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WISCONSIN COURT OF APPEALS
DISTRICT III

Appeal No. 2014AP2846-FT

MARCO ARAUJO, M.D.,

Plaintiff-Respondent,

v.

RONALD H. VAN DEN HEUVEL and GREEN BOX, N.A. GREEN BAY, LLC,

Defendants-Appellants.

Appeal from a Final Judgment of the Circuit Court of Brown County, the Honorable Donald R. Zuidmulder Presiding,
Circuit Court Case No. 13 CV 463

PLAINTIFF-RESPONDENT'S BRIEF

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INTRODUCTION

Plaintiff-Respondent Marco Araujo, M.D. ("Araujo") filed a Complaint against Defendants-Appellants Ronald Van Den Heuvel ("Van Den Heuvel") and Green Box, N.A. Green Bay, LLC ("Green Box") alleging Van Den Heuvel used misrepresentations and false promises to induce Araujo to invest $600,000 in Green Box. Araujo served discovery requests. Defendants-Appellants' interrogatory answers were deficient and the documents requested were never produced. Nearly 17 months after Araujo served his discovery requests, and after the trial court granted a Motion to Compel discovery which the Defendants-Appellants disregarded, the trial court granted Araujo's Motion to Strike the Answer and for Default Judgment as a sanction for the Defendants-Appellants' refusal to provide discovery.

The trial court's entry of Default Judgment in favor of Araujo was well within its discretion and based upon its finding that the Defendants-Appellants' behavior was egregious and that they were not blameless. Because Araujo sought the liquidated sum of his $600,000 contract claim, the trial court did not err in declining to hold a hearing on Araujo's damages when it granted Default Judgment in the amount of $600,000 plus prejudgment interest and costs.

STATEMENT OF THE CASE

In the Complaint filed on March 19, 2013, Araujo asserted claims for breach of contract, common law fraud, negligent misrepresentation, strict liability misrepresentation, violation of Wis. Stat. § 551.501 (regarding sale of securities), rescission, a claim under Wis. Stat. § 100.18, misappropriation and punitive damages. (A-Ap. 1.) Araujo alleged Van Den Heuvel used misrepresentations and false promises to induce Araujo to invest $600,000 in Green Box.

Araujo paid $600,000 to Green Box on April 5, 2011, but Green Box failed to perform its contractual obligations to Araujo. Defendants-Appellants answered the Complaint through counsel, Attorney Ty Willihnganz.

On May 15, 2013, Araujo served interrogatories and document production requests. (A-Ap. 72-81.) The interrogatories sought information concerning Green Box's accounting practices, Green Box's advertising materials, the representations made by Van Den Heuvel concerning Green Box, Green Box's members, the financial records of Green Box, Green Box's formation, Green Box's employees, prospective transactions between Green Box and third parties, and the accounting of the $600,000 paid by Araujo to Green Box and/or Van Den Heuvel. The document production requests sought information relating to Green Box and Van Den Heuvel's communications with Araujo, Green Box's corporate records, and Green Box's correspondence.

On June 5, 2013, Attorney Willihnganz sent correspondence to Araujo's counsel enclosing what purported to be the Defendants-Appellants' interrogatory answers. (A-Ap. 82.) Willihnganz indicated responses to the document production request would be forthcoming.

Because the Defendants-Petitioners' interrogatory answers were deficient in various ways, on August 6, 2013, Araujo filed a Motion to Compel. (A-Ap. 62.)

On August 13, 2013, Attorney Willihnganz filed a Motion to Withdraw as counsel of record for the Defendants-Appellants. (A-Ap. 116.) Despite this fact, Willihnganz appeared at the September 20, 2013 Scheduling Conference.

The Defendants-Appellants failed to respond to the Motion to Compel and did not appear at the September 30, 2013 hearing. They also failed to respond to multiple letters sent by Araujo's counsel to Willihnganz, and Araujo's

counsel was unable to reach Willihnganz by telephone. (A-Ap. 68-70, 112-114, 115.)

On October 4, 2013, the trial court entered an Order granting the Motion to Compel, in which it ordered Van Den Heuvel and Green Box to produce the documents requested by Araujo in his document production request on or before November 1, 2013. (A-Ap. 121-122.) The Court further ordered Van Den Heuvel and Green Box to serve responsive answers to Araujo's interrogatories on or before November 1, 2013. (Id.) The Defendants-Appellants never served any additional discovery responses.

On November 5, 2013, Araujo filed a Motion to Strike the Defendants' Answer and for Default Judgment ("Motion to Strike"). (A-Ap. 125-130.) In order to abide by the Scheduling Order, on the same day Araujo also disclosed an expert witness regarding the financial representations made

by the Defendants-Appellants and Araujo's damages. (A-Ap. 123-124.)

On November 22, 2013, Araujo's counsel wrote the trial court regarding pending Motion to Strike. (A-Ap. 223-224.) A few days later, on November 25, 2013, Van Den Heuvel sent a letter to the trial court in which he professed ignorance of the proceedings since Willihnganz attempted to withdraw from the representation on August 13, 2013. (A-Ap. 225.)

Araujo deposed Attorney Willihnganz on January 22, 2014 and on June 17, 2014. Willihnganz testified that he had an oral lease for his office located in the same building in which Green Box's offices were located. (A-Ap. 240-244.) He stated that his files related to Green Box were located on Green Box's computer server, and also kept paper files in his file cabinet. (A-Ap. 245-246.) Willihnganz stated that the door to his office from the lobby area to which Van Den

Heuvel had access was not locked. (A-Ap. 246.) Willihnganz testified that although he would receive mail at a different suite than Green Box, a Green Box employee would retrieve Willihnganz' mail from the mailbox on the road and deliver it to Willihnganz in his office, sometimes placing it on his chair. (A-Ap. 297-299.)

In June 2013, Willihnganz told Van Den Heuvel that he would need to obtain substitute counsel, as Willihnganz couldn't handle any type of litigation given his suspension. (A-Ap. 248, 249, 275-279.) Willihnganz relayed that he could not participate in the case filed by Araujo. (A-Ap. 277) Willihnganz told Van Den Heuvel he "was no longer capable of representing anyone in litigation or practicing law in any form." (A-Ap. 277.) Willihnganz even "begged" Green Box personnel to retain alternate counsel. (A-Ap. 279, 317.) In a letter describing the situation, Willihnganz stated:

> I did constantly remind Company officials that I needed to be replaced as counsel in the Araujo matter, and that there was an outstanding discovery request in the matter and that the Company needed to produce all of the documents requested by the Plaintiff.

(A-Ap. 313.) Thus, Willihnganz repeatedly advised Van Den Heuvel that he needed replacement counsel. (A-Ap. 280.) Willihnganz also relayed to Phil Reinhart, Green Box's Director of Human Resources, that the company needed new counsel. (A-Ap. 281.)

Although Van Den Heuvel said he would obtain replacement counsel to represent him and Green Box, it was not until December 30, 2013 that counsel appeared for Green Box, and January 21, 2014 that counsel appeared for Van Den Heuvel. (Id.; R-App. 1-3.) At no time did Van Den Heuvel or his substitute counsel attempt to rectify the failure to respond to Araujo's discovery requests, despite passage of almost a year between the time Van Den Huevel claimed to

first acquire knowledge of the failure to respond adequately to the discovery requests and the trial court's decision to grant Judgment on October 13, 2014.

Moreover, testimony from Van Den Heuvel's first attorney disputed Van Den Heuvel's claim that he had not known of the failure to provide discovery until November 25, 2013. The attorney's testimony evidence not just knowledge, but a willful failure to follow the attorney's advice regarding the discovery requests and his repeated instructions to obtain substitute counsel when the attorney was suspended from practice.

Attorney Willihnganz testified that although he was not an employee of Green Box or Van Den Heuvel, he would provide "legal services on request" based upon "an understanding that money would be provided" to Willihnganz for his fees "as financing came in." (A-Ap. 263.) As a contractor for Green Box, Willihnganz' duties were akin to an

in-house counsel's. (A-Ap. 273.) Willihnganz has characterized the suspension of his license as a result of Green Box "defaulting upon its promises," to provide him with office space, a monthly fee, and full coverage of all bar fees and CLE course tuition. (A-Ap. 312.)

In opposing the Motion to Strike, Van Den Heuvel claimed in an affidavit that he informed Araujo's counsel in August 2013 that Willihnganz was no longer his attorney and requested communications to be made directly to Van Den Heuvel. (A-Ap. 219.) By affidavit, Araujo's counsel stated that the first time he had ever spoken with Van Den Heuvel was on November 25, 2013. (A-Ap. 235-237.)

Willihnganz believed Van Den Heuvel's failure to obtain additional counsel was due to a lack of financial resources and Van Den Heuvel's belief that counsel is unnecessary unless there is a hearing scheduled. (A-Ap. 288.) In this regard, Willihnganz has characterized Van Den

Heuvel as "dangerously cocksure when it comes to legal matters," and though he heard Willihnganz' advice, Van Den Heuvel tended "not to listen to me or react well when I present him with bad news," and had the tendency to ignore Willihnganz' legal advice and requests. (A-Ap. 315.)

According to Willihnganz, and contrary to the Defendants-Appellants' claim, he explained to Van Den Heuvel that since Green Box was a limited liability company, it needed to appear by counsel. (A-Ap. 289.) Willihnganz further noted that Van Den Heuvel has "been involved in litigation for years" and also understood this requirement based on his past experience. (Id.)

Willihnganz was unaware of any action taken by Van Den Heuvel to respond to Araujo's objections to the Defendants-Appellants' interrogatory responses or failure to produce any documents. (A-Ap. 290.) Contrary to the Defendants-Appellants' contention, Willihnganz did tell Van

Den Heuvel that he was not getting the assistance he needed in responding to Araujo's discovery requests. (A-Ap. 286.)

After considering the briefing of the parties on the Motion to Strike, the trial court by a written Decision and Order filed October 7, 2014, granted the motion. (A-Ap. 320-326.) The trial court held that the Defendants-Appellants' conduct was egregious and that they were not blameless in their failure to participate in the litigation.

On October 23, 2014, the Court entered a Default Judgment in the amount of $813,735.34, of which $600,000 was the principal amount demanded in the Complaint, with pre-judgment interest at the amount demanded in the Complaint of $212,219.18, plus costs of $1,516.16. (A-Ap. 327.)

ARGUMENT

I. THE CIRCUIT COURT ACTED WITHIN ITS DISCRETION IN FINDING THAT THE DEFENDANTS WERE NOT BLAMELESS AND CONCLUDING THAT THE DEFENDANTS' ANSWER SHOULD BE STRICKEN AND DEFAULT JUDGMENT ENTERED AS A SANCTION.

Circuit courts have broad discretion to impose sanctions in response to discovery violations. *Selmer Co. v. Rinn*, 2010 WI App 106, ¶ 35, 328 Wis. 2d 263, 789 N.W.2d 621 (citing *Sentry Ins. v. Davis*, 2001 WI App 203, ¶ 19, 247 Wis. 2d 501, 634 N.W.2d 553). An appellate court reviewing a circuit court's sanction "will uphold a discovery sanction as long as the record shows the court applied the proper legal standard to the relevant facts using a demonstrated rational process to reach a reasonable conclusion." *Id*. "A circuit court need not make an explicit egregiousness finding as long as the facts provide a reasonable basis for the court's implicit finding." *Id.* at ¶ 36 (citing *Teff v. Unity Health Plans Ins.*

Corp., 2003 WI App 115, ¶ 14, 265 Wis. 2d 703, 666 N.W.2d 38).

Section 804.12(2) of the Wisconsin Statutes, which "governs sanctions for violation of discovery orders, allows a circuit court to render a judgment by default against a disobedient defendant." *Rao v. WMA Sec., Inc.*, 2008 WI 73, ¶ 36, 310 Wis. 2d 623, 752 N.W.2d 220. In *Rao*, the Supreme Court affirmed the circuit court's holding that defendant waived its right to jury trial on damages by violating discovery orders, causing its pleadings to be struck and default judgment to be entered.

While it is within a circuit court's discretion to strike the answer and enter a default judgment against a disobedient defendant, the sanction of dismissal with prejudice for the wrongdoing of an attorney is only appropriate when the client has been blameless. *Indus. Roofing Servs., Inv. v. Marquardt*, 2007 WI 19, ¶ 61, 299 Wis. 2d 81, 726 N.W.2d 898. A court

considering whether a client was blameless may consider whether the client was at fault for failing to act "in a reasonable and prudent manner" when the client "knew or had reason to know that its attorney was failing to properly manage the case." *Id*. at ¶ 64.

Here, the trial court applied the proper legal standard to the relevant facts through a rational process. While the Defendants-Appellants dislike the conclusion reached by the trial court, the record establishes it was reasonable and therefore a proper exercise of discretion.

Defendants-Appellants ascribe significance to the trial court's comment that their conduct was "arguably unintentional," and claim that the trial court "summarily found that there was no less severe sanction." (Br. of Defs.-Appellants at 13.) It is well established that a party may engage in egregious conduct sufficient to warrant sanction, including dismissal or entry of default judgment, where the

conduct is unintentional. "Egregious misconduct is conduct that, *though unintentional*, is extreme, substantial, and persistent." *Rinn*, 2010 WI App 106, ¶ 36 (citing *Teff v. Unity Health Plans Ins. Corp.*, 2003 WI App 115, ¶ 14, 265 Wis. 2d 703, 666 N.W.2d 38) (emphasis added).

The trial court located egregious conduct in various facts, such as: (1) the Defendants-Appellants' awareness that Willihnganz could no longer represent them and their failure to take appropriate actions to obtain substitute counsel (A-Ap. 325); (2) the Defendants-Appellants' awareness that the discovery responses were incomplete (Id.); (3) Van Den Heuvel's familiarity with the civil justice system given his involvement in 79 cases in Brown County (Id.); (4) Van Den Heuvel's knowledge of the inadequacies of the discovery responses and the fact multiple letters from Araujo's counsel directed to Willihnganz at Green Box's offices should have alerted the Defendants-Appellants to the potential problem

(Id.); and (5) the complete lack of any evidence that the Defendants-Appellants took immediate action to rectify the situation upon becoming aware of the discovery disputes. (Id.)

Defendants-Appellants' attempt to find fault in the trial court's account of the record is without merit. For example, they assert that there was no evidence that they received the letters addressed to Willihnganz after June 2013. (Defs.-Appellants Br. at 12.) Yet, Van Den Heuvel claims that by mere happenstance he received correspondence from Araujo's counsel dated November 22, 2013. (A-Ap. 219.) While he claims not to have received any of the other correspondence in the matter over the preceding months, the evidence before the trial court indicated that Willihnganz' mail was delivered to his office in Green Box's headquarters by Green Box's own staff. Thus, there was evidence before the trial court to strongly suggest that these letters were

received by the Defendants-Appellants.

The trial court then considered whether there was any less severe sanction available, and reasonably concluded there was not. As the trial court noted, Araujo's "reasonable interrogatories and document request directly relate to Araujo's various claims that Defendants misrepresented the nature of Araujo's investment and later misappropriated the money that Araujo actually invested, and without that information the case has been unable to proceed." (A-Ap. 326.) Further, they had "categorically failed to comply with a court order compelling discovery for Araujo since October 2013, have not suggested any less severe sanctions which would remedy their discovery violations, and have not indicated they are even willing and able to comply with the October 4, 2013 Order." (Id.) All of these facts are established in the record, and support the trial court's reasonable conclusion that no lesser sanction could remedy

the situation created by the Defendants-Appellants' egregious conduct.

Finally, the record is replete with other examples of egregious conduct not explicitly relied upon by the trial court. These instances may be properly considered by this Court as a further reason to affirm the trial court. *See Rinn*, 2010 WI App 106, ¶ 36.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO REQUIRE PROOF OF DAMAGES WHERE PLAINTIFF SOUGHT A LIQUIDATED SUM IN HIS CONTRACT CLAIM.

The trial court did not err in entering Default Judgment in favor of Araujo where the Default Judgment entered was for the amount demanded in Araujo's contract claim, plus prejudgment interest and costs. Defendants-Appellants claim they should have had an opportunity to object to the trial court's determination of damages. But the trial court had already struck the Answer and found the Defendants-

Appellants to be in default, thereby preventing the Defendants-Appellants from contesting the sum sought by Araujo in his Complaint.

When a circuit court renders a default judgment as a sanction failure to participate in discovery, the procedure for deciding the issue of damages lies within the discretion of the circuit court. *RAO*, 2008 WI 73, ¶ 41. While it may be error not to make inquiry beyond the complaint to determine the merits of punitive damages claim, *Apex Electronics Corp. v. Gee*, 217 Wis. 2d 378, 390, 577 N.W.2d 23 (1998), there is no requirement that a circuit court make such an inquiry where punitive damages are not sought.

Had Araujo sought entry of a default judgment which included punitive damages up to twice the $600,000 in compensatory damages he demanded in the Complaint, a hearing may have been necessary. Araujo did not request that the Default Judgment rendered by the trial court include

punitive damages, however, as he instead submitted a proposed default judgment which included Araujo's damages of $600,000 as alleged in the Complaint's claim for breach of contract, plus the prejudgment interest as set forth by contract and alleged in the Complaint. Proof of damages for personal injury or other unliquidated claims may require additional proof beyond the complaint, *see Apex Electronics*, 217 Wis. 2d at 387, but no such proof is required for a contract claim for a set amount.

Contrary to the Defendants-Appellants' contention, the fact that Araujo named an expert witness in this matter has no bearing on the question of whether the trial court acted within its discretion in entering a default judgment for the amount demanded in Araujo's contract claim. To abide by the Scheduling Order, Araujo disclosed a forensic accountant and stated he "may be called to testify regarding the financial representations made by Defendants in this matter, and

Araujo's damages." (A-Ap. 123.) Defendants-Appellants ignore that Araujo disclosed his expert to opine on their financial misrepresentations, and not merely Araujo's damages.

Finally, the Defendants-Appellants claim that the trial court erroneously failed to include in the Default Judgment a provision requiring Araujo to transfer the membership units of Green Box that Araujo holds back to the Defendants-Appellants upon satisfaction of the Judgment. Should the Court find remand necessary on this limited issue, Araujo has no objection to an amendment of the Default Judgment to require return of the membership units upon satisfaction of the Judgment.

CONCLUSION

The Defendants-Appellants were well-advised by Willihnganz since June 2013 that: (1) their attorney of record could not represent them; (2) they needed to obtain other

counsel; and (3) the importance of fully responding to Araujo's discovery requests. Over a period of months Araujo's counsel sent numerous letters to Willihnganz at Green Box's office concerning the lack of discovery. The deficiencies in the discovery responses were never remedied, and it was not until December 30, 2013 that new counsel appeared for Green Box, and January 21, 2014 that new counsel appeared for Van Den Heuvel.

These and other facts in the record before the trial court provide ample basis upon which to reasonably conclude that the Defendants-Appellants' conduct was egregious and that they were not blameless, as they manifestly failed to conform their conduct to that of a reasonably prudent client. Thus, the trial court acted within its discretion in entering a Default Judgment. Because the Default Judgment entered was for the liquidated sum demanded in Araujo's contract claim, plus prejudgment interest and costs, the trial court did

not err in declining to hold a hearing on damages upon granting Araujo's Motion to Strike the Answer and for Default Judgment.

Accordingly, the Court should affirm the Judgment.

Dated this 9th day of April, 2015.

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RULE 809.19(8)(D) CERTIFICATION

I hereby certify that this brief and accompanying appendix conform to the rule contained in s. 809.19(8)(b)(c) for a brief and appendix produced with a proportional serif font, as modified by the Court's order. The length of those portions of this brief referred to in s. 809.19(1)(d), (e), and (f) is 3,110 words.

Dated this 9th day of April, 2015.

By: *s/ Jonathan T. Smies*
Jonathan T. Smies
Winston A. Ostrow

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12)(f).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this Certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 9th day of April, 2015.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on April 9, 2015, this brief was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within three (3) calendar days.

I further certify that the brief was correctly addressed.

Dated this 9th day of April, 2015.

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