

DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Harold Arviv, Arviv Holdings, Ltd., Crepaco Corporation and
Belgravia Corporation v. Jeffrey M. Perlow, Jeffrey M. Perlow, P.A.,
and Perlman & Perlow, P.A.

528 So. 2d 139 (Fla. Dist. Ct. App. 1988) · No. No. 87-2607 · Decided July 20, 1988

SUMMARY

The Florida Fourth District Court of Appeal reversed a final judgment dismissing the plaintiffs’ complaint with prejudice for failure to comply with discovery orders. The court held that discovery sanctions require the noncomplying party to have the present ability to comply and that dismissal was unreasonable absent a finding of willfulness or bad faith. The case was remanded with instructions to reinstate the complaint.

CASE DETAILS

COURT	District Court of Appeal of Florida, Fourth District
WRITING FOR THE COURT	Per Curiam; Hersey, C.J.; Dell, J.; Walden, J.
JURISDICTION	Florida
DECIDED	July 20, 1988
DOCKET	No. 87-2607
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Plaintiffs appealed a final judgment dismissing their complaint with prejudice as a discovery sanction.
STANDARD OF REVIEW	Abuse of discretion
PRECEDENTIAL VALUE	Published Florida District Court of Appeal opinion
PARTIES	Harold Arviv, Arviv Holdings, Ltd., Crepaco Corporation, Belgravia Corporation v. Jeffrey M. Perlow, Jeffrey M. Perlow, P.A., Perlman & Perlow, P.A.

TOPICS

- sanctions
- discovery dispute
- appellate procedure
- civil procedure
- standard of review

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by dismissing the complaint with prejudice as a discovery sanction when the plaintiff lacked the present ability to comply with the discovery orders.
2. Whether dismissal or striking of pleadings as a discovery sanction requires a finding that the noncompliance was willful, in bad faith, or in contumacious disregard of the court's authority.

HOLDINGS

1. The trial court abused its discretion by dismissing the complaint with prejudice because the plaintiff had no present means of complying with the discovery orders.
2. Striking pleadings or dismissing a complaint for discovery noncompliance is unreasonable absent a determination that the failure was willful, in bad faith, or in contumacious disregard of the court's authority.

KEY QUOTATIONS

“It is well settled that sanctions for failure to comply with discovery may only be imposed when the non-complying party has the present ability to comply with the discovery orders.” (140)

“The striking of pleadings is unreasonable absent a determination that the failure was willful or done in bad faith.” (140)

FACTUAL BACKGROUND

The trial court entered discovery orders requiring plaintiff Harold Arviv to appear for a deposition. At the time, Arviv was involved in criminal proceedings in Canada and was required as a condition of bail to register with police daily in Toronto. The plaintiffs offered to defer all reasonable expenses incurred by opposing counsel in traveling to Canada for the deposition.

PROCEDURAL HISTORY

The trial court dismissed plaintiffs' complaint with prejudice for failure to comply with discovery orders. The Fourth District Court of Appeal reversed and remanded with instructions to reinstate the complaint.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Reverse the final judgment and reinstate plaintiffs' complaint.

CASES CITED

- Wallraff v. T.G.I. Friday's Inc., 490 So. 2d 50 (Fla. 1986)
- McNamara v. Bradley Realty, Inc., 504 So. 2d 814 (Fla. 4th DCA 1987)

OPINION

PER CURIAM.

528 So. 2d 139 (1988) Harold ARVIV, Arviv Holdings, Ltd., Crepaco Corporation and Belgravia Corporation, Appellants, v. Jeffrey M. PERLOW, Jeffrey M. Perlow, P.A., and Perlman & Perlow, P.A., Appellees. No. 87-2607. District Court of Appeal of Florida, Fourth District. July 20, 1988. *140 Gregory A. Martin of Wallace, Engels, Pertnoy, Martin & Solowsky, P.A., Miami, for appellants.

William R. Wicks, III, and Carmen Y. Cartaya of Dixon, Dixon, Nicklaus, Valle & McIntosh, Miami, for appellees. PER CURIAM. This is an appeal from a final judgment dismissing plaintiffs' complaint with prejudice for failure to comply with certain discovery orders. Plaintiffs appeal.

We reverse and remand with instructions to reinstate plaintiffs' complaint. Since there is nothing particularly novel about the circumstances and law we do shortly record: 1. The trial court abused its discretion by dismissing the complaint with prejudice for failure to comply with discovery because the plaintiff, Harold Arviv, had no means of complying with discovery.

At the time of the discovery order Arviv was involved in criminal proceedings in Canada and one of the conditions of his bail was that he register with police daily in Toronto. Additionally, plaintiffs indicated that they would be willing to defer all reasonable expenses of opposing counsel in travelling to Canada in order to take Mr. Arviv's deposition. 2.

It is well settled that sanctions for failure to comply with discovery may only be imposed when the non-complying party has the present ability to comply with the discovery orders. The striking of pleadings is unreasonable absent a determination that the failure was willful or done in bad faith. Wallraff v. T.G.I. Friday's Inc., 490 So. 2d 50 (Fla. 1986); McNamara v. Bradley Realty, Inc., 504 So.

2d 814 (Fla. 4th DCA 1987). 3. The trial court failed to make a finding that the failure to appear was willful or done in contumacious disregard of the court's authority as required by Wallraff and McNamara. Reversed and remanded with instruction to reinstate plaintiffs' complaint. HERSEY, C.J., and DELL and WALDEN, JJ., concur.