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Discovery Delayed is Not Discovery Denied for Purposes of Sanctions

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A recent unpublished Appellate Division decision holds that even a party's willful refusal to produce documents demanded in discovery may not be a basis for dismissal of the party's claims or defenses in a lawsuit. In ***Liberty Mutual Insurance Company v. Viking Industrial Security, Inc. et al.***, Docket No. A-6297-10T3 (N.J. Super. Ct. App. Div. January 8, 2014), an insurance fraud case, Liberty Mutual and the State of New Jersey (collectively, "Liberty Mutual") had obtained an order granting discovery sanctions against a group of defendants affiliated with the Viking Group, Inc. (Viking defendants). The trial court had found that the Viking defendants had engaged in "a calculated method of discovery misconduct," had acted in "enormous bad faith," and had "really done everything in their power to impede discovery in this matter." As a result the trial court entered a sanctions order, which established certain facts, allowed the jury to draw negative inferences against the Viking defendants, and awarded more than $108,000 in attorneys' fees and costs. With the sanctions order, Liberty Mutual was then able to prevail on its claims and, ultimately, obtained a judgment against the Viking defendants for damages, penalties, interest, and attorneys' fees. The Viking defendants then appealed, challenging the sanctions order as unwarranted.

The facts at issue involved the payroll of the Viking companies, which the defendants had under-reported for several years in order to receive lower premiums for workers' compensation insurance issued by Liberty Mutual. As a result of the under-reporting, Liberty Mutual calculated Viking's premiums using only the smaller payroll. Eventually, the State Office of Insurance Fraud Prosecutor contacted Liberty Mutual to report that an anonymous caller had alleged that Viking was not disclosing its actual payroll. In response to Liberty Mutual's investigation, the Viking defendants' accountant only provided the investigators with the smaller payroll and did not reveal that Viking maintained a complete payroll on its QuickBooks program.

Liberty Mutual suspected that Viking had not provided accurate payroll records and estimated a new premium. When Viking failed to pay the new premium, Liberty Mutual terminated its workers' compensation policy. Viking's accountant subsequently worked with Liberty Mutual to determine the correct premium and provided the complete payroll amount but he did not furnish the detailed QuickBooks records. Ultimately, Liberty Mutual and Viking reached an agreement under which the workers' compensation policy would be reinstated in exchange for Viking's $563,744 payment secured by a promissory note. Viking made a few payments on the note before defaulting. Liberty Mutual then sued.

During the course of the lawsuit, Liberty Mutual requested that the Viking defendants produce any payroll records maintained in electronic form. The Viking defendants did not provide the QuickBooks records, claiming that the payroll records were not kept in electronic form. Eventually, one of Viking's bookkeepers testified about the QuickBooks records. Liberty Mutual then obtained an order compelling the Viking defendants to produce those records.

Once the records were produced Liberty Mutual was able to use the Quickbooks records in depositions and in preparing for trial. Liberty Mutual also obtained sanctions against the Viking defendants for their delay in producing the records, including attorneys' fees, and a "spoliation order," which conclusively established certain facts in Liberty Mutual's favor and allowed the jury to draw negative inferences against the Viking defendants.

On the Viking defendants' appeal from the judgment, the appellate court reversed the trial court's sanctions order. The Appellate Division did not equate the Viking defendants' failure to turn over the records for almost a year to a spoliation situation in which a party "has hidden, destroyed, or lost relevant evidence and thereby impaired another party's ability to prosecute or defend the action." It reasoned that, however recalcitrant the Viking defendants were, the QuickBooks records were eventually provided intact during the lawsuit and Liberty Mutual was able to use the records at depositions in preparing expert reports and at trial. Because the party seeking discovery ultimately received it, the court considered the extreme sanctions in the spoliation order to be inappropriate. However, the Appellate Division did approve the use of lesser sanctions, including the payment of Liberty Mutual's attorneys' fees, to level the playing field and eliminate any prejudice to Liberty Mutual from the delayed production.

The *Viking Industrial Security* case shows that, as long as the prejudice against a party by another party's failure to make timely discovery can be cured by those lesser measures, courts will be reluctant to impose the severe sanctions of dismissal of a party's claims or defenses.

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