UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

WINSTON KINGSTON,

Plaintiff,

v. No. 12-CV-227 (DNH/CFH)

VIDAR QUDSI, Dr., Altona Correctional Facility;
BRIAN FISCHER, Commissioner, DOCCS,

Defendants.

APPEARANCES: **OF COUNSEL:**

WINSTON KINGSTON
Plaintiff Pro Se
107-12 172 Street
Jamaica, Queens, New York 11433

HON. ERIC T. SCHNEIDERMAN
Attorney General for the
State of New York
Attorney for Defendants
The Capitol
Albany, New York 12224-0341

C. HARRIS DAGUE, ESQ.
Assistant Attorney General

CHRISTIAN F. HUMMEL
U.S. MAGISTRATE JUDGE

REPORT-RECOMMENDATION AND ORDER[1]

Plaintiff pro se Winston Kingston ("Kingston"), a former inmate in the custody of the New York Department of Corrections and Community Supervision ("DOCCS"), brings this action pursuant to 42 U.S.C. § 1983 alleging that defendants, one DOCCS employee and one DOCCS official, violated his constitutional rights under the Eighth Amendment. Compl. (Dkt. No. 1). Presently pending is defendants' second motion made pursuant to Fed. R.

---

[1] This matter was referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636(b) and N.D.N.Y.L.R. 72.3(c).

Civ. P. 37 seeking dismissal of Kingston's complaint with prejudice, or in the alternative, seeking compulsion of Kingston's appearance for a deposition and other sanctions. Dkt. No. 32; Dague Decl. (Dkt. No. 32-1) ¶ 12 . Kingston does not oppose the motion. For the following reasons, it is recommended that defendants' motion be granted.

I. Background

On May 11, 2012, the Court issued a Mandatory Pre-Trial Discovery and Scheduling Order ("Scheduling Order") directing that defendants may take Kingston's deposition by providing Kingston with a notice of deposition. Dkt. No. 16 at 3. The Scheduling Order notified Kingston that his "failure . . . to attend, be sworn, and answer appropriate questions may result in sanctions, including dismissal of the action pursuant to Fed. R. Civ. P. 37. Id. at 4. By notice of deposition dated July 20, 2012, defendants advised Kingston of their intent to depose him on August 22, 2012 at 9:00 a.m., at the Office of the Attorney General in Albany, New York. Dague Decl. ¶ 4; Dkt. No. 32-2 at 2–3 (notice of deposition). The notice of deposition was mailed to Kingston at 107-12 172 Street, Jamaica, Queens, New York 11433.[2] Dague Decl. ¶ 5; Dkt. No. 32-2 at 3; see also Dkt. No. 17 (notice of change of address by Kingston).

On August 22, 2012, defendants' counsel and a court reporter were prepared to take Kingston's deposition. Dague Decl. ¶¶ 6–8. However, Kingston neither appeared for the scheduled deposition nor provided defendants any notice prior to August 22, 2012 of his

[2] From the commencement of this action until the time of this memorandum-decision and order, Kingston moved to-and-from various residences. Between May 14, 2012 and January 14, 2013, Kingston's address on file with the Court was 107-12 172 Street, Jamaica, Queens, New York 11433. See Dkt. Nos. 17, 25.

intent to not attend his deposition. Id. ¶¶ 9–10; Dkt. No. 32-2 at 8 (deposition transcript noting date, time, and Kingston's absence). The Office of the Attorney General incurred an $85.00 court reporter fee. Dague Decl. ¶ 11; Dkt. No. 32-2 at 12 (invoice billed to the Office of the Attorney General). On October 23, 2012, defendants filed the first motion pursuant to Fed. R. Civ. P. 37. Dkt. No. 22. Kingston failed to respond that motion.[3]

By Memorandum-Decision & Order dated June 26, 2013, this Court ordered Kingston to appear for a deposition once he reimburses defendants the incurred court reporter fee. Dkt. No. 31 at 8–9. Specifically, this Court ordered Kingston to reimburse $85.00 to defendants within thirty days of June 26, 2013. Id. at 8. Kingston was ordered to appear for a deposition on or before August 9, 2013 once reimbursement was made. Id. at 8. Kingston was notified that "[i]n the event [he] fails to reimburse the defendants for the $85.00 fee, or fails to appear for the deposition, and produce documents pursuant to the notice, the defendants may move this Court for an order of dismissal of this action." Id. As of August 9, 2013, Kingston has failed to reimburse defendants within the court ordered time-period. Dague Decl. ¶ 15. This motion followed.

II. Discussion

Defendants seek dismissal of Kingston's action as a sanction for failing to attend a scheduled deposition and comply with the Court's order dated June 26, 2013. In the

[3] Between December 13, 2012 and February 4, 2013, the Court has sua sponte extended Kingston's response deadline and twice granted Kingston an extension upon Kingston's letter motions. Dkt. No. 24 at 2; Text Orders dated 01/28/2013, 02/04/2013. The Court has warned Kingston that his "continued inaction in this matter could result in this Court recommending dismissal of this action." Dkt. No. 24 at 2.

alternative, defendants seek the compulsion of Kingston's appearance for a deposition along with other unspecified sanctions. Kingston does not oppose.

A. Federal Rule of Civil Procedure 37

Pursuant to the Federal Rules of Civil Procedure, sanctions may be awarded where parties fail to comply with court orders or fail to attend their own depositions. FED. R. CIV. P. 37(b) & (d); N.D.N.Y.L.R. 1.1(d) ("Failure of an attorney or of a party to comply with . . . Orders of the court, or the Federal Rules of Civil . . . Procedure shall be a ground for imposition of sanctions."). Such sanctions include: (1) an order establishing facts; (2) an order precluding evidence, issues or claims; (3) an order striking a pleading; (4) staying proceedings; (5) dismissing the action; or (6) rendering a default judgment against the disobedient party. FED. R. CIV. P. 37(b)(2)(A)(i-vi) & (d)(3).

A district court has broad discretion to impose sanctions. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002) (citation omitted). Dismissal and default are drastic remedies which should generally only be used when lesser sanctions would be inappropriate. Southern New England Tel. Co. v. Global NAPs Inc., 624 F.3d 123, 144 (2d Cir. 2010) (citations omitted). However, discovery orders are meant to be complied with; thus, dismissal is justified when noncompliance is attributed to willfulness, bad faith, or fault of the offending party. Id. (citations omitted). In deciding an appropriate sanction, "the court may consider the full record . . . [specifically] the willfulness of the non-compliant party; the reasons for the noncompliance; the efficacy of lesser sanctions; the duration of the non-compliance; and whether the party has been warned of the consequences of non-compliance." Broadcast Music, Inc. v. Metro Lounge & Café LLC,

No. 10-CV-1149 (NAM/ATB), 2012 WL 4107807, at *2 (N.D.N.Y. July 18, 2012) (citations omitted);[4] see also Bambu Sales, Inc. v. Ozak Trading Inc., 58 F.3d 849, 852–54 (2d Cir. 1995). The goals of sanctions are to "ensure that a party will not benefit from its own failure to comply . . . [, act as] specific deterrents and seek to obtain compliance with the particular order issued[, and] . . . serve [as] a general deterrent on the case at hand and on other litigation . . . ." Update Art, Inc. v. Modiin Pub., Ltd., 843 F.2d 67, 71 (2d Cir. 1988) (citations omitted).

In this case, all relevant factors support dismissal of Kingston's action with prejudice. First, despite the Court's repeated warnings, Kingston failed to advise the Court the reason for his failure to comply with the June 26, 2013 Order, which provided specific instructions to Kingston on how to proceed with discovery. Kingston does not claim that he did not understand the Court's orders. As such, it can only be determined that Kingston's failure to comply with the June 26, 2013 Order was willful. Baba v. Japan Travel Bureau Int'l, Inc., 165 F.R.D. 398, 402–03 (S.D.N.Y. 1996) (citation omitted) ("Noncompliance with discovery orders is considered wilful when the court's orders have been clear, when the party has understood them, and when the party's non-compliance is not due to factors beyond the party's control.").

Second, sanctions other than dismissal would not be effective in compelling Kingston's participation in this instance. Kingston failed to appear for a scheduled deposition on August 22, 2012. While Kingston advised the Court of his intent to respond to defendants' first motion seeking sanctions, Kingston never followed through with a filing. The Court

[4] All unpublished opinions cited to by the Court in this Memorandum-Decision and Order are, unless otherwise noted, attached to this Order.

ordered Kingston to reimburse defendants a certain fee within a specified time period. However, Kingston did not send any payment to defendants' counsel.[5] Further, Kingston has not established any contact with this Court since March 20, 2013. It has been over a year from when Kingston failed to appear for his deposition. Thus, it is fair to conclude that imposing sanctions other than dismissal would not serve any meaningful purpose. Update Art, Inc., 843 F.2d at 71.

Moreover, Kingston has been warned of the consequences of failing to comply with the Court's orders. "The severe sanction of dismissal with prejudice may be imposed even against a plaintiff who is proceeding pro se, so long as a warning has been given that noncompliance can result in dismissal." Valentine v. Museum of Modern Art, 29 F.3d 47, 50 (2d Cir. 1994) (citing cases). Since warning notices have been repeatedly given to Kingston, dismissal of this action with prejudice may be imposed.

Accordingly, it is recommended that defendants' motion on this ground be granted and Kingston's complaint be dismissed with prejudice.

B. Failure to Prosecute

Federal Rules of Civil Procedure 41(b) provides that a court may dismiss an action "[i]f the plaintiff fails to prosecute or comply with [the Federal Rules of Civil Procedures] or a court order . . . ." FED. R. CIV. P. 41(b); see Link v. Wabash R.R. Co., 370 U.S. 626, 629 (1962); MTV Networks v. Lane, 998 F. Supp. 390, 393 (S.D.N.Y. 1998); see also

[5] The Court further ordered that upon receipt of the reimbursement, defendants were entitled to take Kingston's deposition on or before August 9, 2013. The scheduling of the second deposition was unnecessary because Kingston failed to fulfill the former court instruction.

N.D.N.Y.L.R. 41.2(b).

Since a Rule 41(b) dismissal is a "harsh remedy . . . [it] is appropriate only in extreme situations." Lucas v. Miles, 84 F.3d 532, 535 (2d Cir. 1996) (citations omitted). Furthermore, where the plaintiff is pro se, "courts 'should be especially hesitant to dismiss for procedural deficiencies. . . .'" Spencer v. Doe, 139 F.3d 107, 112 (2d Cir. 1998) (quoting Lucas, 84 F.3d at 535); see also Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 477 (2d Cir. 2006). To determine whether dismissal for failure to prosecute is appropriate, courts should consider:

> (1) the duration of plaintiff's failure to comply with the court order, (2) whether the plaintiff was on notice that failure to comply would result in dismissal, (3) whether the defendant[] is likely to be prejudiced by further delay . . . (4) a balancing of the court's interest in managing its docket with the plaintiff's interest in receiving a fair chance to be heard, and (5) whether the judge has adequately considered a sanction less drastic than dismissal.

Lucas, 84 F.3d at 535*;* see also Lewis v. Rawson, 564 F.3d 569, 576 (2d Cir. 2009) (citations omitted).

A review of this case's procedural history shows that Kingston's inactivity began after March 20, 2013 when he notified the Court that his operative address is 107-12 172 Street, Jamaica, Queens, New York 11433. Dkt. No. 30. Kingston's failure to take action for over four months constitutes presumptive evidence of lack of prosecution. N.D.N.Y.L.R. 41.2(b). After March 20, 2013, despite the number of granted extensions and warnings concerning the failure to respond, Kingston failed to oppose defendants' first motion for sanctions. A copy of the June 26, 2013 Order was served on Kingston by regular mail, which was not returned to the Court. Dkt. No. 31. A search of DOCCS's inmate population information

database shows that Kingston remains released from DOCCS's custody.[6] Given Kingston's failure to respond to defendants' motions or take action in this case for over four months, the Court's repeated warnings concerning the dismissal of this action, and the lack of returned mail from Kingston, the Court can only conclude that Kingston has abandoned the prosecution of this action.

Moreover, after the numerous and unavailing attempts to communicate with Kingston to proceed with discovery, to hold this action in abeyance until and upon Kingston's decision to reestablish contact with the Court and defendants would prejudice defendants' interest in resolving the allegations against them. Lucas, 84 F.3d at 535. There is no lesser sanction other than dismissal that would not jeopardize the Court's legitimate interest in managing a congested docket with efficiency. Id.

Accordingly, in the alternative, Kingston's complaint should also be dismissed with prejudice for his failure to prosecute his action.

III. Conclusion

For the reasons stated above, it is hereby **RECOMMENDED** that defendants' motion to dismiss as a sanction (Dkt. No. 32) be **GRANTED** as to all defendants and that judgment be entered in favor of all defendants on all claims.

Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court "within fourteen

---

[6] Kingston was released to the Division of Parole on March 15, 2013. See DOCCS, INMATE POPULATION INFORMATION SEARCH, http://nysdoccslookup.doccs.ny.gov/GCA00P00/WIQ1/WINQ000 (lasted visited Sept. 10, 2013).

(14) days after being served with a copy of the . . . recommendation." N.Y.N.D.L.R. 72.1(c) (citing 28 U.S.C. §636(b)(1)(B)-(C)). **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.** Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Small v. Sec'y of HHS, 892 F.2d 15 (2d Cir. 1989); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

Dated: September 10, 2013
Albany, New York

Christian F. Hummel
U.S. Magistrate Judge

2012 WL 4107807
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

BROADCAST MUSIC, INC.;
MJ Publishing Trust, Plaintiffs,
v.
METRO LOUNGE & CAFÉ LLC, et al., Defendants.

No. 5:10–CV–1149 (NAM/ATB). | July 18, 2012.

Attorneys and Law Firms

Sammer Essi, pro se.

Paul I. Perlman, Esq., for Defendants.

Opinion

ORDER and REPORT–RECOMMENDATION

ANDREW T. BAXTER, United States Magistrate Judge.

***1** This matter has been referred to me for Report and Recommendation by the Honorable Norman A. Mordue, United States District Judge.

This action was filed by plaintiffs Broadcast Music, Inc. ("BMI") and MJ Publishing Trust ("MJ"), alleging copyright infringement against defendants in connection with alleged public performances of music at the Metro Lounge & Café ("Metro Lounge"). (Dkt. No. 1). Presently before the court are plaintiffs' motions for discovery sanctions as against defendant Sammer Essi, as well as for default as against Metro Lounge. (Dkt.Nos.34, 37).

I. *Background*

Defendants filed their answer on February 11, 2011. (Dkt. No. 16). All three of the defendants were originally represented by the same attorney. In addition to Sammer Essi, and Gabriel Sande, individually, Metro Lounge was named as an entity. On January 3, 2012, I granted defense counsel's motion to withdraw. (Text Order dated Jan. 3, 2012). Mr. Essi was directed to obtain new counsel. (*Id.*) Mr. Sande, represented by new counsel, [1] entered into a settlement agreement with plaintiffs and was terminated as a defendant on April 11, 2012. (Dkt. No. 32).

On January 10, 2012, Mr. Essi appeared before me and stated that he had not yet been able to retain an attorney, and I extended his deadline to do so until January 17, 2012. I also informed him that his past-due discovery responses were due on January 31, 2012, and his deposition was to be completed by February 14, 2012, whether or not he retained counsel. (Text Orders dated Jan. 3 & 10, 2012).

On January 22, 2012, I held a status conference, during which Mr. Essi stated that he would be representing himself. (Text Order dated Jan. 22, 2012). I informed defendant Essi that he could represent himself as an individual, but he could not represent Metro Lounge, the corporate defendant. (*Id.*) I ordered defendant Essi to provide the outstanding discovery, directed to him individually, by March 31, 2012, and I informed Mr. Essi that he was responsible for producing this discovery, notwithstanding any further delay in obtaining counsel for Metro Lounge. (*Id.*) I extended the deadline to complete Mr. Essi's deposition to April 29, 2012, I extended the deadline for all discovery to May 18, 2012, and I extended the deadline for dispositive motions to June 26, 2012. (*Id.*)

On April 25, 2012, I held another status conference. Mr. Essi attended the conference in-person. Plaintiff's counsel agreed to send defendant Essi another copy of the discovery requests because defendant had still failed to respond to discovery. I gave defendant Essi until May 18, 2012 to respond to the outstanding discovery. To the extent that documents were no longer available, defendant Essi was ordered to provide the plaintiffs' counsel with a sworn affidavit, explaining how the documents were lost or destroyed. (Text Order dated April 25, 2012). Defendant Essi also stated that he had been unable to retain an attorney to represent Metro Lounge. I granted plaintiffs' counsel leave to file whatever motions he deemed appropriate regarding the lack of representation for the corporate defendant. (*Id.*)

***2** On June 8, 2012, plaintiffs filed a motion requesting that, if defendant Metro Lounge did not appear by counsel within fourteen days of an order requiring it to do so, plaintiffs would be authorized to ask the Clerk to "enter a Notice of Default" and upon such entry, the plaintiffs would be authorized to move for a "Default Judgment." (Dkt. No. 34). On June 13, 2012, I issued a Text Order, giving defendant Essi "one final opportunity to fully comply with this court's 4/24/12 Text Order. In my June 13th Text Order, I also stated that defendant Essi's failure to comply with the court's prior orders by June 25, 2012 "MAY RESULT

IN THE IMPOSITION OF SANCTIONS AGAINST HIM INCLUDING THE POSSIBLE ENTRY OF A DEFAULT JUDGMENT ....“ (Text Order dated June 13, 2012).

On June 26, 2012, defendant Essi attempted to file a letter, explaining why he could not afford to retain counsel for Metro Lounge and explaining that some of the documents in question were no longer available due to a fire and subsequent water damage at the restaurant. (Dkt. No. 36). The letter was stricken from the docket because defendant Essi neglected to include a certificate of service on plaintiffs. (Dkt. No. 36). Also on June 26, 2012, plaintiffs filed a motion for discovery sanctions, including default, against Mr. Essi as the individual pro se defendant. (Dkt. No. 37). Defendant Essi has not responded to the motion for sanctions. [2]

II. *Discovery Sanctions*

A. Legal Standards

Rule 37(b) of the Federal Rules of Civil Procedure provides that if an individual fails to comply with a court order regarding discovery, the court may take various steps to sanction the disobedient party. FED. R. CIV. P. 37(b)(2)(A)(i-vii). The sanctions include an order establishing facts, an order precluding evidence, issues or claims, and an order striking pleadings. *Id.* Rule 37(b)(2)(A)(vi) authorizes the court to render a default judgment for failure to comply with a discovery order.

The imposition of sanctions under Rule 37 is within the discretion of the district court. *See Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir2002). A default judgment, the most severe sanction that a court can apply, should be imposed as a discovery sanction only in extreme circumstances. *See Marfia v. T.C. Ziraat Bankasi, New York Branch*, 100 F.3d 243, 249 (2d Cir.1996) (citations omitted). The court may consider the full record in selecting the appropriate sanction. *Southern New England Telephone Co. v. Global NAPs, Inc.*, 624 F.3d 123, 144 (2d Cir.2010) (citing *Nieves v. City of New York*, 208 F.R.D. 531, 535 (S.D.N.Y.2002)). The court should also consider the willfulness of the non-compliant party; the reasons for the noncompliance; the efficacy of lesser sanctions; the duration of the noncompliance; and whether the party has been warned of the consequences of the noncompliance. *Amatangelo v. National Grid USA Service Co., Inc.*, No. 04–CV–246, 2007 WL 4560666, at *8 (W.D.N.Y. Dec. 18, 2007) (citing *3801 Beach Channel, Inc. v. Shvartzman*, No. 05–CV–207, 2007 WL 2891119, at *4 (E.D.N.Y.2007)). The party in question, particularly a *pro se* litigant, must have had prior notice that violation of the court's order would result in a dismissal or a default judgment. *Woodward v. Beam*, No. 07–CV–645, 2008 WL 4998398, at *2 (W.D.N.Y. Nov. 19, 2008) (citations omitted).

***3** Rule 37(b) (2)(C) provides that instead of, or in addition to the various sanctions listed in the rule, the court must order the disobedient party, the attorney for that party, or both to pay the reasonable expenses, including attorneys fees, caused by the failure, unless the failure was substantially justified or other circumstances make the award of expenses unjust.

B. Application

In this case, plaintiffs move for a default judgment as a sanction for Mr. Essi's failure to answer plaintiffs' request for discovery after being ordered to do so several times by the court. (Dkt. No. 37). Plaintiffs served their document requests, interrogatories, and requests for admissions on September 22, 2011. (Pls.' Exs. 1, 2) (Dkt. No. 37–1). Defendant Essi did not respond to the discovery request, and plaintiffs sent a second request on October 28, 2011. (Pls.' Ex. 3). On November 8, 2011, plaintiffs served a notice to take defendant Essi's deposition on December 9, 2011. (Pls.' Ex. 4). Defendant Essi has never responded to the plaintiffs' interrogatories at all.

At the same time that the court granted defendant Essi's counsel's motion to withdraw, the court reminded defendant Essi that the “[o]utstanding interrogatories and document requests must be provided to new counsel, and that defendant Essi must advise his new attorney that the responses were due by January 31, 2012. (Text Order Dated Jan. 3, 2012). On January 10, 2012, after defendant Essi told the court that he had been unable to retain new counsel, I gave the defendant an extension of time to do so, but told him that the “previously set” deadlines for providing “past-due” discovery responses and to submit to a deposition “remain in effect .” (Text Order dated Jan. 10, 2012).

Defendant Essi did not respond to the discovery, and on February 22, 2012, I told plaintiffs' counsel to provide defendant with “another copy” of the interrogatories and document requests “the responses to which are delinquent.” I ordered defendant Essi to respond to those discovery requests by March 31, 2012, notwithstanding his inability to locate an attorney. I also told defendant Essi that he must submit to a deposition on or before April 29, 2012. On March 30, 2012, defendant served an incomplete response to the plaintiffs' first

request for documents. (Pls.' Ex. 6). The "response" consisted of the plaintiffs' papers, with defendant Essi's handwritten responses to *some* of the requests.

There were brief penciled-in responses to Requests Nos. 8–14, which were not "documents," but were statements of what the documents might contain. Request No. 8 asked for all documents reflecting the maximum lawful capacity of the entire Metro Lounge. Defendant simply penciled-in "101 capacity." Although defendant's penciled-in responses for Requests Nos. 9, 11–12, state that documents were "enclosed," plaintiffs state that no documents were attached. Defendant stated that there were no records reflecting the music performed or provided at the Metro Sushi Lounge on November 6, 2009 and November 7, 2009. In response to the question asking about documents reflecting ownership of the building, defendant penciled-in that the building was "owned by uncle." Plaintiffs requested a copy of the defendant's ASCAP licensing agreements from 2007 until the present, and defendant answered that the "bill" was enclosed "what we could salvage." However, plaintiffs claim that no document was attached to the responses. Defendant Essi does not claim otherwise.

***4** On April 25, 2012, I held another status conference, and I ordered the plaintiffs to provide defendant Essi "another copy" of the discovery requests for which the responses were still outstanding, including sworn responses to plaintiffs' interrogatories. (Text Order dated April 25, 2012). I told plaintiff to provide "any other available documents," and to the extent that the documents were no longer available, he was to provide an *affidavit*, explaining the circumstances under which the relevant documents were lost or destroyed as a result of a fire and/or other events at the Metro Lounge.

Notwithstanding my April 25, 2102 order, defendant Essi failed to provide the requested material, and failed to provide a ***sworn statement,*** attesting to the unavailability of the documents requested. On June 12, 2012, plaintiffs filed a letter, asking the court to "reissue" its April 25, 2012 Text Order, giving defendant Essi another chance to comply with discovery requests or suffer the consequences of a potential default judgment. (Dkt. No. 35). On June 13, 2012, I issued another Text Order, giving defendant Essi "one final opportunity" to fully comply with this court's prior order. (Text Order dated June 13, 2012). In my June 13th Order, I specifically warned defendant Essi that his failure to comply with the court's orders by June 25, 2012 could result in the imposition of sanctions "INCLUDING THE POSSIBLE ENTRY OF A DEFAULT JUDGMENT...." (*Id.*) The warning to defendant was crystal clear.

Defendant Essi's, June 26, 2012 "attempted" filing requested assistance from the court in proceeding toward "settlement." (Dkt. No. 36). The letter explained defendant Essi's problems with the business and noted that his "partner" was able to settle with plaintiffs for considerably less than they were asking from him. Defendant attached a four page document, purportedly a letter, addressed to BMI. In the letter addressed to the court, defendant also mentioned his problems with insurance and other issues. The document was not sworn to as the court had directed, and there was no certificate of service upon plaintiffs. [3] Defendant still failed to obey the court's orders regarding discovery. I ordered that the letter be stricken because of the deficiencies. (Dkt. No. 38). He has also failed to respond to the motion for discovery sanctions.

Based upon the entire record and upon defendant Essi's continued failure to abide by the court's orders, the court finds that a default judgment would be appropriate. Defendant has *willfully* failed to produce the relevant documents after at least four orders to do so by the court. When he "responded" to the document requests, he neglected to attach the documents that he stated he was attaching to the response. The court understood that some of the documents could be unavailable and afforded defendant the opportunity to submit an affidavit, explaining why he could not produce these documents. Defendant also failed to comply with that order.

***5** Defendant states that the reason for the noncompliance is because the documents may not be available due to a fire and subsequent water damage at the Metro Lounge. However, as stated above, defendant listed some documents in the response he sent to plaintiffs without attaching the relevant documents. If that had been a mistake, he could have corrected it by sending the documents by separate cover, but he has not done so even after the plaintiffs pointed it out in their motion for discovery sanctions. When given the opportunity to submit an affidavit, attesting that certain documents were no longer available to him, he failed to comply. Thus, although the court was somewhat sympathetic to his stated plight and his lack of funds, defendant has not acted in good faith with respect to plaintiffs' attempts at discovery, nor has he acted in good faith in complying with the court's orders.

The defendant's failure to comply has now lasted since September of 2011, when plaintiffs first requested the

discovery. It does not appear that defendant will ever send the documents to the plaintiff. "Lesser" sanctions are ineffective because it is unclear that defendant could pay monetary sanctions, and prohibiting him from presenting evidence is tantamount to a default judgment in this case. Finally, defendant was specifically warned that his continued failure to abide by the court's orders could result in the entry of a default judgment against him. Thus, this court recommends that a default judgment be entered as to liability.

The court notes that Rule 37 also provides for attorneys fees and costs in addition to or in lieu of any other sanction, unless the court finds such an award to be unjust. Fed.R.Civ.P. 37(b)(2) (C). Based upon this court's finding that a default judgment should be entered in this case and if so, defendants will be assessed damages for the statutory violations, the court finds that to award additional fees at this time would be unjust, and given defendant Essi's stated financial status, awarding further expenses would be futile.

III. *Default and Dismissal*

A. Legal Standards

It is well-settled that a person who has not been admitted to practice law may not represent anyone other than himself. [4] *Lattanzio v. COMTA*, 481 F.3d 137, 139–40 (2d Cir.2007). *See also* 28 U.S.C. § 1654. In *Berrios v. N.Y. City Housing Authority*, 564 F.3d 130, 133 (2d Cir.2009), the court made it clear that the rule prohibiting an entity from proceeding *pro se* applies to a corporation of which the individual is the sole shareholder; a limited liability company of which he is the sole member; a partnership of which he is a partner; a co-party in the litigation; an estate that has beneficiaries or creditors other than the lay litigant; or a minor child. *Id.* Courts have also disapproved any circumvention of this rule by the "procedural device" of assigning the corporation's claims to the lay individual. *See Sanchez v. Walentin*, No. 10–CV–7815, 2012 WL 336159 (S.D.N .Y. Jan. 31, 2012) (citing cases). A corporation may not take any action "pro se," including the execution of a stipulation of settlement. *Grace v. Bank Leumi Trust Co. of NY*, 443 F.3d 180, 192–93 (2d Cir.2006) (citations omitted). In *Guest v. Hansen*, 603 F.3d 15, 20 (2d Cir.2010), the Second Circuit stated that the court has a responsibility to ensure appropriate representation for the parties appearing before it, even if those parties do not raise the issue.

B. Application

***6** Although Metro Lounge initially appeared through counsel, the attorney withdrew, leaving the company unrepresented. Mr. Essi was told numerous times that the company could not proceed without counsel, and he initially told the court that he would attempt to retain new counsel for the company. However, it is clear from Mr. Essi's later representations that he was not able to, and will not be able to retain new counsel to defend on behalf of the company.

The appropriate action for the court to take when a defendant corporation does not appear through counsel is to enter a default judgment against the defendant. *See Grace*, 443 F.3d at 192. In this case, plaintiffs' motion asks only that defendant be given another two weeks within which to appear by counsel. However, this court finds that defendant has been well-aware of the requirement for quite some time, and that, an additional two weeks would not solve the defendant's problem. Thus, this court will recommend that a default judgment be entered against Metro Lounge based on its continued failure to appear through counsel after its original attorney withdrew.

IV. *Damages*

The plaintiffs' motion did not include an assessment of the damages in this case. Although the damages are statutory, there are costs and attorneys fees requested in the complaint. (Dkt. No. 1). The court must ensure that there is a reasonable basis for the damages specified in a default judgment. *J & J Sports Productions, Inc. v. Imperial Lounge & Sports Bar, Inc.*, No. CV 08–2061, 2012 WL 1356598, at *1–2 (E.D.N.Y. March 30, 2012) (Report–Recommendation) (citations omitted). Thus, although I recommend the entry of a default judgment as to liability for both defendants based on the record, damages must be determined at a later date. Fed.R.Civ.P. 55(b)(2)(B). The court need not necessarily hold a hearing on damages if the court may rely upon detailed affidavits and documentary evidence. *See United States v.. Cafolla*, No. 5:12–CV–127, 2012 WL 2469968, at *5–6 & n. 3 (N.D.N.Y. June 27, 2012) (citations omitted).

WHEREFORE, based on the findings above, it is

RECOMMENDED, that plaintiffs' motion for discovery sanctions in the form of a default judgment against individual defendant Sammer Essi (Dkt. No. 37) be **GRANTED,** and that a default judgment be entered with respect to liability against the defendant, and it is

RECOMMENDED, that plaintiffs' motion for an Order giving defendant Metro Lounge fourteen (14) more days within which to obtain an attorney (Dkt. No. 34) be **DENIED AS MOOT,** and it is

RECOMMENDED, that a default judgment with respect to liability be entered against defendant Metro Lounge based upon its failure to appear through counsel, and it is

RECOMMENDED, that if the court adopts this recommendation, the court hold a damage inquest by affidavit or otherwise, to determine the amount of damages in this case, and it is

ORDERED, that the Clerk serve copies of this Report–Recommendation upon defendants.

***7** Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have **FOURTEEN (14) DAYS** within which to file written objections to the foregoing report. Any objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Secretary of Health and Human Services,* 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 6(a), 6(e), 72.

Footnotes

1 New counsel for Mr. Sande filed a notice of appearance on February 7, 2012. (Dkt. No. 27).

2 Defendant Essi cannot respond to the motion for the plaintiffs' June 8, 2012 motion for default because it is addressed to defendant Metro Lounge, and defendant Essi may not respond on behalf of the LLC.

3 Although in the letter, plaintiff states that he was “forwarding” a copy to BMI and “would like a confirmation they received it in writing,” it did not contain a proper certificate of service. (Dkt. No. 36).

4 An limited exception exists if an individual appears for an estate in which there are no other beneficiaries or creditors. *See Guest v. Hansen,* 603 F.3d 15, 20 (2d Cir.2010). The exception is not applicable to this case.