

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

J&P RECOVERY, INC. : CIVIL ACTION
: :
v. : :
: :
R.C. DOLNER, INC. and : :
R.C. DOLNER, LLC : NO. 00-5761

MEMORANDUM ORDER

This case arises from defendants' termination of plaintiff while it was performing work on a construction project. Plaintiff asserted claims for breach of contract, intentional interference with contractual relations and violation of the Contractor and Subcontractor Payment Act. Defendants filed an answer with affirmative defenses and a counterclaim for breach of contract.

Presently before the court is defendants' combined Motions to Dismiss for Failure to Prosecute and for Entry of a Default Judgment on their counterclaim for plaintiff's failure to appear through counsel as ordered by the court on May 3, 2002.

Plaintiff's counsel filed a motion to withdraw on October 15, 2001 based on plaintiff's failure to pay legal fees. Defense counsel objected on the ground that such withdrawal would likely upset a tentative settlement. The court denied the motion on December 5, 2001 without prejudice to renew upon effectuation

of a settlement. When presented with a draft of the settlement agreement, however, plaintiff rejected it.¹

Plaintiff's counsel renewed their motion to withdraw on February 27, 2002. By then, plaintiff had refused to respond to counsel's repeated requests for an assurance that they would be compensated for sums overdue for services rendered and a lawsuit had finally been filed by counsel against plaintiff to recover the amounts owed. The court granted the motion and ordered plaintiff to appear through new counsel by June 3, 2002. Plaintiff was advised by the court of the obligation of a corporation to appear in federal court through counsel and cautioned that the failure to do so would subject its claims to dismissal and subject it to a default judgment on defendants' counterclaim. Plaintiff failed to appear through new counsel by June 3, 2002 or since.

A court may dismiss an action as a sanction against a party who fails to comply with the Federal Rules of Civil Procedure or any order of the court. See Fed. R. Civ. P. 41(b). A court also has the inherent power to dismiss a case that cannot 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

¹ The agreement provided for a mutual release of all claims except for a specified claim for approximately \$40,000 which defendants would retain the right to pursue against plaintiff.

(1962). See also Hewlett v. Davis, 844 F.2d 109, 114 (3d Cir. 1988). A failure to comply with a court order to engage counsel may also fairly be viewed as a failure to defend 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); Eagle Assocs. v. Bank of Montreal, 926 F.2d 1305, 1310 (2d Cir. 1991).

In assessing dismissal or default as a sanction, a court generally considers the so-called Poulis factors. See Harris v. Philadelphia, 47 F.3d 1311, 1330 n.18 (3d Cir. 1995); Anchorage Assoc. v. V.I. Bd. of Tax Review, 922 F.2d 168, 177 (3d Cir. 1990); Hicks v. Feeney, 850 F.2d 152, 156 (3d Cir. 1988); Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 868 (3d Cir. 1987).² Not all of the Poulis factors need be satisfied to warrant such a sanction. See Hoxworth, 980 F.2d at 919; Hicks, 850 F.2d at 156.

Plaintiff bears sole responsibility for the failure to appear through counsel as ordered. Plaintiff failed to compensate their former counsel, causing their withdrawal, and has ignored a court order to appear through new counsel.

² These factors include the extent of the party's responsibility for the failure properly to litigate; prejudice to the adverse party; any history of dilatoriness by the recalcitrant party; the willfulness of the offending conduct; the adequacy of any other sanctions; and, the merit of the underlying claims.

Defendants are clearly being prejudiced by their inability to defend against plaintiff's claims and adjudicate their counterclaim. The court cannot reasonably allow plaintiff to obstruct the orderly conduct of litigation which it initiated, and deprive defendants of any right to redress on a counterclaim, by refusing to obtain new counsel after its frustrated and uncompensated prior counsel withdraws.

Plaintiff invoked the judicial process and then failed to pay the fees necessary to retain counsel. Plaintiff's actions have made impossible the proper and efficient litigation of this case which was due to be tried at the time plaintiff refused to execute the settlement and counsel withdrew. Plaintiff's disregard of the court's order has been flagrant.

The meritoriousness of a claim must 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. This factor is thus of limited practical utility in assessing dismissal under Rule 41. If a claim as alleged lacks merit, it would generally be subject to dismissal under Rule 12(b)(6) without the need to weigh other factors. Ordinarily, however, it would be difficult to characterize as meritorious claims which have been asserted by a party which then obstructs their resolution through litigation in

the manner prescribed by law. Also, in this case defendants have pled a facially cognizable counterclaim.³

A monetary sanction would be unlikely to achieve compliance by a party which is apparently undeterred by the prospect of a monetary judgment by default and has been recalcitrant even in the face of the instant motion. Also, as plaintiff has failed to pay legal fees owed to its former counsel even when faced with a collection action, it is likely that any monetary sanction would not be easy to enforce. The appropriate sanctions, however, can be imposed in a measured way and the court will proceed in that fashion.

The pertinent factors clearly favor the imposition of sanctions of the type requested.

Plaintiff's claims will be dismissed. Defendants will be given the option of withdrawing their counterclaim and terminating this action, which in the circumstances may ultimately be the most pragmatic course. If not, plaintiff will be given a final opportunity to defend against the counterclaim and should it still fail to do so, a judgment by default will be entered.

³ Defendants allege that plaintiff failed to perform its work in a proper manner, otherwise failed to fulfill its obligations under the parties' contract and forced defendants to engage others to complete work plaintiff failed to complete.

ACCORDINGLY, this day of August, 2002, upon consideration of defendants' Motions to Dismiss Plaintiff's Action for Failure to Prosecute (Doc. #17, part 1) and for Entry of Default Judgment (Doc. #17, part 2), and in the absence of any timely response thereto, **IT IS HEREBY ORDERED** that the Motion to Dismiss is **GRANTED** and plaintiff's claims herein are **DISMISSED**; defendants shall have until August 12, 2002 to withdraw their counterclaim or, should they not do so, plaintiff shall have until September 4, 2002 to appear through counsel to defend or judgment on the counterclaim will be entered against it and proceedings on damages scheduled; and, the Motion for Entry of Default Judgment is **DENIED**, without prejudice to renew should defendants elect to press their counterclaim and should plaintiff then still fail to appear through counsel to defend by the date specified above.

BY THE COURT:

JAY C. WALDMAN, J.