

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

DARYL GREENE : CIVIL ACTION
 :
 v. :
 :
 LONDON HARNESS & CABLE CORP. : NO. 99-CV-3807

FINDINGS OF FACT and CONCLUSIONS OF LAW

J.M. KELLY, J.

DECEMBER , 2000

On December 14, 2000, the Court held a hearing on the Order to Show Cause Why Plaintiff's Complaint Should Not be Dismissed. The Court is now prepared to make its Findings of Fact, Conclusions of Law and decision.

FINDINGS OF FACT

1. Plaintiff, Daryl Greene, filed the present action which alleges that his employer, London Harness & Cable Corp. ("London"), discriminated against him because of his race and retaliated against him for engaging in a protected activity.

2. Marshall Williams, Esquire ("Williams"), represents Daryl Greene in this case.

3. On December 15, 2000, Daryl Greene requested entry of default against London. Default was entered.

4. Daryl Green's request to enter default was filed despite an agreement between counsel to extend time for London to answer the Complaint.

5. Daryl Greene's request to enter default required the parties to engage in motion practice in order to vacate the default, which in turn has extended the time necessary to resolve

this case.

6. Daryl Greene failed to serve initial disclosures for seven months.

7. On April 13, 2000, London filed a Motion to Strike answers to interrogatories and Compel Daryl Greene's production of documents. The Court granted this unopposed motion on May 4, 2000, and ordered Daryl Greene to serve Answers to Interrogatories within ten days.

8. Daryl Greene failed to serve Answers to Interrogatories within ten days, as ordered by the Court on May 4, 2000, or at all.

9. On May 18, 2000, London filed a Motion for Sanctions against Daryl Greene. Oral argument was held on June 5, 2000, London's Motion for Sanctions was granted and a monetary sanction was imposed against Daryl Greene and Williams in the amount of \$250.00.

10. The Court ordered Williams to provide Daryl Greene with a copy of the order that imposed sanctions.

11. The Court specifically warned that continued failure by Plaintiff's counsel to abide by Court Orders and the Federal Rules of Civil Procedure may result in dismissal of this case.

12. Daryl Greene was allowed the opportunity to object to the amount of the sanction. Instead, Daryl Greene chose to attack and direct blame towards London's counsel. The Court warned that this cynical attempt to shift blame bordered upon a

violation of Rule 11 of the Federal Rules of Civil Procedure.

13. Williams sent a letter to Daryl Greene's current employer designed to interfere with compliance with a subpoena served by London.

14. On October 3, 2000, a hearing was held on, among other motions, Defendant's Motion for Sanctions and Plaintiff's Motion for Extension of Time to Answer Defendant's Motion for Summary Judgment. At the October 3, 2000 hearing, Daryl Greene was ordered to supply Defendant's counsel with the names, addresses and telephone numbers of a total of nine (9) witnesses and a statement that specifically sets forth a summary of each potential witnesses' testimony within seven (7) days of the date of the Order. These names have apparently still never been served.

15. At the October 3, 2000 hearing, Daryl Greene was allowed until October 18, 2000¹ to depose witness Mark Greene and until October 31, 2000 to respond to Defendant's Motion for Summary Judgment.

16. At the deposition in this matter of Mark Greene, Plaintiff:

- a. Questioned the witness concerning his religion;
- b. Asked the witness whether he had ever been a member of a paramilitary organization;

¹ Apparently London suggested the deposition take place on October 20, 2000, hence, this does not appear to be an instance of Williams flouting an order of the Court.

c. Questioned the witness concerning community organizations with which he participates;

d. Demanded the witness produce tax returns, even though the witness had never been served with a subpoena duces tecum.

As a result of this questioning, Mark Greene terminated the deposition. The Court cannot see how this line of questioning is reasonably calculated to lead to the discovery of admissible evidence. Rather, the questions appear intended to harass and intimidate the witness.

17. Daryl Greene filed a Motion to Extend the time within which he may respond to London's Motion for Summary Judgment, purportedly in order to conclude the deposition of Mark Greene that was terminated by the witness. Yet, Daryl Greene has made no application to the Court to compel Mark Greene's testimony.

18. On November 15, 2000, the Deputy Clerk telephoned Williams to arrange a date for a hearing on Plaintiff's Motion to extend time within which to respond to London's Motion for Summary Judgment. The Deputy Clerk left a message on his answering machine. The Deputy Clerk left another message on November 16, 2000 and again on November 17, 2000. Williams did not return her calls. At that time, the Deputy Clerk faxed an Order to Williams, scheduling the Hearing for 9:45 A.M., November 20, 2000. Williams left a voice mail message with the Deputy Clerk on November 19, 2000, in which he stated he would not

attend the Hearing because he had unidentified "other hearings."²

19. Daryl Greene filed a Motion to Continue the Hearing on the morning that the Hearing was to be held, stating that Williams had been out of town.

20. Williams had attempted to schedule the deposition of Mark Greene on November 19, 2000.

21. Williams stated in a Certificate of Service that he served Defense Counsel with this Motion on Monday, November 19, 2000. Thomas C. Zipfel, Esquire, attorney for London, represented to the Court that he received fax service of the Motion to Continue on the morning of the Hearing.

22. The November 20, 2000 hearing was held as scheduled and Williams failed to attend.

23. Daryl Greene has failed to file a Pre-trial Memorandum, timely or otherwise.

24. Based upon the representation of Thomas Zipfel, Esquire, attorney for London, as corroborated by London's Rule 11 safe harbor letter, the Court finds that Williams stated to Defense Counsel that Daryl Greene's race discrimination claim lacks merit.

25. The Court issued an Order to Show Cause why this case

² The Deputy Clerk was ill and not at work on November 19, 2000. At no time, however, did Williams attempt to call Chambers directly concerning the November 20, 2000 Hearing. To date, Williams has still not contacted Chambers concerning the November 20, 2000 hearing.

should not be dismissed on December 1, 2000. Daryl Greene was allowed to file a Memorandum with the Court on or before December 8, 2000. He did not do so. A hearing was held in this matter on December 14, 2000, at 9:45 a.m. Williams did not attend.

CONCLUSIONS OF LAW

1. The Court may impose sanctions upon a party that fails to obey a scheduling order or a pretrial order. Fed. R. Civ. P. 16(f). Likewise, the Court may dismiss a case sua sponte where a party fails to prosecute its claim. Link v. Wabash Railroad Co., 370 U.S. 626, 629-31 (1962).

2. The sanction of dismissal of a claim is extreme and should be reserved for the most egregious circumstances, where there is a clear record of delay or contumacious conduct. Donnelly v. Johns-Manville Sales Co., 677 F.2d 339, 342 (3d Cir. 1982).

3. Dismissal is appropriate where a party acts in "flagrant bad faith" and "behave[s] with callous disregard of [his] responsibilities." National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976).

4. Before dismissing a complaint, the Court should consider: (1) the personal responsibility of the party; (2) prejudice to the adversary caused by the party's conduct; (3) any history of dilatoriness; (4) whether the conduct was willful or in bad faith; (5) the effectiveness of lesser sanctions; and (6) whether the underlying claim is meritorious. Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 868 (3d Cir. 1984).

5. Although there is no indication that Daryl Greene is personally responsible for Williams's conduct the Court ordered Williams to provide his client with notice of the monetary sanction levied on June 6, 2000. Because Daryl Greene was on notice of the deficiencies of Williams in prosecuting this matter, his personal culpability exceeds that of an unformed client that merely suffers responsibility for the shortcomings of an attorney.

6. London has been continually prejudiced in this case by the need to engage in superfluous motion practice not related to the merits of the case and to attend numerous hearings, including two not attended by Williams. Without Daryl Greene's witness list or Pretrial Memorandum, London is severely hamstrung in its efforts to prepare for trial.

7. The history of dilatoriness of Daryl Greene and Williams are set forth in the Findings of Fact.

8. As much as the Court has tried to ascribe Williams's actions to incompetence, it can only be concluded from Williams's failure to appear at two hearings, his line of questioning at the deposition of Mark Greene and his excuse that he was "out of town" on a day that he had scheduled a deposition in this case that Williams has no regard for this Court and his conduct has been willful and in bad faith.

9. The Court has attempted warnings, reprimands and a monetary sanction in this case, yet, Williams has failed to obey the simplest of this Court's Orders. Faced with an Order to Show

Cause why this case should not be dismissed, Williams failed to file a Memorandum or attend a hearing to present Daryl Greene's case. Reluctantly, the Court finds that dismissal is the only appropriate sanction in this case.

10. The Court has found that Williams has admitted that at least one of Daryl Greene's claims is meritless.

11. The above demonstrate that Daryl Greene and his attorney, Williams, have consistently violated the orders of the Court, failed to prosecute this case, violated Federal Rule of Civil Procedure 11 and the Federal Rules concerning discovery. As previous warnings and a monetary sanction have not appeared to have any affect upon Plaintiff or his counsel, the Court believes that the only appropriate sanction is dismissal of the case.

