

Cite as 2023 Ark. App. 275
ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-22-367

J. ALVIN LEE FARMS, LLC; AND JOHN
ALVIN LEE, JR.

APPELLANT

V.

CNH INDUSTRIAL CAPITAL AMERICA,
LLC

APPELLEE

Opinion Delivered May 10, 2023

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, ELEVENTH
DIVISION
[NO. 60CV-21-7393]

HONORABLE PATRICIA JAMES, JUDGE

AFFIRMED

KENNETH S. HIXSON, Judge

Appellants J. Alvin Lee Farms, LLC and John Alvin Lee, Jr. (collectively “Lee”), bring this interlocutory appeal from the Pulaski County Circuit Court’s order striking their answer and amended answer to the complaint filed by appellee CNH Industrial Capital America, LLC (CNH) in this replevin lawsuit.¹ The trial court’s order was premised on Lee’s repeated discovery violations. On appeal, Lee argues, for various reasons, that the trial court erred in striking their complaint and amended complaint. We affirm.

On November 19, 2021, CNH filed a complaint for replevin against Lee. In the complaint, CNH stated that it was the assignee of five retail installment sale contracts and security agreements covering nine pieces of property, including two tractors and other farm equipment. CNH attached the contracts and security agreements to its complaint. CNH alleged

¹Our jurisdiction is pursuant to Ark. R. App. P.–Civ. 2(a)(4).

that Lee Farms had defaulted on the contracts by failing to pay the installments when due and that Alvin Lee, Jr., was a guarantor. In its complaint, CNH alleged that, as a result of the default, the contract installments had been accelerated, resulting in a net balance of \$208,547.56, which remained past due and unpaid despite demand. CNH alleged that it was entitled to possession of the subject equipment and the issuance of an order of delivery and that, upon obtaining possession, it would sell the equipment in a commercially reasonable fashion and apply the proceeds in accordance with Arkansas law. On December 28, 2021, Lee filed an answer wherein he denied every averment and every paragraph in the complaint.

On January 5, 2022, CNH propounded to Lee a set of requests for admission, as well as a set of interrogatories and requests for production of documents. On February 4, 2022, Lee responded to the requests for admission, denying every request therein, including that Lee had even executed any sales contracts or security agreements. Lee did not timely respond to the interrogatories and requests for production of documents.

On February 21, 2022, CNH filed a motion to compel. In its motion, CNH asserted that Lee's denial of each and every request for admission was inaccurate. CNH asserted further that its counsel had contacted Lee's counsel about the responses to the requests for admission, and that Lee's counsel acknowledged that the responses were inaccurate and confirmed that he would amend the responses by February 10. However, Lee did not provide amended responses to the requests for admission, nor did they respond at all to the interrogatories and requests for production of documents, and the time for responding to discovery had passed.² CNH stated in the motion to compel that its counsel had reached out to Lee's counsel four times to try and

²See Ark. R. Civ. P. 33, 34, and 36 (providing a thirty-day response time to discovery).

resolve the pending discovery issues but had received no response. CNH requested that Lee be compelled to provide proper discovery responses and also asked for sanctions, including striking Lee's answer. CNH attached to its motion to compel these four emails, which had been sent from CNH's counsel to Lee's counsel prior to the filing of the motion:

February 7, 2022:

[Lee's counsel] -

Pursuant to our telephone conversation this morning, you have agreed that you will amend the inaccurate responses to requests for admission no later than Thursday, February 10th. Please also provide responses to the interrogatories and requests for production by that same date. Thank you for your time and attention to this matter.

February 10, 2022:

[Lee's counsel] -

Please advise as to the status of the amended responses to requests for admission and the interrogatories and requests for production of documents. If I do not receive communication from you regarding these discovery documents, I will be forced to proceed with the motion to compel and request my attorney's fees for doing so. Thank you.

February 14, 2022:

[Lee's counsel] -

Please let me hear from you or provide responses to the discovery or I will be forced to file a motion to compel.

February 16, 2022:

[Lee's counsel] -

This is my last attempt to resolve this matter prior to filing a motion to compel. Please let me hear from you. Thanks.

Not only did Lee fail to respond to any of the above emails, they also failed to respond to CNH's motion to compel filed with the trial court.

On March 10, 2022, the trial court entered an order granting CNH's motion to compel. In its order, the trial court found that Lee had failed to timely respond to CNH's discovery requests and had not requested an extension of time. The trial court noted that Lee's responses to CNH's interrogatories and requests for production of documents were significantly past due. The trial court further found that CNH had attempted to confer with Lee on four separate occasions to resolve the discovery dispute to no avail. In the order granting the motion to compel, the trial court ordered Lee to provide full and complete responses to CNH's discovery requests and to supplement any inaccurate responses to their requests for admission within seven days of the order. The trial court also ordered Lee to pay five hundred dollars in attorney's fees.

On March 21, 2022, CNH filed what was styled a "Motion for Contempt." In this motion, CNH again asserted that it had made numerous attempts to resolve the discovery dispute without court intervention. CNH stated that the trial court's March 10 order to compel had granted Lee an additional seven days to respond to discovery but that Lee had still failed to respond to discovery in willful disregard of the court's order. CNH requested that Lee be found in contempt and that Lee be compelled to provide proper discovery responses, and it also asked for sanctions, including striking Lee's answer.

On the morning of May 4, 2022, which was the day a hearing was scheduled on CNH's motion for contempt, Lee filed a response to the motion for contempt. In this response, Lee admitted that discovery had been served but asked that CNH's motion be denied.

On May 4, 2022, the hearing was held as scheduled. After hearing arguments from counsel, the trial court ruled from the bench that Lee would be given until May 10 to provide full and complete discovery responses. The trial court stated:

[Lee's counsel], these discovery requests and requests for admission, requests for production, whatever is here on each and every question, every subsection will be answered fully, documents will be provided fully. You've had ample time to do these. You will have until May 10th to get those done. . . . If they are not answered fully, then, [CNH's counsel], what you are going to do is you're going to file a motion on the 11th and you are going to show me what was not answered. And then at that point the court is going to sanction the defendant by striking his answers.

On May 10, 2022, Lee filed an amended answer to CNH's complaint. In the amended answer, which was electronically filed at 11:25 p.m., Lee again denied every averment and every paragraph in the complaint. Ten minutes later, Lee electronically filed a notice of service of discovery.

On May 11, 2022, CNH filed a motion for contempt and to strike answer. In this motion, CNH stated that Lee had emailed CNH their amended responses to requests for admission and responses to interrogatories and requests for production at 10:03 p.m. on May 10. CNH, however, alleged that Lee's discovery responses were not full and complete responses as ordered by the trial court. In particular, CNH alleged that Lee's responses to interrogatories and requests for production were wholly insufficient and failed to comply with the court's directive. In the interrogatories and requests for production, Lee was asked to state the date and amount of their last payment on each of the retail installment sale contracts, and for each of these requests Lee listed a payment amount and the year 2020. However, when asked on the requests for production to provide any and all documents evidencing these payments, Lee responded:

I have attached some e-mail confirmations.^{3]} I will supplement this response with other documents as soon as I possibly can. I hope I can get this information within the next 10 business days.

CNH alleged in its motion that, instead of providing full and complete responses to the discovery requests, Lee asked for more time. CNH asserted that the discovery was submitted to Lee in January and that more than four months later—after a motion to compel, an order to compel, a motion for contempt, and a hearing on the same—Lee had still not provided full and complete discovery responses. As sanctions for the discovery violation, CNH asked that Lee be found in contempt and that the trial court strike Lee’s answer and amended answer.

On May 13, 2022, Lee filed a response to CNH’s motion for contempt and to strike answer, essentially denying that their discovery responses were inadequate. Lee asked that CNH’s motion be denied.

On May 13, 2022, the trial court entered an “Order on Motion for Contempt.” The trial court’s findings, in their entirety, were as follows:

1. On May 4, 2022 this Court previously heard Plaintiff’s Motion for Contempt and directed the Defendants to provide full and complete responses to discovery by May 10, 2022 and that, if not, Plaintiff may apply to this court to strike the Defendants’ answer filed herein.

2. The Defendants failed to provide full and complete discovery responses by May 10, 2022 as previously instructed by this Court. The responses that were provided requested additional time to supplement responses and were not signed by the Defendants.

3. Because Defendants failed to provide full and complete responses to discovery as directed herein, Defendants’ Answer to Complaint and Amended Answer to Complaint are hereby stricken from the record and Plaintiff may move for default judgment.

Lee now appeals.

^{3]}We observe that these referenced “email confirmations” are not in the record.

The imposition of discovery sanctions is governed by Arkansas Rule of Civil Procedure 37(b)(2). The rule authorizes the trial court to impose sanctions if a party fails to obey an order to provide discovery and gives the court broad discretion to “make such orders in regard to the failure as are just,” including refusing to allow the party “to support or oppose designated claims or defenses,” “striking pleadings,” “dismissing the action,” or “rendering a judgment by default against the disobedient party.” Ark. R. Civ. P. 37(b)(2). There is no requirement that a trial court make a finding of willful or deliberate disregard under the circumstances before sanctions are imposed for failure to comply with discovery requirements. *Coulson Oil Co., Inc. v. Tully*, 84 Ark. App. 241, 139 S.W.3d 158 (2003). The imposition of sanctions for the failure to provide discovery rests in the trial court’s discretion, and our courts have repeatedly upheld the trial court’s exercise of such discretion in fashioning severe sanctions for flagrant discovery violations. *Memphis Scale Works, Inc. v. McNorton*, 2020 Ark. App. 77, 595 S.W.3d 412. The trial court abuses its discretion when it acts thoughtlessly, improvidently, or without due consideration. *Nicholas v. Jones*, 2022 Ark. App. 55, 640 S.W.3d 417. An abuse of discretion may also be manifested by an erroneous interpretation of the law. *Howard v. Baptist Health*, 2022 Ark. 214, 654 S.W.3d 809.

Lee argues, for various reasons, that the trial court erred in striking their complaint and amended complaint. We first address Lee’s contention that there was no discovery violation because, according to Lee, they submitted adequate responses to CNH’s discovery requests by the final May 10, 2022 deadline ordered by the trial court. We disagree.

When Lee finally responded to the interrogatories and requests for production on May 10, they failed to fully respond to CNH's requests for production of documentation of Lee's purported last payments on each of the retail installment sale contracts. Instead, Lee responded:

I have attached some e-mail confirmations. I will supplement this response with other documents as soon as I possibly can. I hope I can get this information within the next 10 business days.

Arkansas Rule of Civil Procedure 37(a)(3) provides that "an evasive or incomplete answer or response is to be treated as a failure to answer or respond." As found by the trial court, Lee failed to provide full and complete responses to discovery as directed. Lee's response is incomplete because in the response itself, Lee asked for an additional ten business days to provide the requested documents. Although Lee argues on appeal that he offered to get the documents within a "practical period of time," more than four months had elapsed since Lee was served with the discovery requests, and at the May 4 hearing, the trial court made it clear that, unless Lee responded fully to discovery by May 10, the trial court would strike Lee's answers. Lee also claims that he attached email confirmations that completely answered the requests; however, Lee does not state the content of these alleged emails, nor are they in the record. And again, Lee himself asked for ten business days to provide complete documentation to satisfy the requests for production. Having reviewed the record, we do not agree with Lee's argument that no discovery violation occurred.

We next address Lee's argument that the trial court erred in striking their answers because CNH's motion for contempt and to strike answer did not contain a statement that CNH had in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. However, this argument is

not preserved because it was not raised below. See *Paschal Heating & Air Conditioning, Inc. v. Zotti*, 2021 Ark. App. 372. A party is barred from arguing, for the first time on appeal, that a motion for discovery sanctions was procedurally defective because it lacked a statement that the parties had conferred, or attempted to confer, about the dispute. *Id.* Moreover, it is clear from the record that CNH did attempt to confer with Lee about the discovery issue without court action, and CNH clearly stated this in its February 21, 2022 motion to compel. Rule 37(a)(3) provides that a motion to compel “shall include a statement that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.” In its motion to compel, CNH stated that its counsel had reached out to Lee’s counsel four times to try and resolve the pending discovery issues but had received no response, and CNH attached four emails to substantiate this claim. In the trial court’s order to compel, it specifically found that CNH had attempted to confer with Lee on four separate occasions to resolve the discovery dispute to no avail. In CNH’s subsequently filed motion for contempt, CNH again stated that it had made numerous attempts to resolve the discovery dispute without court intervention. For these reasons, although it is clear that CNH did attempt to resolve the discovery issue without court action, the issue has been waived because it was not raised below.

Lee also argues that the trial court erred when it “imposed a contempt sanction without a contempt hearing.” However, we observe that in the order being appealed, the trial court did not find Lee in contempt; it struck their answer and amended answer as a discovery sanction. We further note that the supreme court has held that a trial court is not required to hold a hearing before imposing sanctions for discovery violations. *Burton v. Sparler*, 272 Ark. 254, 613

S.W.2d 394 (1981); *see also Marks v. Saville*, 2017 Ark. App. 668, 550 S.W.3d 1. For these reasons, the trial court was not required to hold a hearing before imposing these sanctions.

Finally, we note that Lee states in his brief that, “[a]ctually, the trial court never even considered John Alvin Lee’s response to the motion for contempt.” To the extent that this is an argument, the record shows that Lee’s response was filed at 4:01 p.m. on May 13, 2022, and the trial court’s order was filed at 4:49 p.m. on the same day.

Having reviewed the record and Lee’s arguments on appeal, we conclude that none of Lee’s arguments have merit and that the trial court did not abuse its discretion in striking Lee’s answer and amended answer as a sanction for Lee’s discovery violation. Therefore, we affirm.

Affirmed.

VIRDEN and THYER, JJ., agree.

J. F. Valley, Esq., P.A., by: *James F. Valley*, for appellants.

Nixon, Light & Buzbee, PLLC, by: *John B. Buzbee*, for appellee.