

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

CYMPHUS, INC., et al.

CIVIL ACTION

v.

:
:

VISHAY INTERTECHNOLOGIES, : NO. 01-CV-751
INC.

ORDER

AND NOW, this 28th day of November, 2001, upon consideration of defendant's uncontested Motion for Order to Dismiss with Prejudice (Docket #17), as well as defendant's supplement thereto, IT IS **HEREBY** ORDERED that the motion is GRANTED and this case is DISMISSED WITH **PREJUDICE** for the reasons that follow.

The defendant seeks dismissal of the case against it based on the plaintiff's failure to comply with discovery including a discovery order of this Court. The complaint in this case was filed on February 15, 2001. The defendant served notices of deposition upon each of the plaintiffs on or about April 9, 2001. See Motion for Leave to Withdraw as Counsel for Plaintiffs and Request for Extension of Time, Docket #11, p. 2. The defendant agreed to re-schedule these depositions at the request of the **plaintiffs**. See Defendant's Response to Motion for Leave to Withdraw as Plaintiffs' Counsel and Plaintiffs' Request for Extension of Time, Docket #12, ¶5.

In September of 2001, the plaintiffs' attorneys filed motions to withdraw. The plaintiffs had informed their counsel that they were unable to travel to Pennsylvania **to** appear for depositions. They gave as their reason the fact that plaintiff Cynthia Zarnoski gave birth to twin girls in March of 2001. She breast feeds her daughters and she plans to do so for their entire first year. Plaintiff Darren McCathern is plaintiff Zarnoski's husband and he also has to care for the children.

In addition to permission to withdraw, plaintiffs' attorneys requested that their clients be granted an extension of the deadline for discovery to permit **them to** secure new counsel. This **Court's first scheduling** order, entered on April 16, 2001, set **October 13, 2001** as the deadline for discovery. *In an* order **dated** October 1, 2001, plaintiffs' counsels' motions to withdraw were granted, and the deadline for discovery was extended to December 31, 2001. Replacement counsel was ordered to enter **his or** her appearance on or before October 31, 2001. The plaintiffs were also ordered to make themselves available for depositions *in* Philadelphia as noticed **by** the defendant **no** later than November 15, 2001.

No replacement counsel has **entered** an appearance as of today, November 28, 2001. According to the defendant's **supplement** to its motion to dismiss, the **depositions** of the three

plaintiffs, Ms. Zarnoski, Mr. McCathern, and Cymphus, Inc., were noticed for November 13, 2001 at the office of the defendant's local counsel. A court reporter and defendant's local counsel were present and ready to take the deposition on that day but the plaintiffs did not appear. The plaintiffs did not notify the defendant in advance that they were not going to appear.

On November 6, 2001, the defendant filed this motion to dismiss. The plaintiffs have not responded to the motion.

Under Federal Rule of Civil Procedure 37(b) (2)(C), a party's failure to obey an order to provide or permit discovery may be sanctioned by dismissal of the action. See FED. R. CIV. P. 37(b) (2) (C). In determining whether to dismiss a case on the grounds of plaintiff's failure to obey a discovery order, the court must consider the following factors: "(1) the extent of the party's personal responsibility; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was wilful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of **alternative** sanctions; and (6) the meritoriousness of the claim or defense." Poulig v. State Farm Fire and Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984) (emphasis in original). This Court is obliged to consider all six of **the**

Poulis factors; not all of the factors need to weigh in favor of dismissal for dismissal to be warranted, however. See Hicks v. Feeney, 850 F.2d 152, 156 (3d Cir. 1988).

With regards to the **first** factor, this is not a case in which responsibility needs to be allocated between counsel and party, because the plaintiffs' attorneys were granted leave to withdraw on October 1, 2001. See Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 920 (3d Cir. 1992) (holding that party had personal responsibility after withdrawal of counsel). The **plaintiffs' were personally** responsible for the conduct of this litigation after that date.

The defendant in this case has been prejudiced by the plaintiffs' failures to cooperate with discovery requests and comply with this Court's orders. The defendant has been forced to expend time and money on attempts to force the plaintiff to respond. See Hoxworth, 980 F.2d at 920 (holding that being forced to expend time and money to secure compliance with discovery constitutes prejudice). **As** the defendant wrote in its response to the motion to withdraw:

"In consideration of the family situation of Plaintiffs, Defendant was willing to grant a reasonable extension of time for the depositions and leeway in terms in [sic] providing responses to Interrogatories and the Requests **for Documents**. Immediately prior to the notification by Plaintiffs' Counsel that they were

seeking to withdraw **as** Counsel, Defendant's Counsel was in the process of re-noticing Plaintiffs' depositions for the end of September and was preparing a draft of Motions to Compel **as** to both their answers to Interrogatories and responses to the Requests for Production of Documents."

Response to Motion to Withdraw, Docket #12, ¶5. Subsequently, the defendant was forced to prepare and file **this** motion to dismiss, as well as a supplement to it which alerted **the** Court to the fact that the plaintiffs failed to appear for depositions. **In** addition **to** the time and **money** the defendant has had **to** expend, it has been prejudiced **by** the delay and deprivation of information that plaintiff's failures have **caused**. See Hoxworth, 980 F.2d at 920-921 (holding that delay and being deprived of information constitute prejudice). This case cannot progress until the plaintiffs appear for depositions, which they apparently refuse to do until plaintiff Zarnoski finishes breastfeeding her daughters, which she estimates will happen in March **of** 2002.

There is a history of dilatoriness in this case. **The** plaintiffs have consistently refused to appear for depositions, presumably since the birth of their daughters in March of 2001, just one month after they filed this lawsuit. They failed to secure new counsel and then failed to appear to be deposed, both in **contravention** of a court order.

There is evidence that their failure to appear for depositions was wilful - they informed their counsel that they would not travel to Pennsylvania so long as plaintiff Zarnoski was nursing. There is no evidence of wilfulness or bad faith with regards to their other failures. Because the plaintiffs have not responded to the defendant's motion, the Court has no way of knowing what the basis for their lapses is. With regards to their other failures this factor is neutral; it would not be fair for the absence of information, which the plaintiffs caused, to inure to their benefit.

Alternative sanctions short of dismissal would not be effective in this case. See FED. R. CIV. P. 37(b) (2)(listing as possible sanctions designating certain facts to be established, refusing to allow the disobedient party to support or oppose designated claims, prohibiting introduction of designated evidence, striking pleadings, staying further proceedings pending compliance with the order, treating failure to obey orders as contempt of court and imposition of fees and costs); Titus v. Mercedes Benz of North America, 695 F.2d 746, 750 n.6 (3d Cir. 1982) (listing as possible sanctions a warning, a formal reprimand, placing the case at the bottom of the calendar, a fine, the imposition of costs or attorneys fees on either the party or the party's counsel, temporary suspension of culpable

counsel, dismissal of suit unless new counsel **is** secured, and preclusion of claims or defenses). The plaintiffs are unrepresented. Thus, the sanctions of imposition **of** attorneys fees, the temporary suspension of counsel and dismissal unless new counsel is secured are not applicable. The plaintiffs have not resisted a subset of discovery such that a sanction related to just one or some of their claims would be appropriate. **They** appear to object **to** participating in this lawsuit at all. Placing the case at the bottom **of** the calendar would only serve the plaintiff's apparent end **of** putting the case on hold until their babies have been weaned. The remaining alternative sanctions are a warning, a formal reprimand, treating a failure to obey an **order** as contempt of court and fines or costs. This **Court** does not believe that these lesser sanctions **would** overcome **the** plaintiffs' evident resistance to prosecuting their case.

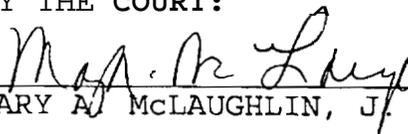
The final criteria, that of the meritoriousness of **the** plaintiff's claim, is neutral. "A claim, or defense, **will be** deemed meritorious when the allegations of **the pleadings**, if established at **trial**, would support recovery **by** plaintiff or would constitute a complete defense." Poulis, 747 F.2d at 869-870. **At this** early stage of the case, based solely on **the** pleadings, **there is no basis to find that one party's case is**

stronger than the other. See Hoxworth, 980 F.2d at 922

(declining to require district court to have a mini-trial before it can impose a default).

Taken together, the Poulis factors weigh in favor of the dismissal of this case.

BY THE COURT:



MARY A. McLAUGHLIN, J.

2 "b9/0, to:

M. Kelly Dillery, Esq.

id to:

Ympkus, Inc.

Zarneski

Tricathena

Kaufman, Esq.