

2/20/83
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG

Plaintiff,

v.

FEDERAL BUREAU OF
INVESTIGATION

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

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION
TO ITS APPLICATION FOR EXPENSES INCURRED IN
PROSECUTING THE DISMISSAL MOTION UNDER RULE 37(b)

In its Memorandum of November 18, 1983, the Court found that the plaintiff's refusal to comply with its discovery orders was not substantially justified and that there were no extenuating circumstances present which would make an award of expenses unjust. Accordingly, the Court held that the defendant was entitled to recover the expenses it had incurred in prosecuting the Rule 37(b) dismissal motion. (See Court's Memorandum at 4). In an accompanying Order, the Court directed the defendant to submit documentation within 15 days detailing the expenses, including attorney fees, it had so incurred. The defendant complied with that directive on December 2, 1983, and requested expenses of \$1,053.55.

On December 15, 1983, the plaintiff opposed defendant's expense application. Plaintiff does not quarrel with the amount of expenses that defendant has requested. Instead, he once again questions the underlying award itself, contending, in essence, that the Court should not have awarded expenses in addition to

dismissing these consolidated cases. Plaintiff also asserts that the award was not proper because he "had a justifiable legal basis for contending that other sanctions were more appropriate than dismissal." (See Plaintiff's Opposition at 2).

Plaintiff's contentions ignore the unambiguous language of Rule 37(b)(2) which, as the Court noted in its Memorandum of November 18, 1983, provides that

[i]n lieu of [a dismissal order] or in addition thereto, a court shall require the party failing to obey the [discovery] order or the attorney advising him, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

(Emphasis added). Rule 37 thus specifically directs that an award of expenses can be in addition to any other permissible sanction, including dismissal. Moreover, the fact that plaintiff may have been justified in contending that other sanctions were, in his opinion, more appropriate than dismissal has no bearing on whether the defendant should be awarded the expenses it incurred as a result of plaintiff's willful failure to comply with the Court's discovery orders.

In sum, given the Court's findings that plaintiff's failure to obey the discovery orders was not substantially justified and that there were no other circumstances present which would make an award of expenses unjust, the Court was correct in awarding the defendant the reasonable expenses that it incurred because of that failure, including its prosecution of the Rule 37(b) dismissal motion. Since plaintiff has not presented any evidence or

argument that questions the reasonableness of the \$1,053.55 that the defendant has requested, the Court should enter an Order directing the plaintiff and his counsel to pay that amount to the defendant forthwith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 20th day of December, 1983, I have served the foregoing Defendant's Reply to Plaintiff's Opposition to its Application for Expenses Incurred in Prosecuting the Dismissal Motion under Rule 37(b)(2), by first class mail, postage pre-paid to:

James H. Lesar, Esq.
Suite 900
1000 Wilson Boulevard
Arlington, Virginia 22209


HENRY J. LAHAIE