in an effort to hide or destroy such information as it may relate to my pending case. . . . [I]f electronic information on my personal computer has been lost, it is the result of my routine, good faith operation of my computer." The trial court clearly rejected plaintiff's contention, finding the number of data files deleted to be "[e]xtremely significant." Specifically, the court observed that plaintiff deleted on average 2,000 files each month through September 2007, but that in October 2007 the deletions increased to more than 200,000 files, with an additional 28,000 files deleted in the first six days of November. The trial court did not abuse its discretion in concluding that plaintiff's deletion of discoverable material was not in good faith.

We further conclude that the trial court acted within its discretion when it dismissed plaintiff's lawsuit as a sanction. Although the seasoned trial judge did not expressly recite on the record the litany of alternative sanctions short of dismissal that were available to him, the record clearly establishes that he was fully aware of his options and that he employed the sanction of dismissal with due care. The trial court expressly recognized that the sanction of dismissal was a drastic measure that should rarely be employed. The trial court further stated, "I've carefully considered all my options. I've reviewed very carefully the cases, especially the federal cases[,] that are cited by the attorney for the defendant. I've compared those cases to what we have here in the instant situation."

The trial court relied heavily on *Leon v IDX Systems Corp*, 464 F3d 951 (CA 9, 2006), a case in which the federal district court explored the many sanctions short of dismissal before it concluded that dismissal was the appropriate sanction. Like the instant case, *Leon* involved the spoliation of discoverable materials from a laptop computer. Similar to this case, there was no manner in which to verify recovery of all the deleted information and no way to know the content of the deleted information. Also, plaintiff's "spoliation threatened to distort the resolution of the case . . . because any number of the . . . files could have been relevant to [defendants'] claims or defenses, although it is impossible to identify which files and how they might have been used." *Id*. at 960. Although plaintiff here maintains that the deleted information would only have been used to impeach plaintiff's testimony at trial, we agree with defendants that plaintiff "did not have the authority to make unilateral decision about what evidence was relevant in this case." *Leon, supra* at 956-957.

We conclude the trial court properly explored its many options before dismissing plaintiff's lawsuit. Accordingly, we hold that the trial court's decision was within the range of principled outcomes. See *Bloemendaal, supra* at 207; accord, *Leon, supra*.

III. Attorneys Fees

A. Standard of review

This Court reviews a trial court's ruling on monetary sanctions for clear abuse of discretion. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 642; 607 NW2d 100 (1999).

B. Analysis

On cross-appeal, defendants argue that the trial court abused its discretion by failing to impose monetary sanctions upon plaintiff.

A trial court has inherent power to impose attorney fees as sanctions for "egregious misconduct of a party or an attorney, such as conduct that causes a mistrial." *Persichini*, *supra*, 238 Mich App at 640-641. When considering a monetary sanction, the trial court should "balance the harshness of the sanction against the gravity of the misconduct." *Id*. at 642.

Defendants first posit that that the trial court disregarded its obligation to consider monetary sanctions. However, our review of the record indicates that the court considered sanctioning plaintiff but reluctantly declined to sanction plaintiff.

Defendants also maintain that the trial court should have imposed sanctions to "make [d]efendants whole for their motion practice and related costs to address the evidence spoliation" and to deter other litigants from similar spoliation. We find no abuse of discretion in the court's denial of monetary sanctions. See *Persichini v William Beaumont Hosp*, 238 Mich App 626, 642; 607 NW2d 100 (1999). We reject the implication asserted by defendants that a dismissal based on spoliation of evidence entails the imposition of a sanction. While the trial court rejected plaintiff's claim that he inadvertently deleted messages, the trial court did not indicate that plaintiff acted in bad faith. Rather, the trial court simply concluded that plaintiff acted improperly in deleting information. We iterate that a court abuses its discretion only if the court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Here, the trial court dealt appropriately with plaintiff's conduct by dismissing the case and the court's refusal to impose an additional sanction was not unreasonable or unprincipled.

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Patrick M. Meter
/s/ Brian K. Zahra