ROBERT L. ERDMAN AND CAROL ERDMAN, Appellants, v. JONATHAN BLOCH, M.D. AND MELBOURNE INTERNAL, ETC., Appellees.

Case No. 5D10-661

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

65 So. 3d 62; 2011 Fla. App. LEXIS 8152; 36 Fla. L. Weekly D 1191

June 3, 2011, Filed

SUBSEQUENT HISTORY: Released for Publication July 28, 2011.

PRIOR HISTORY: [**1]
Appeal from the Circuit Court for Brevard County, John D. Moxley, Jr., Judge.

COUNSEL: James L. Torres, Indialantic, for Appellant.

Michael R. D'Lugo, of Wicker, Smith, Et Al., Orlando, for Appellee.

JUDGES: MONACO, C.J., GRIFFIN and JACOBUS, JJ., concur.

OPINION

[*63] PER CURIAM.

Appellants, Robert Erdman and Carol Erdman ["Erdman"], appeal a final order dismissing their complaint with prejudice [*64] because of their failure to comply with a court order compelling disclosure of their expert witness. We reverse.

Erdman brought suit against Appellees, Jonathan Bloch, M.D. and Melbourne Internal Medicine Associates, P.A. ["collectively Appellees"], alleging medical malpractice. Appellees filed separate answers and affirmative defenses. The parties engaged in discovery for approximately one year. At that point, Erdman filed their notice for jury trial on August 4, 2008. The trial court accordingly issued an order setting various pre-trial deadlines, including disclosure of expert witnesses by March 2, 2009. Erdman disclosed their expert witness on March 9, 2009.

Appellees had difficulty in securing discovery from Erdman's retained expert and filed a motion to strike the expert. They also filed a motion to compel responses to expert [**2] discovery. Thereafter, Erdman moved to remove the case from the trial docket on the ground that they had been unable to locate their expert witness and additional time was required for Erdman to retain a new expert. The trial date was moved and a new order establishing disclosure deadlines was entered that included a new expert witness disclosure deadline of September 14, 2009. On September 18, 2009, Appellees filed a renewed motion to compel response to expert discovery and filed a motion to compel the depositions of Erdman's experts.

A hearing on Appellees' various motions was conducted on November 4, 2009. At the hearing, counsel for Erdman informed the court that their retained expert had "just disappeared off the face of the earth . . . literally cannot be found anywhere." Erdman requested a sixty-day extension of time in order to find a new expert witness and to respond to Appellees' discovery requests. Specifically, Erdman's counsel requested:

Ex L-1

> [A]nd what I ask is the court's indulgence to say - essentially to give me 60 days to get something to Ms. Flanagan. And if I can produce an expert and some expert discovery for her, that obviates most of the points that are in her discovery [**3] requests that we would be here about today. And if I can't produce another expert within that time period, I don't think I'm ever going to get one.

The trial court then went on to confirm exactly what it was that counsel for Erdman was requesting, with the following exchange taking place between the court and Erdman's counsel:

> The Court: So you want a drop dead date of 60 days for your expert?
>
> Mr. Torres: That's maybe a bad term but, yes, Sir. And at that time -- at that juncture, if we have it --
>
> The Court: What's the nature of the expertise?
>
> Mr. Torres: It's a general surgeon.

Again, during the hearing, Erdman's counsel restated the agreement as follows:

> [B]ut then at 60 days, Judge, if I can't find an expert at that point, I'm sure Ms. Flanagan will have a motion, and we'll have to deal with the fact that I don't have an expert and I can't go forward. And we'll have to deal with the case at that point. It gives me a little time, recognizing my own personal situation that I don't want to burden the court with but that's just what I'm facing right now. And so we're looking at, you know, middle of January, January 15th, or let's say that's a little more than 60 days to give a final answer and [**4] respond to expert discovery. If I can't do it at that time, I don't think I'm ever going to be able to do it.

Lastly, Erdman's counsel and the trial court engaged in the following discussion:

> [*65] Mr. Torres: At that point, you would then be in a position to say, here's when we're going to try this case or Ms. Flanagan is going to have a motion for summary judgment, which is going to dissolve [sic] the case or my client is going to take a voluntary dismissal at that juncture. And we would be in that position at that time to put up or shut up and move forward or not.
>
> The Court: So be it.
>
> Ms. Flanagan: Judge, if Mr. Torres doesn't have an expert in 60 days, I would ask that it be self-executing and the Court enter an order dismissing --
>
> The Court: I don't want it to be self-executing but it's going to happen. In other words, if he doesn't have an expert within 60 days, it's a drop dead date.
>
> Ms. Flanagan: Can I just -- without having to come over here and move for a summary judgment and get an affidavit and all that, can I just -- can we just have a motion for entry of involuntary dismissal and submit an order without a hearing?
>
> The Court: I think you need a hearing. ...but if the facts and circumstances [**5] are the same today as they are going -- in 60 days the same today, then case gone. But I need a hearing.

After the hearing, the trial court continued the trial and entered an order that provided in relevant part as follows:

> 1. Plaintiff's Motion to Continue Trial is GRANTED. The case has been removed from the January 4, 2010 trial docket.
>
> 2. Defendants' Motion to Compel Depositions of Experts is GRANTED. If the Plaintiffs have not disclosed a standard of care expert on or before January 15, 2010, the Court will involuntarily dismiss this case.

Erdman did not identify an expert by the January 15, 2010, deadline. As a result, Appellees filed a motion for an involuntary dismissal of the lawsuit. It appears a hearing was conducted, although there is no transcript of

any hearing in the record. The trial court entered the final order of dismissal with prejudice on January 20, 2010, and this appeal followed.

Dismissal of a complaint for non-compliance with a court order is subject to an abuse of discretion standard of review. *Bank One, N.A. v. Harrod*, 873 So. 2d 519, 520 (Fla. 4th DCA 2004). Since 1994, however, the Florida Supreme Court has made a distinction between non-compliance attributable [**6] to the litigant and neglect or misconduct attributable to counsel in considering the propriety of dismissal as a sanction. In *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993), the supreme court said that a dismissal "based solely on the attorney's neglect" in a manner that unduly punishes the litigant "espouses a policy that this Court does not wish to promote." *Id.* at 818. The *Kozel* court articulated a six-factor test for determining whether a dismissal with prejudice is warranted where the failure was attributable to the attorney. These factors include:

> 1. Whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;
>
> 2. Whether the attorney has previously been sanctioned;
>
> 3. Whether the client is personally involved in the act of disobedience;
>
> 4. Whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion;
>
> 5. Whether the attorney offered reasonable justification for noncompliance; and
>
> [*66] 6. Whether the delay created significant problems of judicial administration.

Id. If consideration of these factors suggests the attorney was at fault and if a sanction less severe than dismissal [**7] appears to be a viable alternative, the trial court should employ such an alternative. *Id.* In *Kozel*, the court observed that where the attorney alone is responsible for the noncompliance with a court order, "a fine, public reprimand, or contempt order may often be the appropriate sanction." *Id.*

The dismissal of an action based on the violation of a discovery order requires express written findings of fact supporting the conclusion that the failure to obey the court order demonstrated willful or deliberate disregard. *Ham v. Dunmire*, 891 So. 2d 492, 495-96 (Fla. 2004). Express findings are required to ensure that the trial judge has determined that the failure was more than a mistake, neglect, or inadvertence, and to assist the reviewing court to the extent the record is susceptible to more than one interpretation. *Id.* at 496. While no "magic words" are required, the trial court must make a "finding that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard." *Id.*

This Court, along with the other district courts, has also interpreted *Kozel* to require written findings addressing the *Kozel* factors in an order of dismissal. *Arkiteknic, Inc. v. United Glass Laminating, Inc.*, 53 So. 3d 366, 367 (Fla. 3d DCA 2011); [**8] *Sanders v. Gussin*, 30 So. 3d 699, 703 (Fla. 5th DCA 2010); *Smith v. City of Panama*, 951 So. 2d 959, 962 (Fla. 1st DCA 2007); *Pixton v. Williams Scotsman, Inc.*, 924 So. 2d 37, 40 (Fla. 5th DCA 2006); *Rohlwing v. Myakka River Real Props., Inc.*, 884 So. 2d 402, 407 (Fla. 2d DCA 2004); *Fla. Nat'l Org. for Women, Inc. v. State*, 832 So. 2d 911, 914 (Fla. 1st DCA 2002).

Here, the trial court's order failed to make the required findings. Appellees, however, contend that since the dismissal was based in part upon the acquiescence of Erdman's counsel during the November 4, 2009, hearing, as recounted above, the trial court did not have to consider or make findings on the *Kozel* factors prior to dismissal. We do not find that counsel's statements amounted to an agreement to disregard *Kozel*.

Because of the absence of a hearing transcript, it is not clear from the record whether the trial court considered the *Kozel* factors at the hearing prior to dismissal of the case. If the court had made the findings in the order, the absence of a transcript would have prevented review; but in the absence of such findings, we are bound to reverse and remand for the required findings or, if needed, a *Kozel* [**9] hearing.

REVERSED and REMANDED.

MONACO, C.J., GRIFFIN and JACOBUS, JJ., concur.

JANE F. SANDERS, Appellant, v. LYNDA R. GUSSIN, TRUSTEE, etc., Appellee.

Case No. 5D09-1487

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

30 So. 3d 699; 2010 Fla. App. LEXIS 3907; 35 Fla. L. Weekly D 693

March 26, 2010, Opinion Filed

SUBSEQUENT HISTORY: Released for Publication April 14, 2010

PRIOR HISTORY: [1]**

Appeal from the Circuit Court for Sumter County, William H. Hallman, III, Judge.

COUNSEL: Eric P. Gifford, of Gilligan, King, Gooding & Gifford, P.A., Ocala, for Appellant.

R. Gregg Jerald, of Landt, Wiechens, LaPeer & Ayres, LLP, Ocala, for Appellee.

JUDGES: EVANDER, J. MONACO, C.J. and GRIFFIN, J., concur.

OPINION BY: EVANDER

OPINION

[*700] EVANDER, J.

Jane Sanders (hereinafter referred to as "Plaintiff") appeals from an order dismissing her complaint with prejudice for failure to comply with orders compelling discovery. We reverse because the trial court did not make the requisite findings of fact, pursuant to *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993), prior to entering its order of dismissal.

[*701] In March 2007, Plaintiff, through her counsel, filed a two-count complaint against Lynda R. Gussin, Trustee of the Family Jewels Trust, dated June 24, 2004 (hereinafter referred to as "Defendant"). At the time the complaint was filed, Plaintiff was an 84-year-old woman who had, as acknowledged by Defendant, been diagnosed with mild senile dementia and Alzheimer's Disease.

In Count I, Plaintiff sought to establish a resulting trust in residential property located in The Villages, Sumter County, Florida, and titled solely in Defendant's **[**2]** name. Plaintiff alleged that prior to 2005, the parties were neighbors residing in Fort Myers, Florida. Defendant wanted to relocate to The Villages but was having difficulty finding an affordable home. Defendant approached Plaintiff with the suggestion that they both relocate to The Villages and jointly purchase property there. Plaintiff agreed to Defendant's proposal and provided Defendant with $ 200,000 towards the purchase of a residence. In December 2005, Defendant purchased a home in The Villages for $ 326,000 and the parties moved in together. Approximately nine months later, Plaintiff vacated the residence due to "increased hostility" from Defendant. Plaintiff subsequently discovered that Defendant had wrongfully arranged for title to the property to be placed solely in Defendant's name. In Count II, Plaintiff sought partition of the property. She also filed a notice of *lis pendens* with the complaint.

Defendant filed an answer, affirmative defenses, and a counterclaim, alleging a much different scenario. According to Defendant, the parties entered into a written

Ex L-2

contract on September 2, 2005, whereby Plaintiff agreed to give $ 200,000 to Defendant toward the purchase of a residence **[**3]** to be titled solely in Defendant's name. In return, Defendant agreed to permit Plaintiff to reside in the residence and to amend her existing estate-planning documents to provide a life estate for Plaintiff in the event Defendant pre-deceased Plaintiff. Eighteen days later, the parties executed an amendment to the contract whereby they agreed to equally share the expenses for taxes, insurance and utilities. It was Defendant's contention that Plaintiff had consulted with her attorney and her financial adviser prior to entering these agreements. Defendant further contended that Plaintiff's motivation for entering this arrangement had been to prevent her estranged daughter from ultimately receiving her assets.

Defendant claimed that pursuant to these agreements, she purchased a home that was larger than she needed so as to accommodate Plaintiff. Additionally, and due to Plaintiff's advanced age, Defendant purchased a home that would provide special amenities specifically requested by Plaintiff such as a small wading or therapy pool. Plaintiff voluntarily left the home on June 1, 2006, because of a desire to live "independently." In her two-count counterclaim, Defendant sought damages for **[**4]** slander of title and breach of contract.

In answering the counterclaim, Plaintiff admitted to executing the two above-referenced contracts, but alleged, *inter alia*, that the contracts had been fraudulently procured by Defendant.

On May 23, 2008, Plaintiff was served with Defendant's first request to produce and Defendant's first set of interrogatories. When Plaintiff failed to timely respond to the discovery requests, Defendant filed a motion to compel. On August 8, 2008, the trial court granted the motion to compel and ordered Plaintiff to respond to the discovery requests within twenty days. When Plaintiff failed to respond within twenty days, Defendant filed a motion for sanctions. On September 10, 2008, Plaintiff's counsel filed a response to **[*702]** Defendant's motion advising the court that he had difficulty communicating with Plaintiff because of her advanced age, her deteriorating mental condition and her relocation to Bonita Springs. In addition, Plaintiff's counsel noted that the parties had been engaged in settlement discussions during the prior month. On the same date as the response to Defendant's motion for sanctions, Plaintiff served her response to Defendant's first request to **[**5]** produce and first set of interrogatories. On October 2, 2008, the trial court denied Defendant's motion for sanctions, finding that Plaintiff's failure to timely comply with the discovery requests and the trial court's order had *not* been willful.

On November 6, 2008, Defendant served Plaintiff with a second request to produce and a second set of interrogatories. The interrogatories requested Plaintiff to identify and to provide certain information as to all bank accounts which Plaintiff had between June 1, 2005 and January 1, 2007. The request to produce required Plaintiff to produce all monthly statements for any bank accounts, trust accounts, savings accounts, bonds, investment and/or security accounts from January 1, 2006 through March 1, 2007, on which Plaintiff was a holder or beneficiary.

Approximately two weeks later, Plaintiff produced certain bank statements to Defendant and filed a response to Defendant's second request to produce providing:

> Statements from January 2007 to April 1, 2007 are produced. Additional documents have been requested from AmSouth Bank and will be produced upon receipt.

However, Plaintiff failed to otherwise respond to Defendant's second request to produce **[**6]** and second set of interrogatories and Defendant filed a motion to compel on January 27, 2009. On February 6, 2009, Plaintiff's counsel responded to the motion to compel by advising the trial court, in writing, that Plaintiff was not willfully withholding discovery and he expected that the requested information "should be available within the next ten (10) days . . . ."

On February 9, 2009, the trial court granted Defendant's motion to compel and ordered Plaintiff to comply with Defendant's discovery requests within ten days or it would consider assessing costs and attorney's fees. When Plaintiff failed to comply with this order, Defendant filed a motion for sanctions. After holding a hearing on March 9, 2009, the trial court granted the motion for sanctions, awarded attorney's fees and costs, and gave Plaintiff seven more days to respond to the outstanding discovery requests or have her case dismissed. (The order was dated March 16th, but was

effective as of March 9th.)

On March 13, 2009, Plaintiff filed a motion for reconsideration or alternatively motion for extension of time to comply with the court's order. In this motion, Plaintiff's counsel advised the trial court that Plaintiff **[**7]** had undergone knee-replacement surgery on February 12, 2009, during which Plaintiff experienced serious cardiovascular complications. As a result of the complications, Plaintiff was required to undergo an immediate surgical procedure to install a heart monitor/pacemaker device. Following the two surgeries, Plaintiff had been transferred to a rehabilitative center from which she was expected to be released shortly. Numerous confirmatory medical records were attached to the motion.

In a memorandum opposing Plaintiff's motion, Defendant observed that Plaintiff's response to the second request to produce and second set of interrogatories had been due on December 8, 2008, approximately two months prior to Plaintiff's knee replacement **[*703]** surgery. Defendant further noted that the first propounded request to produce and interrogatories had necessitated a motion to compel.

On March 31, 2009, the trial court entered an order of dismissal finding "that Plaintiff's failure to respond to discovery throughout this lawsuit had been done with willful disregard or gross indifference to multiple orders of this court."

A trial court has the authority to dismiss a complaint for failure to comply with discovery **[**8]** requests. However, because dismissal is the ultimate sanction in our adversarial system, it should be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result. *Kozel*, 629 So. 2d at 818. Further, where the attorney is responsible for procedural error, the court should employ a sanction less severe than dismissal with prejudice. *Id.* In determining the appropriate sanctions, *Kozel* directs a trial court to consider the following factors:

> 1. Whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;
>
> 2. Whether the attorney has previously been sanctioned;
>
> 3. Whether the client is personally involved in the act of disobedience;
>
> 4. Whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion;
>
> 5. Whether the attorney offered reasonable justification for noncompliance; and
>
> 6. Whether the delay created significant problems of judicial administration.

Id.

Here, the trial court's order failed to address each of these six factors. Defendant argues that *Kozel* is inapplicable to the instant case because *Kozel* only applies to those situations **[**9]** where the non-compliance with a court order was the fault of the attorney rather than the litigant. *See, e.g., Pixton v. Williams Scotsman, Inc.*, 924 So. 2d 37, 40 (Fla. 5th DCA 2006) ("If this was a case in which only [the litigants], and not their counsel, had engaged in wrongdoing or noncompliance with the rules, *Kozel* would not apply.")

However, we cannot accept Defendant's assumption that Plaintiff herself was solely responsible for the failure to respond to Defendant's discovery requests. First, the trial court did not make such a finding in its order of dismissal. Second, the record is inconclusive on this issue. For example, Plaintiff's initial (timely) response to the second request to produce suggests, but doesn't expressly state, that Plaintiff produced all of the bank records within her possession. It is unclear from the record why counsel provided an ambiguous response to this request to produce and whether counsel made any effort to obtain the remaining AmSouth Bank records other than having sent his mentally impaired client a copy of the discovery request. Furthermore, the initial response to the second request to produce seems to imply that AmSouth Bank may have been **[**10]** Plaintiff's only bank during the relevant time period. If so, little work would have been required to prepare an adequate response to the second set of interrogatories. It cannot be ascertained from the record what efforts counsel made to have the second set of interrogatories answered.

Plaintiff also argues that the trial court's order of dismissal was an abuse of discretion, particularly given that the last two orders to compel required compliance by February 19, 2009 and March 16, 2009, respectively, and Plaintiff was hospitalized or in a rehabilitative center from February 12th through mid-March, 2009. We decline **[*704]** to address this argument without having the benefit of the trial court's determination of the *Kozel* factors. However, on remand, the trial court should determine whether there is an inconsistency between its findings on "willfulness" set forth in its March 31, 2009 order of dismissal and its October 2, 2008 order denying Defendant's motion for sanctions. Specifically, in its order of dismissal, the trial court found that "throughout the lawsuit" Plaintiff had willfully disregarded "multiple orders" of the court. Yet, in its October 2, 2008 order, the trial court found that **[**11]** Plaintiff's failure to comply with its discovery orders regarding the first request to produce and first set of interrogatories had not been willful.

REVERSED and REMANDED.

MONACO, C.J. and GRIFFIN, J., concur.

AILEEN D. SHORTALL, Appellant, v. WALT DISNEY WORLD HOSPITALITY, ETC., Appellee.

CASE NO. 5D07-3235

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

997 So. 2d 1203; 2008 Fla. App. LEXIS 19418; 34 Fla. L. Weekly D 1

December 24, 2008, Opinion Filed

SUBSEQUENT HISTORY: Released for Publication January 12, 2009.

PRIOR HISTORY: [1]**

Appeal from the Circuit Court for Orange County, George Sprinkel, Judge.

COUNSEL: Michael W. Youkon, Port Orange, for Appellant.

Michael R. D'Lugo, of Wicker, Smith, O'Hara, McCoy & Ford, P.A., Orlando, for Appellee.

JUDGES: TORPY, LAWSON and EVANDER, JJ., concur.

OPINION

[*1204] PER CURIAM.

Aileen Shortall appeals an order dismissing her case with prejudice based on the trial court's finding that she failed to respond to four discovery requests and failed to comply with several aspects of its pretrial order. Ms. Shortall argues that the trial court erred by imposing this sanction without considering the factors set forth in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1994). We agree, and reverse.

The law is well-settled that "[b]efore dismissing a complaint based on the failure to follow a court order, the trial court must consider the factors set forth in *Kozel*." *Scallan v. Marriott Int'l, Inc.*, 995 So. 2d 1066, 33 Fla. L. Weekly D2704 (Fla. 5th DCA Nov. 21, 2008) (citing *Pixton v. Williams Scotsman, Inc.*, 924 So. 2d 37, 39 (Fla. 5th DCA 2006)). In *Kozel*, our supreme court stated:

> To assist the trial court in determining whether dismissal with prejudice is warranted, we have adopted the following set of factors . . . : 1) whether the attorney's **[**2]** disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration. Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative.

629 So. 2d at 818. This Court has recognized that "[a]

Ex L-3

trial court's *failure to consider the Kozel factors* in determining whether dismissal is appropriate *is, by itself, a basis for remand for application of the correct standard.*" *Pixton*, 924 So. 2d at 39-40 (emphasis added). Disney's counsel correctly and admirably concedes that the trial court did not consider the *Kozel* factors before striking Ms. Shortall's pleadings and dismissing her case with prejudice. Accordingly, a reversal is required. *Id.* Additionally, **[**3]** the record below does not evidence any involvement by the client in counsel's failure to respond to discovery and does not evidence prejudice to Disney. Had the trial court simply imposed a lesser sanction and proceeded to trial, there would have been no delay in this matter. Under these circumstances, it appears that counsel's failures did not "rise to the level of egregiousness required to merit the extreme sanction of dismissal" under *Kozel. See Scallan*, 33 Fla. L. Weekly D at 2705.

Accordingly, we reverse the order on appeal, and remand for further proceedings, including a new hearing on Disney's motion for sanctions.

REVERSED AND REMANDED.

TORPY, LAWSON and EVANDER, JJ., concur.

LexisNexis®

AMANDA SCALLAN, Appellant, v. MARRIOTT INTERNATIONAL, INC., Appellee.

Case No. 5D08-267

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

995 So. 2d 1066; 2008 Fla. App. LEXIS 17588; 33 Fla. L. Weekly D 2704

November 21, 2008, Opinion Filed

SUBSEQUENT HISTORY: Released for Publication December 10, 2008.

PRIOR HISTORY: **[**1]**
Appeal from the Circuit Court for Orange County, George A. Sprinkel, Judge.

COUNSEL: James P. Gitkin, of Salpeter Gitkin, LLP, Ft. Lauderdale, for Appellant.

David Goulfine and Dale Hightower, of Hightower & Partners, Orlando, for Appellee.

JUDGES: ORFINGER, J. MONACO and LAWSON, JJ., concur.

OPINION BY: ORFINGER

OPINION

[*1066] ORFINGER, J.

The trial court dismissed Amanda Scallan's complaint against Marriott International, Inc. after striking her pleadings. Ms. Scallan appeals, contending that the court erred in dismissing her case due to difficulties in scheduling her deposition without considering the factors set forth in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993). We agree and reverse. [1]

1 Marriott contends Ms. Scallan's appeal was untimely filed. We disagree. The initial order granting Marriott's motion lacked the necessary words of finality. Only the subsequently entered final judgment was appealable.

[*1067] Ms. Scallan, a Louisiana resident, sued Marriott for injuries that she allegedly sustained when she slipped and fell in the shower of her room while she was a guest at a Marriott hotel in Orlando, Florida. While the litigation was ongoing, Ms. Scallan was diagnosed with breast cancer and began treatment in her hometown. When **[**2]** Marriott attempted to set her deposition in Orlando, Ms. Scallan moved for a protective order, stating that her doctor believed it was unwise for her to travel because of her medical condition. Ms. Scallan offered to be deposed in Louisiana or via a video teleconference, but Marriott rebuffed the idea of a video deposition. The trial court subsequently ordered Ms. Scallan to submit to a deposition in Orlando or pay Marriott's expenses incurred to depose her in Louisiana by a specified date. After Ms. Scallan's deposition was delayed several times, the court struck her pleadings and dismissed her case due to Ms. Scallan's failure to comply with the court order.

Before dismissing a complaint based on the failure to follow a court order, the trial court must consider the factors set forth in *Kozel*, 629 So. 2d 817. *See Pixton v. Williams Scotsman, Inc.*, 924 So. 2d 37, 39 (Fla. 5th DCA 2006). The *Kozel* court stated:

> To assist the trial court in determining whether dismissal with prejudice is warranted, we have adopted the following set of factors . . . : 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether **[**3]** the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6)

Ex L-4

> whether the delay created significant problems of judicial administration. Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative.

Kozel, 629 So. 2d at 818. "Where . . . there is no indication that the trial court considered these factors, because it failed to make the 'required findings' in its order, reversal has been required." *Bank One, N.A. v. Harrod*, 873 So. 2d 519, 521 (Fla. 4th DCA 2004); *see Pixton*, 924 So. 2d at 39-40 ("A trial court's failure to consider the *Kozel* factors in determining whether dismissal is appropriate is, by itself, a basis for remand for application of the correct standard.").

Here, both the trial court's order of dismissal and its final judgment in favor of Marriott lack any findings of willful noncompliance on Ms. Scallan's **[**4]** part. Such a finding is generally required. *See Commonwealth Fed. Sav. & Loan Ass'n v. Tubero*, 569 So. 2d 1271 (Fla. 1990) (holding that trial court may dismiss complaint as sanction for failing to comply with discovery requirements, but order of dismissal must contain explicit finding of willful noncompliance). In discussing the necessity of a written order with findings, the Florida Supreme Court held:

> The dismissal of an action based on the violation of a discovery order will constitute an abuse of discretion where the trial court fails to make express written findings of fact supporting the conclusion that the failure to obey the court order demonstrated willful or deliberate disregard. Express findings are required to ensure that the trial judge has consciously determined that the failure was more than a mistake, neglect, or inadvertence, and to assist the reviewing court to the extent the record is susceptible to more than one interpretation. **[*1068]** While no "magic words" are required, the trial court must make a "finding that the conduct upon which the order is based was equivalent to willfulness or deliberate disregard."

Ham v. Dunmire, 891 So. 2d 492, 495-96 (Fla. 2004) (citing *Commonwealth Fed. Sav. & Loan Ass'n*, 569 So. 2d 1271). **[**5]** Although a trial court has discretion to dismiss a complaint for noncompliance with a court order, "it is for the very reason that the trial judge is granted so much discretion to impose this severe sanction that we have determined that [an order for dismissal] should contain an explicit finding of willful noncompliance." *Commonwealth Fed. Sav. & Loan Ass'n*, 569 So. 2d at 1273.

Although the lack of the necessary findings alone mandates reversal in this case, an analysis of the *Kozel* factors suggests that the alleged misconduct did not rise to the level of egregiousness required to merit the extreme sanction of dismissal. There is nothing in the record before us to suggest that Ms. Scallan engaged in any willful, deliberate or contumacious conduct to avoid being deposed. Marriott was in no way prejudiced by the delay, and, most importantly, there was nothing to suggest that Ms. Scallan, as opposed to her attorney, [2] was even aware of Marriott's efforts to depose her.

> 2 Admittedly, Ms. Scallan's attorney should have been more diligent in putting evidence before the court about the nature of Ms. Scallan's medical condition and the extent of her treatment. However, this failure alone does **[**6]** not justify the dismissal of the suit without an evidentiary hearing and the findings mandated by *Kozel*.

For these reasons, we reverse the final judgment in favor of Marriott and remand this matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

MONACO and LAWSON, JJ., concur.

AMERICAN EXPRESS CO., Appellant, v. SCOTT HICKEY, Appellee.

Case No. 5D02-3221

COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

869 So. 2d 694; 2004 Fla. App. LEXIS 4307; 29 Fla. L. Weekly D 818

April 2, 2004, Opinion Filed

SUBSEQUENT HISTORY: **[**1]** Released for Publication May 5, 2004.

PRIOR HISTORY: Appeal from the Circuit Court for Orange County, Dorothy J. Russell, Judge.

DISPOSITION: Reversed.

COUNSEL: Justin D. Jacobson of Jacobson, Sobo & Moselle, Plantation, for Appellant.

Howard S. Marks and Jessica K. Hew of Graham, Builder, Jones, Pratt & Marks, LLP, Winter Park, for Appellee.

JUDGES: ORFINGER, J. GRIFFIN and PLEUS, JJ., concur.

OPINION BY: ORFINGER

OPINION

[*694] ORFINGER, J.

American Express Co. appeals the trial court's order dismissing its amended complaint with prejudice. Although we sympathize with the trial judge, who was understandably frustrated with the conduct of American Express's attorney, Justin D. Jacobson, we reverse the order dismissing the amended complaint with prejudice.

Following a series of missed deadlines and the failure of American Express's attorney to appear at a scheduled hearing, the trial court dismissed American Express's amended complaint with prejudice. [1] Nonetheless, while we recognize that the trial court has the discretionary power to dismiss a complaint if the plaintiff fails to timely file an amendment or a party fails to meet some other filing deadline, that power must be used cautiously **[**2]** because "to dismiss [a] case based solely on the attorney's neglect unduly punishes the litigant . . . ." *Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993).

1 We too have experienced Mr. Jacobson's lack of diligence, as is evidenced by our difficulty in obtaining the record on appeal, which was furnished to us in an untimely fashion only after several orders from this court.

To assist the trial court in determining whether dismissal with prejudice is warranted, **[*695]** the supreme court has mandated consideration of the following factors: 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; (2) whether the attorney has previously been sanctioned; (3) whether the client was personally involved in the act of disobedience; (4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; (5) whether the attorney offered reasonable justification for noncompliance; and (6) **[**3]** whether the delay created significant problems of judicial administration. "Upon consideration of these factors, if a

Ex L-5

sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative." *Id.* at 818.

Because dismissal is the ultimate sanction, it should be reserved for those aggravated cases in which a lesser sanction would fail to achieve a just result. Our review of the record suggests that dismissal with prejudice was too severe a response to the transgressions of American Express's attorney. The trial court has many options available to it in fashioning an appropriate sanction, including imposing fines, awarding attorney's fees under section 57.105, Florida Statutes (2004), finding counsel in contempt, or referring the matter to the Florida Bar. While it is essential that attorneys adhere to filing deadlines and procedural requirements, sanctions other than dismissal are appropriate in those situations when the attorney, and not the client, is responsible for the error. For the foregoing reasons, the order of dismissal is reversed.

GRIFFIN and PLEUS, JJ., concur. **[**4]**