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

ADMIRAL INSURANCE CO.,	:	**No. 3:01cv0973**
Plaintiff	:	
	:	**(Judge Munley)**
v.	:	
	:	
GINADER, JONES & CO., LLP, JACK JONES, NOVICK CHEMICAL CO, INC., EDWARD NOVICK, ROBERTA NOVICK, NOVICK CHEMICAL CORP., QUAKER CITY CHEMICAL CO., LEE METZMAN, AND STEVE METZMAN,	:	
Defendants	:	
	:	

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MEMORANDUM

Before the court for disposition are motions for sanctions requesting dismissal of the present action in addition to attorneys' fees and costs for plaintiffs' failure to comply with numerous discovery requests. The moving defendants are Ginader, Jones & Co., LLP and Jack Jones ("Movants"). The plaintiff is Admiral Insurance Co. All co-defendants concur with movants. For the following reasons, we will grant the defendants' motions for sanctions in part.

I. Background

Plaintiff is an insurance company that provided movants with a million dollar professional liability policy, covering June 6, 1999 to June 6, 2000. Movants are certified public accountants who acted as outside auditors for Novick Chemical Co. In November 1999, movants were sued in an underlying state action for professional malpractice by Defendants

Novick Chemical Co., Inc., Edward Novick, and Roberta Novick ("Novick Defendants").[1] Novick Defendants alleged, *inter alia*, that movants inaccurately recorded their financial statements.[2]

Plaintiff began to provide for the defense of the movants in the state court action. Subsequently, however, plaintiff filed the present action seeking a declaration that it need not indemnify movants. In answering the instant complaint, movants denied all claims, asserted affirmative defenses, and counterclaimed for breach of fiduciary duty. During discovery, movants identified and sought to depose two of plaintiff's employees, Wayne Pinkstone and Joseph Vizzini. Plaintiff, however, failed to produce the deponents on the first scheduled appearance and subsequently failed to produce them eleven more times over a period of seven months. In total, plaintiff requested continuances of the depositions twelve times, including three times after the court ordered that no further extensions would be granted.

On January 22, 2003, Ginader, Jones and Jack Jones moved to sanction Admiral Insurance Co. for failure to produce the two deponents on twelve scheduled occasions. Subsequently, Defendant Jack Jones died unexpectedly. On February 20, 2003 defendants again moved for sanctions in a supplemental motion claiming that sanctions are more

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[1] See Novick Chemical Co., Inc. v. Quaker City Chemical Co., No. 99-E-76 (Pa Ct. Com. Pl (Lehigh Co.) filed Nov. 9, 1999). The case was eventually settled between the companies where the parties split the proceeds of the policy at issue in this case. That settlement is contingent upon the outcome of this case. See Notes of Testimony of Oral Argument, May 23, 2003, at 23.

[2] Allegedly as a result of their accounting errors, a merger of Novick Chemical Co. with Quaker City Chemical Co. was rescinded. Defendants Quaker City Chemical Co., Lee Metzman, and Steve Metzman later cross-claimed against movants in the state action.

appropriate now due to the death of the defendant.

Movants request that the court dismiss the declaratory judgment complaint with prejudice. They further request that plaintiff be fined for failing to participate in discovery according to its obligations. Finally, they request that plaintiff be ordered to pay all appropriate fees of movants associated with preparation of the numerous rescheduled depositions and the present motions. For the reasons that follow, we will grant the motion in part.

II. Jurisdiction

This court exercises jurisdiction over this case pursuant to 28 U.S.C. § 1332 , diversity jurisdiction, as the plaintiff is a citizen of New Jersey and the defendants are citizens of Pennsylvania. The amount in controversy is greater than $75,000.00. See Compl. at ¶ 5

III. Discussion

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., National Hockey League v. Metropolitan 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 . . . and must be reserved for extreme cases." Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 868-69 (3d. Cir. 1984). 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." National 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). Each of these six factors will be analyzed below.

(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. Trustees of the New Jersey Brewery Employees' Pension Trust 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.

In the present action, there is no evidence to suggest that Admiral Insurance bears any responsibility for the acts of its counsel. However, plaintiff "voluntarily chose this attorney as [its] representative . . . and [it] 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." Link, 370 U.S. at 633-34.

As mentioned above, it is not necessary to meet all six prongs of the Poulis test for sanctions to be awarded. Accordingly, we shall proceed to analyze the remaining factors.

(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 873 (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 instant case, movants assert that they have suffered prejudice based upon the unexpected death of the Defendant Jack Jones. At oral argument movants explained Jones' importance as follows: "Mr. Jones obviously now cannot confer [with us] concerning any

information which might be gathered subsequently if this action were allowed to proceed. If [the deponents] were given a 13th opportunity to appear . . . [we] can't take those transcripts back to Mr. Jones and say, what do you think?" Notes of Testimony of Oral Argument, May 23, 2003, at 11 ("N.T."). Movants further stated that there is nobody currently living at the accounting firm, Ginader, Jones & Co., who has the knowledge that Mr. Jones had about these matters. Id. at 13. To date no depositions have been taken in this case. Id. at 12.

While we are sympathetic to the movants with regard to this argument, we find that with the record before the court, we cannot make a determination as to the extent that they have been prejudiced by the death of Defendant Jones. We will discuss this facet of the case more thoroughly after examining the remainder of the factors.

(3) History of Dilatoriness

The court must next 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 both in pre-discovery and discovery proceedings. For example, sixty days after filing this action, the court had to order plaintiff to serve defendants and to file a report explaining its delay. Document 3,

Order of August 14, 2001 ("Doc."). Plaintiff filed a status report stating that service would occur within two weeks, but failed to explain the delay as ordered. Doc. 4. Next, plaintiff was served with a non-prosecution order as to Novick Defendants. Doc. 11, Order of Nov. 30, 2001. Thereafter, plaintiff filed two summary judgment motions, Docs. 22 and 36, but failed to submit briefs in support of either motion, violating Local Rule 7.5.[3] The court dismissed the first motion without prejudice. Doc. 27. A month after the second motion, movants asked the court to deem plaintiff's motion withdrawn for failure to submit a supporting brief. Doc. 46. The court subsequently deemed it withdrawn. Doc. 51, Order of Apr. 7, 2003.

Plaintiff's dilatory behavior, however, may best be demonstrated with regard to the depositions. Discovery in this case was originally to have been completed by June 28, 2002. See Doc. 16 (minute sheet of case management conference). The depositions at issue were scheduled a total of twelve times: June 12, 2002, June 25, 2002, July 8, 2002, July 24, 2002, August 29, 2002, September 23, 2002, September 27, 2002, October 28, 2002, November 18, 2002, December 20, 2002, January 10, 2003, and finally on January 17, 2003. Motion for Sanctions at Exhibits A-H, J-L ("Mot."). Regarding the last two dates, the court ultimately ordered plaintiff to produce the deponents at movants' counsel's office. Doc. 29, Order of Dec. 20, 2002; Doc. 31, Order of Jan. 10, 2003. Plaintiff did not comply with those orders.

[3]Local Rule 7.5 requires, *inter alia*, that a brief in support of a summary judgment motion must be filed within ten (10) days of the filing of the motion.

On all but one occasion, plaintiff requested continuances.[4] Subsequently, the court reset discovery deadlines seven times. See Docs. 19, 21, 24, 26, 28, 29, and 31 (court orders extending discovery dates). Moreover, plaintiff requested continuances three times after the court ordered that no further extensions would be granted. Doc. 26, Order of Oct. 25, 2002. Finally, after plaintiff failed to produce the deponents for the twelfth scheduled time, movants moved for sanctions. Doc. 33. Even after the motion for sanctions was filed, plaintiff's dilatory conduct continued. It requested an extension of time to file its brief in opposition to the motion for sanctions. Doc. 37

In moving for extensions, plaintiff proffered numerous reasons for its delay in producing the deponents including pre-paid vacation plans, see Doc. 20, inability in locating the deponents, see Docs. 20 and 23, and unavailability of the deponents, see Doc. 25. Plaintiff also stated before the court that "[o]n each of the occasions up to November 20th, [it] had sought a continuance . . . because of other commitments [it] had for the dates that were *unilaterally selected*." N.T. at 16 (emphasis added).

Movants did admit that "throughout these 12 deposition notices . . . [their] office did forward a notice of deposition without an agreed-upon date . . . however, on each and every occasion that was done . . . only after numerous phone calls placed to [plaintiff's] office went unreturned and [they] could not be provided with a date." Id. at 27. At all times, movants held themselves out as amenable to other dates and options for the depositions. See Doc. 33, Mot.

[4] The parties jointly moved the court on October 23, 2002 to extend discovery time. See Doc. 25.

for Sanctions at Exhibits A-C, E-I, K-L (letters to plaintiff regarding deposition dates).

Taken individually, none of these matters warrant sanctions. Yet throughout this case, the court and movants have had to consistently prod the 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.

In this case, plaintiff has ignored numerous deadlines imposed by the court. It has consistently skirted the responsibility of complying with discovery rules by deflecting accountability, citing scheduling conflicts, complaining of unilateral selection of dates by movants, and inability to notify the deponents. Considering its actions throughout the life of this case, plaintiff has demonstrated both in pre-discovery and discovery proceedings a strong history of dilatory conduct and this factor weighs heavily in favor of imposing sanctions.

(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 National 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 promises to the court. The case before us is very similar to National Hockey

League.

During the final conference call on January 10, 2003, requesting an extension, plaintiff stated to the court that at 10:00 a.m. on January 17, 2003, it would produce the deponents at the movants' counsel's office in Scranton, Pennsylvania.[5] N.T. at 6 and 18-19. At exactly 10:00 a.m. on the scheduled date, plaintiff called movants to inform them that the deponents would not be coming, that one deponent now required a subpoena to appear, and that the other was in California. Id. at 7. Movants stated that this was the first time they heard about the subpoena. Id.

At the hearing on these motions, movants stated that "obviously somewhere between January 9th and January 17th, [plaintiff] became aware that [the deponents] would not be appearing and never advised [them] until the scheduled time for starting the depositions." Id. Moreover, plaintiff's counsel admitted that he should not have represented during the final conference call that he could produce the deponents a week later, that he did not use good professional judgment, and that he was busy with other legal proceedings. Id. at 18-19. Finally, and perhaps most egregiously, plaintiff's counsel admitted at the hearing that he never knew, throughout seven months of discovery, the location of one of the deponents until January 16, 2003, the day before the twelfth and final deposition date, id. at 16, even though he had affirmatively represented to the court and to movants that he would produce the deponents

[5] Plaintiff's counsel works in Harrisburg, Pennsylvania, approximately a three-hour drive from Scranton, Pennsylvania where movants' counsel are located.

on numerous occasions, id. at 30.

When asked by the court why he could not have another lawyer cover the depositions, plaintiff's counsel answered that he was the only attorney familiar with the case and was busy with other cases. N.T. at 18. Plaintiff argued that "at the 11th hour, you can't hand over a case to somebody else that has absolutely no contact with the file . . . and say, go attend these depositions, go defend these depositions, when the individual has no familiarity with the issues." Id. at 31. Plaintiff fails to acknowledge, however, that this case should have not have gotten to the 11th hour. If need be, another matter, no doubt, could have been put on hold once instead of this matter being put on hold twelve times. Moreover, in today's practice of law, taking depositions is a routine matter, and covering for depositions is common place.

This case is not a case where plaintiff "show[ed] a failure to move with the dispatch reasonably expected of a party prosecuting a case." Adams, 29 F.3d at 876 (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 delay over eleven months[6] in ascertaining one of the deponent's whereabouts, the disrespect to movants by continuing depositions twelve times without proffering substantial explanations, plaintiff's failure to comply with multiple court orders, and finally informing movants at the exact time that the depositions were scheduled

[6] Movants alerted plaintiff in February 2002 in the joint case management plan that they intended to depose the two persons in question. See Doc. 15 at 12.

that, once again, the deponents would not be coming, we find the conduct was done, if not willfully, at least in bad faith. Therefore, this factor weighs heavily in favor of sanctions.

(5) Meritoriousness of the Claim

Finally, 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 might very well succeed at trial, if the proffered evidence were established. Had plaintiff complied with discovery requests and court orders however, the depositions would have been taken and movants could have conferred with Jones about those statements. Now that cannot occur and movants argue that no one at the accounting firm can replace Defendant Jack Jones, the principal "most intimately involved in this action." N.T. at 11.

Plaintiff argues that its complaint involves only a legal determination, that the court must merely "look at the underlying complaint, and . . . the provisions of the insurance policy at issue . . . that basically it is a legal determination for the Court applying the contract." Id. at 23. Nevertheless, in all proceedings there are questions of fact and of law and movants have also proffered defenses and claims, which if established at trial, may support recovery. See Doc. 8 (Movants' Answer). Thus in this case "both sides' positions appear[] 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 695 (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. With regard to the testimony of the proposed deponents, the defendants have stated:

> [The deponents] have insights into the policy which gives rise to this action, how that policy was interpreted, what factual matters gave rise to their interpretation that coverage was to be denied, how they went about filing a declaratory judgment action, and now if they come back and testify about these matters, if Your Honor gives them a 13th bite at the apple, and they actually appear and do testify, I can't confer with Mr. Jones and say, what do you think about that? Is this what actually happened? What other arguments do we have?

N.T. at 13. We cannot make a determination as to the appropriateness of dismissal as a sanction without having the testimony of these deponents. If the facts support the contention of the movants, then the balance of the factors would weigh more toward dismissal as a sanction. However, we cannot determine, for instance, whether we could simply suppress the testimony of the deponents, Pinkstone and Vizzini, as an alternative sanction, or whether such an action 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.

As such, as discussed more fully below we will order that the depositions be taken, and the portion of the motion for sanctions seeking dismissal will be denied without prejudice.

V. Conclusion

In light of the foregoing analysis, we find in weighing all of the factors set forth above, an appropriate sanction at this point is to order the plaintiff to pay the costs and attorneys' fees incurred by the movants in attempting to schedule the depositions and in filing the two motions for sanctions. To this end, we will order the plaintiff to file a bill of costs regarding those matters. We find this sanction is appropriate as throughout the life of the case, plaintiff exhibited extreme dilatorious conduct in not complying with numerous rules and court orders. Moreover, plaintiff failed to fulfill its duty to the court by ascertaining the whereabouts of the deponents, yet certifying that they would appear. Finally, plaintiff admitted that it didn't use good professional judgment. N.T. at 19.

We will not order dismissal at this time, however, because without the depositions being taken we cannot determine the extent of prejudice caused to the defendants by the death of Defendant Jack Jones. Without being able to do a full analysis of the prejudice we are unable to determine the appropriateness of alternative sanctions. Accordingly, we will order that the depositions occur within the next sixty (60) days and allow the defendants to file another motion for sanctions within ninety (90) days, if warranted, detailing with particularity the prejudice they claim to have suffered and the reasons why sanctions other than dismissal are inappropriate. An appropriate order follows.

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	:	**(Judge Munley)**
v.	:	
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Defendants	:	

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ORDER

AND NOW, this 9th day of September 2003 it is hereby **ORDERED** that:

(1) Defendants' Ginader, Jones & Co., LLP and Jack Jones' motions for sanctions (Docs. 33 and 40) are hereby **GRANTED** in part, and the plaintiff is **ORDERED** to pay the reasonable attorney's fees and costs incurred by Defendants Ginader, Jones & Co., LLP and Jack Jones in attempting take the depositions of Wayne Pinkstone and Joseph Vizzini and for filing the two sanction motions;

(2) Defendants Ginader, Jones & Co., LLP and Jack Jones are ordered to submit a bill of costs to the court within twenty (20) days from date of this order detailing their relevant attorney's fees and costs;

(3) The remainder of the motion for sanctions is **DENIED** without prejudice and may be filed again by Defendants Ginader, Jones & Co., LLP and Jack Jones within ninety (90) days of the date of this order, if they can at that point detail the prejudice and the inappropriateness of alternative sanctions. If no motion for sanctions is filed, dispositive motions are due one hundred (100) days from the date of this order;

(4) The defendants and plaintiff are ordered to work together to ensure that the depositions of Wayne Pinkstone and Joseph Vizzini are taken within the next sixty (60) days.

BY THE COURT:

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Filed: 9/09/03

JUDGE JAMES M. MUNLEY
United States District Court