

SUPREME COURT OF NEBRASKA

Hill v. Tevogt

Hill · No. S-15-311 · Decided April 22, 2016

SUMMARY

The Nebraska Supreme Court held that the district court abused its discretion by excluding the defendant's affidavit statements as a discovery sanction for failing to attend two depositions. Because the excluded evidence supported the defendant's fraud defenses and counterclaims and created a genuine issue of material fact, the court reversed the summary judgment and remanded for further proceedings.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Connolly, J.; Heavican, C.J.; Wright, J.; Miller-Lerman, J.; Cassel, J.; Stacy, J.; Kelch, J.
JURISDICTION	Nebraska
DECIDED	April 22, 2016
DOCKET	S-15-311
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Tevogt appealed from a district court order imposing a discovery sanction that excluded the material statements in his affidavit, followed by summary judgment for Hill and Thorsen and dismissal of his counterclaim.
STANDARD OF REVIEW	Discovery sanctions are reviewed for abuse of discretion. A judicial abuse of discretion occurs when the trial court's reasons or rulings are clearly untenable, unfairly deprive a litigant of a substantial right, and deny just results.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion; the source is temporarily in slip-opinion form pending issuance of an advance opinion citation.
PARTIES	Mark Tevogt v. Jody A. Hill, Dean Owen Thorsen

TOPICS

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by excluding Tevogt's affidavit statements as a discovery sanction for his failure to attend two depositions.
2. Whether the district court erred in granting summary judgment to Hill and Thorsen after excluding the affidavit evidence.

HOLDINGS

1. Under Neb. Ct. R. Disc. § 6-337, the court may sanction a party who fails to attend the party's own deposition even without a prior discovery order.
2. The district court abused its discretion by imposing the severe sanction of excluding Tevogt's affidavit statements.
3. The grant of summary judgment for Hill and Thorsen was erroneous because the excluded evidence created a genuine issue of material fact concerning the underwriting-account shortfall.

KEY QUOTATIONS

“Relevant factors include the prejudice or unfair surprise suffered by the party seeking sanctions, the importance of the evidence which is the root of the misconduct, whether the court warned the sanctioned party about the consequences of its misconduct, whether the court considered less drastic sanctions, the sanctioned party’s history of discovery abuse, and whether the sanctioned party acted willfully or in bad faith.” (at 6)

“We conclude that the court abused its discretion by excluding statements in Tevogt’s affidavit as a sanction for his failure to attend depositions, and further erred in granting summary judgment for the plaintiffs.” (at 8)

FACTUAL BACKGROUND

In 2012, Mark Tevogt purchased Jody A. Hill's and Dean Owen Thorsen's interests in JGP, LLC, financing the purchase with a promissory note payable to them. Tevogt defaulted, and Hill and Thorsen sued for approximately \$120,000 in unpaid principal and interest. Tevogt asserted fraud-related defenses and counterclaims, alleging that the plaintiffs misrepresented or concealed JGP's finances, including an approximately \$60,000 shortfall in an underwriting account. After the district court initially found that his affidavit created a genuine issue of material fact, Tevogt failed to attend two scheduled depositions, leading the court to exclude the affidavit statements and grant summary judgment to the plaintiffs.

PROCEDURAL HISTORY

Hill and Thorsen sued Tevogt for damages under a promissory note after he defaulted. The district court initially denied summary judgment because Tevogt's affidavit created a factual dispute concerning an alleged underwriting-account shortfall. After Tevogt failed to attend two scheduled depositions, the court excluded his

affidavit statements concerning the alleged misrepresentations and shortfall, then granted summary judgment to the plaintiffs and dismissed Tevogt's counterclaim. The Nebraska Supreme Court reversed and remanded.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The cause was remanded for further proceedings. The court did not determine whether Tevogt's conduct warranted a lesser discovery sanction.

CASES CITED

- Coral Prod. Corp. v. Central Resources, 273 Neb. 379, 730 N.W.2d 357 (2007)
- Arens v. NEBCO, Inc., 291 Neb. 834, 870 N.W.2d 1 (2015)
- Paulk v. Central Lab. Assocs., 262 Neb. 838, 636 N.W.2d 170 (2001)
- Behrens v. Blunk, 280 Neb. 984, 792 N.W.2d 159 (2010)
- Gernstein v. Lake, 259 Neb. 479, 610 N.W.2d 714 (2000)
- Stanko v. Chaloupka, 239 Neb. 101, 474 N.W.2d 470 (1991)
- Norquay v. Union Pacific Railroad, 225 Neb. 527, 407 N.W.2d 146 (1987)
- Booth v. Blueberry Hill Restaurants, 245 Neb. 490, 513 N.W.2d 867 (1994)
- Phillips v. Monroe Auto Equip. Co., 251 Neb. 585, 558 N.W.2d 799 (1997)
- Behrens v. Blunk, 280 Neb. 984, 792 N.W.2d 159 (2010)
- Tisdale v. Federal Express Corp., 415 F.3d 516 (6th Cir. 2005)
- Belk v. Charlotte-Mecklenburg Board of Education, 269 F.3d 305 (4th Cir. 2001)
- LeGrande v. Adecco, 233 F.R.D. 253 (N.D.N.Y. 2005)
- Hyde & Drath v. Baker, 24 F.3d 1162 (9th Cir. 1994)
- Mutual Federal Savings & Loan v. Richards & Associates, 872 F.2d 88 (4th Cir. 1989)
- Guidry v. Continental Oil Co., 640 F.2d 523 (5th Cir. 1981)
- Fox v. Studebaker-Worthington, Inc., 516 F.2d 989 (8th Cir. 1975)
- Robison v. Transamerica Insurance Co., 368 F.2d 37 (10th Cir. 1966)
- Alexander v. FBI, 186 F.R.D. 6 (D.D.C. 1998)
- Collins v. Illinois, 554 F.3d 693 (7th Cir. 2009)
- Archibeque v. Atchison, Topeka & Santa Fe Railway Co., 70 F.3d 1172 (10th Cir. 1995)
- Beil v. Lakewood Engineering and Manufacturing Co., 15 F.3d 546 (6th Cir. 1994)
- Stars' Desert Inn Hotel & Country Club v. Hwang, 105 F.3d 521 (9th Cir. 1997)
- Viswanathan v. Scotland County Board of Education, 165 F.R.D. 50 (M.D.N.C. 1995)
- Woodstock Ventures LC v. Perry, 164 F.R.D. 321 (N.D.N.Y. 1996)

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