

DIVISION OF ST. THOMAS AND ST. JOHN

Defendant.

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) **CASE NO. ST-12-CV-457**

Pending before the Court is Defendant United Corporation's July 27, 2013, Motion for an Award of Fees and Costs.¹ For the following reasons, Defendant's Motion will be denied.

On August 16, 2012, Plaintiff Velma Samuel filed a Complaint alleging that on September 9, 2011, she slipped on some spilt milk and fell while shopping at Plaza Extra on St. Thomas, resulting in physical and psychological injuries. The parties are currently engaged in discovery, with all fact witness depositions and written discovery to be completed by September 30, 2013, and all expert depositions to be completed by April 30, 2014.²

² Scheduling Order, Nov. 9, 2012. Proceedings were stayed on December 5, 2012, while the Court considered, and subsequently denied a motion to disqualify Plaintiff's attorney. The stay was lifted on March 25, 2013, reinstating the November 9, 2012, Scheduling Order.

STANDARDS

The Court enjoys broad discretion pursuant to Fed. R. Civ. P. 37(b)(2) to impose sanctions on a party that fails to obey a discovery order including ordering “the disobedient party, 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”³ Pursuant to Fed. R. Civ. P. 37(c), a Court may also order 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”⁴ where “a party . . . fails, after being served with proper notice, to appear for [their] . . . deposition.”⁵

Thus, the Court must first determine whether sanctions are appropriate, and, if so, the type of sanctions that should be imposed. In making such a determination, the Court is guided by the factors set forth in *Poulis v. State Farm Fire and Case. Co.*:⁶

- (1) the extent of the party's personal responsibility;
- (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery;
- (3) a history of dilatoriness;
- (4) whether the conduct of the party or the attorney was willful or in bad faith;
- (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and
- (6) the meritoriousness of the claim or defense

³ Fed. R. Civ. P. 37(b)(2)(C); *see also* 4 V.I.C. § 243 (“Every court shall have power . . . [t]o compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in all actions or proceedings pending therein. . . .”); 4 V.I.C. § 244 (“Any person who willfully violates, neglects or refuses to observe or perform any lawful order of a court shall be guilty of contempt of court and upon being found guilty of such contempt may be punished as provided by law.”); *Molloy v. Independence Blue Cross*, 2012 WL 78942, FN11 (V.I. Jan. 9, 2012) (“The failure to follow a Superior Court order can be the grounds for sanctions against the party or its attorney.”).

⁴ Fed. R. Civ. P. 37(d)(3).

⁵ Fed. R. Civ. P. 37(d)(1)(A)(i).

⁶ 747 F.2d 863, 868 (3d Cir. 1984).

However, “a sanction is reasonable only if its character and magnitude are proportionate to the severity of the violation of the underlying discovery order, and the harmful consequence of that violation.”⁷

ANALYSIS

Defendant seeks an award of costs and attorney’s fees levied directly against Plaintiff’s counsel for Plaintiff’s counsel’s alleged failure to notify Defendant’s counsel that an on-site inspection of Defendant’s premises had been cancelled. Defendant’s counsel incurred travel expenses and attorney’s fees when he traveled from St. Croix to St. Thomas for the inspection that was tentatively scheduled by Plaintiff’s counsel for July 8, 2013.

Here, the facts do not fall squarely within the parameters of uncooperative sanctionable conduct pursuant to Fed. R. Civ. P. 37. While the Court recognizes that “Courts have inherent power to impose sanctions on litigants and attorneys appearing before it for bad-faith conduct,”⁸ the Court need not engage in a lengthy analysis of the applicable legal standard in this instance because the Court does not find that sanctions are necessary or appropriate under the specific circumstances of this case.

Here, the parties agree that on June 25, 2013, Legal Assistant Shakira Charlery of Plaintiff’s counsel’s office, contacted Defendant’s counsel, Richard Prendergast, to discover whether Defendant would be available for an on-site inspection of Plaza Extra located on St. Thomas on Monday, July 8, 2013, for the purpose of allowing Plaintiff’s expert to examine the scene of the slip-and-fall incident. Ms. Charlery and Defendant’s

⁷ *In re Hendricks*, 38 V.I. 127, 132 (Terr. V.I. 1998).

⁸ *Battiste, Jr. v. V.I. Telephone Corp.*, 48 V.I. 3, 8 (V.I. Super. Ct. 2006).

counsel emailed back and forth several times trying to arrange a mutually convenient time, to which Ms. Charley responded, "I will let you know as soon as I find out the time our expert will be getting into STT." Defendant's counsel argues that this exchange resulted in the impression that the on-site inspection had been scheduled for Monday, July 8, 2013, with only the exact time to be set at a later time, while Plaintiff argues that the exchange only established a tentative proposed date and time that were never confirmed or finalized.

On July 1, 2013, Defendant's counsel purchased his tickets to fly to St. Thomas from St. Croix, departing on Friday, July 5, 2013, and returning the evening of Monday, July 8, 2013. On July 1, 2013, Defendant's counsel also emailed Ms. Charley, attempting to confirm the inspection and indicating to Ms. Charley that he had already purchased his tickets. Ms. Charley responded that the experts schedule had not been finalized and they would try their best to accommodate Defendant's counsel's schedule. After not hearing back, Defendant's counsel called Plaintiff's counsel's office several times to try to confirm the inspection time. However, Plaintiff's counsel's office was closed from Wednesday, July 3, 2013 to Friday, July 5, 2013, due to a local holiday, Emancipation Day, and a federal holiday, the Fourth of July, and Defendant could not reach anyone who had knowledge of the status of the inspection.

Defendant's counsel alleges that Plaintiff's counsel's office never contacted Defendant's counsel or Defendant's counsel's office, to notify him of the cancellation of the on-site inspection. However, Plaintiff contends that after discovering on Tuesday, July 2, 2013, that the expert would not be able to attend the inspection, Tish Mercier, a

Legal Assistant for Plaintiff's counsel's office, left a voicemail for Judy Zienka, a Legal Assistant for Defendant's counsel's office, on Wednesday July 3, 2013, prior to leaving the office for the holidays. Ms. Zienka, on the other hand, alleges that she was never informed of the cancellation of the on-site inspection.

The above facts suggest to the Court that Plaintiff's counsel's office failed to communicate *directly* with Defendant's counsel after it was discovered on Tuesday, July 2, 2013, that the expert would not be able to attend the on-site inspection tentatively scheduled for the morning of Monday, July 8, 2013. However, such a finding is not dispositive because, on July 1, 2013, Defendant's counsel bought his plane tickets prior to receiving a final confirmation from Plaintiff's counsel's offices. Upon review of the email communications between Defendant's counsel and Legal Assistant Shakira Charlery, the Court finds that the back-and-forth emails do not suggest that the proposed date and time were confirmed as Defendant's counsel contends, and thus, Defendant's counsel impression that the on-site inspection was set-in-stone was erroneous. Further, Defendant's counsel bought tickets to arrive on St. Thomas on Friday, July, 5, 2013, several days before the tentative inspection date, which suggests to the Court that Defendant's counsel may have had other unrelated business or personal matters to attend to which were not disclosed to the Court.

Further, while some Courts have sanctioned attorneys for repeat last-minute cancellations of scheduled depositions,⁹ that is not the case here. Here, while it appears that Plaintiff's counsel's office merely left a voicemail as a means of notifying

⁹ See, e.g., *Ogletree v. Keebler Co., Inc.*, 78 F.R.D. 661, 662 (N.D. Ga. 1978); *Cattrell Companies, Inc. v. Carlton, Inc.* 614 S.E.2d 1 (W. Va. 2005)(interpreting Rule 37(d) of the West Virginia Rules of Civil Procedure).

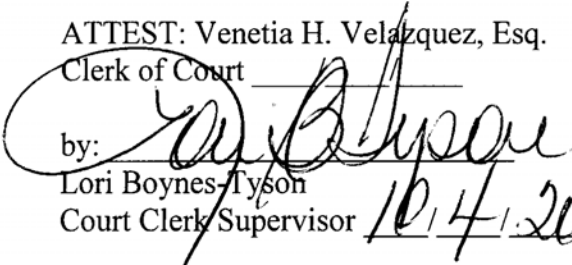
Defendant's counsel's office of the cancellation, the cancellation and the attempt to contact Defendant's counsel was not made last minute. Further, there is no evidence to suggest that Plaintiff's counsel acted in bad faith. In fact, Plaintiff's counsel was under the impression that Defendant's counsel knew the July 8, 2013, date was tentative. Further, Plaintiff's counsel has not exhibited a history of dilatoriness in this particular case, and Defendant is not substantially prejudiced by this miscommunication between counsel. As such, the Court will not impose sanctions on Plaintiff's counsel, but warns Plaintiff's counsel that if Plaintiff's counsel continues and repeatedly fails to adequately communicate with Defendant's counsel, such conduct may be grounds for the imposition of sanctions. Thus, the Court encourages the parties to establish clear lines of communication in regards to discovery matters such that a similar instance may be easily avoided in the future.

Accordingly, Defendant's Motion for An Award of Attorney's Fees and Costs is denied. An Order consistent with this Opinion shall follow.

Dated: September 30, 2013

ATTEST: Venetia H. Velazquez, Esq.
Clerk of Court

by:


Lori Boynes-Tyson
Court Clerk Supervisor

10/4/2013


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS