VIRGINIA LAWYERS WEEKLY

A new hammer

Case dismissed over missed discovery deadline

By: Peter Vieth December 10, 2018

Wielding a new tool provided by the Supreme Court of Virginia earlier this year, a circuit judge has dismissed a civil case because the plaintiff missed her deadline for responding to discovery requests.

The New Kent County mold case was axed on a combined motion-to-compel and motion-to-dismiss even though there was no prior order to compel discovery, according to the defense counsel.

The judge's decision relied on amendments to Rule 4:12(d) which took effect this spring, allowing penalties for a party's failure to respond to discovery, including a request for production, without a prior order to compel.

Mold exposure claim

Richmond lawyer K. Matthew Long, who represented the defendants, related the proceedings.

Plaintiff Kerri Neumann – identified as an "authorized occupant" on a lease – sued her landlords claiming a host of medical problems allegedly caused by mold in the rental property.

After a first round of defensive pleadings, Neumann was allowed to file an amended complaint. By the time she did, Long said, Neumann's discovery responses were overdue. The landlords filed their Motion to Compel/Motion to Dismiss.

Long pointed to the amended version of Rule 4:12(d) which removed the "double hurdle" standard for imposing a penalty on a recalcitrant litigator.

Long-time rule changed in April

It was the law for 17 years that a judge could not sanction a party who ignored discovery requests until that party first failed to comply with an order to compel discovery.

That standard required two trips to the courthouse for the party seeking discovery.

Both the Supreme Court's rules advisory committee and the Boyd-Graves Conference suggested last year the court consider a different approach.

Boyd-Graves conferees said then-existing law forced judges to take two steps to impose discovery sanctions, even when it was clear a party was intentionally uncooperative. They said litigants were rewarded for gamesmanship, delaying discovery responses until the judge ordered compliance. A Boyd-Graves report said abuse of a one-step rule was unlikely, since courts ordinarily wield their sanction authority sparingly.

The high court acted in January to change Rule 4:12(d) to both remove the double-hurdle barrier and to add requests for production to the list of discovery requests that could lead to noncompliance sanctions. The changes were effective April 1.

Missing plaintiff

In the New Kent landlords' case, the plaintiff's lawyer, W. Peyton Akers, apparently lost touch with his client. Akers moved to withdraw as counsel on Sept. 11, the day that Judge B. Elliott Bondurant held a hearing, according to online court records.

Bondurant first heard the discovery motion and took it under advisement, Long said. The judge then heard argument on a demurrer and then took evidence on a plea in bar.

After considering all three motions, Bondurant granted the motion to dismiss for failure to respond to discovery. The entire case was dismissed with prejudice Sept. 24, Long said.

Earlier, Bondurant had dismissed three counts on demurrer without leave to amend. One of those was a claim under the Virginia mold statute, § 8.01-226.12. Bondurant reportedly agreed that – even if the mold statute created a private right of action for tenants – that remedy should be limited to tenant and not extended to authorized occupants, like the plaintiff Neumann.

The judge also dismissed a claim under the Virginia Residential Landlord and Tenant Act, reasoning that the plaintiff – as merely an authorized occupant – was not a party to the lease.

Akers said he understood the reasoning behind the streamlined discovery sanction rule, but he said it can work a hardship on plaintiffs with severe medical issues.

Victims of mold exposure often have memory loss and concentration problems that could hinder their ability to make timely discovery responses, Akers said.

"I think the rule has a place in the law. It prevents cases from dragging out," Akers said. "But I think it's difficult for the clients when they are not doing well, health-wise."

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