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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE
COUNTY, FLORIDA

APPELLATE DIVISION
CASE NO. 2018-235-AP-01
L.T. Case No.: 13-1954 CC 24

GEICO GENERAL INSURANCE COMPANY,
Appellant,

v.

FEELING GOOD CLINIC a/a/o
DAVID DE LA TORRE,
Appellee.
_______________________________/

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DADE COUNTY, FLA.
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Reverend S. Witherspoon

OPINION

Opinion filed: 11/27/19

On Appeal from County Court in and for Miami-Dade County, Florida, Diana Gonzalez-Whyte, County Court Judge

Dutton Law Group, P.A., Rebecca O'Dell Townsend, Louis Schulman, and Scott W. Dutton, for Appellant.

Ryan Peterson, Esq., for Appellee.

Before: DARYL TRAWICK, LISA WALSH and THOMAS REBULL, JJ.

PER CURIAM.

This case involves a claim for Personal Injury Protection ("PIP") benefits by Plaintiff, Feeling Good Clinic ("Feeling Good Clinic" or "Plaintiff"), under an automobile insurance policy issued by GEICO General Insurance Company ("GEICO"). In this appeal, we review the trial court's order sanctioning GEICO by striking GEICO's pleadings below and entering final judgment for the Plaintiff for GEICO's failure to respond to court orders.

The sanctions order was based upon GEICO's failure to abide by several *ex parte* discovery orders entered four years before the 2018 trial setting. GEICO made no attempt to obtain relief from these discovery orders. Likewise, Feeling Good Clinic made no attempt to obtain enforcement of these orders. Instead, the case lingered dormant for approximately three years. In 2018, Feeling Good Clinic noticed the case for trial. GEICO claims that it was not served with the trial order[1] but was present at the March 8, 2018 calendar call, and the matter was set for trial on March 19, 2018.

Four days prior to trial, the Plaintiff filed and noticed for hearing a motion to strike GEICO's pleadings and enter default based on GEICO's failure to comply with the 2014 discovery orders. The trial court reset the hearing on the motion for the next day, March 20, 2018. GEICO complained that it had inadequate time to

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[1] GEICO claims that the Plaintiff and the trial court failed to properly serve discovery and court orders. The record reflects that both the trial court and the Plaintiff served GEICO with all disputed discovery and *ex parte* court orders using the same litigation email for GEICO.

prepare for an evidentiary hearing and was unable to adequately establish its defense to the sanctions motion. Staff counsel for GEICO testified that she prepared the 2014 discovery responses but could not say whether or not they were served. The Plaintiff complained that as of March 20, 2018, the day of trial, GEICO only provided *unsworn* responses to discovery and therefore Plaintiff was unsure what evidence GEICO intended to use at trial to prove its coverage defense.

Following the hearing, the trial court granted the motion to strike pleadings, and entered default final judgment for the Plaintiff. The trial court's order set forth findings under *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993). The order noted that while present counsel for GEICO had never been sanctioned by any court, GEICO had been the subject of similar sanction orders, and "given the scope and number of these violations," no sanction short of striking pleadings would suffice.

On appeal, GEICO argues that it had insufficient time to prepare for the hearing on the motion to strike pleadings. GEICO argues that it never received the discovery directed at coverage which was the subject of the 2014 *ex parte* sanctions orders,[2] and that the trial court abused its discretion in striking pleadings where less severe sanctions would have addressed GEICO's alleged malfeasance.

[2] This argument was refuted by its own litigation support witness, who provided an affidavit that she prepared responses to discovery requests directed at coverage. (R. 220, 223)

The trial court's decision to sanction a litigant for failure to abide by the rules of discovery and orders of court is reviewed under an abuse of discretion standard. *Morris v. Muniz*, 252 So. 3d 1143 (Fla. 2019); *Williams v. Prepared Insurance Company*, 274 So. 3d 398, 404 (Fla. 4th DCA 2019). While a trial judge has discretion to enter sanctions for failure to abide by the discovery rules, "'it is also well established that dismissing an action for failure to comply with orders compelling discovery is 'the most severe of all sanctions which should be employed only in extreme circumstances.'" *Id.* (quoting *Ham v. Dunmire*, 891 So.2d 492, 495 (Fla. 2004) (quoting *Mercer v. Raine*, 443 So.2d 944, 946 (Fla. 1983))). The Supreme Court of Florida in *Kozel v. Ostendorf* noted that although broad discretion vests in the trial court, "it is not necessary or beneficial for that power to be exercised in all situations" and that dismissal punishes the litigant for the malfeasance of counsel and should therefore "be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result." 629 So. 2d 817, 818 (Fla. 1993).

In *Kozel*, the Court adopted a six-part test to guide trial judges in considering what sanction is appropriate to address counsel's failure to abide by court orders in the discovery process. These factors include: "(1) whether the attorney's conduct was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; (2) whether the attorney has been previously sanctioned; (3) whether

the client was personally involved in the act of disobedience; (4) whether the delay prejudiced the opposing party through undo expense, loss of evidence or some other fashion; (5) whether the attorney offered reasonable justification for noncompliance; and, (6) whether the delay created significant problems of judicial administration." 629 So. 2d at 818.

We commend the lower court for her well-reasoned and lengthy order imposing sanctions. We find no abuse of discretion in the trial court's findings on the first, third, and fifth factors. We likewise reject GEICO's argument that there were procedural defects in the trial court's 2014 orders which excused its noncompliance, as GEICO was served with the orders, never requested relief nor addressed the alleged defects. Failure to abide by an order is not excusable on the ground that the order was somehow incorrect or not entered in accord with the rules of procedure. *Carnival Corp. v. Beverly*, 744 So. 2d 489, 496 (Fla. 1st DCA 1986) (counsel's perception that the trial court order is incorrect is no excuse for failing to follow the order).

However, we must reverse for the following reasons.

First, GEICO was deprived of due process at the hearing on Plaintiff's motion to strike pleadings. GEICO had only four days in which to prepare for the hearing on the Plaintiff's motion to strike pleadings. GEICO could not obtain the testimony

of the trial attorney responsible for discovery four years earlier and could only provide the testimony of the staff attorney who prepared the discovery.

In *Brito v. Southern Fidelity Property & Casualty, Inc.*, 271 So. 3d 85 (Fla. 3d DCA 2019), the court explained that notwithstanding the abuse of discretion standard, due process requires that a party be given sufficient time and ability to prepare to refute the allegations in a sanctions motion. In *Torres v. One Stop Maintenance & Management, Inc.*, 178 So. 3d 86, 89 (Fla. 4th DCA 2015), the court held that notice sent to a defendant only a few days prior to a damages trial is insufficient to satisfy due process. The court explained:

> [T]he defendants would have received only a few days' notice for a damages trial. Florida courts have held that such short notice is insufficient to satisfy due process. *See, e.g., J.B. v. Fla. Dep't of Children & Family Servs.,* 768 So. 2d 1060, 1066–67 (Fla.2000) (twenty-four hours' notice for a termination of parental rights proceeding is unreasonable); *Woolf v. Woolf,* 901 So. 2d 905, 911 (Fla. 5th DCA 2005) (two days' notice insufficient for civil contempt hearing); *P & L Fla. Inv., Inc. v. Ferro,* 545 So. 2d 448, 448 (Fla. 3d DCA 1989) (six days' notice in advance of a hearing is unreasonable); *Montgomery v. Cribb,* 484 So. 2d 73, 75 (Fla. 2d DCA 1986) (two days' notice of a hearing on a motion to strike is unreasonable).

In four days, GEICO could not obtain the evidence it needed to refute a motion to strike pleadings based upon GEICO's alleged non-compliance dating back to 2014. On this ground alone, the trial court's order must be reversed.

Additionally, three of the *Kozel* factors found by the trial court were unsupported by the record. Regarding the second factor, whether the attorney has

been previously sanctioned, neither GEICO trial counsel nor GEICO's trial counsel in 2014 were ever previously sanctioned. We reject Appellee's argument that this factor may be satisfied by considering the actions of other in-house counsel or firm attorneys.

The fourth and sixth *Kozel* factors analyze whether the delay prejudiced the opposing party and whether delay caused significant problems for the administration of justice. As set forth above, the case sat for three years with little to no activity. At one point, the trial court issued Plaintiff an order to show cause why this case should not be dismissed for lack of prosecution. Thus, the major culprit for the delay was the absence of activity in this case, not GEICO's noncompliance with 2014 discovery orders. Further, on the sixth *Kozel* factor, the trial court found "that there is no less onerous of a sanction to correct this behavior than striking the pleadings, given the scope and number of these violations." To be sure, GEICO failed to abide by 12 *ex parte* discovery orders. We agree with the trial court that this violation would cause any judge significant dismay. But several sanctions less severe than striking pleadings would have cured the harm resulting from GEICO's nonperformance, including but not limited to a continuance, monetary sanctions against GEICO or counsel, or the exclusion of late-provided witnesses or documents.

For these reasons, we reverse and remand. We DENY the Appellee's motion for attorney's fees.

DARYL TRAWICK, LISA WALSH and THOMAS REBULL, JJ., concur.

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