IN THE UNITED STATES DISTICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PAUL COX,	:	**No. 15cv2013**
Plaintiff	:	
	:	**(Judge Munley)**
v.	:	
	:	
UNITED PARCEL SERVICE, INC.; and	:	
LOCAL UNION 401, INTERNATIONAL	:	
BROTHERHOOD OF TEAMSTERS,	:	
Defendants	:	

::

MEMORANDUM

Plaintiff Paul Cox (hereinafter "plaintiff") claims the defendants unlawfully terminated his employment in contravention of his union's Collective Bargaining Agreement (hereinafter "CBA") and Section 301 of the Labor Management Relations Act (hereinafter "LMRA"). Before the court for Disposition is defendant United Parcel Service, Inc.'s (hereinafter "UPS"), and Defendant Local Union 401, International Brotherhood of Teamsters' (hereinafter "Union"), joint motion to dismiss the plaintiff's complaint with prejudice and award attorneys' fees and costs, pursuant to Rules 37[1] and 41[2] of the Federal Rules of Civil Procedure and brief in support thereof (Doc. 58), filed on May 4, 2017.

[1] See FED. R. CIV. P. 37(b)(2)(A)(v).

[2] See FED. R. CIV. P. 41(b).

The parties have briefed their respective positions and the motion is ripe for disposition.

Background[3]

The instant employment action arises from plaintiff's employment with Defendant United Parcel Service, Inc., (hereinafter "UPS").[4] Plaintiff worked as full-time night mechanic from approximately May 4, 2014, until June 18, 2015, when plaintiff resigned. (Doc. 1, Compl. (hereinafter "Compl.") ¶ 5). As a mechanic, plaintiff maintained and inspected UPS's equipment, including vehicles owned and rented by UPS.[5] (Id. ¶ 6). Plaintiff alleges that during his employment, UPS placed inspection stickers on vehicles that were not roadworthy. (Id. ¶ 8). Plaintiff alleges he objected and insisted on compliance with safety standards and regulations. (Id. ¶¶ 9-10, 16, 28, 32).

On June 18, 2015, shortly after plaintiff began his 6:00 p.m. shift, plaintiff's immediate supervisor requested plaintiff come to his office. (Id. ¶ 11). The

---

[3] We cite to plaintiff's complaint for background allegations. We make no determination as to the veracity of these assertions.

[4] As a Union employee, the Collective Bargaining Agreement, National Master United Parcel Service Agreement and Central Pennsylvania Supplemental Agreement governed the terms of plaintiff's employment. (Compl. ¶ 17).

[5] Defendant obtained permission from the Pennsylvania Department of Transportation to inspect its own vehicles and issue inspection stickers. (Compl. ¶ 7).

supervisor asked if plaintiff wanted union representation at the meeting and plaintiff declined, signing a waiver of right to representation.[6] (Id. ¶¶ 11, 19). During this meeting, plaintiff's supervisor directed plaintiff to sign a resignation form or the supervisor would call the Pennsylvania State Police. (Id. ¶ 12). The supervisor also directed plaintiff to write "personal" as the reasons for his resignation. (Id.) Plaintiff signed the resignation form. (Id.)

In response to his forced resignation, plaintiff filed a two-count complaint on October 16, 2015. (Doc. 1). Count I asserts a breach of contract claim pertaining to the CBA against UPS. Count II states a cause of action under the LMRA against the Union.

UPS answered plaintiff's complaint on February 15, 2016. (Doc. 11). Union filed a motion to dismiss[7] on March 7, 2016 (Doc. 18), which we denied on August 18, 2016. (Doc. 24). Union filed an answer to the complaint on September 8, 2016. (Doc. 27). After a telephonic case management conference during which all parties agreed to the schedule, we issued a case management order on October 3, 2016 directing, among other things, the parties' discovery would be due to be completed by February 1, 2017. (Doc. 33).

---

[6] Plaintiff alleges his supervisor knew that no stewards were available at the time of the meeting, which occurred after 6:00 p.m. (Id. ¶ 11).

[7] FED. R. CIV. P. 12(b)(6)

Extraordinary discovery delays ensued shortly thereafter. The defendants jointly filed the instant motion on May 4, 2017 seeking dismissal of the complaint along with attorneys' fees and costs to defendants, (Doc. 58), thus bringing the case to its present posture.

Jurisdiction

As plaintiff brings suit pursuant to Section 301 of the LMRA, we have federal question jurisdiction. See 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.")

Standard of Review

The law provides that a court may enter sanctions against a party who fails to cooperate with discovery obligations. See generally FED. R. CIV. P. 37; Winters v. Textron, Inc., 187 F.R.D. 518 (M.D. Pa. 1999). Where appropriate the district court has great discretion in determining the proper sanction under Rule 37. See, e.g., Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639 (1976).

Regarding the type of sanction however, "[d]ismissal must be a sanction of last, not first, resort." Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 868-69 (3d Cir. 1984). "Dismissals with prejudice or defaults are drastic sanctions, termed 'extreme' by the Supreme Court, Nat'l Hockey League, 427

U.S. at 643, and "are to be reserved for comparable cases." Poulis, 747 F.2d at 868. Nevertheless, "[t]he authority of a federal trial court to dismiss a plaintiff's action with prejudice ...cannot seriously be doubted." Link v. Wabash R.R. Co., 370 U.S. 626, 629 (1962). "The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the district courts." Id. at 629-30. Furthermore, "[t]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court...not merely to penalize...but to deter those who might be tempted to such conduct in the absence of such a deterrent." Nat'l Hockey League, 427 U.S. at 643.

A court must balance the following factors in assessing whether dismissal of a complaint is warranted: (1) the extent of the personal responsibility of the party; (2) prejudice to the adversary caused by failure to meet discovery orders; (3) history of dilatoriness; (4) willfulness or bad faith of the conduct in question; (5) effectiveness of alternative sanctions other than dismissal; and (6) the meritoriousness of the claim. Poulis, 747 F.2d at 868. Not all six factors need to be met to warrant sanctions, but a consideration and balance of all six factors must be undertaken. Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 919 (3d Cir. 1992).

Discussion

Initially, motions for extension of time to file pleadings or complete discovery take place normally in the course of litigation. Such motions are usually uncontested and routinely granted. Because defendants seek to dismiss the plaintiff's case as a sanction for failure to comply with discovery rules we will briefly discuss the discovery history of this lawsuit.

On October 12, 2016 our first case management order issued setting a discovery deadline of February 1, 2017. (Doc. 33). On December 12, 2016, plaintiff filed his answer to the Union's interrogatories. (Doc. 34). On January 11, 2017, Union moved for an extension of time to complete discovery. (Doc. 35). We ordered the discovery deadline moved back to April 3, 2017. (Doc. 36).

On March 1, 2017, Union counsel filed a letter requesting a discovery conference jointly with UPS. In it, defendants requested our "intervention for the plaintiff's failure to produce and complete discovery responses, as well as for the plaintiff to be submitted for a deposition." (Doc. 37).[8] During the ensuing

[8] Plaintiff makes much of the fact that the letter (Doc. 37) did not follow L.R. 26.3 insofar as the letter did not certify conferring with plaintiff's counsel in a good faith effort to resolve the issues. Plaintiff's grievance is duly noted. At the point plaintiff disobeyed our order of March 21, 2017 (Doc. 47) we were way past L.R. 26.3, and actually it's worse than plaintiff perceives: our case management orders (see, e.g., Doc. 33) specifically direct counsel not to file written discovery motions. Instead, counsel should have notified our case administrator who would have scheduled a telephonic discovery conference, including the court and all counsel, at which discovery disputes would have been resolved. In the interest

telephonic discovery conference we instructed counsel for all three parties to collaborate in drafting an order and submit it to the court, and they complied. (See Doc. 38). On March 9, 2017, we issued the following order submitted by the parties:

> AND NOW, this 9th day of March, 2017, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:
> 1. Plaintiff is Ordered to provide the Defendant, United Parcel Service, full and complete discovery responses to all outstanding discovery within 7 days of the issuance of this order.
> 2. Plaintiff is Ordered to provide the Defendant, International Brotherhood of Teamsters, Local 401, full and complete responses to all outstanding discovery within 7 days of the issuance of this order.
> 3. Failure on the part of the plaintiff to comply with paragraphs 1 or 2 above shall result in the Court issuing an order dismissing this case in its entirety.
> 4. If Plaintiff does comply with both paragraphs 1 and 2 above, Plaintiff is ordered to appear and sit for a deposition on March 23, 2017 in the law offices of Hourigan, Kluger & Quinn, P.C. Should Plaintiff fail to sit for a deposition on March 23, 2017, the Court will issue an order dismissing the case in its entirety.
> 5. Defendants shall notify the Court via filing a letter through the ECF if Plaintiff fails to comply with paragraphs 1, 2, or 4 of this Order. **After being notified by any party that the Plaintiff has failed to comply with paragraphs 1, 2 or 4 of this Order, the Court will issue an order dismissing the case in its entirety.**

(Doc. 41) (emphasis added).

---

of judicial economy we considered Union's letter (Doc. 37) in the nature of a request for a discovery conference. (See Doc. 38).

On March 17, 2017, counsel for UPS filed a letter notifying the court that plaintiff failed to comply with paragraph one (1) of our March 9, 2017 order. Plaintiff provided no discovery responses at all to UPS discovery requests sent on November 23, 2016. In a footnote, counsel for UPS further notified the court that his understanding was plaintiff also failed to satisfy paragraph two (2) of our March 9, 2017 order by not providing any responses to the Union's discovery requests. (Doc. 42). However, neither defendant moved for discovery sanctions at that time.

Subsequently on March 17, 2017, (Doc 43), March 24, 2017, (Doc. 48), and April 3, 2017, (Doc. 49), plaintiff moved for further extensions of the discovery deadline. Our practice is to be liberal with discovery deadlines. We granted the March 17th and March 24th motions. (See Doc. 47, 50). Plaintiff missed both deadlines. On April 17, 2017 counsel for Union once again notified the court, via a four (4) page letter (Doc. 52), of plaintiff's failure to comply with our original order of March 9, 2017, which order was our final effort to correct plaintiff's recalcitrance.

Notably, our briefing order (Doc. 56) for the instant motion directed the parties to discuss the discovery sanction factors set forth in Poulis. Defendants' brief is in compliance; plaintiff's brief is not. Plaintiff's failure to adequately

discuss the Poulis factors in his brief constitutes the latest and final discovery-related slip up in this case.

Discussion: Poulis analysis

(1) Personal responsibility of the party

The first factor for us to examine is whether the party, as opposed to the party's counsel, bears personal responsibility for the action or inaction. Adams v. Tr. of the N.J. Brewery Emp'ees' Pension Tr. Fund, 29 F.3d 863, 873 (3d Cir. 1994). A party may suffer dismissal justly because of its counsel's conduct. Id. However, courts are increasingly emphasizing the appropriateness of "visiting sanctions directly on the delinquent lawyer, rather than on a client who is not actually at fault." Id. (citations omitted). Nevertheless, "a client cannot always avoid the consequences of the acts or omissions of its counsel." Poulis, 747 F.2d at 868.

Plaintiff here "voluntarily chose this attorney as his representative in the action and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" Link, 370 U.S. at 633-34 (citing Smith v. Ayer, 101 U.S. 320, 326 (1879)).

In this case plaintiff himself bears some personal responsibility. UPS's request for production of documents nos. eleven (11) and twelve (12) dealt with plaintiff's tax returns. Plaintiff replied, "to be supplied." (See Doc. 58-7.) Plaintiff never supplied the tax returns. He was questioned regarding the tax returns at his April 7, 2017 deposition:

> Q. The documents that Mr. Anderson [counsel for Union] asked you about, the W2s and so forth, some of that you testified to earlier that you would be able to pull them out in a couple of hours, right?
>
> A. If whatever that – I know I have this year, I have that at my house, and I think I have last year, but I don't know if I have the rest of the years. As long as I can get them from H & R Block, which does my taxes all the time, I don't have a problem giving them to my attorney.
>
> Q. But you haven't explored it yet.
>
> A. No.
>
> Q. Is there a reason you haven't explored it yet?
>
> A. No.
>
> Q. There's no reason for that?
>
> A. No.

(Doc. 58-9 at 241-242)

Thus plaintiff himself is admittedly responsible for non-compliance with a reasonable discovery request in this case. Compliance by providing the tax returns to his own attorney, again by plaintiff's own admission, would not have

been problematic. The flagrant nature of the plaintiff's answers to the foregoing questions at his deposition render him personally complicit in the discovery problems at bar; failure to obtain old tax returns is not an act or omission on the part of plaintiff's counsel.

Nevertheless plaintiff's counsel is obviously complicit in the blatant failure to proceed in accordance with our order of March 9, 2017 (Doc. 41) ("After being notified by any party that the Plaintiff has failed to comply with paragraphs 1, 2 or 4 of this Order, the Court will issue an order dismissing the case in its entirety.")

We find Poulis factor one (1) weighs in favor of dismissal.

(2) Prejudice to adversary

The next factor to be weighed is prejudice to the adversary. Poulis, 747 F.2d at 868. "Examples of prejudice include...the excessive and possibly irremediable burdens...imposed on the opposing party." Adams, 29 F.3d at 874 (citations omitted). "Prejudice also includes deprivation of information through non-cooperation with discovery, and costs expended obtaining court orders to force compliance with discovery." Id.

In the instant case, movants assert that they have suffered prejudice because plaintiff's failure to fully respond to discovery requests "has inhibited defendants' ability to obtain deposition testimony on many meaningful issues, or otherwise progress in their fact discovery…" (Doc. 58-1 at 7). Defendants cite

Ware v. Rodale Press, Inc., 322 F.3d 218, 221 (3d Cir. 2003), for the proposition that each [Poulis] factor need not be satisfied for the court to dismiss an action. We are mindful that prejudice does not equate to irreparable harm. In Ware, the court found "the burden imposed by impeding a party's ability to prepare effectively a full and complete trial strategy is sufficiently prejudicial." Id. at 222.

We are sympathetic to the movants' argument, yet the record before the court does not contain examples of specific or generalized instances of prejudice, sufficient to allow the court to determine the nature and extent thereof, in a manner that would lend itself to Poulis factor two (2) analysis. Accordingly, we find Poulis factor two (2), prejudice to adversary, to be neutral.

(3) History of dilatoriness

Next we look to the conduct in question to determine if a history of dilatoriness exists. Poulis, 747 F.2d at 868. "Extensive or repeated delay or delinquency constitutes a history of dilatoriness, such as consistent non-response to interrogatories, or constant tardiness in complying with...orders." Adams, 29 F.3d at 874 (quoting Poulis, 747 F.2d at 868). Moreover, the court must consider the party's problematic acts "in light of its behavior over the life of the case." Id. at 875.

In this case, plaintiff has exhibited a long history of dilatory conduct in the discovery proceedings as noted above. His explanations for failing to meet the

deadlines in our strongly-worded order of March 9, 2017, failed to resonate with the court. Yet despite his history of dilatoriness we gave plaintiff another bite at the apple, extending discovery deadlines to March 23, 2017, (Doc. 47) and once again warned that failure to comply will result in the dismissal of this action. Still, our efforts to prompt plaintiff were for naught.

In fact, the only deadlines plaintiff met were the statute of limitations (see Doc. 1); his reply brief (Doc. 46) to the defendants' brief in opposition to motion for extension of time to complete discovery (Doc. 45); and his brief in opposition (Doc. 59) to defendants' motion to dismiss presently at bar (Doc. 58).

We make clear that individually none of these matters warrant sanctions, but throughout this case the court and movants were compelled to consistently prod plaintiff into action. "Time limits imposed by the rules and the court serve an important purpose...[i]f compliance is not feasible, a timely request for an extension should be made to the court. A history by counsel of ignoring these time limits is intolerable." Poulis, 747 F.2d at 868.

Plaintiff has ignored numerous deadlines imposed by the court. He has consistently skirted the responsibility of complying with discovery rules by deflecting accountability, citing scheduling conflicts, and complaining of the ordinary life issues nearly everyone deals with, let alone practicing attorneys.

Considering his actions in the discovery phase of this case, plaintiff has demonstrated a strong history of dilatory conduct weighing heavily in favor of dismissal under Poulis factor three (3), dilatoriness.

(4) Willful or bad faith conduct

The fourth factor to be considered is the willfulness, or bad faith, of the conduct at issue. Poulis, 747 F.2d at 868. "Willfulness involves intentional or self-serving behavior." Adams, 29 F.3d at 875. The court must look for contumacious behavior that can be characterized as flagrant bad faith. Id. (citing Nat'l Hockey League, 427 U.S. at 643).

In Nat'l Hockey League, the Supreme Court approved a district court's dismissal of a case where over seventeen months plaintiffs failed to comply with discovery proceedings and broke numerous commitments to the court. The facts before us are similar.

This case is not one where plaintiff, "show[ed] a failure to move with the dispatch reasonably expected of a party prosecuting a case." Adams, 29 F.3d at 875 (citations omitted). Rather, this is a case where plaintiff has "willfully failed to comply with...court orders, and to comply with outstanding discovery requests, and failed to advance plausible reasons for the failures." Bedwell v. Int'l Fidelity Ins. Co., 843 F.2d 683, 695 (3d Cir.1988).

Taking into consideration plaintiff's unexplained delays extending throughout this case, the disrespect to movants by continuing depositions without proffering substantial explanations, plaintiff's failure to comply with multiple court orders, insufficient and incomplete answers to interrogatories, and finally admitting to blatant discovery stalling at deposition, we find the conduct was done willfully and in bad faith. Therefore, Poulis factor four (4) weighs heavily in favor of sanctions.

(5) Meritoriousness of the claim

The court must consider the merit of the claim before dismissing the complaint. Poulis, 747 F.2d at 868. "A claim...will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff." Poulis, 747 F.2d at 869-870. Summary judgment standards need not apply. Id. at 869.

Plaintiff here might have succeeded at trial if his claims were proved. We note that his complaint alleges serious misconduct on the part of both defendants. Had plaintiff complied with discovery requests and court orders his claims may have been established as meritorious.

Regardless, every case raises questions of fact and of law. Movants have also proffered defenses and claims, which if established at trial, may support recovery. Thus in this case "both sides' positions appear [to be] reasonable from

the pleadings and...an examination of meritoriousness [does] not appear to advance the analysis one way or another." Bedwell, 843 F.2d at 696 (citations omitted). Therefore, we find that "[t]he meritoriousness factor here is neutral and not dispositive." Id.

(6) Alternative Sanctions

A district court must consider alternative sanctions before dismissing a case with prejudice. Adams, 29 F.3d at 876. Sanctions other than dismissal include considering certain facts as established, prohibiting evidence, rendering judgment by default, and requiring payment of attorney's fees. FED. R. CIV. P. 37(b)(2)(A)-(E).

In this case, we are unable to determine the appropriateness of alternative sanctions without having more information, to wit, the discovery plaintiff failed to provide.

The facts of record support movants' contentions. If we could conclude otherwise then the balance of the factors might meander away from dismissal as a sanction. However, we find that excluding the outstanding discovery as evidence of plaintiff's case in chief would be "tantamount to a dismissal, and would 'simply result in the delay of an entry of judgment in favor of [movants] and against [plaintiff].'" Bedwell, 843 F.2d at 696. Therefore, Poulis factor six (6) favors dismissal.

Plaintiff's argument

In his brief in opposition to the defendants' motion to dismiss (Doc. 59), plaintiff first argues for the relevance of International Brotherhood of Electrical Workers Local Union No. 380, Heath & Welfare Fund v. Travis Electric, Inc., Civ. No. 07-1649, WL2954751 (E.D. Pa. July 30, 2008). That case dealt with an alternative request for arbitration, denied because Rule 7(b) of the Federal Rules of Civil Procedure requires the request to be in the form of a motion, and Eastern District Local Rule 7.1(c) requires briefing. In reality, International Brotherhood is wholly irrelevant to the instant case because (1) no alternative request for arbitration is involved here; and (2) under normal circumstances we specifically forbid formal discovery motions. See n.8.

Plaintiff next argues, in at least a hint of Poulis, that the willful and dilatory conduct referred to by defendants in their brief is described as prejudicial and cannot be cured by sanctions other than dismissal, but defendants did not describe the prejudice in particular terms. We agree with plaintiff, and found the factor neutral.

Plaintiff claims four months passed before he knew of the UPS interrogatories because they were mistakenly not downloaded, presumably from an email. Plaintiff was well aware of the discovery deadlines in force at the time,

and should have queried UPS counsel regarding the interrogatories. Computer mistakes might excuse four days or even four weeks, but not four months.

On the whole, plaintiff's brief did not advance his case.

Conclusion

After a careful review we find, in weighing all of the factors set forth above, dismissal of this case with prejudice is warranted.[9] An appropriate order follows.

Date: July 26, 2017

s/ James M. Munley
JUDGE JAMES M. MUNLEY
United States District Court

[9] Defendants' motion seeks attorneys' fees and costs in addition to dismissal. We will deny the motion insofar as fees and costs are concerned because we find dismissal to be a sufficient discovery sanction in this case.