

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

ROBERT E. HOWELL, SR.

PLAINTIFF

V.

NO: 5:15CV00316 PSH

**MARVIN EVANS, JR.,
GAYLON LAY, KARL P. CHERRY,
and EDDIE KNIGHT**

DEFENDANTS

ORDER

Before the Court is a Motion to Dismiss for lack of prosecution filed by defendants Marvin Evans, Jr., Gaylon Lay, Karl P. Cherry, and Eddie Knight (the “Defendants”) (Doc. No. 68). Defendants assert Plaintiff Robert E. Howell, Sr. (“Plaintiff”) has failed to prosecute this case by not appearing for two scheduled depositions and not arranging to reschedule his deposition. Counsel for the Defendants served Plaintiff a Notice of Deposition dated May 25, 2017, setting his deposition for June 13, 2017, at the Office of the Arkansas Attorney General. *See* Doc. No. 68-1. Plaintiff did not appear. *See* Doc. No. 68-2 (June 13, 2017 Statement for the Record). Counsel attempted to reschedule Mr. Howell’s deposition before the discovery deadline of July 7, 2017, and served Plaintiff with a Notice of deposition dated June 14, 2017, setting his deposition for June 23, 2017, at the Office of the Arkansas Attorney General. *See* Doc. No. 68-3. The Notice was accompanied by a letter, warning Mr. Howell that should he fail to appear a second time, Defendants would file a Motion to Dismiss for failure to prosecute. *Id.* Plaintiff failed to appear at the June 23 deposition. *See* Doc. No. 68-4 (June 23, 2017 Statement for the Record).

On July 5, 2017, the Court entered a text order directing Plaintiff file a response to the Defendants’ motion to dismiss within 14 days if he chose to respond. *See* Doc. No. 70. Plaintiff was cautioned that if he failed to file a response, the Court would decide the Defendants’ motion

without the benefit of his input. *Id.* More than 14 days have passed, and Plaintiff has not responded to the Defendants' motion.

Rule 37(d) of the Federal Rules of Civil Procedure allows a district court to dismiss an action when a party fails to appear for his deposition. *See also Aziz v. Wright*, 34 F.3d 587, 589 (8th Cir. 1994) (no motion to compel is required before dismissal under Rule 37(d)). Likewise, Rule 41(b) of the Federal Rules of Civil Procedure allows a defendant to move to dismiss the action or any claim against it when the plaintiff fails to prosecute or comply with the Rules of Civil Procedure or a court order. Plaintiff's failure to appear at two scheduled depositions along with his failure to communicate with Defendants' counsel to reschedule those depositions is cause for the dismissal of this case. The parties cannot comply with the discovery deadline or the deadline to file motions for summary judgment without Plaintiff's cooperation in the discovery process. Accordingly, the Defendants' motion to dismiss is GRANTED, and this case is DISMISSED without prejudice.

IT IS SO ORDERED this 25th day of July, 2017.



UNITED STATES MAGISTRATE JUDGE