UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1991

September Term, 2014

WILLIAM KOINER

v.

JOHN OWENS, et al.

Berger,
Arthur,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: August 4, 2016

Stormwater periodically floods William Koiner's driveway and front lawn. The parties dispute whether the flooding is caused by the Defendants' resurfacing the lane on which his property fronts or by changes that Koiner himself made to the stormwater management system. Due to discovery failures, the trial court limited the evidence that Koiner could produce at trial. Koiner proceeded with his case, but at the conclusion of his case-in-chief, the trial court granted a motion of judgment for the Defendants. This appeal follows.

FACTS

According to the Complaint filed in this case, William Koiner, John Owens, Donna Owens, Thomas Owens, Brian Jones, Diane Henderson, and Andrew Samuel are neighbors who own property along Usher Lane in St. Mary's County. Koiner believes that the Defendants have rerouted stormwater run-off from Usher Lane onto his land causing damage to his driveway and front yard. Moreover, Koiner is concerned that resurfacing Usher Lane will "disturb[] and modif[y]" the "undriven shoulders," thereby exacerbating the stormwater damage. Koiner's Complaint sought to enjoin the future trespass of water on to his land. The Defendants, at that time unrepresented parties, filed a substantive "response" to the Complaint in which they alleged that the flooding on Koiner's property was caused not by their actions on Usher Lane, but by Koiner himself "block[ing] an established drain pipe and fill[ing] in the established storm water drainage ditch while constructing a new driveway."

Koiner filed suit in the Circuit Court for St. Mary's County. We have prepared a chronology to show the important dates as the case made its way through that court:

September 23, 2013	Koiner files complaint seeking injunctive relief.
November 12, 2013	Defendants file their "response."
December 18, 2013	Koiner's counsel, Daniel Guenther, Esq., moves to withdraw his appearance due to a conflict of interest.
January 7, 2014	Scheduling conference held.
January 8, 2014	Scheduling Order entered. Key dates in the Scheduling Order are as follows:
	Feb. 28, 2014 — Plaintiff's expert disclosure deadline
	Apr. 11, 2014 — Defendants' expert disclosure deadline
	June 13, 2014 — Discovery deadline
	July 11, 2014 — Dispositive motions deadline
	Aug. 8, 2014 — Motions hearing
	Sept. 4, 2014 — Trial
January 15, 2014	Koiner's counsel's motion to withdraw is granted, he is removed from the case, and Koiner is notified in writing to obtain new counsel.
June 3, 2014	Defendants serve discovery (Interrogatories, Requests for Production of Documents, and Requests for Admission of Facts) on Koiner.
July 11, 2014	Defendants file a Motion for Summary Judgment.

July 17, 2014	Koiner files a "Motion to [Modify] Scheduling Order and/or Other Relief."
July 31, 2014	Defendants file Opposition to Koiner's "Motion to [Modify] Scheduling Order and/or Other Relief."
August 4, 2014	Koiner files an Opposition to Defendants' Motion for Summary Judgment
August 18, 2014	Hearing held on Koiner's "Motion to [Modify] Scheduling Order and/or Other Relief".
August 21, 2014	Trial court issues an "Opinion and Order of Court" denying Koiner's "Motion to [Modify] Scheduling Order and/or Other Relief."[1]
August 25, 2014	Koiner files a motion for reconsideration (with an affidavit) of the denial of the "Motion to [Modify] Scheduling Order and/or Other Relief."
August 25, 2014	Court holds hearing on Defendant's Motion for Summary Judgment.
September 2, 2014	Trial court issues an "Opinion and Order of Court" granting in part and denying in part the Defendants' Motion for Summary Judgment. Opinion placed strict limits on Koiner's case at trial, stating:

> This court agrees that Plaintiff will be unable to provide any expert testimony to support his contentions at trial [because] he did not comply with discovery deadlines. Furthermore, this court agrees that Plaintiff may experience some difficulty proving

[1] This document, the key document for Koiner's first appellate issue, was inexplicably not made a part of the record extract.

> his claim of trespass upon the land without a surveyor or any other witnesses and evidence as he failed to disclose or provide that information in discovery. However, Plaintiff need not prove damages via expert as asserted by Defendants … as he is seeking injunctive relief only. Furthermore, Plaintiff may still present his own testimony based on firsthand knowledge of the situation as to what caused the storm water drainage on his property. Thus, Plaintiff has some evidence, no matter how slight or uncollaborated, [2] to support his contention that Defendants' actions caused the storm water runoff, and summary judgment is not appropriate.

September 4, 2014 Koiner files a "Motion for Protective Order and/or Motion in Limine," seeking to preclude Defendants from the benefit of Koiner's failure to respond to discovery.

September 23, 2014 Defendants file Opposition to Koiner's "Motion for Protective Order and/or Motion in Limine."

September 24, 2014 Trial court denies Koiner's "Motion for Protective Order and/or Motion in Limine."

November 7, 2014 Trial held.

At the conclusion of Koiner's case-in-chief, the Defendants made an oral motion for judgment, which was granted. This timely appeal followed.

[2] It is not clear whether this was meant to say "uncorroborated."

ANALYSIS

On appeal, Koiner asks us to review three key decisions: (1) the August 21, 2014 decision not to modify the scheduling order; (2) the September 23, 2014 decision denying Koiner's request for a protective order; and (3) the November 7, 2014 decision to grant judgment at the conclusion of the plaintiff's case. Because we see no abuse of the trial court's discretion in any of these decisions, we affirm.

1. The Trial Court's Refusal to Modify the Scheduling Order

Koiner's first complaint is that the trial court abused its discretion by refusing to modify its scheduling order. Recognizing that scheduling orders are entrusted to the sound discretion of the trial court and that appellate courts will overturn only for an abuse of that discretion, Koiner tries two tactics. *First*, he argues that the trial court abused its discretion by treating the scheduling order as if "written in stone" and declining to exercise discretion. *Second*, he suggests that because the effect of the refusal to modify the scheduling order was the same to Koiner's case as if the court had granted a default judgment, then the decision not to modify the scheduling order should be reviewed as if it was a default judgment. Neither of these tactics can prevail.

The idea that the trial judge failed to exercise discretion because he orally described his original scheduling order as "written in stone" is completely belied by the written order in this case (which Koiner omitted from the record extract). The trial court's written order recites the language from its original scheduling order: "'The deadlines and dates in this order are final and may not be modified without leave of court *for good cause shown*.'" It

identifies this "good cause" language as derived from our decision in *Naughton v. Bankier*, 114 Md. App. 641, 654 (1997), and then proceeds to apply that standard. The trial court's order carefully recites the factors that it considered, weighs them, and decides not to grant the requested relief. It is clear from reading the court's opinion that, contrary to Koiner's claim, the court carefully exercised its discretion and decided not to modify the scheduling order.

We also reject Koiner's second suggestion, that the effect of the refusal to modify the scheduling order was the same as if the trial court had granted a default judgment, therefore, the decision should be reviewed as a default judgment. We reject all three premises implicit in this theory. *First*, it isn't true that holding Koiner to the original scheduling order was tantamount to a default judgment, a point which is made obvious by the trial court's denial of the Defendant's Motion for Summary Judgment, which allowed the case to proceed to trial. The decision did not have the effect of a default judgment. *Second*, courts rule on the motions before them. The trial court's job at the August 18 hearing was to determine whether Koiner had demonstrated good cause to change the schedule, not to predict how not changing the schedule would, down the road, hurt Koiner's case. And, *third*, default judgments, as Koiner admits, are reviewed on the same abuse of discretion standard as are motions to modify scheduling orders, making the entire exercise pointless.

We see no error in the trial court's August 21, 2014 decision to deny a modification of the scheduling order.

2. The Trial Court's Denial of Koiner's Motion for Protective Order.

Koiner next argues that the trial court abused its discretion by denying his request for a protective order. Here chronology becomes critical.

According to Koiner—and this much is true—the Defendants requested discovery—interrogatories, requests for production of documents, and requests for admission of facts—on June 3, 2014. Inarguably, these discovery requests were late; pursuant to relevant rules, discovery responses were due on August 7, 2014, some three weeks *after* the discovery deadline in the Scheduling Order. Koiner decided not to respond to discovery requests. According to Koiner, it was only at the August 25, 2014 summary judgment hearing that he became aware that the Defendants intended to use his failure to respond to the discovery against him. Immediately after that, on September 4, 2014, Koiner filed his Motion for Protective Order, in which he asserted for the first time that the Defendants' discovery was served too late.

Unfortunately, however, Koiner's recitation of the chronology is slightly flawed. He misses that on July 11, 2014, the Defendants filed a Motion for Summary Judgment that was significantly predicated on Koiner's failure to respond to the Defendant's Request for Admission of Facts. In his Opposition to the Motion for Summary Judgment, Koiner reasserted his request to modify the scheduling order, but completely failed to argue that discovery sanctions were inappropriate because the Defendants had made their discovery requests too late pursuant to the scheduling order. After the August 18 hearing, the trial court denied Koiner's motion to modify the scheduling order. Thus, when the trial court

ruled on the Defendants' motion for summary judgment, the sole basis of Koiner's opposition was gone, leaving the Defendants' motion for summary judgment unrebutted. Most significantly, at this point Koiner still had not articulated his view that he shouldn't have to respond to the discovery, let alone be sanctioned for noncompliance, because the discovery was served on him too late. That was the state of the papers, arguments, and the trial court's knowledge when it ruled on summary judgment. It ruled, as it had to, based on the information before it. Based on Koiner's failure to respond to discovery and failure to oppose sanctions for that failure, the trial court granted summary judgment in part and denied it in part. When, thereafter on September 4, 2014, Koiner moved for a protective order, it was already too late.

Viewed from the perspective of this more complete chronology, it is clear that as of the filing of his opposition to the motion for summary judgment, Koiner had waived his objection to the discovery sanction. Given that waiver, we cannot find that the trial court abused its discretion in denying Koiner's motion for protective order.

3. The Trial Court's Grant of Defendants' Motion for Judgment

Koiner's final argument is that the trial court erred in granting judgment at the conclusion of his case. According to Koiner, he succeeded in putting on a *prima facie* case

and that the trial court, therefore, erred in granting the Defendant's "motion to dismiss." This reflects a misunderstanding of what actually occurred.[3]

This was an action at equity seeking an injunction. As such, the trial court was the finder of fact. At the conclusion of Koiner's case, the Defendants made a motion pursuant to Rule 2-519. That Rule provides:

> (a) **Generally.** A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party… . The moving party shall state with particularity all reasons why the motion should be granted. …
>
> (b) **Disposition.** When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff … .

Quite simply, it doesn't matter whether Koiner succeeded in putting on a *prima facie* case. Rather, the trial court, as the finder of fact was, at the conclusion of Koiner's presentation, unpersuaded that he had established by a preponderance of the evidence, that the defendants had caused the flooding of Koiner's driveway and front lawn. That determination is reviewed by this Court on an abuse of discretion standard and Koiner has made no arguments to suggest that it was such an abuse.[4] Moreover, we have reviewed the transcript and find no evidence from which *any* finder of fact could have determined what

[3] The misunderstanding was not Koiner's alone. Although, Defendants' counsel properly described his motion as a motion for judgment, the trial court and the clerk both referred to it as a motion to dismiss.

[4] His arguments, instead, go to his view that he produced a *prima facie* case.

caused the flooding. As such, we see no abuse of discretion in the trial court's decision to grant the motion for judgment.

JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.