Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-219

NOVEMBER TERM, 2018

Town of Colchester v. Robert Andres*	}	APPEALED FROM:
	}	
	}	Superior Court,
	}	Environmental Division
	}	
	}	DOCKET NO. 30-3-11 Vtec
		Trial Judge: Thomas S. Durkin

In the above-entitled cause, the Clerk will enter:

Defendant appeals an order from the Environmental Division, finding defendant in contempt for violating a prior court order and ordering him to pay a civil penalty of $2400 and attorney's fees and costs of $3339. On appeal, defendant argues that the order is in error because he was denied requested discovery and that the evidence does not support the finding of contempt. We affirm.

This dispute stems from a January 2013 order, which enjoins defendant from using or occupying a seasonal camp in the Town of Colchester from November 1 to March 31 without obtaining a permit authorizing year-round use and occupancy. The Town filed a motion for contempt of that order in March 2018. The court held a hearing in May 2018. After the hearing, the Environmental Division found the following. Defendant was aware of the 2013 injunction that prohibits him from occupying or using his seasonal camp without a permit. Defendant had not obtained a permit to use or occupy the camp. Defendant has an apartment in Burlington where can reside and therefore was able to comply with the order. During the off-season, defendant drove his minivan to the camp, on several occasions and used the camp and the woodstove on a somewhat regular basis between early January and mid-February. This use was willful. Therefore, the court found defendant in contempt of the 2013 order and imposed a civil penalty plus attorney's fees and costs.

On appeal, defendant first argues that the order is in error because the Town did not fully comply with his discovery requests. In April 2018, defendant propounded requests for production, seeking a list of witnesses and anything prepared by the witness, and a list of dates and times the witnesses visited his camp. A couple of weeks later, the Town responded to the request. The Town indicated that no reports existed and provided a list of dates, a list of four witnesses, and photographs, including one that was attached to an email with a short statement. There were no further discovery requests prior to trial.

On appeal, defendant asserts that at trial, he learned that the photographs contained notes that were not provided to him. The facts related to defendant's argument are as follows. At the hearing, defendant questioned witnesses regarding whether notes existed. During cross-

examination, defendant question a Town employee about whether there were notes from her meeting with her attorney and she replied that if there were notes then they had been provided. Defendant also questioned the Town employee as to whether the building inspector provided notes with the photographs that were uploaded to the Town website. The Town employee answered that typically there "was a very brief description of the photographs with the date." The building inspector testified that there were no further notes that were associated with the photographs. At the beginning of the second day of trial, defendant moved to strike the building inspector's testimony on the basis that the Town did not comply with defendant's discovery request. The Town attorney represented that anything responsive had been provided to defendant. The court denied the motion.

The trial court has discretion to decide matters related to discovery. Med. Ctr. Hosp. of Vt., Inc. v. City of Burlington, 152 Vt. 611, 627 (1989) ("[D]iscovery rulings are within the court's sound discretion, and will not be disturbed on appeal unless that discretion has been abused or withheld entirely."). Further, "the award of sanctions for failure to comply with discovery requests is vested in the sound discretion of the trial judge." In re R.M., 150 Vt. 59, 64 (1988).

The court did not abuse its discretion in denying defendant's motion to strike the building inspector's testimony. Vermont Rule of Civil Procedure 37 sets forth a process for parties to follow to secure responses when requests to produce are incomplete. See V.R.C.P. 37(a)(2), (3) (directing that where party provides incomplete answer to request to produce, discovering party may move for order compelling production). If a party fails to comply with a resulting order, the court may then impose sanctions. V.R.C.P. 37(b). Only when there has been "a failure to comply with a specific discovery order would sanctions such as witness preclusion be appropriate." In re R.M., 150 Vt. at 63.

Here, defendant has not demonstrated that the Town did not comply with discovery or that there was a failure to comply with a discovery order that would allow the sanction of striking a witness's testimony. Defendant neither moved to compel nor challenged the adequacy of the Town's responses until trial, claiming that he did not know prior to that time that the Town had not fully complied with his request. The trial court acted within its discretion in declining to issue an order compelling further discovery. The building inspector testified that no additional notes existed, and it was in the province of the court to credit this testimony. Having declined to order compliance, there was no basis for the court to impose a sanction on the Town.

Next, defendant argues that the evidence does not support the court's findings. This Court reviews the Environmental Division's findings for clear error and "will not overturn its factual findings unless, taking them in the light most favorable to the prevailing party, they are clearly erroneous." In re Eastview at Middlebury, Inc., 2009 VT 98, ¶ 10, 187 Vt. 208 (quotation omitted).

We conclude that the evidence supports the court's findings that defendant drove his minivan to the camp, went inside the camp, and used the wood stove at times when he was prohibited from occupying or using it. These findings were supported by testimony of and photographs taken by the Town building inspector, a deputy sheriff, and a private investigator. The Town building inspector observed and photographed the camp fourteen times between November 2017 and February 2018. The photographs show, and the inspector testified, that a black or blue minivan owned by defendant was moved on and off the property several times during that period. On multiple occasions light snow covered the van in the morning, indicating that the van had been there overnight. After heavier snow was on the ground, the area in front of the camp was plowed on a somewhat regular basis. The snow on the steps and landing of the camp's front door was compacted in a way indicative of foot traffic. In addition, the photographs demonstrate

that a wood pile on the camp porch got smaller in mid-January and into February. In addition, when a deputy sheriff served a summons and complaint on defendant on March 13, 2018, he found defendant at the camp with his dog, and observed smoke coming out of the chimney. It was snowing and there were no footprints or tire tracks, indicating that defendant had been inside for some time. Finally, a private investigator visited the camp on two occasions and on the second visit observed a minivan in the front of the house and a faint blue light coming from inside. evidence is sufficient to support the court's findings that defendant used or occupied the camp during prohibited periods. Moreover, it was within the province of the court as factfinder to credit this evidence over defendant's explanations for his presence on the property. See id. (explaining that trial court determines credibility and weight of evidence).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice