

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 3, 2002 Session

VANDERBILT UNIVERSITY
vs.
TECHGEM DIAMOND TOOLS, INC., TECH-GEM CORP., S.S. GUPTA,
a/k/a S.S. KANDELWAL, and SURESH GUPTA

Appeal from the Chancery Court of Davidson County
No. 98-1321-I Chancellor Irvin H. Kilcrease, Jr.

No. M2001-02505-COA-R3-CV- **Filed December 31, 2002**

This is an appeal by Tech-Gem Corporation from a default judgment entered by the Chancery Court of Davidson County as a sanction for non-compliance with discovery orders.¹ Prior to trial, the Chancellor granted Vanderbilt University's Motion for a Default Judgment against Tech-Gem as to all four issues of liability alleged in Vanderbilt's complaint because of repeated failures to comply with discovery requests. Over one year later, the Chancellor heard the case and found that Vanderbilt was entitled to a judgment, jointly and severally against the defendants TechGem Diamond Tools, Inc. and Tech-Gem, in the amount of \$22,731.00 plus pre-judgment interest. After the trial, Tech-Gem filed a Motion to Set Aside the Default Judgment. The Chancellor denied the motion and found that Vanderbilt would be prejudiced if the Motion to Set Aside were granted. We agree with the trial court and affirm its decision for the reasons stated herein.

Tenn. R. app. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed and Remanded

J.S. DANIEL, Sp.J., delivered the opinion of the court in which BEN H. CANTRELL, P.J., M.S., and WILLIAM B. CAIN, J. joined.

Alan Dale Johnson and Alfred H. Knight, Nashville, Tennessee, for the Appellant, Tech-Gem Corp.

Katharine R. Cloud, Nashville, Tennessee, for the Appellee, Vanderbilt University.

¹The remaining defendants have not appealed from the Chancery Court order.

FACTS

Tech-Gem is a New York corporation that is wholly owned by Diety Corporation, also a New York company. S.S. Gupta, a citizen and resident of India, is the sole shareholder of Diety Corporation. S.S. Gupta is the father of Suresh Gupta. Suresh Gupta, also an Indian citizen, is the brother-in-law of Dr. Kiran Desai. Dr. Desai is the president of TechGem Diamond Tools, Inc., a Tennessee corporation, with its principal place of business in Murfreesboro, Tennessee.

On February 22, 1995, Vanderbilt entered into a one year contract with TechGem Diamond Tools. The terms of the contract required Vanderbilt to develop computer software for use in a robotics manufacturing system to cut gem stones. Vanderbilt was to receive a total of \$75,769.00 which was to be paid as follows: 25% upon execution of the agreement, 25% after completion of the first quarter, 25% after completion of the second quarter, and 25% after completion of the project.

On April 28, 1998, Vanderbilt filed a complaint alleging breach of contract, misrepresentation and fraudulent inducements, unjust enrichment, and piercing the corporate veil of TechGem Diamond Tools. Vanderbilt named TechGem Diamond Tools, Tech-Gem, S.S. Gupta, and Suresh Gupta in the complaint as defendants. Vanderbilt asserts in its complaint that S.S. Gupta, Suresh Gupta, and Tech-Gem exercised complete dominion and control over the finances, policies, and business practices of TechGem Diamond Tools. Vanderbilt further alleges that the agreement with TechGem Diamond Tools was entered into only after receiving assurances from Suresh Gupta and Tech-Gem that they would be responsible for payment under the terms of the contract to Vanderbilt. Furthermore, Vanderbilt alleges that without these assurances, it would not have entered into the contract and that TechGem Diamond Tools was unjustly enriched by the services provided to them by Vanderbilt.

On May 29, 2001, a trial on the merits was held against the remaining defendants as to liability and against all defendants as to damages. Vanderbilt entered a certified copy of the March 20, 2000 order as to liability against Tech-Gem as its first exhibit. No additional proof was put on by Vanderbilt as to Tech-Gem's liability.

In determining the damage aspect of the case, the trial court noted that the contract includes the following language concerning termination and default: "[u]pon termination, [TechGem Diamond Tools] will pay Vanderbilt \$7,577 for each of the tasks undertaken in the proposal." The contract includes a list of ten tasks that Vanderbilt was to perform. TechGem Diamond Tools contends that Vanderbilt did not complete the contract. Vanderbilt's position is that the contract imposed an obligation on TechGem Diamond Tools to provide the "hardware" and that TechGem Diamond Tools's failure to provide the "hardware" resulted in Vanderbilt's inability to complete the project. The trial court found that "based upon the unambiguous language of the contract, TechGem Diamond Tools did not have an obligation to provide the 'hardware' to Vanderbilt."

Moreover, the trial court found that the contract contemplates payment for work that was completed and determined that Vanderbilt had in fact completed three of the ten tasks. Therefore, based upon the contract terms, a judgment for \$22,731.00 was awarded to Vanderbilt.

After the conclusion of the trial and over a year after the entry of the default judgment, Tech-Gem filed a Motion to Set Aside Default Judgment. The Chancellor denied this motion finding that Vanderbilt would be prejudiced if the Motion to Set Aside were granted. It is from this determination that Tech-Gem appeals.

DISCOVERY MISCONDUCT WHICH LED TO DEFAULT

A review of the record demonstrates that Tech-Gem was uncooperative during the entire discovery process. On August 4, 1998, Vanderbilt propounded its First Set of Interrogatories and Requests for Production of Documents to all Defendants. After counsel for Vanderbilt had sent three separate letters insisting that the defendants comply with discovery requests, Vanderbilt filed a Motion to Compel Discovery on November 25, 1998. Tech-Gem failed to respond to this motion. On December 21, 1998, the trial court entered an Order compelling discovery responses within ten days. Tech-Gem failed to comply with the order and Vanderbilt moved for a judgment by default. Responses and discovery request were received on January 5, 1999 and the trial court refused Vanderbilt's request for default.

Next, Vanderbilt filed its Second Motion for Judgment by Default or, in the Alternative to Compel Attendance at Deposition after Tech-Gem ignored Vanderbilt's May 6, 1999, Notice of Deposition. The Notice set the deposition at the New York offices of Tech-Gem. Not only did Tech-Gem fail to appear at the deposition, it failed to notify Vanderbilt that it would not appear. The trial court denied Vanderbilt's motion for default but its August 25, 1999 Order stated that not only had "Tech-Gem Corp. failed to appear for its deposition which had been duly noticed for June 8, 1999 at its office at 608 5th Avenue, New York, New York; that there was no justifiable excuse for this failure to appear and that appropriate sanctions should result because of Tech-Gem's conduct." Once again the trial court refused to order a default for this inappropriate conduct. The trial court did, however, order Tech-Gem to provide a representative to appear for a deposition in Nashville, Tennessee pursuant to Rule 30.02(6) of the Tennessee Rules of Civil Procedure, pay one-half of Vanderbilt's expenses and costs with respect to its trip to New York, and pay reasonable attorneys' fees and expenses associated with its Motion For Judgment by Default.

After the August 25, 1999 Order was entered, Vanderbilt remained unsuccessful in scheduling Tech-Gem's representative's deposition. In addition, Tech-Gem did not comply with the trial court's order to pay sanctions. Therefore, on November 4, 1999, Vanderbilt filed its Third Motion for Judgment by Default against Tech-Gem. Only after Vanderbilt filed its Third Motion for Default did Tech-Gem attempt to comply with the August order. Tech-Gem paid the sanctions and advised Vanderbilt that S.S. Gupta would be in the United States during the month

of February 2000 and indicated that he would be available to be deposed both in his individual capacity and as the representative for Tech-Gem. Vanderbilt informed Tech-Gem that it could not agree to postpone the rule 30.02(6) deposition that long. In response, Tech-Gem presented Anupam Dave as their rule 30.02(6) representative.² At the time of his deposition, Mr. Dave had been employed by Tech-Gem for approximately four months and had virtually no knowledge of any of the requested topics. Specifically, he had no personal knowledge of the facts and relationships of the parties which were the subject of the lawsuit.

After the futile attempt to depose Mr. Dave as Tech-Gems's corporate representative, Vanderbilt again attempted to schedule depositions for both S.S. Gupta and Suresh Gupta in February 2000. At that time Vanderbilt was informed that the Guptas would not be available for depositions in February, but would be available some time in March. Tech-Gem's failure to produce S.S. Gupta for deposition forced Vanderbilt to file its fourth and final Motion for Judgment by Default on February 25, 2000. On March 20, 2000, the trial court granted Vanderbilt's motion against Tech-Gem as to all four issues of liability alleged in the complaint as a sanction for its failure to comply with discovery orders.

DECISION

Tennessee law firmly establishes the trial court's control over pre-trial discovery and the impositions of sanctions for discovery abuse. *Benton v. Snyder*, 825 S.W.2d 409, 416 (Tenn. 1992); *Lewis v. Brooks*, 66 S.W.3d 883, 886 (Tenn. Ct. App. 2001). Rule 37.02 of the Tennessee Rules of Civil Procedure provides numerous options of which the trial court may avail itself when faced with a party who disregards discovery orders. Rule 37.02 (C) specifically authorizes the trial court to render a default judgment against a party as a sanction for the party's non-compliance with discovery orders. Tenn. R. Civ. P. 37.02 (C); *Shahrdar v. Global Housing, Inc.*, 983 S.W.2d 230, 236 (Tenn. Ct. App. 1998); *Yearwood, Johnson, Stanton & Crabtree, Inc. v. Foxland Development Venture*, 828 S.W.2d 412, 413 (Tenn. Ct. App. 1991); *Holt v. Webster*, 638 S.W.2d 391, 394 (Tenn. Ct. App. 1982). A default judgment is an extreme sanction, however, "it is appropriate 'where there has been a clear record of delay or contumacious conduct.'" *Shahrdar*, 983 S.W.2d at 236 (quoting *In re Beckman*, 78 B.R. 516, 517 (M.D. Tenn. 1987)). When a trial court, in its discretion, renders a judgment by default as a discovery sanction, its decision will only be reversed upon a finding of an abuse of discretion. *Brooks v. United Uniform Co.*, 682 S.W.2d 913, 915 (Tenn. 1984); *Shahrdar*, 983 S.W.2d at 236; *Holt*, 638 S.W.2d at 394.

² Rule 30.02(6) of the Tennessee Rules of Civil Procedure provide that "[a] party may in the party's notice and in a subpoena name as the deponent a public or private corporation ... and describe with reasonable particularity the matters on which examination is requested." Tenn. R. Civ. P. 30.02(6). "[T]he organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf." Tenn. R. Civ. P. 30.02(6).

Based upon Tech-Gem's willful disregard of the trial court's discovery orders, we find the trial court's rendering of a default judgment against Tech-Gem to be an appropriate use of the sanctions provided to the court by Rule 37.02 of the Tennessee Rules of Civil Procedure. In addition, we find that Tech-Gem has waived its right to challenge the default judgment. We note that a motion for relief from a default judgment must "be made within a reasonable time." Tenn. R. Civ. P. 60.02. In this case, Tech-Gem waited approximately fifteen months after the entry of the judgment and after the conclusion of the trial before it attempted to set the judgment aside. Despite the fact that an order declaring liability had been entered against it, Tech-Gem chose to proceed to trial without taking any steps to challenge the default judgment. Tech-Gem's inaction, therefore, constituted a waiver as to any bases it may have possessed to challenge the judgment.

We, therefore, find that the record does not reflect an abuse of the lower court's discretion in its imposition of a default judgment as a Rule 37.02 discovery sanction and affirm the trial court's refusal to set this judgment aside.

J. S. DANIEL, JUDGE