STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

FORD MOTOR CREDIT COMPANY, a Delaware Corporation,
Appellee,

V

File No. 94-12104-AV
HON. THOMAS G. POWER

DOUGLAS E. OSTAHOWSKI,
Appellant.

Timothy C. Runyan (P34529)
Attorney for Appellee

Appellant in Pro Per

OPINION

Douglas E. Ostahowski appeals from a Decision of the District Court awarding a deficiency judgment of $3,234.15 in favor of Plaintiff-Appellee.

Ostahowski purchased a new 1985 Ford Tempo. The vehicle was financed--through Plaintiff-Appellee. At the time of purchase, a motor vehicle service contract was also purchased. The service contract was not financed through Plaintiff-Appellee, nor was it Ford product. The service contract company was unable to meet it obligations resulting in Ostahowski being required to personal pay repair bills. The service contract was the focal issue raise in a counter-claim which sought rescission and made claims of fraud.

On appeal, it is initially asserted that the trial court erred in denying Ostahowski's motion to dismiss or for default judgment for the reason that Plaintiff-Appellee had failed to comply with discovery requests. In Frankenmuth Ins v ACO Inc, 193 Mich Ap 389 (1992), the Court held:

"Default judgment is a possible sanction for discovery abuses. MCR 2.313(B)(2)(c). It is, however, a drastic measure and should be used with caution. Equico Lessors, Inc v Original Buscemi's. Inc, 140 Mich App 532, 534; 364 NW2d 373 (1985). When the sanction of a default judgment is contemplated, the trial court should consider whether the failure to respond to discovery requests extends over a substantial period of time, whether there was a court

order directing discovery that has not been complied with, the amount of time that has elapsed- between the violation and the motion for default judgment, and whether wilfulness had been shown. Id., pp 534-535. The court must also evaluate on the record other available options before concluding that a drastic sanction is warranted. Hanks v SLB Management, Inc, 188 Mich App 656, 658; 471 NW2d 621 (1991). The sanction of default judgment should be employed only when there has been a flagrant and wanton refusal to facilitate discovery, that is, the failure must be conscious or intentional, not accidental or involuntary. Equico Lessors, Inc, p 535. We review the trial court's decision to grant a default judgment for an abuse of discretion. Id." (Emphasis added.)

* *

"A party need not move to compel answers in order to be entitled to sanctions under MCR 2.313(D)(1). However, in the absence of an order or some other compelling circumstance, we are not inclined to find the wilfulness required to enter a judgment by default for failure to answer interrogatories."

Having reviewed the trial transcript and court file, this Court finds that the trial court did not abuse its discretion in denying the motion. The trial court reviewed the document presented at the trial, considered the arguments of Ostahowski, and found no prejudice in the failure of Plaintiff-Appellee to timely provide discovery. This Court finds no error.

Secondly, it is asserted that the trial court-erred by not dismissing the case when representatives of Plaintiff-Appellee did not appear at trial. This Court initially finds that the issue is not preserved for appellate review. The record does not reflect that a motion for dismissal was made by Ostahowski. Furthermore, contrary to the argument on appeal, this Court finds that the record does not demonstrate that the subpoenas were properly served. MCR 2.506(G)(2) provides that:

"A subpoena may also be served by mailing to a witness a copy of the subpoena and a postage-paid card acknowledging service and addressed to the party requesting service. The fees for attendance and mileage provided by law are to be given to the witness after the

witness appears at the court, and the acknowledgment card must so indicate. If the card is not returned, the subpoena must be served in the manner provided in subrule (G) (1) · "

The record reflects that subpoenas were issued and mailed by certified mail, return receipt requested, to the offices of Mr. Alex Trotman and Mr. John Popp. Although there were return receipts presented, the mailings were not restricted delivery to the addressees only, and the receipts do not appear to bear the signature of the addressee/witnesses. Further, the rule provides that if witness fees are not to be paid until the witness appears at the court, the acknowledgment card must so indicate. There is no evidence that either proposed witness personally signed and returned an acknowledgement of service pursuant to the quoted rule. Absent an acknowledgment by the witnesses, they were not properly served. There is no error committed by the trial court.

Finally, it is argued that the trial court erred in failing to rule that Ostahowski's requests to admit were deemed admitted by the failure of the Plaintiff-Appellee to timely answer. The record reflects that on January 28, 1994, Ostahowski filed 13 separate requests to admit directed to Plaintiff-Appellee. The file does not contain a proof of service on Plaintiff-Appellee's counsel of the requests to admit. MCR 2.107(C)(3) provides in part that: "Service by mail is complete at the time of mailing." MCR 2.312(B)(l) provides, in part, that:

"Each matter as to which a request is made is deemed admitted unless, within 28 days after service of the request, or within a shorter or longer time as the court may allow, the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter."

If the requests to admit were served by mail on January 28, 1994, Plaintiff-Appellee would have been required to serve its responses no later than Friday, February 25, 1994. Plaintiff-Appellee's proof of service of the answers to the requests to admit was dated Monday, February 28, 1994. If the requests to admit were served by mail later than January 28, 1994, the answers were timely served. If the answers were served late, they were but one business day late. In the absence of a proof of service of the requests and the absence of any demonstrated prejudice to Ostahowski by the lateness of the answers, this Court finds no abuse of discretion by the trial court in accepting the answers to

the requests to admit and not deeming the requests admitted.

It is the finding of this Court on appeal that no reversible error has been presented. The decision of the District Court is affirmed.

IT' IS SO ORDERED.

HON. THOMAS G. POWER
Circuit Judge
Dated: 11/21/94