[Cite as *Cody v. Segway, Inc.*, 2009-Ohio-5832.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92741 and 92954

CLEMENT CODY, ET AL.

PLAINTIFFS-APPELLANTS

vs.

SEGWAY, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-655009

BEFORE: Celebrezze, J., Gallagher, P.J., and Sweeney, J.

RELEASED: November 5, 2009

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} This appeal stems from a product liability action filed by appellant, Clement Cody,[1] in the common pleas court against appellees, Segway of Cleveland ("SOC") and Segway, Incorporated ("Segway") (collectively referred to as "appellees"). Appellant is appealing various rulings of the trial court, including an order granting Segway's motion to compel inspection of the Segway unit at issue, a dismissal of the case with prejudice, and a denial of appellant's motion for reconsideration. For the reasons set forth in this opinion, we affirm in part, reverse in part, and remand this case to the trial court for further proceedings consistent with this opinion.

{¶ 2} Clement Cody was injured while using an allegedly defective Segway personal transportation device designed and manufactured by appellees. As a result of these injuries, appellant filed suit on March 25, 2008 seeking damages. After a case management conference was held, the parties were ordered to complete discovery by October 17, 2008.

{¶ 3} Appellant served Segway with interrogatories and a request for production of documents on July 15, 2008. Segway claimed it could not respond to the discovery requests unless and until an inspection of the Segway unit had taken place, but appellant refused to allow such an inspection.

[1] The lower court action included Peg Heinzer-Cody (aka Margaret Heinzer), as an intervenor-plaintiff. For ease of discussion, we refer to Clement Cody as appellant herein.

{¶ 4} Appellant filed a motion to compel asking the trial court to order Segway to respond to the discovery requests. Likewise, Segway filed a motion to compel inspection of the Segway unit at issue. The trial court granted both motions. In its order compelling appellant to produce the Segway unit for inspection, the court stated that failure to comply with this order would result in dismissal of the suit. Although the unit was never produced for inspection, appellant claims he never outright refused an inspection. Appellant claims he merely sought clarification with regard to highly probative electronic information that could be destroyed upon inspection of the unit.

{¶ 5} According to appellant, his counsel contacted the court to seek clarification of the order compelling inspection. A hearing was held by the trial court on December 15, 2008 where appellant sought a pretrial to discuss this order. The trial judge explained that appellant could file a motion asking the court to reconsider the motion to compel inspection, but that a pretrial was not the appropriate mechanism for such a request.

{¶ 6} The court went on to say: "What you can do, all the time, is call counsel on the opposite side, and you guys can agree upon a date, and be here, any day, except Friday, after one o'clock, and you can ask to see me, and you know, we'll come in, and we'll talk about any problems that you have."

{¶ 7} At no time during this hearing did appellant's counsel indicate his concern about losing crucial information as a result of the inspection. Appellant's counsel then made arrangements with opposing counsel to discuss

the matter with the trial judge on December 30, 2008. When the parties arrived for this meeting, they were told that the trial judge was out for the holidays and all issues would be addressed at the January 6, 2009 settlement conference.[2] Appellant never filed a motion with regard to the information that was electronically stored on the Segway unit.

{¶ 8} Appellant's counsel of record was unable to attend the settlement conference due to a scheduling conflict and sent another attorney from his firm in his place. Upon arriving at the settlement conference, appellant was asked if an inspection of the unit was ever permitted. After discovering that no inspection had ever taken place, the bailiff indicated to appellant that the trial judge was dismissing the case with prejudice. Appellant's counsel asked to speak with the trial judge, but was denied because he was not the counsel of record.[3]

{¶ 9} In its journal entry dismissing the case with prejudice, the trial court stated: "The court granted both motions [to compel] and ordered the inspection to go forward immediately and the interrogatories to be answered within 21 days of the inspection. Plaintiff failed to submit the product for inspection."

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[2] Appellees contend that no such issues were to be addressed at the settlement conference.

[3] The attorney who attended the settlement conference in place of appellant's counsel of record sought to file an entry of appearance, which the trial court refused to allow.

{¶ 10} The court went on to say that appellant's counsel "was informed by the court that in order to have the ruling [on the motion to compel] reconsidered he would need to file an appropriate motion. No motion was ever filed." Finally, the court stated: "The court had previously notified plaintiff in its entry dated 12-10-08 that failure to submit to the inspection would result in the case being dismissed. As counsel was not present for plaintiff, Clement Cody, at the settlement conference held on 1-6-08 [sic] and plaintiff failed to comply with the court's order dated 12-10-08, this case is hereby dismissed with prejudice."

{¶ 11} Appellant then filed a Civ.R. 60(B) motion for relief from judgment and motion for reconsideration arguing that appellant's counsel took no action to warrant a dismissal with prejudice. The trial court first ruled on this motion after appellant had already filed a notice of appeal. The case was remanded to the trial court for a proper ruling on the motion for reconsideration, which was inevitably denied. In its denial of appellant's motion for reconsideration, the trial court held that appellant's counsel was not present at the settlement conference and failed to file a motion articulating appellant's hesitancy with regard to the order compelling inspection. This appeal followed.

Review and Analysis

{¶ 12} Appellant presents three assignments of error for our review:

{¶ 13} "The trial court erred in granting defendant/appellee's motion to compel inspection as the inspection would likely destroy sensitive electronic information crucial for proving the plaintiff's case in chief."

{¶ 14} "The trial court erred in dismissing plaintiff/appellant's action with prejudice as the trial court did not establish or verify that plaintiff/appellant ignored a court order or that plaintiff appellant's counsel demonstrated any conduct so flagrantly negligent to justify the harsh and dispositive sanction of dismissal with prejudice forever barring plaintiff/appellant's opportunity to prove defendant/appellee's negligence to a trier of fact."

{¶ 15} "The trial court erred in denying plaintiff/appellant's motion for relief from judgment as the plaintiff filed a timely motion demonstrating a meritorious defense and excusable neglect under the law."

Motion to Compel

{¶ 16} When issuing orders related to discovery matters, trial courts are given great deference. *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578, 592, 664 N.E.2d 1272. As such, when reviewing a trial court's order granting a motion to compel, we apply an abuse of discretion standard. *DeMeo v. Provident Bank*, Cuyahoga App. No. 89442, 2008-Ohio-2936, at ¶71. To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. "'The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations.'" *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385, 94 N.W.2d 810. In order to have an abuse of that choice, the result must be "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." Id.

{¶ 17} The trial court did not abuse its discretion when granting Segway's motion to compel inspection of the Segway unit at issue. Appellant argues that the trial court abused its discretion by granting the motion to compel despite the fact that sensitive information crucial to appellant's case could be destroyed during the inspection. Despite appellant's contention that the refusal was based on this electronically-stored information, Segway attached correspondence

between the parties in support of their motion to compel inspection, and a review of this correspondence shows that appellant did not mention the electronically stored information when denying Segway access to the unit for inspection. Appellant's counsel simply refused to produce the unit for inspection until Segway replied to appellant's paper discovery.

{¶ 18} Likewise, appellant did not mention any electronically stored information in his brief in opposition to Segway's motion to compel. The only argument presented by appellant in his brief in opposition was that an inspection of the unit was not necessary for Segway to respond to appellant's discovery requests.

{¶ 19} The trial court's decision to grant Segway's motion to compel was not unreasonable or arbitrary. On appeal, appellant has failed to present any compelling legal argument as to why the motion to compel inspection should have been denied. In fact, in his brief in opposition to Segway's motion to compel, appellant failed to cite to any case law indicating why the motion should be denied by the trial court; he merely argued such an inspection was unnecessary. The trial court acted within its sound discretion when granting Segway's motion to compel inspection. As such, assignment of error I is overruled.

Dismissal with Prejudice

{¶ 20} When an appellate court reviews a trial court's dismissal of a case with prejudice, it employs an abuse of discretion standard as defined above.

Autovest, L.L.C. v. Swanson, Cuyahoga App. No. 88803, 2007-Ohio-3921, at ¶18. This standard is heightened, however, when the plaintiff is forever denied a review of his case on the merits. Id., citing *Jones v. Hartranft* (1997), 78 Ohio St.3d 368, 372, 678 N.E.2d 530.

{¶ 21} Appellant argues that his attorney's conduct was not so "flagrantly negligent" as to warrant such a harsh sanction as a dismissal with prejudice and that such dismissal was an abuse of the trial court's discretion. This court has noted that "[i]t is 'a basic tenet of Ohio jurisprudence that cases should be decided on their merits.'" *Jackson v. City of Cleveland*, Cuyahoga App. No. 83060, 2003-Ohio-7079, at ¶9, quoting *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 3, 454 N.E.2d 951.

{¶ 22} The same issue was addressed in *Willis v. RCA Corp.* (1983), 12 Ohio App.3d 1, 465 N.E.2d 924, where the court dismissed a case with prejudice when the plaintiff did not appear at a pretrial due to a failure to record the date on his calendar. Id. at 3. This court modified the dismissal to be one without prejudice holding that "the record [did] not show that plaintiff's absence was contumacious, deliberately dilatory, or gross misconduct, the dismissal with prejudice was too harsh a penalty." Id. at 1.

{¶ 23} This court went on to say that "the power of the trial court to prevent undue delays and to control its calendars must be weighed against the policy which favors disposition of litigation on the merits." Id. at 3. In *Sazima v. Chalko*, 86 Ohio St.3d 151, 1999-Ohio-92, 712 N.E.2d 729, the Ohio Supreme

Court stated that "[t]he extremely harsh sanction of dismissal should be reserved for cases when an attorney's conduct falls substantially below what is reasonable under the circumstances evidencing a complete disregard for the judicial system or the rights of the opposing party." Id. at 158, quoting *Moore v. Emmanuel Family Training Ctr., Inc.* (1985), 18 Ohio St.3d 64, 70, 479 N.E.2d 879.

{¶ 24} Appellant's case was dismissed with prejudice because he failed to produce the Segway unit for inspection and because his counsel of record failed to appear at the January 6, 2009 settlement conference. In its order dismissing the case with prejudice, the trial judge also stated that she had informed appellant that the proper mechanism for voicing his concerns related to the order compelling inspection would be to file a motion with the court. However, at the December 15, 2008 hearing, where this conversation took place, the trial judge specifically stated: "What you can do, all the time, is call counsel on the opposite side, and you guys can agree upon a date, and be here, any day, except Friday, after one o'clock, and you can ask to see me, and you know, we'll come in, and we'll talk about any problems that you have."

{¶ 25} Appellant claims it was based on this statement that he planned to meet with opposing counsel on December 30, 2008 to discuss the matter before the judge. Because the trial judge was unavailable on that date, the discussion was postponed until the settlement conference on January 6, 2009, where the case was dismissed with prejudice. Although appellant did not employ the most

practical and efficient methods of voicing his concerns, his actions were not so unreasonable, especially in light of the trial judge's statement delineated above, as to warrant a dismissal with prejudice.

{¶ 26} Nothing in the record shows that appellant's conduct was "substantially below what is reasonable under the circumstances evidencing a complete disregard for the judicial system or the rights of the opposing party." *Sazima*, supra, at 158. Based on Ohio's strong position in support of hearing cases on the merits and appellant's reasonable belief that he could arrange a meeting with the trial judge and opposing counsel to discuss his concerns with the order compelling inspection, the trial court abused its discretion in dismissing appellant's case with prejudice and denying him his day in court. As such, appellant's assignment of error II is well taken.

Motion for Reconsideration

{¶ 27} In light of our disposition of appellant's second assignment of error, appellant's claim that the trial court erred in denying his motion for reconsideration is moot.

Conclusion

{¶ 28} The trial court acted within its sound discretion when granting Segway's motion to compel inspection of the Segway unit. The trial court abused its discretion, however, when it dismissed appellant's case with prejudice based on a mere procedural misunderstanding. Accordingly, we reverse the decision of the trial court that dismissed appellant's case with prejudice.

{¶ 29} This cause is affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellees share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, P.J., and
JAMES J. SWEENEY, J., CONCUR