

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

REGINALD EDWIN BOSSIER

PLAINTIFF

VERSUS

CAUSE NO. 1:08-cv-408-LTS-RHW

STATE FARM FIRE AND CASUALTY COMPANY

DEFENDANT

**MOTION FOR SANCTIONS UNDER RULE 37(b) FOR FAILURE TO
COMPLY WITH [124] COURT ORDER OF SEPTEMBER 3, 2009**

COMES NOW the Plaintiff, by and through undersigned counsel and files this his Motion for Sanctions Under Rule 37(b) For Failure to Comply With [124] Court Order of September 3, 2009, and would show unto this Honorable Court the following:

1.

On or about December 2, 2008, Plaintiff propounded his first set of Interrogatories and Requests for Production of Documents to Defendant.

2.

After an extension to answer the discovery was agreed upon by counsel for the parties, Defendant provided its discovery responses on February 17, 2009.

3.

Counsel for Plaintiff sent to counsel for Defendant on March 9, 2009, a detailed letter outlining State Farm's discovery response deficiencies in a good faith effort to resolve same without Court intervention. (See ECF 33, Exhibit A)

4.

On March 20, 2009, Plaintiff filed a Motion to Compel [ECF 33] related to outstanding discovery matters.

5.

While the Motion to Compel was pending, and after additional discovery obtained, Plaintiff filed a Supplemental Memorandum in Support of Motion to Compel to update and supercede the argument made in the original motion. [ECF 54]

6.

The United States Magistrate Judge entered his Order granting in part and denying in part said Motion on June 5, 2009. [ECF 59]

7.

On June 19, 2009, Plaintiff filed his [61] Application for Review of, and Objection to, June 5, 2009, Order of United States Magistrate Judge.

8.

On August 28, 2009, Senior Judge L. T. Senter, Jr. entered his [116] Order with regard to Plaintiff's [61] Application for Review stating as follows:

This Court will not go so far as to adopt ½ mile as an absolute distance entitling Plaintiff to information related to other claims. However, the Magistrate Judge's order provides no basis for accepting Defendant's unilateral decision to limit Plaintiff to the 1/10 mile figure, and it should not matter how many claims fall within the latter distance if the former may also be "reasonably calculated to lead to the discovery of admissible evidence."

...

Therefore, this matter is referred to the Magistrate Judge to revisit Plaintiff's interrogatories 1 and 21, and requests for production 3 and 7.

9.

On September 3, 2009, Magistrate Walker conducted a telephone hearing on said discovery matters. An [124] Agreed Order was entered on September 3, 2009, ordering Defendant to provide neighboring claims files graphically demonstrated by the map attached as Exhibit A to said order. The order also stated "that these other claim files shall be produced within 14 days from September 3, 2009."

10.

The Court ordered documents were to be produced by State Farm by September 17, 2009. Having received no documents or communication from State Farm regarding the neighboring claims files, undersigned counsel's office sent an email to counsel for State Farm on September 18 asking when the documents would be provided. (Exhibit A) State Farm's counsel advised that the documents would be sent to Plaintiff on Monday or Tuesday.

11.

On September 18, 2009, counsel for Plaintiff advised counsel for State Farm that she had shortened her Europe trip, with penalty, to return two days early to review the documents in preparation for trial and asked that the documents be delivered to Plaintiff's counsel by Tuesday (September 22). (Exhibit B)

12.

There has been no response to Plaintiff's email and the neighboring claims files have not been provided to date. The proposed pre-trial order in this matter is due to the Court on October 7 and trial is scheduled for November 2, 2009.

13.

This is at least the third time State Farm has violated this Court's discovery orders. (See ECF # 73 and ECF #75). It is apparent that neither State Farm nor its counsel feel any compunction concerning such violations. Is there any misconduct by State Farm that will result in sanctions? That seems to be the question State Farm is asking this Court to answer. This Plaintiff and others who rely on the Court's even-handed enforcement of its orders seek an answer as well.

14.

Plaintiff requests that this Honorable Court find that State Farm is in violation of the [124] Agreed Order and enter sanctions under Rule 37 for such violation. Under the circumstances, Plaintiff would maintain that the most severe sanction available under Rule 37(b), namely rendering a default judgment against State Farm, is the most appropriate sanction to award. This Honorable Court should render default judgment against State Farm on all issues. Under the circumstances, a default judgment is the appropriate sanction. As noted by the Fifth Circuit in a similar case:

Under the plain language of Rule 37(b)(2), "[i]f a party . . . fails to obey an order to provide or permit discovery," the district court has authority to "strick[e] out pleadings . . . or render [] a judgment by

default.” Fed. R. Civ. P. 37(b)(2)(C). We have explained that “dismissal is authorized only when the failure to comply with the court’s order results from willfulness or bad faith . . . [and] where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions. *Bluitt v. Arco Chem. Co.*, 777 F.2d 188, 190 (5th Cir. 1985). In making its “bad faith” determination, the district court was entitled to rely on its complete understanding of the parties’ motivations. See Fed. R. Evid. 404(b); *Batson*, 805 F.2d at 550-51; *Emerick v. Fenick Indus. Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976). Defendants present no authority for the proposition that the district court is prevented from considering a party’s actions in a related case in making its bad faith determination under Fed. R. Civ. P. 37. Moreover, the dilatory and obstructive conduct of the defendants has been well-documented and the extreme sanction of default judgment was warranted by their actions. See *Bonaventure v. Butler*, 593 F.2d 625, 626 (5th Cir. 1979) (“Deliberate, repeated refusals to comply with discovery orders have been held to justify the use of this ultimate sanction.”); *Emerick*, 539 F.2d at 1381 (“[W]hen a defendant demonstrates flagrant bad faith and callous disregard of its responsibilities, the district court’s choice of the extreme sanction is not an abuse of discretion.”). Accordingly, the district court did not abuse its discretion in entering a default judgment in the 1996 suit.

Smith v. Smith, 145 F.3d 335, 344 (5th Cir. 1998).

15.

While death knell sanctions are awarded with caution, “over-leniency is to be avoided where it results in inadequate protection of discovery.” *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1126 (5th Cir. 1970), *cert. denied*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115. “[W]hen a [party] demonstrates flagrant bad faith and callous disregard of its responsibilities, the district court’s choice of the extreme sanction is not an abuse of discretion.” *Emerick, supra*, at 1381. See also, *Prestia v. USF&G*, No. 1:08-cv-1432-LG-RWH, where this Honorable Court

dismissed a plaintiff's case with prejudice for failing to comply with a discovery order.

16.

The standard for imposing a dismissal of a plaintiff's claim or default judgment against a defendant as a sanction under Rule 37(b)(2)(C) is authorized "when the failure to comply with the Court's order results from wilfulness or bad faith . . . [and] where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions." *Bluitt v. Arco Chem. Co.*, 777 F.2d 188, 190 (5th Cir. 1985). However, the requirement of "bad faith" and/or "willfulness" is not imposed to reserve the sanction only for those with a subjective bad intent. Instead, the limitation on the use of default "applies to protect those who, through no fault of their own, are unable to comply with court orders." *Emerick v. Fenick Industries Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976). *See also, Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) (Rule 37's phrase "refuses to obey" is met when party fails to comply with an order). *Id.* at 1094.

17.

Further, this Court should treat as contempt of court State Farm's failure to obey its order. With regard to civil contempt, the Fifth Circuit described the standard in *American Airlines v. Allied Pilots Association*, 228 F.3d 574, 581 (5th Cir. 2000), as follows:

A movant in a civil contempt proceeding bears the burden of establishing by clear and convincing evidence: 1) that a court order was in effect, 2) that the order required certain conduct by the respondent, and 3) that the respondent failed to comply with the court's order.

A finding of bad faith is not necessary. The Fifth Circuit has held that the "contemptuous actions need not be willful so long as the contemnor actually failed to comply with the court's order." *See also, McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 69 S.Ct. 497, 93 L.Ed. 599 (1949) (intent of defendant irrelevant).

18.

In addition to default judgment and contempt citation, Plaintiff should be awarded attorney's fees and expenses for the extreme effort required during the discovery process. State Farm should also be required to pay for Plaintiff's counsel's travel expenses and penalties that were incurred unnecessarily.

19.

Plaintiff requests that he be relieved of the requirement of filing a separate memorandum in support of this motion.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests this Honorable Court enter an Order sanctioning State Farm for its failure to comply with the Court's order and ordering the Defendant to pay costs and expenses, including reasonable attorneys' fees, incurred in bringing this Motion before the Court, together with any and all additional relief in favor of the Plaintiff deemed appropriate by the Court.

THIS the 23rd day of September, 2009.

Respectfully submitted,

REGINALD EDWIN BOSSIER

BY: */s/ Judy M. Guice*

JUDY M. GUICE (#5057)

Judy M. Guice (MSB #5057)
JUDY M. GUICE, P.A.
P. O. Box 1919
Biloxi, MS 39533-1919
Telephone: (228) 374-9787
Facsimile: (228) 374-9436

CERTIFICATE OF SERVICE

I, Judy M. Guice, counsel for Plaintiff, do hereby certify that I have this day electronically filed the foregoing with the Clerk of this Court using the ECF system which sent notification of such filing to the following:

H. Benjamin Mullen, Esquire
John A. Banahan, Esquire
Bryan, Nelson, Schroeder, Castigliola & Banahan, PLLC
P. O. Drawer 1529
Pascagoula, MS 39568

This the 23rd day of September, 2009.

s/Judy M. Guice

JUDY M. GUICE (MSB #5057)

Rachel Poulos

From: Ben Mullen [ben@bnsch.com]
Sent: Friday, September 18, 2009 2:43 PM
To: Rachel Poulos
Cc: Layna Lassiter
Subject: RE: Bossier - Neighboring Properties

Importance: High

Rachel,

I finally heard back from the group copying at SF. They've had some people out, but I should have them to give to you by Monday or Tuesday.

Thanks.

Ben

H. Benjamin Mullen, Esq.
BRYAN, NELSON, SCHROEDER,
CASTIGLIOLA & BANAHAN, PLLC
Post Office Drawer 1529
1103 Jackson Avenue
Pascagoula, MS 39568-1529
Tel.: 228.762.6631
Fax: 228.769.6392

From: Rachel Poulos [mailto:rachel@judyguice.com]
Sent: Friday, September 18, 2009 1:58 PM
To: Ben Mullen
Cc: Layna Lassiter
Subject: RE: Bossier - Neighboring Properties

Will we be receiving the documents today? If so, I will stay until 5:00 p.m. Please advise.

Rachel Poulos, Legal Assistant
Judy M. Guice, P.A.
P. O. Box 1919
Biloxi, MS 39533
Telephone: (228) 374-9787
Facsimile: (228) 374-9436
rachel@judyguice.com

From: Ben Mullen [mailto:ben@bnsch.com]
Sent: Friday, September 18, 2009 8:54 AM
To: Rachel Poulos
Cc: Layna Lassiter
Subject: RE: Bossier - Neighboring Properties

Let me check on it. I thought they would be here by now.

H. Benjamin Mullen, Esq.
BRYAN, NELSON, SCHROEDER,
CASTIGLIOLA & BANAHAN, PLLC



Post Office Drawer 1529
1103 Jackson Avenue
Pascagoula, MS 39568-1529
Tel.: 228.762.6631
Fax: 228.769.6392

From: Rachel Poulos [mailto:rachel@judyguice.com]
Sent: Friday, September 18, 2009 8:31 AM
To: Ben Mullen
Cc: Layna Lassiter
Subject: Bossier - Neighboring Properties

Ben:

We have not received the neighboring files as ordered by the Court. Will the files be delivered to us today? Our office closes at 3:00 p.m. on Fridays. Thank you for your assistance.

Rachel Poulos, Legal Assistant
Judy M. Guice, P.A.
P. O. Box 1919
Biloxi, MS 39533
Telephone: (228) 374-9787
Facsimile: (228) 374-9436
rachel@judyguice.com

Rachel Poulos

From: judy@judyguice.com
Sent: Friday, September 18, 2009 11:57 PM
To: ben@bnsch.com; Office
Subject: Bossier

Ben--i expected the documents to be produced within the time ordered by the court. I have shortened my trip, with penalty, to return 2 days early to review them in preparation for trial. Your cavalier attitude regarding court orders is perplexing. I must have the documents in hand tues.

Judy
Sent from my Verizon Wireless BlackBerry

