IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

DARRELL O. GALDE,	)	KNOX CHANCERY
	)	
Plaintiff/Appellee	)	NO. 03A01-9807-CH-00228
	)	
v.	)	HON. H. DAVID CATE
	)	CHANCELLOR
GEORGE D. KERITSIS,	)	
	)	
Defendant/Appellant	)	AFFIRMED

George F. Legg, Anna F. Hinds, Knoxville, for Appellant.
David S. Wigler, Knoxville, for Appellee.

O P I N I O N

INMAN, Senior Judge

A corporation styled SCC, Inc., was organized in May, 1992 by the parties. Each was issued a certificate for 500 shares of capital stock.[1] The company prospered.[2] For the fiscal year ending June 30, 1993, gross receipts were three million dollars; two years later, its gross receipts were nearly six million dollars. Keritsis was the CEO, and he informed Galde, during the growth period, that the company should be sold. He obtained Galde's endorsed certificate to "free his hand" in negotiating a sale, and agreed to pay Galde 50 percent of the proceeds. Corporate minutes memorialized this transaction. But a sale was never consummated; rather, Keritsis looted SCC's treasury. For the fiscal year ending June 30, 1993, he took $142,000.00; for the fiscal year ending June 30, 1994, he

[1]An unusually protracted trial, given the circumstances, focused on the question of the capitalization of SCC, Inc.

[2]Selling, essentially, engineering software.

took $177,000.00; the succeeding fiscal year he took $1,264,713.00. For the calendar year 1995 he reported taxable income from SCC, Inc. of $1,569,000.00.

During these years Galde's compensation annually was $40,000.00. He testified that his shares had a market value of 1.5 million dollars on the day he transferred them to Keritsis.

When the looting was completed, Keritsis closed the doors of SCC, Inc. Galde filed this action alleging promissory fraud. The jury agreed and returned a verdict for 1.2 million dollars in compensatory damages and two million dollars in punitive damages.

His motion for judgment NOV or for a new trial being overruled, Keritsis appeals, insisting that there is no evidence to support the plaintiff's theory of recovery. In the consideration of the appeal, we are required to take the strongest legitimate view of the evidence favoring the plaintiff, to discard all contrary evidence, and to allow all reasonable inferences to uphold the verdict, which may be set aside only if there is no material evidence to support it. *Witter v. Nesbit*, 878 S.W.2d 116 (Tenn. App. 1993).

There is no apparent reason to dwell on the issue of material evidence to support the verdict. The plaintiff testified that he endorsed his stock certificate and delivered it to Keritsis who, *for no other consideration*, promised to sell the company and pay the plaintiff 50 percent of the proceeds. Rather than sell the company as agreed, and notwithstanding a bona fide offer, Keritsis simply looted its treasury. The thrust of his argument that the plaintiff's action for promissory fraud fails for lack of proof is directed to the fact that he *did not sell the company*. This argument deserves, prima facie, short shrift, because the standard for proving promissory fraud is that the representation [to find a buyer] must be made with the

intent not to perform. *Fowler v. Happy Goodman Family,* 575 S.W.2d 496 (Tenn. 1978). There is abundant evidence to support the jury's finding that Keritsis promised to sell the stock in SCC, Inc. and distribute 50 percent of the proceeds to Galde, which he failed to do, and the judgment is accordingly affirmed.

But we are of the opinion that the verdict and judgment should be upheld upon another ground. Keritsis refused repeatedly to submit to a pretrial deposition, and refused to obey the court's orders directing him to do so. The plaintiff urged the trial court to enter a default judgment against Keritsis in at least four written motions. The plaintiff now urges this Court to pretermit all other issues raised in this appeal by affirming the judgment in this case on the alternative ground that the trial court should have entered a default judgment against Mr. Keritsis.

In *American Steinwinter Investor Group v. American Steinwinter, Inc.,* 964 S.W.2d 569 (Tenn. App. 1997), the defendant Stallone had failed to appear and produce items included on a notice for his deposition, after the court had ordered him to do so. The trial court struck the answer of defendant Stallone and entered judgment against him for violation of the Consumer Protection Act in the amount of $1,681,503.00. We approved the judgment after citing the relevant subsections of Rule 37 of the Tennessee Rules of Civil Procedure:

> "T.R.C.P. Rule 37 provides in pertinent part as follows:
>
> 37.01. Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:
>
> (2) MOTION. If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30.02(6) or 31.01, or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order

compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

* * *

37.02. Failure to Comply with Order. If a deponent; a party; an officer, director, or managing agent of a party; or, a person designated under Rule 30.02(6) or 31.01 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Rule 37.01 or Rule 35, or if a party fails to obey an order entered under Rule 26.06, 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:

> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> (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;
>
> * * *
>
> (E) Where a party has failed to comply with an order under Rule 35.01 requiring the party to produce another for examination, such orders as are listed in paragraphs (Q), (B), and (C) of this rule, unless the party failing to comply shows that he or she is unable to produce such person for examination.

* * *

37.04 Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Requests for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30.02(6) or 31.01 to testify on behalf of a party fails (1) to appear before the officer who is to take his or her deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, 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 Rule 37.02 . . .”

We then held,

> It clearly appears from the record that Stallone was guilty of flagrant disregard of the Rules and Orders of the Court, and that severe sanctions were in order. It also clearly appears from the record that Stallone was guilty of overt refusal to disclose serious breaches of faith of the corporate officers and directors in the misuse and/or abstraction of the contributions of stockholders, and that his persistent resistance to discovery efforts were his means of evading his liability for his misconduct. The sanctions imposed against him by the Trial Court were appropriate and well deserved. The amount of the judgment against Stallone is supported by a preponderance of the evidence. No ground of reversal is presented by appellant’s first issue.

American Steinwinter, Inc., 964 S.W.2d at 573-74.

We agree with the appellee that the case at Bar for meaningful sanctions is at least as compelling as in *Steinwinter.* Keritsis’ refusal to submit to a deposition was clearly prejudicial to the plaintiff, who had the burden of demonstrating that Keritsis did not intend to perform his promise to pay the plaintiff for his interest in SCC, Inc. The record reveals that Keritsis’ actions were egregiously scornful of the judicial process. He not only refused contumaciously on four occasions to appear for a deposition, he refused to attend the trial; and, compounding his behavior, after Judgment was entered he refused to appear and answer interrogatories. For this defiance a Writ of Attachment was issued upon a finding of criminal contempt.

We agree with the appellee that under the clear facts of this matter, the trial judge would have been justified in entering a default judgment against Keritsis.

The judgment is affirmed at the cost of the appellant. The case is remanded for all appropriate purposes.

William H. Inman, Senior Judge

CONCUR:

Houston M. Goddard, Presiding Judge

Herschel P. Franks, Judge