6/21/83

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Civil Action Nos.
78-322 and 78-420
(Consolidated)

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S DISMISSAL MOTION

On May 18, 1983, the defendant moved pursuant to Rule 37(b)(2), F.R.Civ.P., to dismiss these cases because plaintiff has willfully refused to comply with the Court's discovery orders of February 4, 1983 and April 13, 1983. Although, plaintiff readily acknowledges his non-compliance with those orders, he opposes defendant's motion on the ground that dismissal is too harsh a sanction. However, neither the authorities nor the "equitable considerations" that plaintiff cites in his opposition support that position.

Plaintiff first quotes an Eighth Circuit case, Laclede Gas Co. v. G.W. Warnecke Corp., 604 F.2d 561, 565 (8th Cir. 1979), for the proposition that dismissal is a severe sanction under Rule 37 and thus should be used "under limited circumstances." But plaintiff ignores the remainder of the Laclede opinion which indicates that one of those circumstances is a party's willful

violation of a court's discovery orders.[1/] In that respect, the Eighth Circuit's approach is consistent with recent decisions of the Supreme Court and other appellate courts, all of which have held that a plaintiff's willful failure or refusal to comply with discovery orders warrants the dismissal of his action. See, e.g., Roadway Express v. Piper, 447 U.S. 752, 763-64 (1980); National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642-43 (1975); Corchado v. Puerto Rico Marine Management, Inc.,

1/ Plaintiff also selectively cites Professor Moore's discussion of the Supreme Court's decision in Societe International v. Rogers, 357 U.S. 197 (1958), as indicating that dismissal is not always an appropriate sanction under Rule 37(b). What plaintiff conveniently overlooks, however, is the following prefatory remarks about the Rogers case.

> [T]he Rogers opinion laid particular emphasis upon the level of contumacy as a determinant of the harshness of the sanction. It stated unequivocally that no willfulness is necessary to bring Rule 37(b) into play, but added that, absent willfulness, the case may not be dismissed for failure to produce."

4A Moore's Federal Practice ¶ 37.03 [2.-1] at 37-62 (emphasis added). Furthermore, plaintiff neglects to cite Professor Moore's treatment of the Supreme Court subsequent decision in National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976), which included the following quote from that decision:

> [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. Id at 643.

See 4A Moore's Federal Practice, supra, at 37-63. In short, Professor Moore's treatise lends no support to plaintiff's position that dismissal of these actions is not warranted. Instead, given Mr. Weisberg's complete contumacy of the Court orders of February 4 and April 13, 1983, dismissal is the only appropriate sanction.

665 F.2d 410, 413-14 (1st Cir. 1981); Independent Investor v. Touche Ross, 607 F.2d 530, 533-34 (2d Cir. 1978); G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647 (9th Cir. 1978). Against this judicial backdrop and in light of plaintiff's willful refusal to comply with this Court discovery orders, there can be little doubt that dismissal of these consolidated cases is an appropriate sanction.

The next prong of plaintiff's attack against dismissal is his trumped-up assertion that the "equities" in these cases "are overwhelmingly in [his] favor" and thus militate against such a sanction.[2/] There is absolutely no truth, however, to any of the so-called "equities" enumerated by plaintiff. For example, plaintiff repeats his off-heard diatribe that the FBI has a vendetta against him which has manifested itself over the years. Yet, other than his own unsubstantiated statements, plaintiff has not produced one shred of credible evidence which establishes that the FBI has attempted to harass or retaliate against him in any

2/ In support of his position that courts should consider "the equities of a situation" when fashioning sanctions under Rule 37, plaintiff quotes from Williams v. Krieger, 61 F.R.D. 142, 145 (S.D. N.Y. 1973). A perusal of that decision quickly establishes, however, that the district court was only referencing those situations where there has been no earlier order compelling discovery. This, of course, is inapposite to the instant litigation where plaintiff has twice been ordered to answer defendant's discovery and twice has refused to do so. Such refusal alone belies any claim that there are "equities" in which these cases which should influence the severity of the sanction imposed against plaintiff for his willful refusal to comply with the Court's discovery orders.

way.[3/] Nor has plaintiff produced any evidence to substantiate the other numerous charges that he levels against the FBI. Rather, it seems apparent that the substance of plaintiff's opposition -- similar to his simultaneously filed motion for reconsideration -- is but a desperate attempt by him to obfuscate the fact that he has twice refused to comply with the Court's orders.

Finally, plaintiff's position that the Court should limit any sanction to the search issue, should be rejected. Inasmuch as plaintiff invoked this Court's processes when he filed this action, he must obey its orders, even those with which he disagrees. Plaintiff has persistently refused to do so; accordingly, his right to further utilize the Court's processes as to these cases should be revoked. Indeed, anything less than complete dismissal under circumstances such as those present here would "introduce into litigation a 'sporting chance theory' encouraging parties to withhold information during discovery" because they know that such will only result in lesser sanctions being imposed. G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647 (9th Cir. 1978). Or, as the Supreme Court observed in upholding a dismissal for failure to comply with a discovery order,

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3/ It is interesting to note that plaintiff has made the same bald-faced assertions against the FBI with respect to his other numerous FOIA requests. Recent judicial scrutiny of those assertions determined not only that they were not accurate but also that the FBI has been "forthright and cooperative in its handling of Mr. Weisberg's requests." Weisberg v. U.S. Department of Justice, No. 82-1072, slip op. at 27 (D.C. Cir. April 5, 1983) (A copy of that opinion is attached as Exhibit A to Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for an Order Compelling Discovery, filed on April 6, 1983).

> [although] it might well be that these [plaintiffs] would faithfully comply with all future discovery orders entered by the District Court in this case . . . [if the order of dismissal were overturned], other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976) (emphasis in original). In short, this Court should dismiss these consolidated actions in order "to protect the integrity of its orders." G-K Properties v. Redevelopment Agency, 577 F.2d at 647.

CONCLUSION

For the reasons set forth above and in defendant's memorandum in support of its Rule 37(b)(2) dismissal motion, the Court should grant that motion and dismiss these cases with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 1983, I have served the foregoing Defendant's Reply To Plaintiff's Opposition To Defendant's Dismissal Motion by first class mail, postage pre-paid to:

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