

**ROBIN CANHA,**

vs.

**PETER W. GUBELLINI.**

*Appeals Court of Massachusetts.*

*Entered: May 29, 2014.*

*By the Court (Grasso, Sikora & Maldonado, JJ.)*

**DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28 ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, RULE 1:28 DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.**

**MEMORANDUM AND ORDER PURSUANT TO RULE 1:28**

The plaintiff, Robin Canha, appeals the dismissal of her legal malpractice action by a judge of the Superior Court, which entered after she failed to comply with a court order requiring her to produce certain documents in discovery and to appear for deposition.<sup>1</sup> See Mass.R.Civ.P. 37(b)(2)(C), as amended, 390 Mass. 1208 (1984). Canha also appeals the denial of her motion to alter or amend the judgment pursuant to Mass.R.Civ.P. 59(e), 365 Mass. 827 (1974).

Canha admits at the outset that she failed to fully comply with the discovery order that resulted in the dismissal of her complaint, but argues that she owes her noncompliance to poor advice and miscommunications between her and her lawyers. Canha asserts that, since the attorneys are to blame for the discovery violation, the judge abused his discretion in sanctioning her with an order of dismissal of her complaint and with a denial of her subsequently filed motion to alter or amend the judgment. We affirm. *Discussion. Dismissal of the complaint.* We review the judge's entry of dismissal for abuse of discretion, *Eagle Fund, Ltd. v. Sarkans*, 63 Mass.App.Ct. 79, 85 (2005), and will not disturb a judge's decision unless it was characterized by arbitrary determination, capricious disposition, whimsical thinking, or idiosyncratic choice.<sup>1</sup> *Greenleaf v. Massachusetts Bay Transp. Authy.*, 22 Mass.App.Ct. 426, 429 (1986). See *Roxse Homes Ltd. Partnership v. Roxse Homes, Inc.*, 399 Mass. 401, 405-406 (1987); *Short v. Marinas USA Ltd. Partnership*, 78 Mass.App.Ct. 848, 852-853 (2011).

The plaintiff's claims are rooted in the actions of two attorneys — Leonard A. Eskenas and Margo Nash, who represented Canha at two different times.<sup>2</sup> Attorney Eskenas represented Canha throughout discovery and through the hearing on defendant Gubellini's motion to compel discovery.<sup>3</sup> Eskenas moved to withdraw, asserting as grounds a breakdown in communications between Canha and him, two days before Gubellini served upon Canha a motion to dismiss based upon her continued failure to produce discovery. Canha then filed a pro se appearance on her own behalf and Attorney Nash filed a limited appearance on behalf of Canha thereafter. Nash represented Canha at the hearing on Gubellini's motion to dismiss and Eskenas's motion to withdraw and for counsel fees.

On appeal, Canha argues that both Attorneys Eskenas and Nash caused Canha to violate the judge's discovery order. She claims first Eskenas failed to properly advise her on how to prepare the discovery documents (which were voluminous) for responsive production<sup>4</sup> and, furthermore, that he failed to explain that the discovery order had compelled her to produce the outstanding discovery.<sup>5</sup> As a result, Canha asserts that because her attorney, and not she, caused the noncompliance with the discovery order, the judge's entry of an order of dismissal of her complaint was too harsh a sanction and an abuse of his discretion. We disagree.

To begin with, the severest of sanctions is appropriate even when the failure to comply is not wilful. See *Greenleaf v. Massachusetts Bay Transp. Authy.*, *supra* at 430. Moreover the judge here determined that Canha had acted with knowledge and intent and did not credit Canha's claim that she was unaware of the discovery order. He determined that, at the very least, Canha would have known about the

contents of the order compelling discovery shortly after Eskenas moved to withdraw from the case — a fact Canha herself admits. The judge determined that rather than produce the required discovery, however, Canha persisted with her objection.<sup>6</sup>

The judge found that Canha had defied the court order, and, furthermore, that she did so despite clear warnings by the prior judge, both on the record and in his written order, that he would entertain a motion to dismiss should she fail to come forward with the discovery. As a result, the judge deemed Canha's failure to produce the discovery 'contemptuous,' 'inexcusable,' and in 'utter disregard' of the court order, and he entered an order of dismissal as a result.<sup>7</sup> The judge's entry of dismissal was neither whimsical, capricious, nor unduly harsh and, therefore, we conclude that the judge was 'warranted in invoking the severe sanction which he did.' *Ibid.* See *Short v. Marinas USA Ltd. Partnership*, 78 Mass. App. Ct. at 853 (in light of the defendant's disregard for the court's order, conduct which the judge rightly found to be 'knowing and intentional, we conclude that the imposition of a default judgment was within the broad range of the judge's discretion'). We perceive no abuse of discretion. *Ibid.*

*Motion to alter or amend.*

After the judgment of dismissal had entered, Canha (appearing pro se) filed a motion to alter or amend the judgment pursuant to Mass.R.Civ.P. 59(e), 365 Mass. 827 (1974). In her motion, she requests that the judge vacate his order of dismissal, and she reasserts as grounds that she did not wilfully violate the discovery order. She argues that Attorney Eskenas had initially caused her to violate the order but adds that she was later acting on the advice of Attorney Nash. Canha states in her motion that: '[p]laintiff was advised by her then counsel, Attorney Margo Nash, not to produce her tax returns and purchase [and sale] agreements on her business and [p]laintiff followed the instructions of her attorney and did not wilfully defy the order.'<sup>8</sup> She argues on appeal that Attorney Nash then compounded the situation by rearguing the settled issue of whether Canha should not be required to produce these documents rather than simply informing the judge that Canha was fully prepared to turn them over.

In denying Canha's motion, the judge conducted no additional hearing and made no additional findings of fact or rulings of law. 'An appellate court is always grateful for findings,' but they are not required in every instance. *Greenleaf v. Massachusetts Bay Transp. Authy.*, *supra* at 431. The judge was fully entitled to discredit Canha's affidavit. We conclude, therefore, that he did not abuse his discretion in denying Canha's motion to alter and amend the judgment and leaving, thereby, the judgment of dismissal in place. Accordingly, we affirm both the March 13, 2012, judgment of dismissal and the April 17, 2012, order denying Canha's motion to alter or amend the judgment.

*So ordered.*