NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 10-3843

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES E. PIETRANGELO, II, Plaintiff-Appellant, v. SANDUSKY LIBRARY; TERRI ESTEL; CITY OF SANDUSKY, OHIO; RICK BRAUN; KRIS PARSONS; JIM DOE, Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

O R D E R

Before: GUY, SUHRHEINRICH, and CLAY, Circuit Judges.

James E. Pietrangelo, II, an Ohio attorney currently on inactive status and proceeding *pro se*, appeals a district court order dismissing his complaint pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure for his failure to cooperate in discovery concerning his claims brought under 42 U.S.C. §§ 1983, 1985, and 1988, and state law. This case has been referred to a panel of the Court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Seeking monetary and injunctive relief, Pietrangelo filed the instant complaint against the Sandusky Library; Terri Estel, a library employee; the City of Sandusky; and Sandusky Police Officers Rick Braun and Kris Parson. He alleged that his constitutional rights were violated when he was asked to leave the library on October 28, 2009, after confronting library staff regarding the behavior of other patrons. The defendant police officers escorted him from the building. Pietrangelo

also asserted state law claims for wrongful ejectment, conversion, defamation, intentional infliction of emotional distress, false arrest, and breach of contract.

The parties began taking discovery soon after the lawsuit was filed. However, during his deposition taken on March 5, 2010, Pietrangelo objected to the defendants' request to list "the name of each medical practitioner, therapist or other healthcare worker who has treated [him] for the extreme emotional distress [he] allege[d] to have suffered." Pietrangelo also refused to answer, among similar questions including whether he had seen a doctor about sleep problems; whether he had been treated for anxiety or depression; whether he has ever been treated by a mental health practitioner for "any injury or illness caused by the events of October 28, 2009"; what year he was born; whether he has retained counsel; whether he has an active law license; whether he has ever resided in Vermont; whether he moved to Ohio; whether he has ever been deposed; where he went to college; whether he was married or had any hobbies; and under which statute he claimed damages. Pietrangelo asserted that the questions were "[n]ot reasonably calculated to lead to discovery of admissible evidence" and that they were "premature."

Because of Pietrangelo's refusal to answer the foregoing questions, counsel for the City defendants contacted the district court to resolve the dispute over the relevance of the information. The district court ordered Pietrangelo three times to answer the questions and warned him of the possible consequences, including dismissal of his case, if he failed to do so. The deposition re-commenced, at which time Pietrangelo refused to answer subsequent questions. Counsel for the City contacted the court, once again, for assistance concerning Pietrangelo's refusal to answer the questions. This time, the court confirmed that Pietrangelo refused to answer the questions, concluded that he had violated the court's earlier order, and suggested that the deposition continue to the extent possible. The deposition continued but Pietrangelo refused to answer additional questions.

Thereafter, the defendants sought an order to show cause and sanctions based on Pietrangelo's repeated refusal to respond to relevant questions during his deposition. At a show cause hearing held on June 14, 2010, the district court found Pietrangelo in contempt of court,

dismissed his complaint with prejudice, and imposed sanctions. On June 22, 2010, a written order was entered to this effect. Pietrangelo filed a notice of appeal from this order on July 9, 2010. The district court later entered an order awarding the defendants attorneys' fees.

On appeal, Pietrangelo argues that he was not afforded due process during the contempt proceedings. He also raises numerous challenges to the validity of the district court's contempt ruling, asserting, *inter alia*, that the ruling was invalid because (1) the district court could not conduct a telephonic hearing on the record; (2) the court refused his request to suspend the deposition to allow him to file a motion for protective order; and (3) the district court was biased. He also argues that the award of attorneys' fees was improper.

A district court's dismissal of a complaint under Federal Rule of Civil Procedure 37(b)(2) is reviewed for an abuse of discretion. *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 510 (6th Cir. 2002). An abuse of discretion occurs if the district court "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *see also Salkil v. Mount Sterling Twp. Police Dep't*, 458 F.3d 520, 527-28 (6th Cir. 2006). Moreover, an abuse of discretion is found only when this Court is left with "the definite and firm conviction that the court below committed a clear error of judgment." *Sako v. Gonzales*, 434 F.3d 857, 863 (6th Cir. 2006) (quoting *Balani v. INS*, 669 F.2d 1157, 1160 (6th Cir. 1982)).

In determining whether the dismissal amounts to an abuse of discretion, this Court considers:

> "(1) whether the party's failure [to cooperate in discovery] is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's [failure to cooperate in discovery]; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal was ordered."

United States v. Reyes, 307 F.3d 451, 458 (6th Cir. 2002) (quoting *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 363 (6th Cir. 1999)). "Although no one factor is dispositive, dismissal is proper if the record demonstrates delay or contumacious conduct." *Id.* The plaintiff "has the burden of showing that his failure to comply was due to inability, not willfulness or bad faith." *Id.* A district court does

not abuse its discretion in dismissing a case "if the party has the ability to comply with a discovery order but does not." *Id*.

Regarding the first factor, the district court explicitly directed Pietrangelo to answer the questions propounded to him. Contrary to Pietrangelo's argument on appeal, these questions were well within the scope of pretrial discovery. *See* Fed. R. Civ. P 26(b) (parties in a civil action may obtain discovery regarding any unprivileged matter that is relevant to the claim or defense of any party). And because Pietrangelo's damages claim put his mental health at issue, his medical records were not privileged. *Cf. Maday v. Pub. Libraries of Saginaw*, 480 F.3d 815, 821 (6th Cir. 2007) (holding that the plaintiff waived psychotherapist-patient privilege by seeking mental health damages). Pietrangelo repeatedly refused to answer. His refusal was without any lawful basis and in complete defiance of the court's order. Moreover, it is noted that Pietrangelo is an attorney, albeit currently inactive. As pointed out by the district court, "an attorney should most understand the importance of complying with court orders, and the consequences of failing to do so." We conclude that Pietrangelo's withholding of his responses to relevant questions was willful.

Regarding the second factor, the defendants were unable to prepare and present an adequate defense without Pietrangelo's complete cooperation during the deposition. Accordingly, we conclude that the defendants were prejudiced by Pietrangelo's failure to cooperate in discovery.

As to the third factor, the district court gave Pietrangelo ample warning regarding the possible consequences of continued failure to cooperate in discovery.

Regarding the fourth factor, although it is not evident from the record whether less drastic sanctions were considered before dismissal was ordered, no single factor of these four is dispositive, and dismissal may be proper even if the court did not consider a lesser sanction when, as here, a clear record of delay is found in the record. *See Harmon v. CSX Transp., Inc.*, 110 F.3d 364, 368-69 (6th Cir. 1997) (in the context of sanctioning counsel).

Pietrangelo asserts that he was denied due process during the contempt proceedings. "[C]ivil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary

civil proceeding upon notice and an opportunity to be heard." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994). As the foregoing shows, Pietrangelo was accorded notice and an opportunity to be heard whenever his vexatious conduct was challenged and when the parties moved for sanctions and civil contempt. Having considered the four factors, we conclude that the district court did not abuse its discretion in dismissing Pietrangelo's complaint for his failure to cooperate in discovery.

Although Pietrangelo attacks the district court's contempt ruling on multiple grounds, most of these attacks are clearly baseless and merit no discussion. His argument that the district court could not conduct a telephonic hearing on the record is without merit. *See* Northern District of Ohio Local Civil Rule 37.1 ("The Judicial Officer may attempt to resolve the discovery dispute by telephone conference.").

His argument that the district court abused its discretion by refusing his request to suspend the deposition to allow him to file a motion for a protective order under Federal Rule of Civil Procedure 30(d)(3) is also without merit. Pietrangelo was unable to identify any arguable basis for his refusal to answer that he could have developed in a motion for a protective order. In these circumstances, the district court did not abuse its discretion by refusing his request to suspend the deposition to allow him to file a motion. *Cf. Coleman v. Am. Red Cross*, 979 F.2d 1135, 1138 (6th Cir. 1992) (whether to issue a protective order forbidding certain discovery is for the district court's discretion).

His judicial bias claim relates to adverse legal rulings. Judicial rulings alone almost never constitute a valid basis for a finding of judicial bias. *See Liteky v. United States*, 510 U.S. 540, 555 (1994). As Pietrangelo's allegations of bias are based on his displeasure with the district court's judgment, no bias has been established. *Id*.

Finally, to the extent the parties' briefs present arguments regarding the August 23, 2010, order granting the defendants' motions for attorneys' fees and costs, the issue is not before this Court. Because the district court granted the defendants' motion after Pietrangelo filed the instant appeal and the defendants' motion did not fall under Federal Rule of Appellate Procedure 4(a)(4),

Pietrangelo's appeal from this ruling was docketed separately under No. 10-4119. On November 5, 2010, this Court dismissed No. 10-4119 for want of prosecution because Pietrangelo did not pay the filing fee. *Pietrangelo v. Sandusky Library*, No. 10-4119 (6th Cir. Nov. 5, 2010). The parties' arguments regarding review of the order granting the defendants' motion are moot.

Accordingly, the district court's order is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Clerk