UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOVAUGHN NOEL SMITH WADE,

Plaintiff,

v. Case No. 8:23-cv-0316-KKM-NHA

AUTO CLUB SERVICES, INC.,

Defendant.

ORDER

Plaintiff Jovaughn Noel Smith Wade—through counsel, Mr. Warren Pearson—has repeatedly failed to comply with court orders and failed to attend his own deposition. Due to this pattern of noncompliance, Auto Club Services, Inc., moves for sanctions, requesting that I dismiss this case with prejudice. (Doc. 42). Wade opposes the motion. (Doc. 44). Although I agree with Auto Club that a sanction is warranted here, dismissal with prejudice is not the appropriate one because Wade's behavior (in reality, his counsel's) sounds more in negligence than willfulness. Accordingly, I grant the motion in part.

Federal Rules of Civil Procedure 37 and 41(b) and a court's "inherent authority" empower a court to sanction an uncooperative party, including through dismissal. *Degen v. United States*, 517 U.S. 820, 827 (1996) ("A federal court has at its disposal an array of

means to enforce its orders, including dismissal in an appropriate case."); *Foudy v. Indian River Cnty. Sheriff's Off.*, 845 F.3d 1117, 1126 (11th Cir. 2017) ("Federal courts possess an inherent power to dismiss a complaint for failure to comply with a court order."); *see also World Thrust Films, Inc. v. Int'l Fam. Ent., Inc.*, 41 F.3d 1454, 1456 (11th Cir. 1995) (per curiam) ("A district court has authority under Federal Rule[] of Civil Procedure 41(b) to dismiss actions for failure to comply with local rules." (quotations omitted)).

Specifically, under Rule 37(d)(1)(A)(i), if "a party or a party's officer, director, or managing agent . . . fails, after being served with proper notice, to appear for that person's deposition," then a district court is permitted to impose any sanctions "listed in Rule 37(b)(2)(A)(i)–(vi)." FED. R. CIV. P. 37(d)(1)(A)(i), (3). The referenced provisions of Rule 37(b)(2)(A), include "dismissing the action or proceeding in whole or in part." FED. R. CIV. P. 37(b)(2)(A)(v). Because dismissal under Rule 37 is the most severe sanction, it is only appropriate "when a plaintiff's recalcitrance is due to willfulness, bad faith[,] or fault." *See Phipps v. Blakeney*, 8 F.3d 788, 790 (11th Cir. 1993). Put differently, a district court is not permitted to dismiss a case unless a party demonstrates "disregard of responsibilities" or "flagrant disregard for the court and the discovery process." *Aztec Steel Co. v. Fla. Steel Corp.*, 691 F.2d 480, 481 (11th Cir. 1982). And "when less drastic sanctions would . . . ensure compliance with the court's orders," dismissal is not appropriate. *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1542 (11th Cir. 1993).

In addition to, or instead of, the sanctions listed in Rule 37(b)(2)(A)(i)–(vi), "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, I find an award of attorney's fees justified. There is no dispute that Wade and his attorney, Mr. Pearson, both failed to attend Wade's deposition on April 8, 2024. (Doc. 42-3). Auto Club's counsel sent an email to Mr. Pearson notifying him that Wade's deposition was set for April 8, 2024. *See* (Doc. 42-2). The next day, Auto Club served Mr. Pearson with formal notice of the scheduled deposition. *See* (Doc. 42-3). Although Mr. Pearson suggests that he did not see either email at the time, he ultimately concedes that he received the official notice of Wade's deposition but "overlooked" the email because it was "routed into" the incorrect folder in his inbox. Resp. at 4. Thus, there can be no dispute that Wade was served with notice of his deposition set for April 8, 2024, but failed to attend. Accordingly, sanctions under Rule 37(d)(3) are appropriate on account Wade's failure to attend his deposition.

Auto Club contends that dismissal with prejudice is the appropriate sanction due to Wade's "actions in not prosecuting this case since the filing of the [c]omplaint," Wade's "complete[] indifferen[ce] to the case deadlines as evidence by the Court's prior [o]rders,"

and Wade's failure "to attend his deposition." Mot. for Sanctions at 4. Although I agree with Auto Club that Wade has disregarded multiple orders and deadlines, his conduct is attributable to his attorney and Mr. Pearson's conduct thus far appears negligent or reckless, at worse. Thus, dismissal now is not appropriate because the limitations period has expired and counsel's conduct amounts to "more a matter of negligence than purposeful delay or contumaciousness." *Burden v. Yates*, 644 F.2d 503, 505 (5th Cir. 1981); [1] *see also Just. v. United States*, 6 F.3d 1474, 1482 n.15 (11th Cir. 1993) (explaining that an order without prejudice "has the effect of precluding [plaintiff] from refiling his claim due to the running of the statute of limitations . . . [t]he dismissal [is] tantamount to a dismissal with prejudice"); *Mickles on behalf of herself v. Country Club Inc.*, 887 F.3d 1270, 1280 (11th Cir. 2018) ("Where a dismissal without prejudice has the effect of precluding a plaintiff from refiling his claim due to the running of the statute of limitations, the dismissal is 'tantamount to a dismissal with prejudice, a drastic remedy to be used only in those situations where a lesser sanction would not better serve the interests of justice.' " (quoting Burden, 644 F.2d at 1280)).

Although dismissal is not warranted yet, Mr. Pearson's pattern of noncompliance is not unnoticed, and the Court will not continue to prompt counsel to cure missed deadlines.

[1]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

At the outset of this case, Judge Bucklew (who was then presiding over the case) ordered Wade to show cause as to why this case should not be dismissed for failure to timely serve. (Doc. 4). And after inheriting this case from Judge Bucklew, I entered two additional orders following the initial order requiring Wade to file a Certificate of Interested Persons and Corporate Disclosure Statements because Wade had failed to timely file the appropriate disclosure statement. *See* (Docs. 31, 35–36). It was not until dismissal was threatened that Wade complied. Additionally, after missing the deadline to file a mediation notice, I entered an order directing Wade to do so and again threatened dismissal before Wade complied. *See* (Doc. 39). If this pattern of noncompliance with court orders—coupled with Wade's other discovery-related failures, *see* Mot. for Sanctions at 1–2; Reply (Doc. 47) at 1–2 (detailing Wade's lack of compliance in timely providing his initial disclosures)—continues, such conduct will result in dismissal because it evidences willful contempt for court orders. Additionally, Mr. Pearson's is on notice that his explanations for these failures, *see* (Doc. 49) at 3 (justifying his pattern of noncompliance by citing staff shortages, email failures, illness, and "the long planned and impossible to delay startup of a restoration construction labor company wherein [he] is a principal shareholder"); *see also* Resp. at 2-3 (contending that "ongoing e-mail communication issues" prevent Mr. Pearson from serving discovery responses), will not justify continued noncompliance with court orders and discovery deadlines.

In sum, sanctions in the form of attorney's fees are awarded to Auto Club and are to be paid by Mr. Pearson to remedy Wade's failure to attend his deposition and expenses incurred in preparing the instant motion.

Accordingly, the following is **ORDERED:**

1. Auto Club's Motion for Sanctions (Doc. 42) is **GRANTED IN PART**.
2. Auto Club is awarded reasonable attorney's fees and expenses caused by Wade's failure to attend the deposition. *See* FED. R. CIV. P. 37(d)(3). By **May 14, 2024**, Auto Club may file a supplemental motion requesting a specific reasonable amount of attorney's fees and expenses and must support the request with documentation (i.e., an affidavit, time entries, and receipts for expenses). *See* Local Rule 7.01(c).
3. Wade's Unopposed Motion for Oral Argument and Evidentiary Hearing (Doc. 49) is **DENIED AS MOOT**.

ORDERED in Tampa, Florida, on April 30, 2024.

Kathryn Kimball Mizelle
Kathryn Kimball Mizelle
United States District Judge