

2/10/84
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

FEDERAL BUREAU OF
INVESTIGATION, et al.,

Defendants.

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

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO
VACATE OR, IN THE ALTERNATIVE, TO ALTER
THE AMENDED JUDGMENT ENTERED ON JANUARY 31, 1984

Ignoring the fact that he has twice opposed defendants' motion to have expenses assessed against him under Rule 37(b), F.R.Civ.P.,¹ counsel for plaintiff now attempts to litigate the issue for a third time by moving the Court to amend or alter the Amended Judgment which merely made the judgment in these consolidated cases consistent with the Court's earlier orders and with the provisions of 28 U.S.C. §1961 and Official Form 32, F.R.Civ.P. Rather than burdening the record with a repetition of the arguments supporting their position that the assessment of expenses against plaintiff's counsel was warranted, the defendants

¹ See Plaintiff's Opposition to Defendants' Motion to Dismiss, served on June 6, 1983; and, Plaintiff's Opposition to Defendants' Application for Expenses in Prosecuting Its Dismissal Motion Under Rule 37(b)(2), served on December 15, 1983.

instead respectfully refer the Court to those arguments.²
Suffice it to say here that the orders assessing such expenses³
are in full compliance with the requirements of Rule 37(b), and
thus plaintiff's counsel's effort to graft additional requirements
onto that rule should be summarily rejected.⁴

² See Defendants' Motion Pursuant to Rule 37 for Dismissal, filed on May 18, 1983; Defendants' Application for Expenses Incurred in Prosecuting Its Dismissal Motion Under Rule 37(b)(2), filed on December 2, 1983; and Defendants' Reply to Plaintiff's Opposition to the Application for Expenses Incurred in Prosecuting the Dismissal Motion Under Rule 37(b)(2), filed on December 20, 1983.

³ See Memorandum and Order entered on November 18, 1983, and the Order entered on December 21, 1983.

⁴ Plaintiff's counsel's reliance on Roadway Express v. Piper, 447 U.S. 752 (1980), to avoid the reach of Rule 37(b) and this Court's Orders of November 18 and December 21, 1983, is especially misplaced. Indeed, the following passage from that decision completely undermines plaintiff's position:

Federal Rule of Civil Procedure 37(b) authorizes sanctions for failure to comply with discovery orders. The District Court may ... "dismiss the action or render a judgment by default against the disobedient party." [citations omitted] Both parties and counsel may be held personally liable for expenses, "including attorney's fees," caused by the failure to comply with discovery orders. [footnote omitted] Rule 37 sanctions must be applied diligently both "to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent." [citation omitted]

The respondents (i.e., the counsel) in this case never have complied with the District Court's order that they answer Roadway's interrogatories. That failure was

(CONTINUED)

Lastly, it should be noted that, contrary to plaintiff's counsel's representations, defense counsel never stated that the defendants "would move to amend the judgment so they could attach plaintiff's counsel's property." Instead, during a phone conversation with plaintiff's attorney, defense counsel indicated that the defendants were going to request the Court to have the Clerk amend the judgment entered on January 10, 1984, so that it would be consistent with the Court's Order of December 21, 1983, and with the provisions of 28 U.S.C. §1961 and Official Form 32 of the Federal Rules of Civil Procedure. Counsel also told plaintiff's attorney that if he did not comply with the Court's December 21, 1983 Order, the defendants would have no alternative but to execute on the judgment, if amended to reflect the dictates of that Order. Plaintiff's counsel's assertion that the "defendants do not want a resolution of the issues on the merits by the Court of Appeals and have sought to have the judgment amended so they can squeeze plaintiff's attorney and thereby

⁴ (FOOTNOTE CONTINUED)

the immediate ground for dismissing the case
... and it also exposed respondents and
their clients to liability under Rule 37(b)
for the resulting costs and attorney's fees.

Id. at 763-64 (emphasis added). As the defendants have previously asserted, the same situation occurred in these cases: that is, the repeated failure by plaintiff and his counsel to comply with the Court's orders directing that the defendants' interrogatories be answered warranted dismissal of the cases and "exposed [counsel] and [his] client to liability under Rule 37(b) for the resulting costs and attorney's fees." Id.

force a settlement on their terms" is thus patently untrue. Indeed, it is the defendants' position that if counsel for plaintiff disagrees with the Amended Judgment and the underlying Order of December 21, 1983, he should litigate the issue on appeal instead of trying to relitigate it for the third time in this forum.

CONCLUSION

For the reasons set forth above and in the defendants' earlier papers, plaintiff's motion to vacate, or, in the alternative, to alter the Amended Judgment entered on January 31, 1984, should be denied.

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General

JOSEPH E. diGENOVA
United States Attorney


BARBARA L. GORDON


HENRY J. LAHAIE

Attorneys, Department of Justice
Civil Division, Room 3338
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone (202) 633-4345

Attorneys for the defendants.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

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

FEDERAL BUREAU OF
INVESTIGATION, et al.,

Defendants.

O R D E R

Upon consideration of plaintiff's motion to vacate or, in the alternative, to alter the amended judgment entered on January 31, 1984, the defendants' opposition thereto, and the entire record herein, it is

ORDERED and ADJUDGED that plaintiff's motion be, and the same is hereby, denied.

Dated this ____ day of _____, 1984.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify on this 10th day of February, 1984, I have served the foregoing Defendants' Opposition To Plaintiff's Motion To Vacate Or, In The Alternative, To Alter The Amended Judgment Entered On January 31, 1984, and a proposed Order, by first class mail, postage pre-paid to:

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


HENRY I. LAHAIE