

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

THOMAS J. MANNING,

Plaintiff,

Case No. 3:09-cv-153

Judge Thomas M. Rose

-v-

**DIVERSIFIED COLLECTION SERVICES,
INC.,**

Defendant.

**ENTRY AND ORDER GRANTING DIVERSIFIED'S MOTION TO
DISMISS (Doc. #16), DISMISSING THIS CASE WITH PREJUDICE AND
TERMINATING THIS CASE**

This matter comes before the Court on a Motion To Dismiss filed by Defendant Diversified Collection Services, Inc. ("Diversified"). (Doc. #16.) Diversified seeks to dismiss Plaintiff Thomas J. Manning's ("Manning's") claim with prejudice pursuant to Fed. R. Civ. P. 41 for failure to prosecute or, alternatively, dismiss Manning's class action claim. The time has run and Manning has not responded to Diversified's Motion To Dismiss.

Procedural History

Manning's Complaint, filed on April 22, 2009, alleges violations of the federal Fair Debt Collection Practices Act and the Ohio Consumer Sales Practices Act. (Doc. #2.) The Complaint also asserts a class action.

On September 28, 2009, this Court entered a Preliminary Pretrial Order that sets a discovery deadline for February 19, 2010, and a status conference following discovery for February 23, 2010. (Doc. #11.) Following entry of the Preliminary Pretrial Order, Diversified served Manning with Interrogatories and Requests for Production of Documents.

Neither Manning nor his representative participated in the status conference on February 23, 2010. Also, Manning has not responded to Diversified's discovery request and Manning has not sought discovery from Diversified.

Analysis

If a plaintiff fails to prosecute a matter or to comply with the Federal Rules of Civil Procedure or a court order, that plaintiff's complaint may be dismissed. Fed. R. Civ. P. 41(b). Further, unless the dismissal order states otherwise, a dismissal for failure to prosecute, except one for lack of jurisdiction, improper venue or failure to join a party operates as an adjudication on the merits. Fed. R. Civ. P. 41(b).

Courts are to consider four factors when considering dismissal pursuant to Rule 41(b). *Stough v. Mayville Community Schools*, 138 F.3d 612, 615 (6th Cir. 1998). The four factors are: (1) whether the party's failure to cooperate is due to willfulness, bad faith or fault; (2) whether the adversary was prejudiced by the dilatory conduct of the party; (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. *Id.* Further, prior notice, or the lack thereof, is a key consideration. *Id.* Finally, an action is to be dismissed if the plaintiff is acting in bad faith and it does not appear that the plaintiff intends to seek the prosecution of the claims. *Livingston v. Redwine*, No. 1:06cv337, 2007 WL 2713857 at *7 (S.D. Ohio Sept. 17, 2007).

In this case, Manning has failed to pursue his claims and has not complied with this Court's Preliminary Pretrial Order or the Federal Rules of Civil Procedure regarding discovery. Also, he did not participate in the Court's conference following the discovery deadline. Finally, the record indicates that Manning's counsel was served with the Court's Preliminary Pretrial

Order¹ and with the Motion To Dismiss that is now before the Court.

Failure to comply with this Court's orders in several instances indicates wilfulness. Diversified is prejudiced because it has received no discovery upon which it could base a motion for summary judgment or prepare for trial. A specific warning was not issued² nor are less drastic sanctions appropriate. The Court's Preliminary Pretrial Order was served on Manning and the Court attempted to contact Manning's counsel for the status conference.

All of the factors to be considered weigh in favor of dismissal. Therefore, Diversified's Motion To Dismiss is GRANTED. Manning's Complaint is DISMISSED WITH PREJUDICE.

The Court need not address the alternative regarding a class action. The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

DONE and ORDERED in Dayton, Ohio this Ninth Day of April, 2010.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

¹The record indicates that Manning's counsel filed a witness list as required by the Preliminary Pretrial Order.

²Manning and his counsel should already be aware of the requirement to follow court orders or seek to have the orders changed.