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

HECTOR L. HUERTAS	:	CIVIL ACTION
V.	:	
CITY OF PHILADELPHIA, et al.	:	No. 02-7955

MEMORANDUM AND ORDER

HUTTON, S.J. January 26, 2005

I. BACKGROUND

On October 18, 2002, Plaintiff Hector Huertas, proceeding pro se, filed a complaint against the City of Philadelphia ("City") and Sun Bancorp., Inc. ("Bank") alleging violations of his civil rights pursuant to 42 U.S.C. § 1983. The gravamen of Plaintiff's complaint is that he was wrongfully accused of robbing a Sun Bancorp branch, resulting in his arrest by Philadelphia police officers. Plaintiff alleges that he sustained injuries due to the Philadelphia police officer's use of excessive force during the arrest.

Although Plaintiff filed the complaint in October of 2002, the case is still in the discovery phase. A review of the docket reveals numerous discovery issues over the past two years. Most notably is Plaintiff's failure to appear for his own scheduled deposition on five different occasions. The records before the Court show that Defendant City first scheduled Plaintiff's deposition for May 12, 2003 and gave him notice of this deposition on April 25, 2003. Plaintiff never responded to the

notice, never filed a motion for a protective order with the Court, and failed to appear at the scheduled time. Defendant City next scheduled Plaintiff's deposition for May 27, 2003. Defendant City gave Plaintiff notice of this deposition on May 13, 2003. Plaintiff never responded to the notice, never filed a motion for a protective order with the Court, and failed to appear. Defendant City next scheduled Plaintiff's deposition for June 17, 2003 and gave Plaintiff notice of this deposition on June 5, 2003. Plaintiff again failed to respond to the notice, failed to file a motion for a protective order, and failed to appear.[1] In July of 2004, both Defendants scheduled separate depositions for Plaintiff. Defendants later combined the depositions into one deposition scheduled for July 22, 2004. Plaintiff received notices on July 1, 2004, July 2, 2004, and July 8, 2004. On July 9, 2004, Plaintiff notified Defendants of his objections to the deposition. Defendants rejected these objections and notified Plaintiff that the deposition would continue as scheduled. Plaintiff failed to appear and failed to file a motion for a protective order with the Court. On August 2, 2004, Defendants filed a motion to compel Plaintiff's appearance at his deposition. In an Order dated October 5, 2004, the Court granted Defendants' motion and ordered Plaintiff to

[1] Plaintiff filed a motion to stay discovery on June 12, 2003 pending his appeal to the Third Circuit. The Court granted the motion to stay discovery on July 11, 2003.

appear at his deposition within thirty days. The Court considered Plaintiff's fear of heights and instructed that the deposition take place no higher than the second floor of a building. Defendants scheduled the deposition on November 4, 2004 at 9:30 a.m. on the first floor; Plaintiff failed to appear at the scheduled time.[2]

Defendants now ask the Court to dismiss the action under Federal Rule of Civil Procedure 37 based on Plaintiff's failure to attend his deposition and comply with an order of this Court. For the reasons listed below, the Court will grant Defendants' motion.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 37(d) states:

> if a party . . . fails to appear before the officer who is to take the deposition, after being served with a proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Fed. R. Civ. P. 37(d). Although Rule 37(d) allows a court to make such orders "as are just," it specifically references the

[2] Defendants properly notified Plaintiff that his deposition was scheduled for 9:30 a.m. on the first floor. Plaintiff responded by sending a letter to Defendants objecting to the deposition because the notice did not state the name of the court reporter. Within this letter was a request to schedule the deposition at a later time. Defendants rejected Plaintiff's requests and notified Plaintiff that the deposition would occur as originally scheduled in compliance with the Court's Order. Plaintiff apparently appeared for his 9:30 a.m. deposition at 1:37 p.m. on November 4, 2004. Neither Plaintiff's letter, nor the fact that he arrived four hours late satisfied Plaintiff's duty to abide by this Court's order.

sanctions outlined in Rule 37(b)(2). That rule permits a court to issue an order "dismissing the action" as a sanction for discovery abuse or failure to comply with a court order. See Fed. R. Civ. P. 37(b)(2)(C).

The Third Circuit set forth the factors a court must balance when determining whether to dismiss an action as a sanction for discovery abuse. See Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 867-68 (3d Cir. 1984). The six Poulis factors are,

> (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 willful 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.

Id. at 868. The Poulis test is not a "mechanical calculation" for deciding whether to dismiss a plaintiff's complaint. See Mindek v. Rigatti, 964 F.2d 1369, 1373 (3d Cir. 1992). Also, it is not necessary that all of the Poulis factors are satisfied to justify dismissal of the claim. See id. Deciding whether to dismiss the action under Poulis requires a balancing of the factors in the "context of the district court's extended contact with the litigant." Id. The Court will evaluate Plaintiff's actions under each of the six Poulis factors to determine whether to dismiss Plaintiff's claim.

III. DISCUSSION

A. Extent of Plaintiff's Personal Responsibility

The first Poulis factor looks at the party's personal responsibility for the misconduct. Here, Plaintiff is representing himself. This is not a case where Plaintiff's counsel is responsible for the discovery violations. Although courts grant pro se litigants some leeway in following the requirements detailed in the Federal Rules of Civil Procedure, all litigants have an "obligation to comply with court orders." See Burns v. Glick, 158 F.R.D. 354, 356 (E.D. Pa. 1994).

This Court has granted Plaintiff much leeway regarding the requirements of the federal and local rules. Within the first six months of discovery, Plaintiff filed six motions to compel with the Court. None of these motions complied with Local Rules 7.1(c) or 26.1(f). In an Order dated April 24, 2003, the Court cautioned Plaintiff to abide by these rules or face sanctions including dismissal. See Docket No. 42. The Court also included the relevant portions of the rules in the footnote of that Order. In an Order dated April 30, 2003, the Court again reminded Plaintiff of the need to attempt to resolve discovery disputes without the Court's intervention. The Court instructed Plaintiff to abide by Federal Rule of Civil Procedure 37(a)(2)(A) and certify to the Court that he attempted to resolve all discovery disputes with the opposing party. Despite these detailed

instructions from the Court, Plaintiff continued to file motions without abiding by the federal or local rules. As of the date of this Order, Plaintiff has filed twenty-nine motions. Fifteen of these motions have been motions to compel Defendants to comply with discovery and none of them contain the certificates required by the rules.[3] Additionally, in failing to appear for his fifth deposition, Plaintiff disobeyed a direct Order from this Court. During the time Plaintiff was scheduled to appear for each deposition, he was filing other motions with the Court. Within these motions, Plaintiff harassed and disparaged Defendants and Defendants' counsels. Defendants have incurred additional unnecessary expenses filing responses to many of these motions.

The Court finds that Plaintiff is personally responsible for his repeated failure to appear for his own deposition, his failure to abide by this Court's Order, and his failure to abide by the relevant federal and local rules. Plaintiff's repeated violations weigh heavily toward dismissing Plaintiff's claim.

B. Prejudice to Defendants

The second Poulis factor concerns the prejudice to Defendants caused by Plaintiff's misconduct. See Poulis, 747 F.2d at 868. To find prejudice, a court does not need to find

[3] The Court notes that it is not only the formality of the certificate that is lacking, but any indication of a good faith effort on the part of Plaintiff to resolve the dispute without the Court's involvement. On the contrary, many of Plaintiff's motions contain irrelevant and inappropriate personal remarks regarding Defendants' counsels.

evidence of “irremediable harm” to the opposing party. See Ware v. Rodale Press, Inc., 322 F.3d 218, 223 (3d Cir. 2003). Courts look for evidence of extra costs, repeated delays, and the need to file additional motions in response to the abusive behavior of the responsible party. See Ware v. Rodale Press, Inc., 2002 WL 89604, *3 (E.D. Pa. Jan. 23, 2002). Under Poulis, evidence of prejudice to the opposing party weighs heavily in favor of dismissal. See Smith v. Altegra Credit Co., 2004 WL 2399773, *5 (E.D. Pa. Sept. 22, 2004).

Here, Plaintiff’s failure to attend his deposition has clearly prejudiced Defendants. Defendants scheduled Plaintiff’s deposition five different times and gave him adequate notice each time. Defendants incurred extra costs preparing for and attending each of these five depositions, providing a court reported at each of these depositions, and filing a motion to compel Plaintiff’s attendance at his deposition with the Court. These costs were the direct result of Plaintiff’s failure to attend his scheduled depositions.

In addition to the costs Defendants have incurred, Defendants have also been prejudiced by the delay Plaintiff’s behavior has caused in the case. Plaintiff’s failure to appear for his own deposition has delayed the progress of this case considerably. A “‘prolonged delay in litigating a case creates a presumption of prejudice’ because it harms a defendant’s ability

‘to present a full and fair defense on the merits of plaintiff’s claim.’” Smith, 2004 WL 2399773, at *5 (quoting Beckman v. Integrated Sys. Int’l, Inc., 2002 U.S. Dist. LEXIS 19394, *10 (E.D. Pa. Sept. 30, 2002)). The Court finds that Plaintiff’s failure to attend his own properly noticed deposition, on five different occasions, has prejudiced Defendants. The Court also notes that this prejudice weighs heavily toward dismissing Plaintiff’s claim.

C. Plaintiff’s History of Dilatoriness

The third Poulis factor examines Plaintiff’s history of dilatoriness. See Poulis, 747 F.2d at 868. “Extensive or repeated delay or delinquency . . . such as consistent non-response to interrogatories, or consistent tardiness in complying with court orders” constitutes a history of dilatoriness. Adams v. Trs. of the N.J. Brewery Employees’ Pension Trust Fund, 29 F.3d 863, 874 (3d Cir. 1994). In Poulis, the plaintiff once failed to answer interrogatories and failed to file a pre-trial statement. See Poulis, 747 F.2d at 868. The Third Circuit found this showed a history of dilatoriness. See id. Here, as recounted in detail above, Plaintiff has failed to appear for five properly noticed depositions. Additionally, in failing to appear for his fifth deposition, Plaintiff failed to comply with an Order of this Court. Plaintiff’s actions demonstrate a history of dilatoriness and this factor also weighs in favor of

dismissing Plaintiff's claim.

D. Plaintiff's Willfulness or Bad Faith

Under the fourth Poulis factor, the Court determines whether Plaintiff acted willfully or in bad faith. See Poulis, 747 F.2d at 868. "Willfulness involves intentional or self-serving behavior." Adams, 29 F.3d at 32. In evaluating whether to dismiss with prejudice, the Court looks for the "type of willful or contumacious behavior that can be characterized as acting in 'flagrant bad faith.'" Smith, 2004 WL 2399773 at *6 (quoting Adams, 29 F.3d at 32). A "persistent failure to honor discovery orders may be viewed as a willful effort to evade discovery." Philadelphia Cervical Collar v. Jerome Med., 2003 U.S. Dist. LEXIS 6572 *18 (E.D. Pa. Mar. 31, 2003).

As noted above, Plaintiff has failed to appear for five properly noticed depositions, including the final one for which this Court ordered him to appear. Plaintiff never responded to the first three deposition notices, and filed baseless objections to the final two. Plaintiff requested a protective order for the final deposition, which this Court granted in part and denied in part. Plaintiff was well aware of his obligation to attend his deposition, yet still failed to do so. Additionally, while failing to appear for these five depositions, Plaintiff filed several motions to compel against Defendants. Most of these motions were unfounded, as Plaintiff had not made his discovery

requests in compliance with the Federal Rules of Civil Procedure. See Docket No. 49. In an Order denying one of Plaintiff's motions to compel, the Court cautioned Plaintiff that his behavior was "wholly inconsistent with the Federal Rules." Id.

Plaintiff's behavior deeply troubles the Court. As demonstrated in his numerous filings with the Court, many of Plaintiff's motions contain countless irrelevant and disparaging remarks directed at Defendants' counsels. This behavior further reveals Plaintiff's bad faith and willfulness throughout the two years of discovery and again weighs heavily in favor of dismissal.

E. Effectiveness of Alternative Sanctions

The fifth Poulis factor requires the Court to examine the effectiveness of sanctions other than dismissal. See Poulis, 747 F.2d at 868. Courts often impose monetary sanctions to discourage future discovery abuse. However, monetary sanctions are not an option here because Plaintiff is proceeding in forma pauperis. Additionally, the Court previously awarded Defendant City $200 in expenses and attorney's fees based on Plaintiff's violation of Rule 11 and this did nothing to curb Plaintiff's harassment of Defendants' counsels. See Docket No. 44.

Rule 37 suggests other possible sanctions, but each of these lesser sanctions either is tantamount to dismissal or would not be effective. For example, the rule permits the Court to issue

an order establishing designated facts in accordance with Defendants' claim. See Fed. R. Civ. P. 37(b)(2)(A). However, due to the lack of discovery, it is unclear to Defendants and the Court what facts could be established against Plaintiff short of ones dictating a dismissal. Rule 37 also permits the Court to issue an order striking parts of the pleadings, preventing Plaintiff from supporting or opposing designated claims or defenses, or prohibiting Plaintiff from introducing certain matters in evidence. See Fed. R. Civ. P. 37(b)(2)(B),(C). However, an order striking out portions of the pleadings or preventing Plaintiff from supporting his claim would be tantamount to dismissal of Plaintiff's claim. Plaintiff's complaint appears only to allege a violation of his civil rights under 42 U.S.C. § 1983; therefore, the Court would have to strike the pleading in its entirety. Plaintiff's refusal to attend his own deposition has prevented Defendants from raising specific defenses. Finally, the Court could issue an order staying further proceedings until Plaintiff appears at his deposition. See Fed. R. Civ. P. 37(b)(2)(C). Such an order is more likely to harm Defendants by forcing them to spend time and money toward attempting to depose Plaintiff for a sixth time. Additionally, there is no indication from Plaintiff that he would abide by the Court's order and attend the deposition. Therefore, the Court finds that dismissal is the only appropriate sanction at this

time.

F. Meritoriousness of Plaintiff's Claim

Finally, under the last Poulis factor, the Court must look at the meritoriousness of Plaintiff's claim. See Poulis, 747 F.2d at 868. The analysis under this prong is identical to that the Court would apply when ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. When considering a 12(b)(6) motion, the Court must accept as true all facts alleged in the complaint and any reasonable inferences that can be drawn from them. See, e.g., H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989); see also Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001). Claims by pro se litigants may be dismissed only "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McDowell v. Delaware State Police, 88 F.3d 188, 189 (3d Cir. 1996) (quoting Haines v. Kerner, 404 U.S. 519, 520 (1972)). Furthermore, when a complaint if filed pro se, a court must "apply the applicable law, irrespective of whether a pro se litigant has mentioned it by name." Holley v. Dep't of Veteran Affairs, 165 F.3d 244, 247-48 (3d Cir. 1999).

To establish a claim under 42 U.S.C. § 1983, a plaintiff must "demonstrate a violation of a right secured by the Constitution and the laws of the United States [and] that the

alleged deprivation was committed by a person acting under color of state law." Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir. 1995); see Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). Although Plaintiff's complaint does not cite § 1983, it does allege that the "Philadelphia Police violated my civil rights." Compl. at 1. Plaintiff's complaint also states that the "Philadelphia Police inflicted severe, permanent injuries to my lumbar herniated disk, neck, knees, and right elbow." Id. The Philadelphia police are persons acting "under color of state law." In liberally construing Plaintiff's pleading, the Court finds that the complaint states a § 1983 claim against Defendant City.

Defendant Bank is not a state actor, so Plaintiff must plead a civil conspiracy to state a proper § 1983 claim against Defendant Bank. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). To prove a civil conspiracy under § 1983, a plaintiff must establish (1) the existence of a conspiracy and (2) a deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy. See id. A civil conspiracy is a "combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'" Adams v.

Teamsters Local 115, 2003 WL 22005708, *6 (E.D. Pa. Aug. 6, 2003) (quoting Hampton v. Hanrahan, 600 F.2d 600, 620-21 (7th Cir. 1979), rev'd in part on other grounds, 446 U.S. 754 (1980)). Plaintiff can prove such an agreement through either direct or circumstantial evidence. See id. Here, Plaintiff's complaint states that "Sun Bancorp Inc. forwarded libel and defamatory information to both, the Philadelphia Police and the F.B.I. As a result, the Philadelphia Police inflicted severe, permanent injuries to [Plaintiff]." Compl. at 1. This is sufficient to state a claim of civil conspiracy against Defendant Bank. Therefore, this factor weighs against dismissal.

IV. CONCLUSION

As mentioned above, the Court need not find all Poulis factors weigh in favor of dismissal. No single Poulis factor decides the matter. A careful review of all six factors indicates that the Court must dismiss Plaintiff's claim with prejudice. Plaintiff's failure to attend five scheduled depositions is inexcusable. Furthermore, Plaintiff has abused the discovery process by filing countless motions to compel while providing nothing in return. Finally, his inappropriate remarks regarding Defendants' counsels reveal his bad faith in this proceeding. Although the Court concludes that the claim would withstand a motion to dismiss, the first five Poulis factors weigh heavily in favor of dismissal. For the reasons stated

above, Defendants’ motion is granted and Plaintiff’s claim is dismissed with prejudice.

An appropriate Order follows.

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O R D E R

AND NOW, this 26th day of January, 2005, upon consideration of Defendants' Motion to Dismiss Plaintiff's Action Pursuant to Rule 37(b) and Rule 37(d) of the Federal Rules of Civil Procedure (Docket No. 108), Plaintiff's response thereto (Docket No. 110), and Defendants' reply thereto (Docket Nos. 112 & 113), IT IS HEREBY ORDERED that Defendants' motion is **GRANTED.**

BY THE COURT:

S/_____
HERBERT J. HUTTON, S.J.