

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOVAUGHN NOEL SMITH WADE,

Plaintiff

Case No.: 8:23-cv-00316-KKM-NHA

vs.

AUTO CLUB SERVICES, INC.,

Defendant.

_____/

**DEFENDANT’S MOTION FOR SANCTIONS OR IN THE ALTERNATIVE
MOTION TO COMPEL PLAINTIFF’S DEPOSITION
AND INCORPORATED MEMORANDUM OF LAW**

Defendant, Auto Club Services, Inc. (“ACS” or “Defendant”), pursuant to Federal Rule of Civil Procedure 37(b)(2)(A)(v) and 37(d)(1)(A)(i), moves this Court to dismiss this action with prejudice as a sanction for the Plaintiff’s failure to adhere to the Amended Case Management and Scheduling Order and to appear at his properly noticed April 8, 2024, deposition. In support of this Motion, Defendant states the following:

PROCEDURAL HISTORY

1. On January 9, 2024, the Court issued a Civil Case Order. (Doc. 31).
2. On January 11, 2024, the Court issued an Amended Case Management and Scheduling Order pursuant to Rule 26(f) and Local Rule 3.02(c). (Doc. 34).
3. On January 19, 2024, Defendant’s counsel requested Plaintiff provide his overdue Rule 26 Initial Disclosures. (**Exhibit A**).

4. On January 25, 2024, the Court issued an Order requiring Plaintiff to file a Certificate of Interested Persons and Corporate Disclosure Statement pursuant to the Civil Case Order (Doc. 31) by January 30, 2024. (Doc. 35).

5. Plaintiff failed to comply with the Court's Orders regarding the Certificate of Interested Persons and Corporate Disclosure Statement.

6. On February 2, 2024, The Court issued an Order to show cause as to why Plaintiff failed to comply with the Court's prior Orders requiring Plaintiff to file a Certificate of Interested Persons and Disclosure Statement. (Doc. 36). The Court also notified Plaintiff in the Order that this action would be dismissed without further action if Plaintiff failed to file a Certificate of Interested Persons and Corporate Disclosure Statement by February 6, 2024.

7. After receiving three Orders from the Court, Plaintiff filed a Certificate of Interested Persons and Corporate Disclosure Statement on February 6, 2024.

8. On February 8, 2024, Plaintiff's counsel informed Defendant's counsel that Plaintiff and Plaintiff's counsel were available for Plaintiff's deposition on April 8, 2024. (**Exhibit B**). Defendant's counsel informed Plaintiff's counsel that Defendant would set Plaintiff's deposition for April 8, 2024, at 9:30AM at 101 E. Kennedy Blvd. #2350, Tampa, FL 33602. (**Exhibit B**).

9. On February 9, 2024, Defendant properly served Plaintiff's counsel with Defendant's Notice of Deposition of Plaintiff. (**Exhibit C**).

10. On February 12, 2024, Plaintiff provided his overdue Rule 26 Initial Disclosures to Defendant's counsel.

11. On February 26, 2024, the Court issued an Order due to Plaintiff's failure to comply with the Amended Case Management and Scheduling Order. (Doc. 39). The Court warned Plaintiff's counsel that the failure to comply would result in dismissal without prejudice for failure to prosecute.

12. On March 1, 2024, Plaintiff filed a Notice of Mediation in order to comply with the Court's Amended Case Management and Scheduling Order and the Court's February 26, 2024, Order. (Doc. 40).

13. On April 8, 2024, Plaintiff and his counsel failed to appear for Plaintiff's deposition. Defendant's counsel emailed Plaintiff's counsel to inquire as to whether Plaintiff and his counsel would appear for the deposition. (**Exhibit D**).

14. That same day at 9:43AM, Defendant's counsel also called Plaintiff's counsel to inquire as to whether Plaintiff and Plaintiff's counsel would appear for Plaintiff's deposition. The line disconnected when Defendant's counsel asked where Plaintiff and Plaintiff's counsel were.

15. Plaintiff's counsel called Defendant's counsel back at 9:46AM and stated that he was in Arkansas to observe the solar eclipse and that Plaintiff would be unable to attend the April 8, 2024, deposition.

16. Defendant's counsel received the Certified Non-Appearance for Plaintiff from the Court Reporter. (**Exhibit E**).

17. Later that afternoon, Defendant's counsel conferred with Plaintiff's counsel regarding Plaintiff's failure to appear for Plaintiff's April 8, 2024, deposition. Plaintiff's counsel has agreed to pay the reasonable travel expenses of Defendant's

corporate representative who attended the April 8, 2024, deposition and the cost of the Court Reporter. Plaintiff's counsel also agreed to set Plaintiff's deposition within 14 days of the date of the filing of this Motion. (**Exhibit F**). However, Plaintiff is opposed to any other relief sought by Defendant in this Motion.

18. During their conferral, Plaintiff's counsel acknowledged that the April 8, 2024, deposition notice was properly served on February 9, 2024.

19. Plaintiff's actions in not prosecuting this case since the filing of the Complaint, being completely indifferent to the case deadlines as evidenced by the Court's prior Orders, and failing to attend his deposition, falls squarely within this Court's discretion to issue the sanction of dismissal.

20. Plaintiff's actions should not be tolerated in the Middle District of Florida. Defendant has suffered prejudice by Plaintiff failing to appear for his deposition and Plaintiff's failure to properly prosecute this matter has resulted in the Court issuing three prior Orders to ensure Plaintiff's compliance.

21. The discovery deadline for this matter is August 30, 2024. Plaintiff's failure to appear for his deposition has resulted in the delay of this matter and Defendant is unable to conduct additional discovery until Plaintiff is deposed.

22. Accordingly, based on the record before the Court, Defendant respectfully submits this action should be dismissed with prejudice and that Defendant be awarded its attorneys' fees and costs for preparing this Motion, attending Plaintiff's deposition, and preparing for Plaintiff's deposition.

MEMORANDUM OF LAW

A. The Requirements of Rule 26 and Rule 37

Federal Rule of Civil Procedure 26 provides that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense” Fed. R. Civ. P. 26(b)(1). Discovery is expected to be accomplished voluntarily with minimal judicial intervention. *See Bell v. Bray and Gillespie, LLC*, No. 6:05-CV-355-ORL19JG, 2006 WL 923741, at *1 (M.D. Fla. Apr. 10, 2006).

As demonstrated above, this matter has not been able to proceed without judicial intervention at virtually every Court Ordered deadline. Plaintiff has missed nearly every deadline set by the Court and failed to appear for an agreed to April 8, 2024, deposition.

Federal Rule of Civil Procedure 37(b)(2)(A)(v) provides that “[i]f a party. . . fails to obey an order to provide or permit discovery . . . , the court where the action is pending may issue further just orders[,]” including the issuance of an order “dismissing the action or proceeding in whole or in part[.]” Rule 37(d)(1)(A)(i), and (3) authorizes the same sanction if a party fails to appear for a properly-noticed deposition. While disfavored, “dismissal [with prejudice under Rule 37] may be appropriate when plaintiff’s recalcitrance is due to willfulness, bad faith or fault.” *Phipps v. Blakeney*, 8 F.3d 788, 790 (11th Cir. 1993). However, a violation of a discovery order caused by simple negligence, misunderstanding, or inability to comply will not justify a Rule 37 dismissal. The severe sanction of dismissal . . . is appropriate only as a last resort, when less drastic sanctions would not ensure compliance with the court’s

orders.” *Clark v. Keen*, 2009 WL 179674, at *4 (M.D. Fla. Jan. 23, 2009) (quoting *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1542 (11th Cir. 1993)).

B. Defendant Has Demonstrated Plaintiff’s Willful Disregard of the Case Management and Discovery Requirements

This is not a case of simple negligence, misunderstanding, or the inability to comply. Rather, Plaintiff has failed to adhere to the Court’s deadlines and failed to attend a deposition that was properly noticed for a date provided by Plaintiff’s counsel. As a result of Plaintiff’s failure to properly prosecute his case, Plaintiff has unnecessarily caused delay, increased Defendant’s fees and costs, and prejudiced Defendant¹ by willfully failing to appear for his deposition. Plaintiff did so by (1) ignoring the properly served Notice of Deposition; (2) failing to inform Defendant’s counsel that Plaintiff could no longer attend; (3) failing to timely serve his initial disclosures; (4) and repeatedly failing to adhere to the deadlines in the Civil Case Order and Amended Case Management and Scheduling Order.

Put simply, this pattern of failing to comply with the Court’s Orders and Plaintiff’s discovery obligations is willful, in bad faith, and justifies dismissal because Plaintiff’s indifference will only continue without a severe sanction from this Court.

C. Dismissal Is Warranted Due to Plaintiff’s Bad Faith

Defendant has easily met the burden of establishing that Plaintiff was properly served with a Notice of Deposition and has repeatedly ignored the Amended Case

¹ Sanctions for discovery abuses are intended to prevent unfair prejudice to litigants and insure integrity of discovery process. *Gratton v. Great American Communications*, 178 F.3d 1373 (11th Cir. 1999) (finding that district court’s dismissal based on the willful non-compliance of a discovery order was a not an abuse of discretion).

Management and Scheduling Order. Litigants who are " willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents ... and in this era of crowded dockets, that they also deprive other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism." *G-K Properties v. Redevelopment Agency*, 577 F.2d 645, 647 (9th Cir.1978).

Courts find bad faith when a party delays or disrupts the litigation or hampers enforcement of a court order. *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1304 (11th Cir. 2006); *Marcelle v. Am. Nat'l Delivery, Inc.*, No. 3:09-cv-82-J-34MCR, 2010 WL 1655537, at *4 (M.D. Fla., Apr. 23, 2010) (holding that the defendant's failure to attend the depositions and comply with the court's discovery order was part of a pattern of willful disobedience and warranted a sanction of default judgment).

As demonstrated by the procedural history, bad faith, and lack of respect for the litigation process is not hard to find. Here, the deposition was properly noticed and Plaintiff's counsel has also conceded the same.² Throughout this litigation Plaintiff has disregarded the Court's Civil Case Order, Amended Case Management Order, and failed to appear at his deposition as noticed. Furthermore, Plaintiff was aware sanctions could be imposed because the Court's prior Orders warned Plaintiff and his counsel that failure to prosecute this matter could lead to dismissal. (Doc. 34; 36).

² "A deposition is properly noticed when the party seeking to depose a person by oral questions, provides such person with a reasonable written notice stating, 'the time and place of the deposition and, if known, the deponent's name and address.'" *Pinkston v. Univ. of S. Fla. Bd. of Trustees*, No. 8:18-cv-2651-T-33SPF, 2019 WL 4254471 at *4 (M.D. Fla. Sept. 9, 2019) (citing Fed.R.Civ.P. 30(b)(1)).

Plaintiff's actions constitute an intentional and conscious disregard of Plaintiff's responsibility to adhere the discovery process in prosecuting his own case. Moreover, there is not any justifiable or credible excuse for Plaintiff's failure to appear at his properly noticed deposition.

Dismissal is appropriate and this Court would not be alone in dismissing a case for failing to attend a properly noticed deposition. *Watkis v. Payless ShoeSource, Inc.*, 174 F.R.D. 113, 117-18 (M.D. Fla. 1997); *Hashemi v. Campaigner Publications, Inc.*, 737 F.2d 1538, 1539 (11th Cir. 1984). Additionally, dismissal with prejudice is appropriate as a deterrent to other parties who fail to properly prosecute their cases and attend properly noticed depositions. *See National Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639 at 642-43, 96 S.Ct. 2778 at 2780-81, 49 L.Ed.2d 747 (1976).

Defendant submits that in this rare instance where a Plaintiff has repeatedly ignored the Court's Orders, missed required deadlines, and failed to attend his own agreed to deposition that mere monetary sanctions would not be effective or appropriate. Defendant is clearly prejudiced by the delays in not timely receiving Plaintiff's initial disclosures, being able to take Plaintiff's deposition, and having to rely on the Court to issue additional Orders for Plaintiff to adhere to the Amended Case Management and Scheduling Order. Accordingly, Defendant submits that Plaintiff's Amended Complaint should be dismissed with prejudice due to his failure to properly prosecute this matter and attend his own deposition.

D. The Court Should Award Reasonable Expenses

Defendant also seeks attorneys' fees and costs incurred for the April 8, 2024, deposition. As for other sanctions, "the Court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed.R.Civ.P. 37(d)(3).

Here, the Court at a minimum is required to award the reasonable expenses, including attorney's fees and expenses caused by Plaintiff's failure to attend his deposition unless the Court finds that the failure to attend the deposition was substantially justified or if other circumstances make an award of expenses unjust. *Melvin v. United States*, 5:22-cv-393-GAP-PRL, at *5 (M.D. Fla. Jan. 16, 2024). Plaintiff's actions are not substantially justified and there are no other circumstances making an award unjust because Plaintiff's deposition was properly noticed for a date provided by Plaintiff.

Additionally, in the event the Court finds that dismissal is not appropriate, Defendant seeks an Order compelling Plaintiff to attend a deposition scheduled prior to May 2, 2024 in order for Defendant to properly conduct discovery by the August 30, 2024 deadline. *Moore v. United States*, 6:21-cv-395-CEM-DCI, at *4 (M.D. Fla. Nov. 22, 2022).

WHEREFORE, Defendant respectfully requests that the Court enter an Order dismissing this action with prejudice. Defendant also requests that this Court order Plaintiff to pay Defendant for the reasonable costs and attorneys' fees incurred in

bringing this Motion, attending Plaintiff's deposition, and preparing for the same as permitted by Rule 37 and any additional relief as the Court deems just and proper.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 3.01(G)

On April 8, 2024, Counsel for Defendants conferred with Plaintiff over the phone regarding the relief requested in this Motion. Plaintiff's counsel has agreed to pay the reasonable travel expenses of Defendant's corporate representative who attended the April 8, 2024, deposition and the cost of the Court Reporter. Plaintiff is opposed to the remainder of the relief requested in this Motion.

Dated this 10th day of April 2024.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on April 10, 2024, the foregoing was filed electronically with the Clerk of Court's electronic filing system and sent via email to:

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warpear@gmail.com

/s/ Brett P. Owens
Attorney