

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 01-0527

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

SPENCER HUTCHINSON,

PLAINTIFF-APPELLANT,

V.

ROBERT BUCKLEY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Spencer Hutchinson appeals from a judgment dismissing his action and ordering him to pay \$23,031 in attorney's fees as a sanction for his egregious conduct in violating discovery orders. Hutchinson argues that the trial court erred in: (1) finding that his discovery response was insufficient and ordering further production; (2) attributing two years of egregious

conduct and bad faith to him; and (3) dismissing this case and imposing sanctions. Because of Hutchinson's insufficient discovery response and two years of egregious conduct and bad faith, we affirm.

I. BACKGROUND

¶2 On October 9, 1998, Hutchinson instituted an action against Robert Buckley alleging breach of an agreement to invest and fund his investment in savings and loan (S&L) institutions. Hutchinson claims that Buckley agreed to provide him with unlimited financing should he wish to purchase shares in S&Ls in which Hutchinson held accounts, should any of those institutions ever convert to public stock-based institutions.

¶3 On December 22, 1998, in the course of discovery, Buckley requested documents from Hutchinson concerning the S&L accounts for which Hutchinson claimed Buckley was obligated to provide him financial backing. Essential to Hutchinson's claim was documentation of seventy-eight accounts he held at S&L institutions, including their opening and closing dates and monetary totals; Hutchinson only partially complied with this discovery demand. Despite an explicit warning from the trial court that noncompliance could result in contempt and dismissal of this action, Hutchinson continued to disregard the discovery request. Moreover, he only provided an affidavit that vaguely explained his unsuccessful efforts to obtain the documentation.

¶4 Accordingly, the trial court dismissed the action and ordered that Hutchinson pay attorney's fees as a sanction for his egregious conduct in violating discovery orders. He now appeals.

II. DISCUSSION

¶5 Hutchinson argues that the trial court erred in finding that his discovery response was insufficient, in attributing two years of egregious conduct and bad faith to him, and in dismissing this case and imposing sanctions. We reject his arguments.

¶6 The trial court has both statutory and inherent authority to sanction parties for failure to obey court orders. *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991). Where a party fails to comply with an order to provide discovery, the court may dismiss the action, find the non-complying party in contempt, and “require the party failing to obey the order ... to pay the reasonable expenses, including attorney fees, caused by the failure” WIS. STAT. § 804.12(2)(b) (1999-2000).¹ The authority to impose sanctions is essential to the trial court’s ability to enforce its orders. *Johnson*, 162 Wis. 2d at 274. A trial court’s decision to dismiss an action is discretionary, and will not be disturbed unless the party claiming to be aggrieved by the decision establishes that it has erroneously exercised its discretion. *Id.* at 273.

¶7 The trial court thoroughly examined all of the relevant facts in concluding that Hutchinson’s discovery response was insufficient. Hutchinson failed to produce the required documents that he initially agreed to deliver. Hutchinson then represented that the documents would be provided by his family, friends, and agents; they never provided the information. He next claimed that the

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

account information was not in his control and refused to contact his alleged joint account holders (friends and relatives) for the information.

¶8 The trial court considered this conduct to be a history of “jerking around” Buckley. The trial court further considered that Hutchinson failed to provide complete information regarding approximately fifty-eight of the S&L accounts and provided no documentation for twenty-one of the accounts. Hutchinson raised no objections to any of Buckley’s discovery requests and admitted he agreed that Buckley was entitled to all of the information he sought.

¶9 The trial court examined all of the relevant facts in determining that Hutchinson’s conduct merited sanctions. The trial court thoroughly examined Hutchinson’s excuses for his continued failure to comply with the rules of discovery and court orders, finding them to be completely inadequate. In response to the court’s express order to produce the documentation, Hutchinson did nothing; he simply repeated his earlier assertions that his accountants and brokers no longer had the documents and refused to pursue the information from the financial institutions where which he claimed to have accounts.

¶10 The trial court was unable to question Hutchinson about these matters because he did not attend his contempt hearing. In response to the continued discovery requests, Hutchinson only provided an affidavit that vaguely explained his unsuccessful efforts to obtain the documentation. The court expressly found this affidavit to be “absolutely insufficient and inadequate.” The trial court took judicial notice that Hutchinson’s representations about the unavailability of his S&L account records were simply untrue based upon facts generally known. Accordingly, the court found Hutchinson’s excuses for his

continued failures to comply with his discovery obligations and court orders to be completely inadequate.

¶11 In Wisconsin, dismissal is an appropriate sanction where the non-complying party has acted in bad faith and has no clear and justifiable excuse for noncompliance. *Id.* at 275-77. The trial court's decision is discretionary; therefore, we must affirm its decision if the trial court did not erroneously exercise its discretion even if we may have ruled differently. *Burkes v. Hales*, 165 Wis. 2d 585, 590, 478 N.W.2d 37 (Ct. App. 1991). In rendering the decision, the trial court considered the facts, applied the correct law and reached a reasonable decision. Hutchinson's conduct over a two-year period was both in bad faith and egregious. Further, his failure to comply with his discovery obligations and the trial court's orders was without excuse.

¶12 Following the trial court's review of the facts, the court considered the applicable legal standards. The trial court thoroughly discussed the requirements set forth in *Johnson*, applying them to the facts here and found:

[T]here is a pattern of conduct that has continued for two years wherein the plaintiff has failed to cooperate with discovery, has misled this Court and misled defense counsel, has provided information that I believe is nothing, to use a term, hogwash.

The Court finds the plaintiff in this case has acted both in bad faith and egregiously without any excuse for the last two years.

¶13 The trial court rose above what was required in dismissing this action. The court was not required to conduct the exhaustive analysis that it did. *See Burkes*, 165 Wis. 2d at 590-91 (Stating that reasons to dismiss an action need not be exhaustive; it is enough that the trial court undertook a reasonable inquiry

and examination of the facts and the record shows that there is a reasonable basis for the court's determination.) (citations omitted).

¶14 There were eleven recorded attempts by Buckley to get Hutchinson to comply with his discovery requests. The trial court expressly indicated that if Hutchinson failed to produce the documents specified in its order, the court would issue an order to show cause why he should not be held in contempt and sanctions imposed, including imposition of cause and dismissal of the action for egregious conduct. Despite the exhaustive measures the trial court took to get Hutchinson to comply, Hutchinson continued to act in bad faith.

III. CONCLUSION

¶15 The trial court properly determined that Hutchinson acted egregiously and in bad faith over a period of two years when he failed to comply with the rules of discovery and the court's orders. Accordingly, the court acted within its discretion when it dismissed Hutchinson's action and ordered him to pay attorney's fees.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

