

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

NEYEMBO MIKANDA, : CIVIL ACTION  
 : NO. 05-3877  
 Plaintiff, :  
 :  
 v. :  
 :  
 SOUTH AFRICAN AIRWAYS, :  
 et al., :  
 :  
 Defendants. :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

MAY 23, 2007

Plaintiff has repeatedly failed to produce discovery to Defendant and to comply with this Court's order to do so. As a result, Defendant is unable to defend itself in this suit. Having afforded Plaintiff an opportunity to explain this failure, and under the authority of Federal Rule of Civil Procedure 37, the Court will grant Defendant's motion to dismiss Plaintiff's complaint as sanctions (doc. no. 46).

I. BACKGROUND

On July 27, 2005, Plaintiff Neyembo Mikanda, proceeding pro se, brought suit against Defendant South African Airways (SAA) for injuries sustained in connection with a flight from Philadelphia to Lusaka, Zambia (via New York, Senegal, and South

Africa). He alleges three counts<sup>1</sup>: (1) after the aircraft was sprayed with a chemical substance (disinsection) to rid it of potentially harmful insects, Plaintiff suffered an allergic reaction, (2) he did not receive the proper medical treatment from SAA staff following that allergic reaction, and (3) SAA wilfully lost his baggage.

On August 15, 2006, the Court granted in part SAA's motion for summary judgment; the Warsaw Convention prevents Plaintiff from recovering for SAA's spraying of the chemical disinsection (doc. no. 23). However, Plaintiff was allowed to proceed on Counts II and III.

According to the Court's pretrial scheduling order, discovery was due by November 15, 2006 (doc. no. 22). On November 13, 2006, SAA filed a motion to compel (doc. no. 28). Prior to that date, Plaintiff had failed to provide (1) his initial self-executing disclosures, (2) responses to SAA's first set of interrogatories, (3) responses to SAA's first request for production of documents, or (4) responses to SAA's first request for admissions. At Plaintiff's November 7, 2006, deposition,<sup>2</sup> he failed to produce the required documentation; as such, defense

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<sup>1</sup> The complaint does not contain "counts" per se, but, after hearings with Plaintiffs, the Court was able to discern three separate allegations.

<sup>2</sup> Given the volatility of the case, the Court instructed Plaintiff to be deposed in the courthouse so that Magistrate Judge Rueter could monitor the deposition (doc. no. 26).

counsel could not depose Plaintiff with respect to the alleged documents. (Plaintiff filed initial disclosures on November 14, 2006, and December 1, 2006.)

SAA scheduled an independent medical examination (IME) for Plaintiff. SAA provided Plaintiff with a month's notice of the IME, and provided him with a reminder the day before the IME was scheduled to take place. Plaintiff failed to appear for the IME. At oral argument, Plaintiff first represented to the Court that he never received the notice; after questioning by the Court, he changed his story and said that while he had received notice, he did not feel comfortable submitting to a medical examination. Trans. of 12/1/06 Hrg. at 21-22. The Court reminded Plaintiff that, in order to prevail on his claim that SAA's inaction on the plane worsened his medical condition, Plaintiff would have to provide evidence regarding his medical condition and that SAA was entitled to collect its own evidence regarding his medical condition. Trans. of 12/1/06 Hrg. at 24.

As of the December 1, 2006, hearing, Plaintiff had not produced any of the discovery documents or answers that were requested of him. The Court instructed Plaintiff that without documentation of his illness and other records to support his claim, his case would have no merit. Plaintiff told the Court that he was "able to obtain some medical papers." Trans. of 12/1/06 Hrg. at 12. He nevertheless asked the Court for an

extension of 90 days to complete discovery, which the Court granted. The Court stated: "So, if he wants 90 days [to provide answers to Defendant's discovery requests], it seems to me that it is a fair request under these circumstances. But I will say this to Mr. Mikanda: This will be the last 90 days, I mean, short of some extraordinary circumstances that I can't even imagine." Trans. of 12/1/06 Hrg. at 11. The Court stayed all other discovery until Plaintiff responded to SAA's interrogatories and requests for production of documents (doc. no. 39).

The "medical papers" that Plaintiff told the Court he had already obtained were never produced; nor was any other documentation. In fact, to date, Plaintiff has not produced discovery to SAA or complied with the Court's order to produce documentation regarding his medical condition and his lost baggage. The Court warned Plaintiff that his claims could not proceed without his producing the relevant documentation. Trans. of 12/1/06 Hrg. at 24.

On March 16, 2007, two weeks after Plaintiff's deadline for complying with the Court's December 1, 2006, discovery-related order, SAA filed the present motion for sanctions (doc. no. 46). Plaintiff never responded to the motion.

On April 12, 2007, the Court issued a rule to show cause why Plaintiff's case should not be dismissed. On April 30, 2007, Plaintiff answered the rule to show cause (doc. no. 49). His

two-page statement asserted his "right to due process under the Constitution of the United States" and that "[t]his case should be adjudicated on the merit: due process, rather than on a technicality." He also argued that SAA is not likely to succeed on the merits. Finally, he requested the Court "to issue an order directing both parties to direct written responses and to produce requested documents and/or admissions as is just and proper." Nowhere in the document does Plaintiff explain why he has yet to provide the documentation ordered by the Court to be produced.

In short, Plaintiff has not answered SAA's discovery requests, produced the materials necessary to sustain his claims, complied with the Court's order, or even explained his failure to do so. At this stage of the litigation, Defendant does not possess the necessary materials to defend itself.

## II. DISCUSSION

### A. Standard for Dismissal Under Rule 37

The Court's power to dismiss an action as sanctions for the plaintiff's failure to comply with the Court's orders and refusal to respond to the defendant's discovery requests is found in Federal Rule of Civil Procedure 37:

If a party . . . fails to obey an order to provide or permit discovery, . . . or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the

failure as are just, and among others the following . . .  
. [a]n order striking out pleadings or parts thereof,  
or staying further proceedings until the order is  
obeyed, or dismissing the action or proceeding or any  
part thereof, or rendering a judgment by default  
against the disobedient party . . . .

Fed. R. Civ. P. 37(b)(2)(C). The Third Circuit has instructed that a district court is to weigh the following factors in determining whether to dismiss an action as sanctions:

- (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.

Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868 (3d Cir. 1984) (emphases omitted). The Court is mindful that dismissal of a case is an "extreme" sanction. Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976).

#### B. Application of the Standard

All six factors enumerated by the Third Circuit counsel in favor of dismissing Plaintiff's case.

One, Plaintiff is personally responsible for his failure; he is proceeding pro se and cannot lay the blame for his inactions on another party. Two, SAA has been noticeably prejudiced: due to Plaintiff's inactions, it cannot defend itself. Moreover, it has been prejudiced by having to pay for the IME that never took

place and having to continue to pay for attorney's fees for the case. Three, Plaintiff has a history of dilatoriness, having failed to ever provide the requested documentation or answer any of SAA's discovery requests. Four, Plaintiff's conduct was willful and in bad faith. As Plaintiff's misstatements to the Court at the December 1, 2006, hearing concerning his failure to appear at the medical examination suggest, Plaintiff has not been entirely forthcoming with the Court. Moreover, although encouraged to do so by the rule to show cause, Plaintiff has not offered an explanation for his failure to abide by the Court's order to produce the requested discovery. Five, the other obvious sanction here--precluding Plaintiff from introducing evidence to support his claims--leads to the same result: his claims would fail on the merits. Six, in the Court's opinion, Plaintiff's claims have no merit in the first place. According to SAA, after Plaintiff's adverse reaction to the disinsection spray, SAA staff provided him with oxygen and took him to a clinic at the airport. For his part, Plaintiff has yet to provide any support for his claim that SAA was negligent. Finally, Plaintiff has not provided any evidence that SAA "willfully" lost his luggage.

In short, although Plaintiff begs the Court to adjudicate the case on the merits, there are no merits to his case.

### III. CONCLUSION

Plaintiff's blatant disregard for the discovery process and this Court's order dictates that his claims be dismissed with prejudice. That Plaintiff is proceeding pro se means only that the Court affords him leeway in his filings and dealings with the Court; it does not mean that he is allowed to disregard the rules of the Court or to twist them to his advantage.

An appropriate Order follows.

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O R D E R

**AND NOW**, this **23d** day of **May, 2007**, for the reasons stated in the accompanying Memorandum, it is hereby **ORDERED** that Defendant's motion for sanctions (doc. no. 46) is **GRANTED**. Plaintiff's case is **DISMISSED WITH PREJUDICE**.

**IT IS FURTHER ORDERED** that the Clerk of Court shall mark this case **CLOSED**.

**AND IT IS SO ORDERED.**

S/Eduardo C. Robreno  
EDUARDO C. ROBRENO, J.