

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

SUBAR, INC. t/a BG PACKAGING : CIVIL ACTION
CORP. :
 :
v. :
 :
PRECISION PLASTICS, INC., :
SHIFRA LEFKOWITZ and :
OSCAR WERBERGER : NO. 96-2815

M E M O R A N D U M

WALDMAN, J.

August 13, 1997

Plaintiff asserted a breach of contract claim against defendant Precision Plastics, Inc. ("Precision") and a fraud claim against all three defendants.¹ Plaintiff avers that Precision failed to pay amounts owing for services performed and goods delivered. Plaintiff avers that defendant Lefkowitz made fraudulent misrepresentations successfully to induce plaintiff to release additional valuable material to Precision.²

Presently before the court is plaintiff's Second Motion for Sanctions pursuant to Rule 37(b)(2)(C) in which plaintiff seeks a default judgment against Precision on the contract claim for \$177,881.39 plus interest at the contract rate of 6% from the date of each of the invoices, which are attached to the

1. It appears that defendant Lefkowitz is or was a principal of Precision and employed defendant Werberger.

2. Plaintiff asserted a similar claim against defendant Werberger but concluded after discovery that he was not culpable. At court proceedings on August 12, 1997, plaintiff's counsel moved to dismiss the claim against this defendant with prejudice.

complaint, and against defendant Lefkowitz on the fraud claim for \$77,222.96, as well as a dismissal of Precision's counterclaims.³

The court set August 12, 1997 for a hearing on plaintiff's motion by formal order in which the court directed defendants to appear and show cause why the requested sanctions should not be imposed. From the pleadings, exhibits and other matters of record, the following appears.

Plaintiff served its first set of interrogatories and request for production of documents upon defendants Lefkowitz and Precision on November 7, 1996. Defendants did not respond. On December 17, 1996, then counsel for defendants Lefkowitz and Precision informed plaintiff's counsel that plaintiff would have to file a motion to compel to obtain any response from these defendants to the outstanding discovery requests.

Plaintiff filed such a motion to compel responses from defendants Lefkowitz and Precision which was granted by court order of January 13, 1997 directing defendants to respond to plaintiff's discovery requests within 20 days. On February 3, 1997, Williams & Cuker filed a withdrawal of appearance as counsel for defendants Lefkowitz and Precision, having represented to the court that they were discharged by these defendants.⁴

3. By order of July 11, 1996, plaintiff's claims against Harrison Group, Inc. were dismissed pursuant to Fed. R. Civ. P. 41(a)(1).

4. Williams & Cuker continued to represent defendant Werberger.

Defendants Lefkowitz and Precision failed to respond to plaintiff's discovery requests as ordered by the court on January 13, 1997. Plaintiff's counsel attempted to contact Lefkowitz and Precision by telephone on February 4, 1997 concerning their continued failure to comply with their discovery obligations. The person answering refused to identify herself or confirm this was a correct phone number for defendants and hung up. Upon attempting to reach defendants again, plaintiff's counsel left a message on an answering machine. No response was ever received.

On February 10, 1997, plaintiff filed a motion for sanctions seeking default judgment against defendants Lefkowitz and Precision and dismissal of defendant Precision's counterclaims. By order of March 3, 1997, the court denied plaintiff's motion without prejudice to renew if defendants failed to avail themselves of a final opportunity to comply with court ordered discovery by March 17, 1997. Defendants Lefkowitz and Precision did not do so. They have never provided plaintiff with any response whatsoever to any of its discovery requests.

By order of January 13, 1997, the court also admonished Precision about the obligation of a corporation to appear through counsel. By order of March 3, 1997, the court gave Precision a final opportunity to appear through counsel by March 17, 1997. Defendant Precision has failed to appear through counsel since terminating its prior counsel almost eight months ago.

In assessing a motion to enter default judgment or to dismiss as a sanction, a court generally considers the so-called

Poulis factors. See Anchorage Assoc. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 177 (3d Cir. 1990); Hicks v. Feeney, 850 F.2d 152, 156 (3d Cir. 1988), cert. denied, 488 U.S. 1005 (1989); Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868 (3d Cir. 1987).⁵ Not all of the Poulis factors need be satisfied for such a sanction to be warranted. Hicks, 850 F.2d at 156.

Defendants Lefkowitz and Precision are in clear violation of the court's orders of January 13, 1997 and March 3, 1997. Because they disengaged counsel, defendants Lefkowitz and Precision are solely responsible for their failure to honor their discovery obligations.

The inability to obtain basic and essential information from these defendants clearly prejudices plaintiff's ability to prosecute its claims and mount a defense to Precision's counterclaims. 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 and need to expend resources to compel discovery).

5. These factors include the following:

1. The extent of the party's personal responsibility for failure to prosecute or defend.
2. The extent of any prejudice to the adversary from that failure.
3. Any history of dilatoriness on the part of the recalcitrant party.
4. Whether the conduct was willful or in bad faith.
5. The adequacy of alternative sanctions.
6. Whether the underlying claim appears to have merit.

Poulis, 747 F.2d at 868.

Plaintiff is not complaining about a limited or isolated failure to comply with a discovery request. Defendants Lefkowitz and Precision have repeatedly refused plaintiff's attempts to obtain information through appropriate discovery devices, avoided plaintiff's attempts amicably to address this dereliction and ignored two court orders to respond to outstanding discovery requests. Defendants' persistent failure to meet their discovery obligations and honor court orders compelling their cooperation must be viewed as willful. See Morton v. Harris, 628 F.2d 438, 440 (5th Cir. 1980) (Rule 37(b) dismissal for repeated failure to comply with court orders compelling production of particular documents). Moreover, defendant Precision has completely ignored the court's instruction and its legal obligation to appear through counsel.

Given their total refusal to provide discovery and flagrant disregard for court orders, it is highly unlikely that a monetary sanction not approaching the amount of plaintiff's claim would induce defendants' compliance or deter others as stubbornly bent on resisting discovery. Moreover, the court seriously doubts that parties who cause the issuance of checks without sufficient funds, flagrantly ignore their legal obligations and fail even to honor a court order to appear at a court proceeding to explain themselves would satisfy any order imposing monetary sanctions. The court's only practicable course at this stage is to grant the sanctions requested. Such a sanction is commensurate with and fairly penalizes defendants' flagrant conduct, and will

also serve to deter others from engaging in similar conduct. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976).

The meritoriousness of a claim or defense must be determined from the face of the pleadings. See C.T. Bedwell & Sons v. International Fidelity Ins. Co., 843 F.2d 683, 696; Poulis, 747 F.2d at 870. It follows that this factor is of limited practical utility in assessing a claim for if a claim as alleged lacks merit, it would likely be subject to dismissal under Rule 12(b)(6) without the need to weigh other factors. The blatant refusal to provide any discovery, however, does suggest a perceived weakness of Precision's counterclaims and any defense of Lefkowitz and Precision to plaintiff's claims.

Further, as noted, defendant Precision has persisted in ignoring its legal obligation and court directives to appear through counsel. See Rowland v. California Men's Colony, 506 U.S. 194, 202 (1993) (corporations may appear in federal court only through licensed counsel). Where a corporation fails to appear through counsel, entry of default judgment against it or dismissal of its claim is "perfectly appropriate." United States v. High Country Broadcasting Co., Inc., 3 F.3d 1244, 1245 (9th Cir. 1993). See also Dow Chemical Pacific Ltd. v. Rascator Maritime S.A., 782 F.2d 329, 336 (2d Cir. 1986); Securities & Exchange Comm'n v. Research Automation Corp., 521 F.2d 585, 589 (2d Cir. 1975).

The court has been very patient but finally provided defendants Precision and Lefkowitz with one last opportunity to appear on August 12, 1997 to show cause why the requested sanctions were not justified. Neither defendant appeared, through counsel or otherwise. This is truly an egregious case.

Plaintiff attached to its complaint 105 invoices, one from December 31, 1994 and others bearing various dates through 1995 and to March 6, 1996. Many of these invoices are for several hundred dollars or less and one for as little as \$18.30. Plaintiff has done absolutely no calculation of the interest which it claims. The court does not propose to calculate 6% of each amount in 105 invoices ranging between \$18.30 and several thousand dollars. Moreover, while plaintiff avers that it "has often demanded payment of the sum in question," i.e., \$177,881.39, it provides no information as to any particular demand for payment of any specific invoice. Plaintiff has provided no past due notices.

While plaintiff asks for prejudgment interest "from the date that each invoice became due and owing," it has provided no information as to terms of payment and none appears from the face of the invoices. Plaintiff makes no showing as to payment terms provided by any contract between the parties or reasonably inferred from a pattern and practice. There can be no doubt, however, that as of the time the complaint in this action was served on May 9, 1996, it was clear to defendants that plaintiff was insisting on immediate payment of these invoices and that

such insistence was reasonable from plaintiff's other averments.

Plaintiff also has not presented any evidence regarding any attorney fees it reasonably incurred in preparing and prosecuting this motion.

Accordingly, default judgment will be entered against defendant Precision in the amount of \$177,881.39 plus interest at the contract rate of 6% from May 9, 1996 and its counterclaims will be dismissed. Default judgment will be entered against defendant Lefkowitz on liability on plaintiff's fraud claim against her. A hearing will be held on August 19, 1997 at which the court will formally receive plaintiff's evidence of the loss it incurred in delivering printing plates and additional product to defendant Precision in reliance on the misrepresentations of defendant Lefkowitz. Defendant Lefkowitz will again be given an opportunity to appear at such hearing. Appropriate orders will be entered.

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O R D E R

AND NOW, this day of August, 1997, upon
consideration of plaintiff's Second Motion for Sanctions against
defendant Precision Plastics (Doc. #41) and in the absence of any
response thereto, after an opportunity for hearing and argument
thereon and consistent with the accompanying memorandum, **IT IS
HEREBY ORDERED** that said Motion is **GRANTED** in that **JUDGMENT** is
ENTERED in the above action for plaintiff and against defendant
Precision Plastics, Inc. in the amount of \$191,382.58 and
defendant Precision's counterclaims in this action are **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.

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AND NOW, this day of August, 1997, upon
consideration of plaintiff's oral motion made of record in court
proceedings on August 12, 1997 to dismiss with prejudice all
claims against defendant Wercberger upon learning through
discovery that he is not a proper party defendant herein,
consistent with Fed. R. Civ. P. 41(a)(2), **IT IS HEREBY ORDERED**
that said motion is **GRANTED** and all claims against defendant
Wercberger in this action are **DISMISSED** with prejudice.

BY THE COURT:

JAY C. WALDMAN, J.

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AND NOW, this day of August, 1997, upon
consideration of plaintiff's Second Motion for Sanctions against
defendant Lefkowitz (Doc. #41) and in the absence of any response
thereto, consistent with the accompanying memorandum, **IT IS**
HEREBY ORDERED that said Motion is **GRANTED** in that **JUDGMENT is**
ENTERED in the above action for plaintiff and against defendant
Lefkowitz in an amount to be determined at a hearing at 4:00 p.m.
on August 19, 1997 in Courtroom 9-B, Ninth Floor, U.S.
Courthouse, 601 Market Street, Philadelphia. **IT IS FURTHER**
ORDERED that the deputy clerk again cause service by certified
mail on defendant at the address she has provided the court and
that plaintiff forthwith file and similarly serve the testimony
in affidavit form on which it will rely as well as any exhibits
it will offer.

BY THE COURT:

JAY C. WALDMAN, J.