

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

NAZARETH NAT'L BANK & TRUST CO. : CIVIL ACTION  
:   
v. :   
:   
E.A. INTERNATIONAL TRUST, :   
E.A. INTERNATIONAL, INC., :   
STEVEN STACKPOLE and :   
GAVIN GREENE : NO. 98-6163

MEMORANDUM ORDER

Plaintiff alleges that it sustained losses totaling more than \$4 million it had entrusted to defendants as a result of their fraudulent conversion. Plaintiffs have asserted claims for fraud, breach of a fiduciary duty and conversion.

Presently before the court is defendants' Motion for Entry of Judgment by Default against defendant Greene as a sanction for his failure to engage in discovery and to allow the case fairly to proceed to resolution.<sup>1</sup>

A court may render a judgment by default as a sanction against a party who fails to obey an order to provide discovery, fails to comply with a discovery order pursuant to Rule 26(f) or fails to appear for deposition. See Fed. R. Civ. P. 37(b)(2)(C) & 37(d). A failure to provide discovery or to comply with a court order to do so may also fairly be viewed as a failure to defend

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<sup>1</sup>The other defendants have never appeared. Defaults and default judgments on liability have been entered against them.

which justifies an entry of a default judgment under Fed. R. Civ. P. 55(b)(2). See Hoxworth v. Blinder Robinson & Co., Inc., 980 F.2d 912, 918-19 (3d Cir. 1992); Bryant v. City of Marianna, Fla., 532 F. Supp. 133, 137 (N.D. Fla. 1982) (such conduct "denies plaintiffs' right to a determination of their claims as well as the court's duty to dispose of cases before it"). See also National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642-43 (1976); Philips v. Medical Systems Intern., V.B. v. Bruetman, 982 F.2d 211, 214 (7th Cir. 1992) (default judgment against defendants for refusal to provide discovery); U.S. v. De Frantz, 708 F.2d 310, 312 (7th Cir. 1983); (default judgment for failure to appear for deposition with dubious excuse); Jordan Intern. Co. of Del. v. M.V. Cyclades, 782 F. Supp. 25, 27 (S.D.N.Y. 1992) (default judgment against defendant for failure to comply with discovery order); U.S. v. Dimucci, 110 F.R.D. 263, 267 (N.D. Ill. 1986) (default judgment against defendants who failed to appear for deposition).<sup>2</sup>

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<sup>2</sup>A court also has the inherent power to resolve through appropriate sanctions a case that cannot otherwise be disposed of expeditiously because of the willful inaction or dilatoriousness of a party. See Chambers v. NASCO, Inc., 501 U.S. 32, 34 (1991); Link v. Wabash R.R. Co., 370 U.S. 626, 630-32 (1962); Hewlett v. Davis, 844 F.2d 109, 114 (3d Cir. 1988).

Mr. Greene has been proceeding pro se and has directly discussed with plaintiff's counsel the discovery requests made of him and his obligation to respond. He thus must personally bear responsibility for the failure properly to provide discovery in this action.

The inability during the allotted discovery period to obtain information from a party defendant regarding pertinent issues is obviously prejudicial to a plaintiff in its attempt to prosecute its claims and obtain a prompt resolution of its lawsuit. See Adams v. Trustees, N.J. Brewery Trust Fund, 29 F.3d 863, 874 (3d Cir. 1994) (prejudice encompasses deprivation of information from non-cooperation with discovery as well as the need to expend resources to compel discovery). Defendant's failure to provide discovery or appear for deposition has clearly prejudiced plaintiff in its ability to resolve its claims and secure relief.

Plaintiff is not complaining about an isolated breach. Defendant has been totally recalcitrant in honoring his discovery obligations, the court's Rule 26 order of June 28, 1999 directing all parties to proceed in such a manner as to ensure completion of discovery by September 15, 1999 and the court's orders of October 6, 1999 giving Mr. Greene a final opportunity to November 10, 1999 "to honor his discovery obligations" in response to an

earlier motion for default judgment. He has provided no explanation for his continuing failure to appear for deposition and to produce requested documents. A persistent failure to honor discovery obligations and court discovery orders must be viewed as "a willful effort to evade and frustrate discovery." Morton v. Harris, 628 F.2d 438, 440 (5th Cir. 1980). See also Jourdan v. Jabe, 951 F.2d 108, 110 (6th Cir. 1991). He has failed to file any of the pretrial submissions required by the court's scheduling order. He has not responded to the instant motion to strike his answer and enter a default judgment against him.

Precluding defendant from introducing evidence regarding the matters about which he has failed to provide discovery would be tantamount to a default judgment on liability. Given the egregiousness of defendant's conduct, any proportionate monetary sanction would be substantial and more importantly, unlikely to achieve compliance. A default judgment is the only practical sanction and meaningful relief in the circumstances presented.

Plaintiff has been deprived of its right to conduct discovery and is clearly being prejudiced by its inability to adjudicate its claims before assets available to satisfy any judgment may be removed or dissipated. A court cannot allow a defendant to obstruct the orderly conduct of litigation, effectively avoid any prospective liability and deprive plaintiff

of any right to redress by "stonewalling" discovery attempts.

The meritoriousness of a claim or defense is to be determined from the face of the pleadings. See C.T. Bedwell Sons v. International Fidelity Ins. Co., 843 F.2d 683, 696 (3d Cir. 1988); Poulis, 747 F.2d at 870. On the face of his answer, the only document ever filed by defendant Greene, he does assert some facially meritorious defenses. As plaintiff fairly observes, however, they are pled in conclusory fashion with no supporting factual allegations. In any event, it is difficult conscientiously to characterize a defense as meritorious when the defendant refuses to subject it to scrutiny through the normal discovery process.<sup>3</sup>

Defendant's violation of the federal rules and the court's scheduling and discovery orders has been persistent and flagrant. It has resulted in a significant delay and diversion of resources. There is an absence of any justification. Defendant has effectively thwarted discovery, making impossible the proper and efficient litigation of this action.

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<sup>3</sup>Defendant also failed to provide any written answers or objections to requests for admissions which largely track the averments in plaintiff's complaint and were served well over 30 days ago. These matters are thus properly deemed to be admitted. See Fed. R. Civ. P. 36(a). When this is considered, it can fairly be said that Mr. Greene appears to have no meritorious defense. Further, in view of the admissions, plaintiff would be entitled to the alternative and equivalent relief of summary judgment, at least on liability.

The pertinent factors weigh significantly in favor of granting the default judgment requested by plaintiff.

**ACCORDINGLY**, this                    day of January, 2000, upon consideration of plaintiff's Motion to Strike the Answer of and Enter Judgment by Default against Gavin Greene, and alternative Motion for Summary Judgment (Doc. #18, all parts), and in the absence of any response thereto, **IT IS HEREBY ORDERED** that the Motion to Strike the Answer and Enter Judgment by Default is **GRANTED** and **JUDGMENT is ENTERED** on liability in the above case for plaintiff and against defendant Greene; plaintiff's alternative Motion for Summary Judgment is **DENIED** as moot; plaintiff shall have until January 24, 2000 to file and serve its proof on damages to which defendants shall respond by February 3, 2000, and a hearing will then be scheduled if necessary to resolve any disputed material facts which may appear.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**