

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

NOV 18 1983

HAROLD WEISBERG,)	
)	
Plaintiff,)	JAMES F. DAVEY, Clerk
)	
v.)	Civil Action No. 78-0322
)	
WILLIAM H. WEBSTER, et al.,)	
)	
Defendants.)	
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HAROLD WEISBERG,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 78-0420
)	
FEDERAL BUREAU OF INVESTIGATION,)	
et al.,)	
)	
Defendants.)	
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M E M O R A N D U M

Plaintiff Harold Weisberg brings these consolidated cases under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, against defendant Federal Bureau of Investigation, seeking access to some 150,000 pages of documents pertaining to the assassination of John F. Kennedy. Four matters are currently before the Court: defendant's motions to 1) dismiss under Fed.R.Civ.P. 37(b)(2)(C) and 2) for expenses and fees under Fed.R.Civ.P. 37(b)(2); and plaintiff's motions for 3) reconsideration of this Court's orders of April 13 and April 28, 1983, and, in the alternative, for 4) certification for interlocutory appeal under 28 U.S.C. § 1292(b).

Several aspects of this litigation's prolonged history deserve

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brief description. An issue throughout has been the adequacy of defendant's search for documents responsive to plaintiff's FOIA request. On October 26, 1982, the Court denied defendant's motion for partial summary judgment on the search issue. Subsequently, in December, 1982, defendant propounded a set of fourteen interrogatories and requests for production regarding certain facts and documents plaintiff claimed demonstrated the inadequacy of defendant's search. Plaintiff responded by moving for a protective order. On February 4, 1983, the Court denied plaintiff's motion, and ordered plaintiff to respond to the interrogatories within twenty days. Plaintiff subsequently filed blanket objections based primarily on arguments already advanced and rejected by the Court in ruling upon the protective order. Defendant then filed a motion to compel. On April 13, the Court granted the motion, and ordered plaintiff to "serve upon the defendant and file with the Court responsive answers to defendant's interrogatories and requests for production of documents providing finally his contentions concerning the adequacy of the FBI search, within 30 days from the date of this Order." Defendant was also awarded costs incurred in connection with prosecuting its motion to compel. To date, as plaintiff acknowledged at the November 9, 1983 hearing on the pending motions, plaintiff has not complied with any of this Court's discovery orders.^{1/}

Fed.R.Civ.P. 37(b) provides that:

If a party...fails to obey an order to provide or permit discovery...the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

1/ It is noteworthy that the Court of Appeals recently expressed its disapproval of plaintiff's litigation tactics in another FOIA case involving Kennedy assassination materials. See Weisberg v. United States Department of Justice, 705 F.2d 1344, 1354 n.12 (D.C.Cir. 1983).

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party (emphasis supplied).

The Supreme Court recently observed that Rule 37 sanctions, including dismissal, "must be applied diligently." Roadway Express v. Piper, 447 U.S. 752, 763-64 (1980). See also National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1977) (per curiam); Societe Internationale v. Rogers, 357 U.S. 197 (1958). Dismissal is justified if there exists "some element of wilfulness or conscious disregard" on the part of the party in noncompliance with a court order. Dellums v. Powell, 566 F.2d 231, 235 (D.C. Cir. 1977). See also National Hockey League v. Metropolitan Hockey Club, Inc., supra, 427 U.S. at 640; Cine Forty-Second St. Theatre v. Allied Artists, 602 F.2d 1062, 1066 (2d Cir. 1979); G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647 (9th Cir. 1977); Van Nostrand v. University of Minnesota, 656 F.2d 315, 316 (8th Cir. 1981).

Plaintiff by his own admission has failed to comply with this Court's discovery orders of February 4 and April 13. As the Court of Appeals has indicated, Fed.R.Civ.P. 37(d) "plainly requires a party receiving interrogatories to make one of two responses: an answer or a motion for a protective order." Dellums v. Powell, supra, 566 F.2d at 235. The Court's February 4 denial of plaintiff's motion for a protective order therefore left only one response available to plaintiff: answering the interrogatories. Because of plaintiff's wilful and repeated refusals to answer in compliance

with court orders,^{2/} the Court in its discretion concludes that dismissal under Fed.R.Civ.P. 37(b)(2)(C) is appropriate.

Fed.R.Civ.P. 37(b)(2) also provides that a court shall require a party to comply with a discovery order to pay reasonable costs and attorney's fees incurred by the opposing party as a result of the failure to comply unless the failure was "substantially justified" or "other circumstances make an award of expenses unjust." See Hamilton v. Ford Motor Co., 636 F.2d 745, 747 (D.C.Cir. 1980); see generally 8 Wright & Miller Federal Practice and Procedure § 2289 (1970). Plaintiff has not shown the requisite justification or any extenuating circumstances. In particular, the grounds for non-compliance asserted by plaintiff -- the impropriety of agency discovery in FOIA litigation -- have been repeatedly rejected by this Court, and cannot serve as a "substantial justification" at this late date. Consequently, defendant is entitled to costs and fees incurred.

Not Rule grounds

In view of the Court's disposition of defendant's motion to dismiss, plaintiff's motions for reconsideration and, in the alternative, for certification for interlocutory appeal, are denied.

An appropriate order follows.

2/ In addition, plaintiff has failed to pay the costs assessed against him in connection with the April 13 order.


United States District Judge

Dated: 11/18/83

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HAROLD WEISBERG,)
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Civil Action No. 78-0420

O R D E R

Upon consideration of plaintiff's motion for reconsideration of this Court's orders of April 13 and April 28, 1983, or in the alternative, to amend the orders to permit an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), defendant's motion to dismiss, oppositions filed thereto, oral arguments, and the entire record, it is by the Court this 18th day of November, 1983

ORDERED that plaintiff's motion for reconsideration of this Court's orders, or in the alternative, to amend this Court's orders to certify for interlocutory appeal, is hereby denied. It is further

ORDERED that defendant's motion to dismiss these consolidated actions is hereby granted and these cases are dismissed with prejudice. It is further

ORDERED that defendant shall submit an affidavit or other documentation within fifteen (15) days from the date of this order, detailing the expenses, including attorney's fees, which were incurred in prosecuting the dismissal action. Plaintiff shall have ten (10) days to respond to that documentation at which time the Court will assess against plaintiff what it determines to be reasonable expenses.


United States District Judge