

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

UNITED STATES OF AMERICA ex rel. :
DEBORAH RIVA MAGID : CIVIL ACTION
:
v. :
:
BARRY WILDERMAN, M.D., P.C., : NO. 96-CV-4346
BARRY WILDERMAN, M.D., ERIC :
GERWIRTZ, M.D., STEVEN PALLONI, :
M.D. :

MEMORANDUM ORDER

AND NOW, this 15th day of August, 2006, upon consideration of Relator Deborah Riva Magid's Motion For Order To Mark Relator's Motion For An Entry Of Default And Sanctions As Uncontested As To Barry Wilderman, M.D., P.C. And Barry Wilderman, M.D. (Doc. No. 190), Motion To: (1) Strike "New Matter" Contained In Arthur Shuman, Esq.'s Answer To Relator's Motion For Entry Of Default And For Sanctions And (2) For Order To Mark The Relator's Motion For Entry Of Default And For Sanctions As Uncontested As To Arthur R. Shuman (Doc. No. 191), and Motion For Order To Mark Relator's Motion For An Entry Of Default And Sanctions As Uncontested As To Eric Gewirtz, M.D. (Doc. No. 192), it is ORDERED as follows:

1. Relator's Motion for Order to Mark Relator's Motion for an Entry of Default and Sanctions as Uncontested as to Barry Wilderman, M.D., P.C. and Barry Wilderman, M.D. (Doc. No. 190), Relator's Motion for Order to Mark Relator's Motion for an Entry of Default and Sanctions as Uncontested as to Eric Gewirtz, M.D. (Doc. No. 192), and that portion of Relator's Motion to: (1) Strike "New Matter" Contained in Arthur Shuman, Esq.'s Answer to Relator's Motion for Entry of Default and for Sanctions and (2) for

Order to Mark the Relator's Motion for Entry of Default and for Sanctions as Uncontested (Doc. No. 191) which seek to have the court mark Relator's earlier Motion as Uncontested as to Arthur R. Shuman are DENIED.¹

2. That portion of Relator's Motion to: (1) Strike "New Matter" Contained in Arthur Shuman, Esq.'s Answer to Relator's Motion for Entry of Default and for Sanctions and (2) for Order to Mark the Relator's Motion for Entry of Default and for Sanctions as

¹ Relator argues that Defendants Wilderman, M.D, P.C., Barry Wilderman, and Eric Gewirtz, as well as Attorney Shuman, have failed to comply with Rule 7.1 of the Local Rules of Civil Procedure, in that their responses to Relator's Motion for Default and Sanctions lack briefs in opposition.

After receiving Relator's Motion for Default and Sanctions, Shuman wrote to the Court offering two reasons why he was unable at that time to file formal responses to the Motion on behalf of himself and his clients. (Fax from Shuman to Chambers (Oct. 29, 2005).) First, Shuman explained that the responses required reference to materials then under a claim of privilege by Diane Levy. This privilege claim was denied in our Memorandum and Order dated August 10, 2006 and Defendants were ordered to disclose these materials to Relator. Accordingly, neither Shuman nor Defendants are currently impeded from addressing these materials in their responses to Relator's Motion.

As a second reason, Shuman explained that Relator's Motion for Default and Sanctions may force him to simultaneously defend himself and his clients, while also placing his clients in opposing positions and requiring their retention of separate counsel. If these conflicts necessitate specific action by Shuman or his clients, they are directed to initiate such action by separate motion. Nevertheless, given Shuman's efforts to inform the Court and Relator of these issues and to file brief Answers in opposition on behalf of himself and his clients, it would be inappropriate to mark Relator's Motion for Default and Sanctions as uncontested as to these individuals.

Moreover, it is unclear what effect an order to "mark" Relator's Motion as uncontested would have on this case. In the absence of a timely response, Local Rule 7.1(c) allows us to grant a motion as uncontested at our discretion. This Rule also permits us to require or permit further briefs, if appropriate. For the reasons cited above, we will not grant Relator's Motion as uncontested at this juncture. This denial does not preclude us from granting Relator's Motion for Default and Sanctions as uncontested at a later date.

Uncontested as to Arthur R. Shuman (Doc. No. 191) that seeks to strike “New Matter” in Shuman’s Answer is DENIED.²

3. Defendants Wilderman, M.D., P.C., Barry Wilderman, and Eric Gerwitz, as well as Attorney Shuman, are directed to file formal responses to Relator’s Motion for Default and Sanctions within five (5) days of the date of this Order.
4. Pursuant to this Court’s Order of June 21, 2005, Defendants Wilderman, M.D., P.C., Barry Wilderman, and Eric Gewirtz are again ordered to produce the requested computer-generated HFCA 1500 forms within five (5) days from the date of this Order. If Defendants cannot produce these materials, their justification for such failure to produce shall be explicitly stated in their responses to Relators Motion for Default and Sanction, as required in ¶ 3 above.

² In his Answer to Relator’s Motion for Order to Mark her earlier Motion as uncontested, Attorney Shuman includes a section entitled “New Matter.” (Doc. No. 188.) In this “New Matter,” Shuman states that (1) he is the attorney for three of the Defendants, (2) he represented Defendant Palloni until November 10, 2004, (3) Relator’s Motion for Default and Sanctions accuses both Defendants and Shuman of wrongdoing, (4) Relator’s Motion contains factual inaccuracies, including those in the Affidavit of Relator’s attorney, and (5) Relator’s Motion places Shuman “in the impossible position, both practically and ethically, of defending himself, defending his clients and having to testify.” (*Id.*)

Relator correctly points out that “New Matter” is a creature of the Pennsylvania Rules of Civil Procedure. *See* Pa. R. Civ. P. 1030. Pennsylvania Rule 1030 directs respondents to plead certain affirmative defenses as well as “any other material facts which are not merely denials of the averments of the preceding pleading” as “New Matter.” The analogous federal rule, Rule 10(c), also permits respondents to set forth “any . . . matter constituting an avoidance or affirmative defense.” Fed. R. Civ. P. 10(c).

It appears that Shuman, by including this section in his Answer, is attempting to place on the record certain reasons to justify his failure to formally respond to Relator’s Motion. While it is unclear whether these claims constitute a defense, as envisioned in Rule 10(c), the federal rules do not bar such averments from being included in the pleading. Although the heading, “New Matter,” is unnecessary, there is no other compelling reason for striking this material from Shuman’s pleading.

IT IS SO ORDERED.

BY THE COURT:

/s/ R. Barclay Surrick
United States District Court Judge