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

GWENDOLYN DASHNER and JOHN HIRKO, SR., as Co-Administrators of the Estate of John Hirko, Jr., Deceased, KRISTIN FODI, and TUAN HOANG,	)	Civil Action
Plaintiffs,	)	No. 99-CV-02124
vs.	)	
JOSEPH EDWARD RIEDY, Individually and in his Official Capacity as a Member of the Bethlehem Police Department, et al.,	)	
Defendants.	)	

* * *

MEMORANDUM OPINION

JAMES KNOLL GARDNER,
United States District Judge

This Memorandum Opinion is filed in response to the Notice of Appeal entered on behalf of plaintiffs on October 19, 2004 from the Order of the undersigned filed September 30, 2004. The appeal arises from the courts grant of defendants' motion for sanctions, and its denial of plaintiffs' motion for reconsideration. For the following reasons we conclude that our Order was correctly entered.

Facts

This civil action arises from the events of April 23,

1997 at 629 Christian Street in Bethlehem, Pennsylvania. On that occasion, the Emergency Response Team of the Bethlehem Police Department attempted to serve a warrant to search for drugs on the premises. The home located there was owned by plaintiff Tuan Hoang and occupied by plaintiffs' decedent John Hirko, Jr. and plaintiff Kristin Fodi. The events of that night ultimately resulted in the death of Mr. Hirko and the destruction by fire of the residence.

A jury trial in this matter was conducted before the undersigned from September 2003 until March 2004. The trial was bifurcated, with the jury returning a liability verdict against defendants in favor of plaintiffs.

Settlement Agreement

Prior to the case proceeding to the damages phase, the parties engaged in settlement negotiations that resulted in the parties reaching an agreement as to damages. The parties placed the agreement on the record in open court before the undersigned on March 22, 2004. Among the terms of the agreement was defendants would pay plaintiffs "$7,890,000, inclusive of attorneys' fees and costs."[1] Plaintiffs' counsel noted that

[1] Notes of Testimony ("N.T." March 22, 2004) of the proceeding conducted before the undersigned at page 4. $7,390,000 of the settlement was to be paid by defendant City of Bethlehem. The remaining $500,000 was to be paid by defendant City's liability insurance carrier, Western World Insurance Company.

"[t]he check" would go to him and that he would distribute it to his clients.[2] In addition to the above, the parties agreed that the plaintiffs would sign a combined release.

During the ensuing two months, plaintiffs' counsel Attorney John P. Karoly, Jr. did not provide defendants with a fully executed release, and defense counsel did not provide plaintiffs' counsel with a $500,000 check that had been tendered by the Western World Insurance Company, the liability carrier for defendant City of Bethlehem.

Defendants' First Motion to Enforce Settlement

On June 3, 2004, defense counsel filed a Motion to Enforce the Settlement Agreement. In this motion, defense counsel noted their efforts to contact plaintiffs' counsel to obtain the release as follows. Defense counsel Susan R. Engle, Esquire, forwarded Attorney Karoly a general release form and a W-9 form by both facsimile transmission and mail on March 31, 2004. On May 21, 2004 Attorney Engle telephoned plaintiffs' counsel, leaving Mr. Karoly a detailed message that informed him that the City's portion of the settlement funds would be available soon and requested information regarding the status of the release. On that same day, plaintiffs' counsel faxed defense counsel a letter, inquiring about the status of the release.

[2] N.T. at page 15.

On May 24, 2004, Attorney Engle telephoned plaintiffs' counsel twice, each time leaving a message inquiring about the release. Defense counsel did not receive a response. That same evening Attorney Engle spoke with the Solicitor for the City of Bethlehem, John F. Spirk, Jr., Esquire, who had recently spoken with plaintiffs' counsel. The Solicitor informed defense counsel that plaintiffs' counsel had indicated that he did not have a W-9 form. On May 25, 2004, defense counsel sent plaintiffs' counsel another copy of a W-9 form, along with a letter that again inquired about the status of the release.

On May 25, 2004, plaintiffs' counsel sent a letter to lead defense counsel Attorney Stephen Ledva, Jr., Esquire, indicating that he was awaiting the return of the personal effects of the decedent. He noted that he would provide the Solicitor with a release "expressly exempting from the language thereof any potential cause of action to compel the return of the items we seek."[3] Plaintiffs' counsel had previously sent a letter to defense counsel on May 19, 2004, asking for the return of decedents personal items.[4]

On May 25, 2004, defense counsel Engle sent plaintiffs' counsel a letter, indicating that return of the personal items had

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[3] Exhibit F to Defendants' Motion to Enforce Settlement Agreement filed June 3, 2004, Letter from Attorney Karoly to Attorney Engle, May 25, 2004.

[4] Exhibit E to Defendants' Motion to Enforce Settlement Agreement filed June 3, 2004, Letter from Attorney Karoly to Attorney Ledva, May 19, 2004.

nothing to do with execution of the release, and that the court had, the previous June, set forth the procedures for plaintiffs' counsel to follow to obtain the return of personal property. Defense counsel further noted that plaintiffs' counsel should put in writing any of his concerns with the release and that any concerns should be forwarded to her. Defense counsel closed by noting that, given that two months had elapsed without plaintiffs' counsel taking any action on the release she would "not rush to complete this settlement at the last minute to accommodate you when you have done nothing to facilitate this process for two months. You can save your intimidation tactics for some unsuspecting future opposing counsel. I have had enough."[5]

Plaintiffs' counsel responded that same day in a letter that read:

> In my 29 years of practice, you are the first attorney that I ever met that was not only not gracious in defeat but, demonstrated a degree of post-trial bitterness and incompetence that truly matched her ineptitude during trial.
>
> Accordingly, your disgusting, inaccurate and infantile correspondence is not deserving of, nor will it receive further response.

Exhibit H to Defendants' Motion to Enforce Settlement Agreement filed June 3, 2004, Letter from Attorney Karoly to Attorney Engle, May 25, 2004. Plaintiffs' counsel then made a demand for 6% interest on the $500,000 owed. Attorney Karoly's letter made no

[5] Exhibit G to Defendants' Motion to Enforce Settlement Agreement filed June 3, 2004, Letter from Attorney Engle to Attorney Karoly, May 25, 2004.

mention of the release.

On May 26, 2004, Attorney Ledva telephoned Attorney Karoly twice to inquire as to the status of the Release and the W-9 form. That afternoon, Attorney Karoly faxed the W-9 form to the insurance carrier for the City. Attorney Karoly did not provide a release. Later that day, Attorney Ledva forwarded a letter to Attorney Karoly acknowledging receipt of the W-9 form, and asking for the Release so that the case could move to its conclusion.

On May 26, 2004, Attorney Karoly faxed Attorney Ledva a letter providing that

> Your 3:24 p.m. fax conveniently ignores my fax of yesterday. Please take time to read it. It appears that Susan has refused to share its contents with you.
>
> Mr. Spirk has the fully executed Release, but he is not authorized to distribute or publish it in any way or form until I receive your cashiers check for $500,000 plus accrued interest.
>
> Although I granted the City 60 days to raise the settlement funds via a bond issue, no such extension was given the carrier. It is of course, totally unacceptable that you didn't even order the check until yesterday.
>
> I hope this is plain enough!

Exhibit J to Defendants' Motion to Enforce Settlement Agreement filed June 3, 2004, Letter of Attorney Karoly to Attorney Ledva, May 26, 2004.

On May 27, 2004, Attorney Ledva called Attorney Karoly twice, leaving messages for him each time. On May 28, 2004, Attorney Ledva called Attorney Karoly, again having to leave a message. On May 28, 2004, Attorney Ledva faxed Attorney Karoly a

letter, indicating that defense counsel had the $500,000 check, and that he was prepared to deliver it upon his receipt of a copy of the Release.

On June 1, 2004, Attorney Karoly and Attorney Ledva discussed the matter over the telephone, with Attorney Karoly indicating that the $500,000 check was not acceptable to him and that he wanted the money wired to him no later than the next day. He also demanded a letter of apology from Attorney Engle for her letter of May 25, 2004. In the conversation, Attorney Ledva indicated that he would call Attorney Karoly on the morning of June 2, 2004. Attorney Ledva called Attorney Karoly on June 2, 2004, and left a message, but did not receive a call back.

The next day, defense counsel filed Defendants' Motion to Enforce Settlement Agreement with an accompanying memorandum. In the memorandum, defense counsel noted that it had

> worked for nearly two weeks to bring this matter to a conclusion, only to be met with new terms and conditions to the settlement unilaterally imposed by Plaintiffs' counsel. Rather than continuing with the exchange of faxed correspondence and unanswered phone calls, Defendants seek the intervention of the Court to enforce the settlement agreement placed upon the record on March 22, 2004.

Memorandum of Law in Support of Defendants' Motion to Enforce Settlement at page 7. In the motion, defendants asked the court to declare that interest was not owed on the $500,000, and to award counsel fees for defense counsel's efforts to obtain Mr.

Karoly's compliance.

Court's Resolution of the Dispute

On June 8, 2004, the undersigned conducted a telephone conference with counsel, hearing informal argument from both sides. Plaintiffs' counsel sought to have the funds issued by certified check. Following argument, plaintiffs' counsel was directed to fax a copy of the executed release to defense counsel. Additionally, defense counsel was directed to contact the insurance carrier to determine whether certified funds could be substituted for the $500,000 check. The next day, the court issued an Order, granting in part, and denying in part defendants' requested relief.

In the June 9, 2004 Order the court directed plaintiffs' counsel to provide defense counsel with "a release in accordance with the settlement agreement approved and adopted by the court on March 22, 2004, no later than June 10, 2004."[6] The Order also required defense counsel to provide a check for $500,000 "within two business days of defense counsel's receipt of a release by plaintiffs which release defense counsel deems to be in accord with the settlement agreement approved and adopted by the court on March 22, 2004." Order of June 9, 2004 at page 2. The Order made clear "that the settlement agreement adopted by the

[6] Order of June 9, 2004 at page 2, footnote 2.

court on March 22, 2004 contains no requirement that payments made in satisfaction of judgment be made by certified check." Order of June 9, 2004 at page 2, footnote 2.

However, the court denied without prejudice defendants' request for sanctions, noting that defense counsel could seek sanctions by separate motion. Additionally, the court concluded that plaintiffs' counsel could seek interest on the amount owed by separate motion.

Defendants' Motion for Sanctions

On June 28, 2004, defendants filed a second motion entitled Defendants' Motion to Enforce Settlement Agreement, in which defense counsel sought sanctions against plaintiffs' counsel. Attached to this Motion was defendants' Memorandum of Law in Support of Defendants' Motion for Sanctions. In the memorandum of law, defense counsel provides a chronology of events which followed the filing of defendants' earlier motion.

Pursuant to the directive given during the June 8, 2004 telephone conference, defense counsel telephoned plaintiffs' counsel on June 9, 2004 but counsel was unable to take the call, so defense counsel left a message. In the message, defense counsel advised Mr. Karoly that the insurance carrier would not issue a certified check and reminded plaintiffs' counsel to fax the release.

On June 11, 2004 plaintiffs' counsel faxed to defense counsel a copy of the release. The Release contained several provisions that had been added by plaintiffs' counsel following the signatures of the plaintiffs and their counsel. The added provisions read:

Subject to the Following

1. This Release is not valid until certified funds are received from Western World Insruance Co. in the principal amount of $500,000.
2. This Release does not waive or release Defendants from any interest on the underlying judgment.
3. This Release does not waive or release Defendants from any claims regarding personalty.

General Release, Exhibit C to Defendants' Motion to Enforce Settlement Agreement, filed June 28, 2004. Subsequently, on June 28, 2004 defendants filed the second Defendants' Motion to Enforce Settlement Agreement.

In their motion, defendants argued that sanctions are warranted under 28 U.S.C. § 1927. This section provides that

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Defendants further argued the "statute thus limits attorney sanctions imposed thereunder to those situations where an attorney has: (1) multiplied proceedings; (2) unreasonably and vexatiously;

(3) thereby increasing the cost of the proceedings; (4) with bad faith or with intentional misconduct." LaSalle National Bank v. First Connecticut Holding Group, L.L.C., 287 F.3d 279, 288 (3d Cir. 2002). Defendants correctly noted that the "appropriateness of sanctions to be imposed is a matter entrusted to the discretion of the district court." Hackman v. Valley Fair, 932 F.2d 239, 242 (3d Cir. 1991). A finding of "willful bad faith on the part of the offending lawyer is a prerequisite for imposing attorney's fees." Hackman, 932 F.2d at 242.

Based on these standards, defendants argued that sanctions are merited because plaintiffs' counsel willfully acted in bad faith by ignoring the court's Order dated June 9, 2004. Defendants noted that plaintiffs' counsel provided the release one day later then was required by the Order. Additionally, plaintiffs' counsel inserted a provision requiring certified funds despite the court's conclusion in its Order that the agreement adopted as an Order on March 22, 2004 had no requirement that the funds be certified. Defendants noted that plaintiffs had delayed resolving this case for nearly two months before indicating to defense counsel that the release would be executed only upon the satisfaction of certain conditions.

Plaintiffs did not file a response to defendants' motion. Accordingly, on July 16, 2004, this court granted the defendants' motion as unopposed. The court directed defense

counsel to submit an accounting of all reasonable costs and counsel fees in connection with defendants' motion for sanctions. On July 21, 2004, defense counsel provided the court with a letter accounting. The court subsequently issued an Order on July 23, 2004, directing plaintiffs and plaintiffs' counsel to pay to defense counsel $13,606.64 for their fees and costs.

Motion for Reconsideration

On July 26, 2004, plaintiffs' counsel filed Plaintiffs' Motion for Reconsideration. In the motion, plaintiffs' counsel avers that he was not served with Defendants' Motion to Enforce Settlement Agreement which motion was filed on June 28, 2004. Additionally, plaintiffs' counsel notes that the certificate of service for the motion does not indicate that the accompanying brief had been served with it. Plaintiffs' counsel also argues that he did not receive a copy of the July 16, 2004 court Order. Plaintiffs argue that, under either Rule 59(e) or 60(b) of the Federal Rule of Civil Procedure, the court should vacate its Order of July 23, 2004 and grant leave to plaintiffs to file an answer to defendants' motion.

Defendants filed Defendants' Reply to Plaintiffs' Motion for Reconsideration on August 4, 2004, In their reply defendants note that plaintiffs' counsel was served the motion by regular mail. Defendants further note that the court's own

electric filing notification system had provided e-mail notification to plaintiffs' counsel at two different e-mail addresses of both defendants' motion and of the court's Order.

Defendants noted that to establish relief under Rule 59(e) of the Federal Rules of Civil Procedure, the moving party must establish 1) the availability of new evidence that was previously unavailable; 2) an intervening change in the applicable law; and 3) the need to prevent manifest injustice or a clear error of law. Smith v. City of Chester, 155 F.R.D. 95 (E.D. Pa. 1994). Defendants argue that plaintiffs have not established any of these requirements.

Defendants also note that relief under Rule 60(b) of the Federal Rules of Civil Procedure is to be granted under only exceptional circumstances. Boughner v. Secretary of Health, Education and Welfare, 572 F.2d 976, 977 (3d Cir. 1978). Defendants note that Mr. Karoly's failure to timely respond does not constitute exceptional circumstances. Defendants also reference a prior case before the United States District Court for the Eastern District of Pennsylvania in which Mr. Karoly sought Rule 60(b) relief after the court entered an Order against his client based upon Mr. Karoly's failure to respond to a defense motion. Joseph v. The GAP, Inc., 1999 WL 106899 (E.D. Pa. 1999). The court denied the Rule 60(b) relief, noting that "Plaintiffs' counsel's disregard for this Court's orders and rules amounts to

an inexcusable form of neglect--gross negligence." Joseph at *3. Accordingly, defendants argue that Attorney Karoly's request for Rule 60(b) relief in this case should be denied.

Discussion

We agree with defendants' arguments in their Brief in Opposition to Plaintiffs' Brief in Support of Motion for Reconsideration. We agree with defendants that plaintiffs have not established any of the elements necessary for relief under Rule 59(e). Federal Rule of Civil Procedure 60(b)(1) allows a court to vacate a prior Order because of "mistake, inadvertence, surprise, or excusable neglect...." However, we do not find the facts of this case fall within this category.

Although plaintiffs contend that they did not receive defendants' motion, the certificate of service indicates that the motion had been served on plaintiffs' counsel. We also note that plaintiffs' counsel received e-mail notification of the motion and the court Order from the electronic filing system of the Eastern District Court. While the certificate of service for the motion did not indicate that a proposed Order and brief were also served, between the service of the motion and the transmission of the electronic filing notices from the court, it is clear that plaintiffs' counsel was apprised of the pending motion. We do not find any exceptional circumstances warranting relief under Rule 60(b).

Defendants correctly set forth the appropriate standards for imposing sanctions. Under 28 U.S.C. § 1927, sanctions are appropriate against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously...." 28 U.S.C. § 1927. We find that plaintiffs' counsel engaged in such conduct. Plaintiffs' counsel repeatedly inserted conditions that were not components of the settlement. For example, although our July 9, 2004 Order clearly indicated that payment by certified funds was not a requirement of the settlement agreement, plaintiffs' counsel inserted a provision on the release conditioning the release on the defendants' payment by certified funds. Counsel for plaintiffs repeated addition of conditions other than those agreed upon in the settlement, delayed resolution of this matter and made it necessary for defendants to pursue the relief that has resulted in these sanctions.

We have evaluated the conduct of the plaintiffs' counsel within the context of the trial as a whole. Significantly, we note that this is not the first time that it was necessary for the court to sanction plaintiffs' counsel. The prior sanctioning arose from discovery violations regarding plaintiffs' counsel failure to disclose evidence, followed by plaintiffs' counsel violation of a court Order that resulted in the spoilation of evidence.

At trial, on November 12, 2003, plaintiffs' expert

forensic pathologist Doctor John J. Shane testified that on or about May 4, 2003 he discovered an additional bullet projectile and bullet fragment and bullet holes in the wall of the premises which had not been found previously by anyone else, including the police. Neither plaintiffs' counsel nor Dr. Shane had informed defendants about this evidence in the six months since Dr. Shane had discovered it. Defendants filed a motion to compel production of the bullet and fragments found by Dr. Shane.

In their Answer and Memorandum of Law in Opposition to Defendants' Motion for Sanctions, and during oral argument, Mr. Karoly indicated that plaintiffs were not in possession of the bullets. At argument, defense counsel asked that, to the extent the bullets remained in the wall, they wanted to inspect the newly-discovered projectile, fragment and bullet holes at the scene.

At the conclusion of the hearing the court concluded that plaintiffs were obligated to disclose such information concerning tangible things under F.R.Civ.P. 26(a)(1)(B), 26(a)(2), 26(a)(3)(C), 26(b)(1), 33, under the continuing duty to disclose and supplement discovery information under Rule 26(e). Accordingly, we ordered plaintiffs' counsel to give defendants and their representatives access to the premises to examine the wall and the bullet and fragments.

The next day at trial, plaintiffs' counsel produced

two envelopes that contained a bullet and bullet fragment. Mr. Karoly indicated that they were removed at his direction that morning from the wall of the premises. Defendants subsequently filed a motion for spoliation of evidence.

On February 11, 2004 we granted the motion in part, concluding that "By removing the projectile and the bullet fragment from the wall, plaintiffs not only violated our Order of January 14, 2004, but also destroyed forever the best evidence of the trajectories of those bullets."[7] As a consequence, we directed that portions of Dr. Shane's testimony related to this evidence be stricken from the record. On that occasion we also awarded counsel fees to the defense attorneys for their preparation of the motion.

The grant of sanctions presently before the court was done in the absence of opposition. However for the reasons outlined above, we concluded that the sanctions were appropriate on the merits, not merely because of Mr. Karoly's failure to respond to defendants' motion for sanctions.

[7] Order and Memorandum of February 12, 2004 at page 8 of the Memorandum.

Conclusion

For the following reasons we respectfully suggest to the United States Court of Appeals for the Third Circuit that plaintiffs' appeal be dismissed.

BY THE COURT:

James Knoll Gardner
United States District Judge

November 2, 2004