

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

AUBURNMOST PROPERTY, LLC, et al.,

Plaintiffs,

v

**Case No. 20-184889-CB
Hon. Michael Warren**

PHILADELPHIA INDEMNITY INSURANCE CO., et al.,

Defendants.

**OPINION & ORDER REGARDING
DEFENDANTS ACRISURE, LLC, HUTTENLOCHER GROUP, LLC,
HUTTENLOCHER GROUP II, LLC AND HUTTENLOCHER HOLDINGS, LLC'S
MOTION FOR SANCTIONS/DISMISSAL FOR PLAINTIFFS' VIOLATION OF
COURT ORDER REGARDING PLAINTIFFS' PRODUCTION OF DOCUMENTS**

**At a session of said Court, held in the
County of Oakland, State of Michigan
September 23, 2021.**

PRESENT: HON. MICHAEL WARREN

OPINION

**I
Overview**

Before the Court is Defendants Acrisure, LLC, Huttenlocher Group, LLC, Huttenlocher Group II, LLC and Huttenlocher Holdings, LLC's Motion for Sanctions/Dismissal for Plaintiffs' Violation of Court Order Regarding Plaintiffs' Production of Documents. The Court having reviewed the Motion, Response, and Reply

thereto, and otherwise being fully informed in the premises, hereby dispenses with oral argument as it would not assist the Court in rendering a decision. MCR 2.119(E)(3).

The instant Defendants ask this Court to dismiss the Plaintiffs' claims and otherwise sanction the Plaintiffs based on the Plaintiffs' failure to properly comply with discovery over an extended period of time and in violation of a stipulated order.

At stake is whether a dismissal should be entered when a lesser sanction would better serve the interests of justice? Because dismissal is a dramatic sanction that should not be imposed when lesser sanctions would better serve the interests of justice, the answer is "no."

Also, at stake is what are the appropriate lesser sanctions when the Plaintiffs' repeated violations of the discovery processes is nothing more than a "dog ate my homework" excuse? The appropriate lesser sanctions are (1) reasonable attorney fees and costs incurred by the Defendants in filing and arguing this Motion, and (b) an additional \$500 a day sanction for each day after the date of this order in which the materials are not produced.

Also, at stake is whether the Court should consider the Defendants' Reply when no such thing exists in standard motion practice, and it was filed without leave of court? Because the Reply was improperly filed, the answer is "no" and the Reply is struck.

II The Reply is Struck

The instant Defendants have filed a Reply without leave of the Court and in violation of MCR 2.119. As such, the Reply is struck. MCR 2.118.

III The Law of Discovery

In the event a party violates an order of this Court to provide or permit discovery, this Court “may order such sanctions as are just” MCR 2.313(B)(2). Such sanctions may include, inter alia, one or more orders (1) establishing facts or other matters in connection with the action, if they were the subject of the violated discovery order, MCR 2.313(B)(2)(a), (2) prohibiting the disobedient party from supporting or opposing designated claims or defenses, MCR 2.313(B)(2)(b), (3) prohibiting the disobedient party from introducing designated matters into evidence, *Id.*, (4) “striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment of default against the disobedient party,” MCR 2.313(B)(2)(c), (5) treating the disobedience as contempt of court, MCR 2.313(B)(2)(d), (5) requiring the disobedient party to produce another for examination, MCR 2.313(B)(2)(e), and (6) sanctioning the disobedient party for reasonable expenses, including attorney fees. MCR 2.313(B)(2)(f). The sanctions of the trial court are within its

sound discretion. *Dean v Tucker*, 182 Mich App 27, 32 (1990). See also *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 396-397 (1992); *Kalamazoo Oil v Boerman*, 242 Mich App 75, 86 (2000).

Although an order dismissing a proceeding or entering a default judgment is a proper sanction for the violation of a discovery order, see, e.g., *Thorne v Bell*, 206 Mich App 625, 632 (1994), this Court “should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate.” *Bass v Combs*, 238 Mich App 16, 26 (1999). See also *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 451 (1995). In exercising its discretion, a trial court must create a record that it gave “careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it.” *Dean*, 182 Mich App at 32. See also *Houston v Southwest Detroit Hosp*, 166 Mich App 623, 629-630 (1987); *Kalamazoo Oil*, 242 Mich at 86. In fact, because an entry of default or dismissal of an action is a dramatic remedy, it must be used with caution. *Mink v Masters*, 204 Mich App 242, 244 (1994); *Traxler v Ford Motor Co*, 227 Mich App 276, 286 (1998).

Accordingly, when evaluating the appropriate sanction to levy for a violation of a discovery order, this Court should consider a number of factors, including, but not limited to, “whether the failure to respond to discovery requests extends over a substantial period of time, whether an existing discovery order was violated, the amount of time that has elapsed between the violation and the motion for a default judgment, the prejudice to [the party requesting default], and whether willfulness has been shown.”

Traxler, 227 Mich App at 286 (citations omitted), quoting *Thorne*, 206 Mich App at 632-633. See also *Frankenmuth Mutual Ins Co*, 193 Mich App at 396-397; *Mink*, 204 Mich App at 244. Attempts to cure and actual notice of the information at issue are also factors to be considered. See, e.g., *Dean*, 182 Mich App at 33. In undertaking this analysis, this Court should also evaluate “whether a lesser sanction would better serve the interests of justice.” *Id.* at 33. In any event, “[t]he sanction of a default judgment should be used only when there has been a flagrant and wanton refusal to facilitate discovery.” *Mink*, 204 Mich App at 244. See also *Traxler*, 227 Mich App at 633; *Kalamazoo Oil*, 242 Mich App at 86. Thus, an accidental or involuntary violation of a discovery order generally should not result in a default judgment. *Mink*, 204 Mich App at 244; *Traxler*, 227 Mich App at 286; *Kalamazoo Oil*, 242 Mich App at 86. This is so because although “the rules of practice give direction to the process of administering justice and must be followed, their application should be a fetish to the extent that justice in a particular case is not done.” *Dean*, 182 Mich App at 32. See also *Higgins v Henry Ford Hosp*, 384 Mich 633, 637 (1971).

IV Discussion

There is no doubt that the Plaintiffs have repeatedly failed to respond to discovery in a timely fashion and violated a stipulated order to compel the production of discovery by a time certain. The litany of excuses offered do not change that state of affairs. The Plaintiffs cannot stipulate to an order and then blame themselves (which is exactly what they are doing) for their failure to comply. They obviously misled themselves and/or

counsel about the ability to produce the documents. Weeks have passed with nothing more than broken promises.

Despite the foregoing, dismissal is too dramatic a sanction. When considering the factors highlighted *supra* about the appropriate remedy, (1) the failure to respond to discovery requests extend over a substantial period of time, (2) an existing discovery order was violated, (3) the time between the violation and the motion for dismissal has only been several weeks, (4) willfulness has not been proven - but there is at least deep neglect, (5) attempts to cure have not yet been successful, and (6) there is no actual knowledge of the material not yet produced. The issue is now whether prejudice will cease or persist. As such, monetary sanctions ("Monetary Sanctions") are warranted in the amount of (1) reasonable attorney fees and costs incurred by the instant Defendants in preparing and filing this Motion and (2) \$500 a day of for each day discovery is not produced after the issuance of this Opinion and Order.

ORDER

Based on the foregoing Opinion, the Court ORDERS the following:

1. The instant Defendants' request to dismiss the case is DENIED; and
2. The Monetary Sanctions are hereby AWARDED, to be fixed by stipulation or motion.

Michael Warren

HON. MICHAEL WARREN
CIRCUIT COURT JUDGE