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' REPLY MEMORANDUM IN SUPPORT OF THEIR RULE 37 MOTION FOR DISMISSAL

Defendants, Yasiel Puig Valdes and Maritza Valdes Gonzalez, submit this reply memorandum in support of their Rule 37 Motion for Dismissal ("Rule 37 Motion") (ECF No. 74).

Introduction

Nearly two years ago now, plaintiff filed this action accusing defendants of conspiring with the Cuban government to torture plaintiff. For nearly two years, defendants have had to live with this incendiary, reputation-damaging allegation hanging over their heads. For nearly a year, defendants have been trying to depose plaintiff, expose his scurrilous allegations for the shake down that they are and finally put this matter behind them. And for nearly a year now, plaintiff has made a mockery of the rules of civil procedure by failing to appear on three different occasions for his properly noticed deposition (this last time, on a date of his own choosing).

Nothing in Plaintiff's Response in Opposition to the Rule 37 Motion (ECF No. 76) justifies or excuses plaintiff's conduct. The fact is that this lawsuit never should have been filed in the first place. It certainly should not be allowed to linger any longer.

The Undisputed Facts

The following facts are not in dispute:

- At the June 24, 2014 hearing on Defendants' Motion to Dismiss the Second Amended Complaint, the Court advised plaintiff's counsel as follows:

> Ms. Bravo, you have chosen – you and your client have chosen – to bring this lawsuit at this time in this court, and now you have an obligation, along with your client, to prosecute it according to the schedule and rules of this court … So, I am not inclined to be forgiving of deadlines because the choice to avail yourself of the court is yours.

(Transcript, excerpts attached as Exhibit A, at 16:7-16.)

- At that same hearing, undersigned counsel expressly advised the Court and plaintiff's counsel that, "I intend … the moment we walk out of the courtroom [to] clear a deposition date for the plaintiff in Miami." (Ex. A at 15:21-22.)

- As promised, on June 25, 2014, undersigned counsel noticed plaintiff's deposition. The deposition was set for August 7, 2014, but defendants' counsel sent an accompanying email to plaintiff's counsel stating that defendants' were willing to work with plaintiff on dates. (ECF No. 52, Ex. A at 1.) Plaintiff's counsel never responded.

- Plaintiff failed to appear for this deposition on August 7. Plaintiff never filed a motion for protective order as required under Fed. R. Civ. P. 26(c)(1)(B). Nor did plaintiff even bother to provide any notice that he would not be appearing.

- On August 12, 2014, defendants again noticed plaintiff's deposition, this time for September 12, 2014. Again, defendants' counsel sent an accompanying email to plaintiff's counsel stating that defendants' were willing to work with plaintiff on dates. (ECF No. 52, Ex. B at 1.) Plaintiff's counsel never responded.

- Plaintiff failed to appear for his deposition on September 12, 2014. Again, plaintiff never filed a motion for protective order as required. Nor did plaintiff bother to provide any notice that he would not be appearing.

- In September of 2014, defendants' counsel tried repeatedly to obtain a date certain for plaintiff's deposition. (*See* ECF No. 52, Exs. C, D and E.) Plaintiff never provided such a date and, so, defendants filed their first Rule 37 Motion for Sanctions (ECF No. 52).

- On November 11, 2014, the Court denied defendants first Motion for Rule 37 Sanctions, but required plaintiff to make himself available for deposition prior to the January 14, 2015 mediation in this case. (ECF No. 60.)

- On January 7, 2015, still not having made himself available for deposition, plaintiff filed a motion to stay this action. (ECF No. 63.) The case did not settle at mediation and, on January 30, 2015, the Court, noting that the Case had been pending for nearly two years, denied the motion to stay and admonished the parties to proceed with discovery. (Transcript, excerpts attached as Exhibit B, at 9-10.)

- On March 3, 2015, defendants noticed plaintiffs' deposition for March 17, 2015. Plaintiffs' counsel responded that she would not be available on that date and requested that the deposition be rescheduled for April 21, 2015. (ECF No. 74, Ex. C.)

Despite the impending Court-imposed pretrial deadlines, defendants accommodated plaintiff's counsel and re-noticed plaintiff's deposition for April 21, as requested.

- Plaintiff did not appear for his deposition on April 21, nor did he file the required motion for protective order. Instead, at 4:00 pm on April 20, plaintiff's counsel called to tell defendants' counsel *for the first time* that the deposition would not be going forward.

Discussion

Plaintiff's real argument in support of his complete failure to engage in discovery appears to be that the rules of civil procedure (and the Court's express admonition that the parties go forward with the court-ordered schedule) do not apply if the plaintiff is having settlement discussions with defendants. (*See* ECF No. 76 at 4-5.) Plaintiff, of course, cites no authority in support of this proposition. The fact is there is no such authority. To the contrary, the law is clear that court deadlines cannot be unilaterally ignored by a party. *See* S.D. Fla. L.R. 26.1(a) and (f).

To be clear, defendants never agreed to a stay of discovery pending settlement discussion. Nor, for that matter, did anybody ever approach defendants about such a stay (had anybody done so, defendants, tired as they are about having this case hang over them and cognizant of the Court's admonition to move this case forward, would not have agreed).

Plaintiff next argues that defendants' Rule 37 Motion should be denied because defendants failed to comply with the "meet and confer" requirements of Fed. R. Civ. P. 37(d), and S.D. Fla. L.R. 7.1(a)(3) (ECF No. 76 at 5-7). That is simply false. As detailed above, (*see* pp. 2 - 4), defendants have spent the better part of the last year conferring

with plaintiff's counsel, trying to schedule plaintiff's deposition for a "mutually convenient" date.

Realizing perhaps that he has no valid justification for his complete failure to engage in discovery, plaintiff devotes the last several pages of his response to arguing that the Court ought not enter a sanction that involves the dismissal of plaintiff's two year old case. (ECF No. 76 at 7-10.) In support of this argument, Plaintiff relies on two cases that are plainly inapposite. *Samadi v. Bank of America, N.A.*, 476 Fed. Appx. 819 (11th Cir. 2012) involved a *pro se* plaintiff who refused to attend his deposition unless he received certain materials from defendant in anticipation of his deposition. *Taylor v. Taylor B.C.*, 133 Fed. Appx. 707 (11th Cir. 2005), involved another *pro se* plaintiff who did in fact show up for his deposition but repeatedly lodged inappropriate objections. Plaintiff's reliance on these cases is mystifying for two reasons. First, in both those cases the court actually sanctioned plaintiffs, despite the deference normally given to *pro se* litigants. *See Samadi* at 821. Second, in stark contrast to plaintiff here, the *pro se* litigants in the cases relied on by plaintiff either appeared for their deposition or advised defendants in advance that plaintiff would not be appearing unless certain conditions were met. That did not happen here and, as a result, defendants have repeatedly incurred significant attorney's fees preparing for depositions that never occurred.

Equally bafflingly is plaintiff's reliance on *Carlucci v. Piper Aircraft Corp., Inc.*, 775 F.2d. 1440, (11th Cir. 1985) and *Kelly v. Old Dominion Freight Line, Inc.*, 376 Fed. Appx. 909 (11th Cir. 2010), for the proposition that plaintiff's conduct here has not evinced the type of bad faith that is necessary to warrant dismissal pursuant to Rule 37. (ECF No. 76 at 9-10.) Without belaboring the point, the conduct addressed in those cases is the exact conduct plaintiff has engaged in here, including, ignoring court rulings, imposing plaintiff's

own time constraints, making conflicting representations to the court, failing to timely respond to requests for production, failing to respond to the opposing party's requests to schedule plaintiff's deposition and failing to appear for plaintiff's scheduled deposition. *See Carlucci* at 1447-48 and *Kelly* at 914-915.

In sum, plaintiff's actions here are precisely the type of bad faith conduct that warrants a dismissal of his case. He filed an action he was not ready to prosecute and then, for nearly a year, has strung along the Court and defendants with false promises about his imminent availability for deposition.

By way of example, on September 16, 2014, plaintiff's counsel wrote to defendants' counsel: "The Chapman case goes to trial in mid-November. I will be unable to do the depo at that time. Let's agree to something in December, then?" (ECF No. 52, Exhibit E.) At the November 5 hearing on defendants' first Motion for Rule 37 Sanctions, plaintiff's counsel told the Court, "[W]e're hoping this week he is going to be released and we can go ahead and get the Visa for him to come to the United States in order to proceed with the deposition." (Transcript, excerpts attached as Exhibit C, at 2:23-25.) When the Court asked how long it would take for plaintiff to get his visa and come to the United States, plaintiff's counsel responded, "Before mediation—the date scheduled for mediation is January 14th. We are hoping to have him for deposition before that time." (*Id.* at 3:1-6.) Then, on March 5, 2015, plaintiff's counsel wrote to defendants' counsel, "Our client should be in Miami by the end of the month." (ECF No. 74, Exhibit C.) Finally, on March 6, 2015, plaintiff's counsel wrote, "Please reschedule the deposition to April 21, and the services of an interpreter will be necessary." (ECF No. 74, Exhibit C.)

Enough is enough. As the Court explained to plaintiff's counsel nearly four months ago, "When you filed this case, and made the legal strategic decision to file this case at

the time you did, you knew your client was being held." (Exhibit B at 3:21-24.) The Court has shown enough patience already, "I have also given more time to the case because I knew of the difficulties you had discussed. But I also advised you that we were not going to just keep rolling it over." (Ex. B at 4:1-4.) It is time to bring this two year old case to an end.

Conclusion

For the foregoing reasons, and the reasons set forth in defendants' Rule 37 Motion (ECF No. 74), defendants move for an order dismissing this action as a sanction for plaintiff's complete failure to abide by the rules of civil procedure concerning discovery. 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 (ECF No. 52).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 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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