STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: October 21, 2020)

JOHN DEVANEY	:	
	:	
v.	:	**C.A. No. WC-2017-0054**
	:	
ST. THOMAS MORE CATHOLIC CHURCH, ST. PETERS BY-THE-SEA EPISCOPAL CHURCH, and ROMAN CATHOLIC BISHOP OF PROVIDENCE	:	

DECISION

CARNES, J. Before this Court for decision is Defendants St. Thomas More Catholic Church, the Roman Catholic Bishop of Providence, and St. Peters By-The-Sea Episcopal Church's (collectively Defendants) motion to dismiss pursuant to Rule 37 of the Superior Court Rules of Civil Procedure. This matter arises out of this Court's August 23, 2019 Conditional Order of Dismissal instructing Plaintiff John Devaney (Plaintiff) to respond to expert interrogatories by September 25, 2019. Defendants allege that, although they received an answer to the relevant interrogatory, the disclosure was not served in compliance with the Court's Order and is on its face entirely improper. As a result, Defendants ask this Court to dismiss Plaintiff's Complaint pursuant to Rule 37. The Court heard oral arguments by the parties on September 23, 2020. Jurisdiction is pursuant to Rule 37.

I

Facts and Travel

This case arises out of the periodic playing of amplified electronic bell sounds from St. Peters By-The-Sea Episcopal Church and St. Thomas More Catholic Church, both located in the

Narragansett Pier neighborhood.[1] Plaintiff purchased a home in the same Narragansett Pier neighborhood in 1995, where he lived with his then wife and four children. Defs.' Ex. 1 at Nos. 7, 17. The Plaintiff alleges that, around the year 1999, the Defendant, St. Peters By-The-Sea Episcopal Church, began playing amplified electronic bell sounds every hour from 8:00 a.m. until 8:00 p.m., with additional bell sounds on Sundays and during weddings and other special occasions. *Id*. at No. 8. In addition, the Plaintiff alleges that Defendant, St. Thomas More Catholic Church, also initiated an electronic bell program in approximately 2000. *Id*.

The Plaintiff filed his Complaint on February 7, 2017, alleging that the electronic bells diminished the free use of his property, interfered with the comfortable enjoyment of life, and created mental anguish precipitating the breakup of his family. Compl. ¶ 11. To wit, the Plaintiff seeks monetary damages, injunctive relief, and a declaratory judgment that the Narragansett noise ordinance exemption for religious places of worship be "deemed ineffective." *Id*. ¶ 17.

On June 7, 2017, the Defendants served a set of interrogatories on Plaintiff, including standard expert interrogatory, numbered Interrogatory No. 6. The Plaintiff responded to those interrogatories on August 12, 2017 and answered Interrogatory No. 6 as follows, "Plaintiff objects to Interrogatory No. 6 to the extent it requests information that has not been fully developed at this stage of the litigation." *See* Defs.' Ex. 1 at 2. Defendants then filed a motion to compel a complete response to its expert interrogatory, which the Court allowed by Order dated September 25, 2018. *See* Defs.' Ex. 2. Pursuant to the Court's Order, on December 12, 2018, the Plaintiff supplemented his answer to Defendants' Interrogatory No. 6 by identifying twelve individuals he called

[1] St. Peters By-The-Sea Episcopal Church is located at 72 Central Street, Narraganset, Rhode Island. St. Thomas More Catholic Church is located at 53 Rockland Street, Narragansett, Rhode Island. Compl. ¶¶ 2, 3.

"proposed experts" and three additional "non-specified" experts to testify to various elements of his claimed damages. *See* Defs.' Ex. 3 at 15-18.

At a subsequent status conference, Defendants contended that Plaintiff's additional answer to their expert interrogatories continued to be deficient. The Court agreed and ordered Plaintiff to disclose all testifying experts by April 5, 2019. *See* Defs.' Ex. 4. On April 5, 2019, Plaintiff served the second compelled response, captioned, in part, "providing additional [e]xpert [w]itnesses." This response identified three additional individuals whom Plaintiff claimed would testify as an expert in his case. *See* Defs.' Ex. 5.

At a hearing on April 11, 2019, Plaintiff was unable to state which, if any, of the fifteen individuals identified in his answers to Interrogatory No. 6 have voluntarily agreed to testify. Defs.' Mem. ¶ 20. Plaintiff was also unable to provide any additional information beyond the scant information included in the disclosures. *Id.* On July 25, 2019, the Court ordered that Plaintiff had until September 25, 2019 "to provide full and complete interrogatory answers respecting Mr. Caswell and Dr. Gibbes that are consistent with the discussion had at the July 25, 2019, hearing . . ." *See* Defs.' Ex. 6. On or about September 24, 2019, in compliance with the Court's Order, Plaintiff served a Supplemental Interrogatory Response, which purports to set forth the expert opinion of Dr. Bertram Gibbes. *See* Defs.' Ex. 8.

The Defendants argue that Plaintiff's further answer remains deficient because, following the second day of Plaintiff's deposition, conducted on February 19, 2020, Plaintiff acknowledged that (1) he had prepared the supplemental interrogatory answer disclosing Dr. Gibbes as an expert; and (2) the answer was never provided to or reviewed by Dr. Gibbes prior to Plaintiff filing the answer with the Court. Defs.' Mem. ¶¶ 24-28. According to his deposition testimony, Plaintiff simply relied upon "conversations" with Dr. Gibbes and a draft report that Dr. Gibbes had prepared

in drafting his interrogatory answer. *See* Defs.' Ex. 9 at 34:14-19; 42:16-24. Plaintiff also admitted to adding content to the answers on his own. *Id*. at 40:9-16. Additionally, Plaintiff testified at his deposition that he did not know if the answer contained the complete and accurate opinion to which Dr. Gibbes was expected to testify. *Id.* at 43:1-14.

Due to this revelation, Defendants have moved to dismiss Plaintiff's Complaint and allege that Plaintiff has failed to meet the requirements of Rule 26 of the Superior Court Rules of Civil Procedure (Rule 26). Defendants argue that Plaintiff's responses neglect to provide anything more than his own opinion of the purported opinion of his expert Dr. Gibbes, and it remains unclear still as to exactly what Dr. Gibbes will testify about and the summary of the grounds for each of his opinions. Defs.' Mem ¶¶ 36-37. Defendants additionally note that Plaintiff's expert is still insufficiently disclosed despite the several warnings this Court has provided Plaintiff regarding the requirement that he provide a complete and full expert disclosure. *Id.* ¶ 35.

Plaintiff contends his responses are in compliance with the Court's August 23, 2019 Order because they are consistent with the discussion at the July 25, 2019 hearing and the requirements of Rule 26(b)(4)(A). Pl.'s Mem. 3. Plaintiff argues that his response contains what he expects Dr. Gibbes to testify on and he has not disregarded, willfully disobeyed, or failed to comply with the Court's Order. *Id.* at 4. Plaintiff additionally questions why Defendants made no effort to form an agreement with Plaintiff for supplementation of the interrogatories. *Id.*[2]

[2] Plaintiff cites Rule 26(e)(3), which provides: "A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new request for supplementation of prior responses." Plaintiff asks the Court to question why Defendants chose to proceed by Court Order rather than a less costly and time-consuming option to compel answers provided by Rule 26(e)(3).

II

Standard of Review

Rule 37 provides the Superior Court with the tools necessary to achieve a smooth functioning of the discovery process by allowing the trial justice to enter orders for failing to comply with discovery demands and to sanction a noncompliant party. Super. R. Civ. P. 37. The assortment of tools provided by Rule 37 includes (i) permitting a party to file a motion for an order compelling discovery and (ii) providing the trial justice with authority to sanction a party for failing to comply with a court order, attend a deposition, serve answers to interrogatories, or respond to a request for inspection. *Id.*

Should the nonmoving party fail to comply with an order compelling discovery, Rule 37 itemizes the potential sanctions that the Court, in its discretion, can impose. *Id.* The Court may hold the nonmoving party in contempt. Super. R. Civ. P. 37(b)(1). Additionally, the Court may order that the facts at issue be deemed established thenceforth; preclude the disobedient party from either supporting or opposing the designated claims or defenses; strike out certain pleadings; or stay the proceeding until the order is obeyed. Super. R. Civ. P. 37(b)(1), (2).

The Rule also affords the Court the discretion to enter either a final judgment dismissing the action or a judgment by default. Super. R. Civ. P. 37(b)(2)(C). There is nothing in the Rules of Civil Procedure to suggest that final judgment can only be imposed after other, less severe, sanctions are employed. *See id*. "[A]t some point a defendant is entitled to a dismissal of a complaint in an action in which a [party's] persistent failure to comply with discovery requests and related court orders causes inordinate delay, expense, and frustration for all concerned." *Mumford v. Lewiss,* 681 A.2d 914, 916 (R.I. 1996). Such a situation is characterized by "continuous and willful noncompliance with discovery orders," *Goulet v. OfficeMax, Inc.*, 843

A.2d 494, 496 (R.I. 2004) (mem.), that rises to the level of "persistent refusal, defiance or bad faith." *Flanagan v. Blair*, 882 A.2d 569, 573 (R.I. 2005) (internal quotation and emphasis omitted).

III

Analysis

A trial justice has the ability to protect the integrity of the judicial system by penalizing those whose conduct may warrant dismissal and deterring others from engaging in similar conduct. *See Lett v. Providence Journal Co.*, 798 A.2d 355, 365 (R.I. 2002); *see also National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) ("[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the [superior] court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."). "Where, as here, the plaintiff flouts the discovery rules and he appears to be less than forthcoming upon discovery of such violation, the ultimate sanction of dismissal with prejudice is warranted." *Joachim v. Straight Line Productions*, LLC, 138 A.3d 746, 754 (R.I. 2016).

The conduct taken on the part of Plaintiff in this case presents a "brazen defiance of the discovery rules and a disregard for the purpose of such rules, which serve 'to prevent trial by ambush and to enable litigants to prepare for trial free from the elements of surprise and concealment so that judgments can rest upon the merits of the case rather than the skill and maneuvering of counsel.'" *Id* at 753-54 (quoting *Narragansett Electric Co. v. Carbone*, 898 A.2d 87, 95 (R.I. 2006)). Under Rule 37(b), where a party to an action refuses to obey an order to provide discovery, the trial justice may dismiss the action or proceeding. *The Travelers Insurance Co. v. Builders Resource Corp.*, 785 A.2d 568, 569 (R.I. 2001) (mem.) (holding that "[d]ue to the defendant's blatant refusal to comply with its discovery obligations, including its duty to answer

interrogatories, and attend a duly noticed deposition, the trial justice . . . did not abuse her discretion by ordering the entry of default judgment").

Plaintiff's arguments do little to persuade the Court that he is in compliance with the discovery Orders entered in this case. His responses at his deposition plainly admit to noncompliance with such Orders. *See* Defs.' Ex. 9 at 34-43. Plaintiff has admitted to supplementing his responses with "things that [he's] seen on [his] own . . ." *See id.* at 40:13-16. He has also admitted he does not know if the answers provided were a complete and accurate opinion of that which Dr. Gibbes will testify to. *Id.* at 43:1-14. Plaintiff asks the Court to focus on the use of "expects" and "expected" in the language of Rule 26(b)(4)(A) to conclude that he is in compliance by simply providing mere speculations as to what Dr. Gibbes will testify to. Such speculations, however, will not enable Defendants to prepare for trial '"free from the elements of surprise and concealment."' *Joachim*, 138 A.3d at 753 (quoting *Carbone*, 898 A.2d at 95). This is inconsistent with the purpose of the rules of discovery. Additionally, Plaintiff's argument asking the Court to question why the Defendants sought a court order rather than coming to an agreement with Plaintiff is irrelevant. The Court does not need to question the Defendants' motives for pursuing an option plainly available to them under Rule 26(e)(3). Nor does this fact change Plaintiff's continued noncompliance.

Plaintiff has been aware that he must comply with the expert discovery disclosure orders and has been given numerous chances and warnings by this Court. *See, e.g.*, Order (Sept. 25, 2018) (McGuirl, J.) (granting Defendants' Motion to Compel); Order (Feb. 1, 2019) (McGuirl, J.) (setting briefing schedule ordering Plaintiff to disclose experts by April 5, 2019); Order (Aug. 23, 2019) (McGuirl, J.) (compelling Plaintiff to provide full and complete interrogatory answers respecting Mr. Caswell and Dr. Gibbes by Sept. 25, 2019). This Court has also warned Plaintiff of the

consequences of failing to follow the rules at status conferences. *See* Tr. 12:4-15, July 25, 2019 ("You've been given opportunity after opportunity before me, even to get this case in order for trial, and you have not prevailed or have not presented any evidence to the Court that would allow me to do that . . . at some point, if people don't . . . comply with court orders, the court dismisses the case."). The record is clear that Plaintiff has been given multiple opportunities to comply with the discovery orders and he continues to evade compliance despite these opportunities. Dismissal has been affirmed by our Supreme Court under similar circumstances. *See Aguayo v. D'Amico*, 981 A.2d 1016, 1017 (R.I. 2009) (mem.) (affirming dismissal where "the trial justice had available to her a variety of options with which to attempt to remedy plaintiff's failure to comply with defendant's discovery requests; and, after exhausting those options, she granted defendant's motion to dismiss and entered final judgment").

The Court has exercised great patience with Mr. Devaney, given his *pro se* status. "*Pro se* litigants are often granted greater latitude by the court, although they 'are not entitled to greater rights than those represented by counsel.'" *Jacksonbay Builders, Inc. v. Azarmi*, 869 A.2d 580, 585 (R.I. 2005) (quoting *Gray v. Stillman White Co.*, 522 A.2d 737, 741 (R.I. 1987)). While the Court is sympathetic to the dilemmas the Covid-19 Pandemic has caused for Mr. Devaney, '"the courts of this state cannot and will not entirely overlook established rules of procedure. . ."' *Id.* (quoting *Gray*, 522 A.2d at 741). Adherence to these rules are "'necessary [so] that parties may know their rights, that the real issue in controversy may be presented and determined, and that the business of the courts may be carried on with reasonable dispatch.'" *Id.* (quoting *Gray*, 522 A.2d at 741). Due to Mr. Devaney's continued lack of compliance with Rule 26 as outlined herein, even as a *pro se* Plaintiff, this case must be dismissed.

IV

Conclusion

Based on the foregoing, including Mr. Devaney's lack of compliance with this Court's multiple Orders, this Court grants Defendants' motion to dismiss.

Counsel shall prepare an appropriate order and judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Devaney v. St. Thomas More Catholic Church, et al.**
CASE NO:	**WC-2017-0054**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**October 21, 2020**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
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