

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

MIGUEL ANGEL CORBACHO
DAUDINOT

Plaintiff,

CASE NO.: 1:13-cv-22589-KMW

v.

YASIEL PUIG VALDES and
MARITZA VALDES GONZALEZ,

Defendants.

**DEFENDANTS' RULE 37 MOTION FOR DISMISSAL PURSUANT TO
RULE 37 AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Defendants, Yasiel Puig Valdes and Maritza Valdes Gonzalez, pursuant to Fed. R. Civ. P. 37(d), move for a dismissal with prejudice of this action as a sanction against plaintiff, Miguel Angel Corbacho Daudinot, for again failing to appear for a properly noticed deposition (which was set for a date of his own counsel's choosing). The grounds for this motion are set forth in the following memorandum of law.

Memorandum of Law

It's been 21 months since this case was filed and plaintiff has not produced any evidence to support his incredible accusation that Yasiel Puig, a Major League Baseball player, and his mother conspired with the Cuban government to torture plaintiff in violation of the Torture Victims Protection Act ("TVPA"). Plaintiff has been given ample opportunity to present such evidence. He simply hasn't done so and, in the process, he's made a mockery of the federal rules of civil procedure and prejudiced defendants' ability to rid themselves of plaintiffs' defamatory allegations.

Procedural Background

On October 9, 2014 (15 months after the filing of plaintiff's initial complaint), defendants filed a Rule 37 Motion for Sanctions based on plaintiff's failure to appear for his duly noticed depositions on August 7, 2014 and September 12, 2014 or to provide a date certain in December for plaintiff's deposition. (ECF No. 52.) As noted then, plaintiff not only failed twice to appear for his deposition without any notice or explanation, plaintiff did not even seek a protective order as required by the Local Rules. On November 11, 2014, the Court denied defendants' motion but required plaintiff to make himself available for deposition prior to the January 14, 2015 mediation in this matter. (ECF No. 60.) The Court also ordered that, "prior to his deposition, Plaintiff shall apprise Defendants that he has obtained a visa and shall notify Defendants when he arrives in the United States." (*Id.*)

Despite the Court's clear instructions, defendants did not hear a word from plaintiff until January 7, 2015, when he filed his Motion for Stay of Proceedings Pending Travel Visa of Plaintiff from Cuba to the United States. (ECF No. 63.) In the motion, plaintiff's counsel requested that the Court "stay the proceedings for a period of three (3) months so that [plaintiff] may finalize his visa process and is allowed to attend the deposition..." despite admitting that plaintiff was incarcerated [in Cuba], and that it was "by no means certain when...release will be granted" (ECF No. 63 at 5.) The Court denied plaintiff's motion to stay and pointedly advised the parties to proceed with discovery according to the Court's scheduling order. (ECF No. 71.)

On March 3, 2015, mindful of the Court's warning and the fast-approaching discovery deadlines, defendants noticed plaintiff's deposition for March 17, 2015 and

served their first request for production to plaintiff. (Defendants' Third Notice of Taking Plaintiff's Deposition is attached as Exhibit A and Defendants' First Request for Production is attached as Exhibit B). On March 5 and 6, plaintiff's counsel notified defendants' counsel that plaintiff would not be available for deposition on March 17 and requested that the deposition be rescheduled for April 21, 2015. (See Exhibit C.) Defendants accommodated plaintiff's counsel's request and rescheduled plaintiff's deposition for April 21, 2015. (Defendants' Fourth Notice of Taking Plaintiff's Deposition is attached as Exhibit D.)

Defendants' counsel prepared accordingly for plaintiff's deposition only to receive a phone call from plaintiff's counsel at 4:00 pm on the eve of plaintiff's deposition advising defendants for the first time that plaintiff was still in Cuba and would not be appearing for his deposition – a deposition, it bears reiterating, that was re-scheduled for a date of plaintiff's choosing.

Not only did plaintiff fail to appear (for a third time) at his properly noticed deposition, he also completely ignored defendants' first request for production (the response to which was due on April 6). To date, plaintiff has not responded to defendants' request for production nor has he produced a single document in response thereto.

Plaintiff's continued disregard of the rules of civil procedure has prejudiced defendants' ability to timely prepare their defense and bring closure to this case. By way of example, the deadline for defendants' disclosure of expert witnesses and reports is April 30, 2015. Without plaintiff's deposition testimony, defendants cannot reasonably be expected to engage an expert and produce a meaningful report. More broadly, without

plaintiff's deposition testimony, defendants are unable to determine what other discovery they ought to be pursuing in defense of this case.

Applicable Law

Rule 37(d)(1)(A) of the Federal Rules of Civil Procedure provides that: "The court where an action is pending may, on motion, order sanctions if: (i) a party...fails, after being served with proper notice, to appear for that person's deposition; or (ii) a party after being properly served with ...a request for inspection under Rule 34, fails to serve its answers, objections, or written response."

Rule 37(d)(3) sets forth the sanctions that may be awarded for a party's failure to appear at its deposition. Those sanctions include the striking of the party's pleadings, dismissal of the action and the awarding of attorneys' fees. "Rule 37 sanctions are intended to prevent unfair prejudice to the litigants and insure the integrity of the discovery process." *Gratton v. Great American Communications*, 178 F.3d 1373, 1374 (11th Cir. 1999).¹

A court's authority to impose sanctions for refusal to comply with discovery orders is broad. *S.E.C. v. Utsick*, 373 Fed. Appx. 924, 926-7 (11th Cir. 2010). "[T]he district court retains the discretion to dismiss a complaint where the party's conduct amounts to flagrant disregard and willful disobedience of the court's discovery orders." *Kelly v. Old Dominion Freight Line, Inc.*, 376 Fed. Appx. 909, 913 (11th Cir. 2010) (upholding dismissal with prejudice as a sanction where the plaintiff committed numerous discovery violations).

¹ Alternatively, the Court should dismiss this action pursuant to Rule 41(b), Fed. R. Civ. P., which authorizes "[a] district court ..., on defendant's motion, to dismiss an action for failure to prosecute or to obey a court order or federal rule." *Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir.1985). Here, because there is a clear record of delay or willful contempt, the dismissal of plaintiff's action should be with prejudice. *McKelvey v. AT&T Techs., Inc.*, 789 F.2d 1518, 1520-21 (11th Cir.1986); *Kelly v. Old Dominion Freight Line, Inc.*, 376 Fed. Appx. 909, 913-14 (11th Cir. 2010).

See *Allstate Ins. Co. v. Palterovich*, 04-21402-CIV, 2008 WL 2741119 (S.D. Fla. 2008) (finding that plaintiff's repeated failure to attend his properly noticed depositions warranted the imposition of sanctions in the form of a default judgment); *Gratton*, 178 F.3d at 1375 (granting dismissal with prejudice where the "case, almost from the very beginning, has been attended by the plaintiff's unwillingness or inability to comply with the civil rules, ordinary and expected litigations procedures, and the orders of this court.").

Conclusion

For the foregoing reasons, defendants move for an order dismissing this action as a sanction for plaintiff's repeated failure to appear at his duly noticed depositions (and plaintiff's failure to respond to defendants' first request for production of documents). Additionally, defendants request that they be awarded their reasonable expenses, including attorney's fees, in pursuing both this motion and their first motion for sanctions. *Kelly*, 376 Fed. Appx. at 915.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/ Averil Andrews
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