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Division II
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No. 52080-0

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

Jacob Cuzdey.

Appellant,

vs.

Daryl Druzianich

Respondent.

APPELLANT'S OPENING BRIEF

THOMAS F. MILLER WSBA # 20264
MILLER LAW OFFICE, P.S.
400 UNION AVE SE
OLYMPIA, WA 98501
ATTORNEY FOR CUZDEY

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I. ASSIGNMENTS OF ERROR

The appellants assign error to the trial courts court decision to dismiss all claims of Jacob Cuzdey for failure to comply with production of financial documents for certain discovery requests under CR 37.

II. ISSUES PRESENTED

Did the trial court err by dismissing all claims by Cuzdey for willful and deliberate failure to comply with an order to compel documents and less restrictive remedies were available.

III. STATEMENT OF THE CASE

The business relationship between the Appellant Mr. Jacob Cuzdey and the Respondent Darryl Druzianich began with an oral agreement in July 2011 in which Mr. Cuzdey would lease the warehouse owned by Darryl Druzianich and Larry Birindell located in Grays Harbor County near the city of Elma. Mr. Cuzdey's need for the warehouse was to continue development and manufacture of a flush cut wooding saw for which he obtained a U.S. Patent in 2010. This oral agreement to rent provided that Cuzdey was to make certain repairs and improvements to the warehouse in lieu of paying rent.

On December 23, 2011, a written lease for the warehouse was executed by Cuzdey, Druzianich and Birindell. (CP 60-67) The business relationship was amicable thru the end of 2013. In December 2013, Cuzdey informed Druzianich that he was having financial difficulties. Druzianich said he would work with Cuzdey and allowed Cuzdey to make minimal rent payments. Birindell was not part of this oral

agreement as he no longer had any interest in the warehouse. Cuzdey made minimal rent payments from December 2013 thru April 2014.

On April 30, 2014 Druzianich asked Cuzdey for security to insure payment of the outstanding rent of \$2,300. Druzianich asked for security in the CNC Milling Machine owned by Cuzdey. Cuzdey accepted, and a written agreement was signed by both parties. However, Druzianich never provided Cuzdey a copy of this signed agreement.

Six days later, Cuzdey sent two employees to the warehouse to prepare for machine work. Upon arrival they found the property gates chained and locked. They contacted Cuzdey who immediately tried contacting Druzianich. Without success he then contacted the Elma Police. They informed him it was a “civil” matter. Cuzdey finally contacted Druzianich and he said he would allow him access to retrieve his motor home that was on the property, in exchange for title to the boat and trailer which was also stored on the property. Under duress and without other living accommodations Cuzdey signed over the titles to the boat and trailer. (CP 12-15)

An employee of Cuzdey attempted to view the property in May of 2014 and found it in disarray with locks broken and items missing. Cuzdey learned from neighboring businesses that trucks had been seen at the shop and things had been loaded into them. Cuzdey attempted to sell the CNC Milling Machine to a machine shop owner in Aberdeen, Cuzdey and he agreed on a price. The owner shortly thereafter told Cuzdey he had agreed on a price with Druzianich for the same machine for 16% of the price they had agreed upon. (CP 14-15)

Because of the loss of equipment and warehouse Cuzdey was forced to utilize manufacturing capabilities in Taiwan for his patented saw and saw blades. Cuzdey never received the value for his equipment and the loss of time to sell under his patent.

The First set of Interrogatories and Request for Documents were answered on May 4, 2017 and signed by Cuzdey' counsel Bruce Clark. (CP Some 2 ½ months later on July 19, 2017 Jason Whalen sent a letter in response asking for supplemental answers and clarifications of certain legal objections. (CP 145-148). Receiving no response from Cuzdey's counsel Bruce Clark the defendants set a motion to compel for October 6 2017. On October 4, 2017 Bruce Clark withdraws. Jack Hanemann then appears for Cuzdey and makes arrangements to provide supplemental responses to the defendants. On January 16, 2018 Hanemann provided this supplemental information. (CP 309).

On February 28, 2018 the deposition of Cuzdey was taken. On March 1, 2018 Hanemann provided supplemental information as requested in the deposition. On April 8, 2018 the motion to dismiss which is the basis of this appeal was filed by the Defendants. (CP 306-314). A response brief with declarations was filed by Jack Hanemann on behalf of plaintiff Cuzdey. (CP 542-552) Oral argument was held before Honorable Judge Grant Blinn and the order was issued dismissing the matter with prejudice on January 26.2018 (CP 564-565).

ARGUMENT

A. The Applicable Standard of Review Is De Novo

Appellate review of an order of dismissal is de novo, and the appellate court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.* 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

B. Dismissal of all claims is **not** warranted under CR 37

A court should issue sanctions appropriate to advancing the purposes of discovery. *Burnet v. Spokane Ambulance* 131 Wn.2d 484, 497, 933 P.2d 1036(1997). The discovery sanctions should be proportional to the discovery violation and the circumstances of the case. *Id.* At 496-97 933 P.2d 1036, [T]he least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. *Magana v. Hyundai Motor Am.* 167 Wn.2d 570 590, 220 P.3d 191, 201 (2009)

Sanctions are permitted for unjustified or unexplained resistance to discovery and serve the purposes of deterring, punishing, compensating and educating a party or its attorney for engaging in discovery abuses. *Johnson v. Jones* (1998) 91 Wash App 127, 955 P.2d 826, appeal after new trial 126 Wash App 1031, review denied 156 Wash.2d 1019, 132P.3d 734.

When a trial court imposes dismissal or default in a proceeding as a sanction for violation of a discovery order, it must be apparent from the record that, (1) the party's refusal to obey the discovery order was willful or deliberate;(2) the party's actions substantially prejudiced the opponent's ability to prepare for trial; and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed. *Rivers v.*

Washington State Conference of Mason Contractors (2002) 145 Wash.2d 674, 4 P.3d 1175.

1. Appellant's Discovery Response was Not Willful and Deliberate.

Appellant answered the first set of interrogatories and request for documents on May 4, 2017. (CP 123-130). While some of the objections were improper as there was substantial evidence explaining the circumstances for limited information. I note that counsel Bruce Clark for Plaintiff Cuzdey withdrew on October 4, 2017. Jack Hanemann then appeared on behalf of Mr. Cuzdey. In his response brief to the motion to dismiss, Mr. Hanneman acknowledged on the record that some of the objections were improper. (CP 544-545)

The record reflects that counsel for the appellant Bruce Clark did not serve Jacob Cuzdey well in prosecution of the claims. The initial complaint had entities that had no claims against the defendants. After Bruce Clark withdrew there was agreement that Jacob Cuzdey was the only party having a viable claim against the defendants. Shortly after attorney Jack Hanemann appeared there was an order signed on January 26, 2018 that dismissed all entities leaving Jacob Cuzdey as the only claimant. (CP 258-259).

Mr. Cuzdey willingly submitted to his deposition in February 2018. Supplemental documents were provided shortly thereafter as noted in motion to dismiss. (CP 306-314). In the response brief against dismissal Jack Hanemann agreed that certain objections lodged by Bruce Clark were improper and asked for an additional 30 days to complete the response or accept dismissal. (CP 542-552).

A telling argument was the one posed by Mr. Michael Sanders in his Motion to Dismiss in which he states ... "it is now clear that Mr. Cuzdey cannot or will not comply".

Mr. Cuzdey has provided everything he had possession of or could. The records requested are from 2011 and 2012. In a small business to have all the records are unlikely. The only records that may be available are from the accountant Kyle Scott who Jack Hanemann located. (CP 543-544) The records for RFP 7 which is the main contention maybe held by the accountant Kyle Scott. Mr. Hanemann asked Judge Blinn to allow time to recover and produce the documents, but this request was denied and the matter was dismissed with prejudice. (CP 564-565). It is clear that Cuzdey could not produce the records as requested, and the court denied the added time with new counsel to provide any responsive documents.

2. Druzianich was Not Substantially Prejudiced in Trial Preparation.

Druzianich can't show substantial prejudice in preparation for trial when the discovery period was some four months away when the motion when the motion to dismiss was filed. Cuzdey submitted to a deposition and produced all the records available. The best way to evaluate whether there were any shortcomings of Cuzdey in providing responsive answers or documents is to look at each of the demands for supplemental information outlined submitted by letter of July 17, 2017 by Jason Whalen counsel for defendants. (CP 135-138). This letter is the outline used by the Defendants in the motion to compel and motion to dismiss.

INTERROGATORY NO. 1. What is your current address? Plaintiffs objected as ambiguous as to which party the question was addressed.

Cuzdey supplemented this answer by providing addresses for all parties as acknowledged in the brief of the defendants seeking dismissal. (CP 127, 309)

REQUEST FOR PRODUCTION NO. 1: Produce all documents relating to the creation and/or governance of *Cuzdey Manufacturing Technologies, LLC*, This

request is meant to include, but not limited to, business license applications, articles of incorporation, shareholder agreements, bylaws, share certificates, unit certificates, but sell agreements, minutes, corporate/company consents, ownership transfer agreements, annual reports, amendments, and resolutions submitted to the Washington Secretary of State and the Washington State Department of Revenue. (emphasis added).

With the dismissal of, *Cuzdey Manufacturing Technologies, LLC*, production of documents for a non- party would not be necessary to prepare for trial. Further as noted in the original answer the associate of Cuzdey who had all the computer records passed away and efforts were made to recover the computer from her husband. Regardless, Cuzdey produced what it had and the defendants admit that they have the necessary records, (CP 309 line 12-15).

REQUEST FOR PRODUCTION NO. 2: Produce all documents relating to the creation and/or governance of *Cuzdey Enterprises Inc.* This request is meant to include, but not limited to, business license applications, articles of incorporation, shareholder agreements, bylaws, share certificates, unit certificates, but sell agreements, minutes, corporate/company consents, ownership transfer agreements, annual reports, amendments, and resolutions submitted to the Washington Secretary of State and the Washington State Department of Revenue. (emphasis added).

With the dismissal of, *Cuzdey Enterprises, Inc.*, production of documents for a non- party would not be necessary to prepare for trial. Further as noted in the original answer the associate of Cuzdey who had all the computer records passed away and efforts were made to recover the computer from her husband. Regardless, Cuzdey produced what it had and the defendants admit that they have the necessary records, (CP 309 line 12-15).

REQUEST FOR PRODUCTION NO. 3: Produce for the period of July 1, 2011 through the present all documents that you have filed with, or otherwise provided to, the Washington Department of Revenue, Department of Labor & Industries, and Employment Security.

(a) Jacob Cuzdey

(b) Cuzdey Manufacturing Technologies, LLC, and

(c) Cuzdey Enterprises, Inc.

With the dismissal of entities, *(b) Cuzdey Manufacturing Technologies, LLC*, and *(c) Cuzdey Manufacturing Technologies, LLC* production of documents for a non-party would not be necessary to prepare for trial. Further as noted in the original answer the associate of Cuzdey who had all the computer records passed away and efforts were made to recover the computer from her husband. That effort has been unsuccessful. (CP 127-128)

The only remaining party is (a) Jacob Cuzdey. As a sole proprietor Cuzdey would have had no need to submit any documents to Employment Security or Labor & Industries.

REQUEST FOR PRODUCTION NO. 5: Produce all Form 1099's, Schedule K-1s and income tax returns for or by plaintiffs for the period of January 1, 2011 through present:

While an individual Jacob Cuzdey would not have any K-1's, the Income Tax Returns available were produced. Cuzdey also produced records as acknowledged by Defendants in brief for dismissal. However, his personal financials were provided as admitted by defendants (CP 310 line 14-17)

REQUEST FOR PRODUCTION NO. 6: With regard to Plaintiff's Complaint for Damages, Breach of Contract, Wrongful Eviction, Unlawful Conversion, and loss of business Opportunity ("Complaint") filed on January 20, 2017, please produce all documents, including e-mail or other correspondence that pertain to the "oral lease" referenced in paragraph 2 of Complaint.

Cuzdey produced all responsive documents.

REQUEST FOR PRODUCTION NO. 7: Please produce true and correct copies of all agreements, contracts invoices work orders, change orders and receipts for any and all repairs and improvements to 4751 State Route 12, Elma Washington (the Property) as described in paragraphs 4-6 of the Complaint.

The defendants argued in the motion to dismiss that the documents produced were non-responsive. (CP 309). This seems to be the major contention of the defendants. The accountant Kyle Scott was located and Jack Hanemann was in the process of trying to locate the records requested. (CP 548-549).

REQUEST FOR PRODUCTION NO. 8: Please produce true and correct copies of all agreements, contracts, check stubs, and /or financial records that show evidence of Plaintiff's monthly rent payments to Defendants for the time period of July 2011 to present as described in paragraphs 6-8 of the Complaint.

All responsive documents in Cuzdey's possession were produced. (CP 309).

REQUEST FOR PRODUCTION NO. 10: Produce copies of all documents in Plaintiffs possession from the Elma Police Department set forth in paragraph 11 of the Complaint.

Cuzdey inquired of the police department and no police report was filed.

Defendants have not challenged this finding and is not part of the motion to dismiss.

INTERROGATORY NO. 15. Please provide every fact that leads you to believe that defendants sold all or most of Plaintiffs machinery and tools as referenced in paragraph 19 of the Complaint.

Cuzdey provided a detailed narrative response on his May 4, 2017 submission to Defendants. Cuzdey referenced photos being taken which was the demand for supplemental information. Copies of photos were later provided. (CP 127).

INTERROGATORY NO. 16. Please provide the name, company address, and telephone number for every witness that Plaintiffs believe have knowledge of the events referenced in the complaint.

Cuzdey answered that they were preparing a responsive list. Cuzdey supplemented this information Defendants have acknowledged the submission in the brief to dismiss the matter. (CP 309)

3. The Court Did Not Explicitly Consider Other Sanctions

Mr. Hanemann in his Responsive Brief on the Motion to dismiss asked for remedies short of dismissal. He asked that time be granted to have the accountant Kyle Scott who he had finally located to see if he had any of the documents requested and those in particular in RFP No. 7. See declaration Bradley Drury. (CP 548- 549).

A major issue is that the major theory of the Plaintiff's case is for an expert opinion on future economic loss. The expert testimony was being developed by Plaintiff's as revealed in Mr. Hanemann's responsive brief to the motion to dismiss. None of the discovery requests in the motion to compel as the basis of the Motion to Dismiss relate to this claim of Loss of Business Opportunity. The trial court by dismissing the matter denied Cuzdey to right to prosecute his claim for Loss of Business Opportunity.

The court should have allowed the accountant Kyle Scott to review his files to see if he had any of the documents. If he found no documents than the answer would be no further documents and the case would have moved forward to trial. The defendants could have moved for summary judgment based on the documents provided.

The underlying theme of the defendant's motion to compel and dismissal is that the documents they seek do exist and Cuzdey refuses to produce them. A reading of the record as a whole does not bear that assumption out. Cuzdey's actions were not willful

and with new counsel and the accountant the documents could be determined to exist or not and the matter proceed. One must remember this is a small business and the records sought are eight years old.

C. Attorney Fees and Costs

Jacob Cuzdey seeks attorney fees and cost pursuant to the written contract at paragraph 25 page 5 and executed on December 23, 2011 by Jacob Cuzdey and Daryl Druzianich. (CP 60-66)

D. CONCLUSION

Appellant asks that the court reverse the decision of the trial court and remand the matter for further proceedings.

RESPECTFULLY Submitted this 23rd day of January, 2019



THOMAS F. MILLER, WSBA #20264
Attorney for Jacob Cuzdey

CERTIFICATE OF MAILING

I certify that on the 23rd day of January, 2019, I placed in the mails of the United States a duly addressed, stamped envelope containing a copy of the Appellant's Brief to the individuals and parties at the addresses listed below:

Court of Appeals, Division Two
950 Broadway
Ste 300, MS TB-06
Tacoma, WA 98402-4454

Michael G Sanders
Mix Sanders Thompson, PLLC
420 Fifth Ave, Suite 2200
Seattle, WA 98101


THOMAS F. MILLER

MILLER LAW OFFICE PS

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