

Cite as 2024 Ark. App. 146
ARKANSAS COURT OF APPEALS
DIVISION IV
No. CV-22-448

JOHNSON INDUSTRIAL
MAINTENANCE CO. D/B/A JIMCO,
LLC, AND ANDY JOHNSON
APPELLANTS

V.

MARY BORKOWSKI AND WILLIAM
BORKOWSKI
APPELLEES

Opinion Delivered February 28, 2024

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NO. 72CV-20-2630]

HONORABLE JOHN C. THREET,
JUDGE

AFFIRMED

CINDY GRACE THYER, Judge

Johnson Industrial Maintenance Co., LLC (JIMCO), and Andy Johnson (collectively, “appellants”) appeal from an order of the Washington County Circuit Court that struck their answer as a discovery sanction and entered default judgment in favor of appellees, Mary and William Borkowski (“the Borkowskis”). On appeal, appellants argue that the circuit court abused its discretion by granting the Borkowskis’ motion for sanctions and awarding them a default judgment and damages “without service or notice thereof to appellants and based on affidavits only.” We affirm.

I. *Factual and Procedural Background*

The Borkowskis filed a complaint against appellants on December 10, 2020. The complaint raised claims of breach of contract, negligence, and breach of implied warranty of

workmanship.¹ Appellants answered the Borkowskis' complaint on January 8, 2021, and filed a counterclaim to recover the amount still owing on the contract. The Borkowskis subsequently filed an answer to appellants' counterclaim.

In March 2021, appellants filed a motion to substitute counsel, noting they had retained Andrew Fischman to represent them. The circuit court entered an order permitting the substitution on March 23.

On May 20, the Borkowskis filed a motion to compel discovery. The motion asserted that they had served their first set of interrogatories and first set of requests for production of documents on appellants² on February 24, 2021, but because of the substitution of counsel, the Borkowskis allowed additional time to respond to their discovery requests. Despite the extension, however, appellants provided "incomplete" responses to the Borkowskis' discovery requests on March 29 and April 1. The motion further alleged that on May 4, the Borkowskis had delivered a "good faith" letter to the appellants and put them on notice that a motion to compel might be necessary. Because those efforts failed, they asked the court to grant their motion to compel and order appellants to supplement and fully answer their discovery requests.

¹The complaint stemmed from appellants' alleged failure to complete renovations and improvements to the Borkowskis' home.

²Separate sets of interrogatories and requests for production were served on JIMCO and on Johnson.

Appellants, through counsel, filed an answer to the motion to compel discovery, asserting that they had complied with discovery requests insofar as they could and were in the process of supplementing their responses. The Borkowskis replied that the defendants' responses were nevertheless inadequate and again asked the court to grant their motion to compel.

The court entered an order granting the Borkowskis' motion to compel on August 10, directing appellants to "answer completely the interrogatories and requests for production of documents propounded by the plaintiffs within 10 days of this order." On that same date, the court sent a letter to counsel for both parties advising that a two-day, non-jury trial had been scheduled for October 6-7, 2021.

The Borkowskis filed another motion to compel, also on August 10, asserting that they served a second set of interrogatories and requests for production on appellants on June 22. In this motion, the Borkowskis alleged that forty-nine days had elapsed since they served their interrogatories, but appellants had failed to provide any response to their discovery requests despite a July 30 "good faith" letter to defense counsel.

Two days later, on August 12, Andrew Fischman filed a motion to withdraw as counsel of record for appellants. In his motion--and pertinent to the issues raised on appeal--Fischman averred that he had "notified defendants of this motion and all pertinent orders and deadlines before this court." The Borkowskis responded that the motion was an attempt to "unreasonably delay this matter" but conceded that they would "not be prejudiced

so long as the current trial dates are maintained, and defendants are compelled to respond to outstanding discovery requests.”

The court permitted Fischman to withdraw by order entered on August 13. Also on August 13, the court entered an order granting the Borkowskis’ second motion to compel discovery. The court directed appellants to answer the interrogatories and requests for production within ten days of the date of the order; in addition, the court ordered appellants to reimburse the Borkowskis for their attorney’s fees and costs associated with their two most recent filings.

On August 26, the Borkowskis filed a motion for sanctions pursuant to Arkansas Rule of Civil Procedure 37. Specifically, they asked the circuit court to enter an order finding appellants in default in an amount to be proved at a hearing for damages. In an order entered on September 22, 2021, the court granted the motion, thereby striking appellants’ pleadings from the record and finding them in default pursuant to Arkansas Rule of Civil Procedure 37(b). The court stated that it would hold a hearing on the then-scheduled trial date of October 6, 2021, to establish the amount of damages owed to the Borkowskis.

On the date set for the hearing, the Borkowskis appeared with their attorney, but appellants failed to appear. Instead of conducting a full-fledged hearing, the court invited the Borkowskis and their witnesses to submit affidavits in support of their claims for damages against the defendants. After they did so, the court entered a “default judgment order on damages,” awarding the Borkowskis \$104,735.42 plus pre- and postjudgment interest, costs,

and attorney's fees. The court ordered appellants to prepare a schedule of their assets within forty-five days.

Appellants failed to prepare their asset schedule, and on November 23, the Borkowskis filed a motion for contempt. The circuit court set a hearing for January 10, 2022. In the meantime, appellants hired attorney Lance Cox, who entered his appearance in the matter on December 6, 2021. The court subsequently rescheduled the hearing on the Borkowskis' motion for contempt for February 28, 2022.

On February 28, appellants filed a motion to set aside the default judgment. In it, they argued that neither of them ever received a copy of many of the filings in the case, including the court's letter notice of the trial date, attorney Fischman's motion to withdraw, and the order granting that motion. They alleged that they were unrepresented by counsel from August 13 to December 5, 2021, and that during that time, multiple documents were filed in the case. Those documents included the August 13 order to compel discovery, the Borkowskis' motion for sanctions, the original default judgment, and the default judgment on damages. They further noted that Johnson's address on the pleadings' certificates of service was incorrect.³ In addition, the documents that had been filed via email had been sent to an incorrect email address. Accordingly, appellants argued that they were never properly served with these pleadings under Arkansas Rule of Civil Procedure 5. Citing the notice requirements of Arkansas Rule of Civil Procedure 55(b), appellants argued that the

³The motion for sanctions was mailed to "2243 Mason Road," although the correct address was "22343 Mason Road."

Borkowskis' failure to provide the required notice rendered the default judgments voidable. In addition, appellants faulted the court's reliance on the affidavits filed in support of the Borkowskis' damages request, in lieu of sworn testimony, again citing Rule 55(b). Finally, citing Rule 55(c), appellants asserted that they had a meritorious defense to the Borkowskis' causes of action that warranted setting aside the default judgment.

The circuit court held a hearing on appellants' motion to set aside the default judgment and subsequently entered an order denying the motion on May 4, 2022. After appellants sought a Rule 54(b) certificate to dispose of their counterclaim, the court entered a final judgment on May 25, 2022. Appellants timely appealed.

II. *Arkansas Rule of Civil Procedure 37 and the Standard of Review*

The circuit court entered a default judgment against appellants pursuant to Arkansas Rule of Civil Procedure 37, which governs a party's failure to comply with discovery. In pertinent part, the rule provides as follows:

(a) *Motion for Order Compelling Discovery.* A party, upon reasonable notice to all parties and all persons affected thereby, may apply for an order compelling discovery as follows:

....

(2) *Motion.* If . . . a party fails to answer an interrogatory submitted under Rule 33, . . . the discovering party may move for an order compelling an answer[.]

....

(b) *Failure to Comply with Order.*

....

(2) *Sanctions By Court In Which Action Is Pending.* If a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . . .

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or *rendering a judgment by default against the disobedient party*[.]

(d) *Failure of Party to . . . Serve Answers to Interrogatories or Respond to Request for Inspection.* If a party . . . fails . . . to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b)(2) of this rule.

(Emphasis added.) “There is no requirement under Rule 37, or any of our rules of civil procedure, that the [circuit] court make a finding of willful or deliberate disregard under the circumstances before sanctions may be imposed for the failure to comply with the discovery requirements.” *Calandro v. Parkerson*, 333 Ark. 603, 608, 970 S.W.2d 796, 799 (1998). Moreover, “the fact that the sanction imposed by the trial court was undoubtedly final and severe is of no consequence, as Rule 37 specifically provides for dismissal of the action where a party fails to comply with an order to provide discovery.” *Id.* at 612, 970 S.W.2d at 801.

We review the imposition of discovery sanctions for an abuse of discretion, and our court has noted that the bar to demonstrate that the circuit court has abused its discretion in an order under Rule 37 is very high. *S.A.M. Grp., LLC v. CR Crawford Constr., LLC*, 2020 Ark. App. 173, at 2–3, 596 S.W.3d 590, 591 (citing *Phelan v. Discover Bank*, 361 Ark. 138, 205 S.W.3d 145 (2005)). The circuit court is in a superior position to judge the actions and

motives of the litigants, and the circuit court's rulings should not be second-guessed. *Russellville Holdings, LLC v. Peters*, 2017 Ark. App. 561, at 13, 533 S.W.3d 119, 127. Our appellate courts have repeatedly upheld the circuit court's exercise of discretion in fashioning severe sanctions for flagrant discovery violations. *Coulson Oil Co. v. Tully*, 84 Ark. App. 241, 251-52, 139 S.W.3d 158, 164 (2003) (citing *Calandro, supra*). A circuit court commits an abuse of discretion when it improvidently exercises its discretion, as when it is exercised thoughtlessly and without due consideration. *Merica v. S&S Home Improvements, Inc.*, 2021 Ark. App. 197, at 5-6, 625 S.W.3d 356, 359.

III. Discussion

A. Lack of Service

Appellants' first argument is that the circuit court abused its discretion in granting the Borkowskis' motion for sanctions and entering a default judgment against them because they were never served with a copy of the order compelling their responses to discovery. Specifically, they argue that they never received notice of the circuit court's August 13, 2021 order pursuant to Arkansas Rule of Civil Procedure 5(a)⁴ and that it was therefore unfair for the court to have entered sanctions against them.

⁴Rule 5(a) requires that "every pleading and every other paper, including all written communications with the court, filed subsequent to the complaint, except one which may be heard ex parte, shall be served upon each of the parties, unless the court orders otherwise because of numerous parties."

This court and our supreme court have repeatedly held that a defendant's failure to comply with a court's order within the prescribed time is sufficient to warrant sanctions. See *Viking Ins. Co. of Wisconsin v. Jester*, 310 Ark. 317, 836 S.W.2d 371 (1992); *Cagle v. Fennel*, 297 Ark. 353, 761 S.W.2d 926 (1988); *Graham v. Sledge*, 28 Ark. App. 122, 771 S.W.2d 296 (1989). Moreover, and relevant to appellants' argument, our courts have upheld Rule 37 sanctions *without* an order to compel production where a defendant has failed to answer interrogatories or has otherwise failed to comply with discovery. See *Cook v. Wills*, 305 Ark. 442, 808 S.W.2d 758 (1991) (striking appellant's third-party complaint on the day of trial as a sanction for his failure to provide discovery); *Harper v. Wheatley Implement Co., Inc.*, 278 Ark. 27, 643 S.W.2d 537 (1982) (striking appellant's pleadings on the day of trial over failure to complete answers to discovery, even though no order compelling discovery had ever been entered).

Because it is permissible for a court to enter Rule 37 sanctions in the complete absence of an order compelling discovery, we cannot say that the circuit court abused its discretion in entering a default judgment despite appellants' purported lack of knowledge of the order compelling discovery in this case. We must also note that despite appellants' claims that they were unaware of the *August 13, 2021*, order, it is undisputed that appellants *were* represented by counsel and served with the Borkowskis' first two motions to compel and the court's *August 10* order compelling discovery. Accordingly, we find no merit to appellants' complaint that the discovery sanction was entered without notice.

B. Arkansas Rules of Civil Procedure 5 and 55

Appellants' second and third points on appeal are related, and we discuss them together here. In short, appellants argue that they were not served with the Borkowskis' August 26, 2021 motion for sanctions in accordance with Arkansas Rule of Civil Procedure 5(b). They further argue that the Borkowskis failed to apply for a default judgment pursuant to Arkansas Rule of Civil Procedure 55(b) and provide them with notice of the application therefor three days prior to the hearing.

Appellants' argument, however, once again ignores the fact that the default judgment against them was not had pursuant to Rule 55.⁵ The default judgment was a discovery sanction imposed under Rule 37. In *National Front Page, LLC v. State ex rel. Pryor*, 350 Ark. 286, 86 S.W.3d 848 (2002), the supreme court expressly held that "Rule 55 requirements do not apply to Rule 37 sanctions." 350 Ark. at 290, 86 S.W.3d at 850 (citing *Viking Ins. Co. of Wisconsin, supra*).

Moreover, in the same case, the court upheld the circuit court's entry of a default judgment as a discovery sanction when *no order compelling discovery was ever issued*. *Id.* at 290, 86 S.W.3d at 850. Here, as noted above, there is no question that appellants were represented by counsel and served with the August 10 order compelling discovery. The circuit court would have been justified in entering default judgment on the basis of their

⁵That rule, in pertinent part, provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, judgment by default may be entered by the court," and "[i]f the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application." Ark. R. Civ. P. 55(a)-(b).

failure to comply with that order alone. Therefore, we find no merit in appellants' argument that they were never properly served with the Borkowskis' motion for sanctions.

C. Sufficiency of Proof of Damages

Finally, appellants argue that the circuit court erred in basing its damages award to the Borkowskis solely on the basis of affidavits from the Borkowskis, their contractor, and their attorney. The only authority they cite in support of this argument is Rule 55(b) itself and *Tharp v. Smith*, 326 Ark. 260, 930 S.W.2d 350 (1996) (noting that proof of damages must be presented following a default judgment, and the "only exception to the proof requirement is in a suit on an account where a verified statement of the account is filed with the complaint").

As previously discussed, however, "Rule 55 requirements do not apply to Rule 37 sanctions." *Nat'l Front Page*, 350 Ark. at 290, 86 S.W.3d at 850. Appellants' argument, based as it is on Rule 55, is therefore entirely misplaced. Because the authority they cite is inapposite, and because they cite no other authority in support of their argument, we need not address it further. *See, e.g., Louisiana v. Joint Pipeline Grp.*, 2010 Ark. 374, at 37, 373 S.W.3d 292, 314 (noting that we do not consider assertions of error that are unsupported by convincing legal authority or argument, unless it is apparent without further research that the argument is well taken); *Macsteel v. Hindmarsh*, 2019 Ark. App. 458, 588 S.W.3d 53.

Affirmed.

ABRAMSON and VIRDEN, JJ., agree.

Cox Law Firm, PLLC, by: *S. Lance Cox*, for appellants.

Mayer LLP, by: John Walker Williams, for appellees.