

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

NATALIE WHITE LESSER and : CIVIL ACTION  
HARVEY LESSER, h/w :  
 :  
v. :  
 :  
CARMENCITA ASERON, a/k/a : NO. 96-8121  
CARMEN ASERON : NO. 97-6070

**MEMORANDUM AND FINAL JUDGMENT**

HUTTON, J.

January 11, 1999

Presently before the Court is Defendant Carmencita Aseron's Motion for Sanctions against Plaintiffs Natalie White Lesser and Harvey Lesser (Docket No. 28), Plaintiff Harvey Lesser's Motion for Sanctions against Plaintiff Natalie Lesser (Docket No. 29), Plaintiff Harvey Lesser's Response to the Defendant's Motion for Sanctions (Docket No. 30), Defendant's Response to Motion for Sanctions of Plaintiff Harvey Lesser (Docket No. 31) and Plaintiff Harvey Lesser's Memorandum of Law in Support of Motion for Sanctions against Plaintiff Natalie Lesser (Docket No. 32). For the foregoing reasons, the Plaintiffs' case is dismissed.

**I. BACKGROUND**

Natalie White Lesser and Harvey Lesser ("Plaintiffs" or the "Lessers") initiated the instant action by filing a complaint against Carmencita Aseron ("Defendant" or "Aseron") on October 17,

1996, in the Court of Common Pleas of Philadelphia County. On September 26, 1997, the Plaintiffs filed suit against Nordstrom, Inc. ("Nordstrom") in the United States District Court for the Eastern District of Pennsylvania. After the Plaintiffs filed suit against Nordstrom in the Eastern District and removed their suit against Aseron there as well, this Court consolidated the Plaintiffs' suits against Aseron and Nordstrom. On August 13, 1998, this Court granted Nordstrom's motion for Summary Judgment and ordered all claims against Defendant Nordstrom, Inc. dismissed with prejudice.

In their complaint, the Plaintiffs claim that Aseron, an employee of Nordstrom, while driving home from work negligently caused a car crash with the Plaintiffs resulting in personal injury to the Plaintiffs. In their Complaint, Natalie White Lesser has asserted claims for serious personal injury, including damages for psychological problems and injuries to her head. Harvey Lesser, on the other hand, does not allege to have suffered any serious physical injury from the accident. Rather, Harvey Lesser claims consortium damages and a worsening of his pre-existing depression brought on by his reaction to the claimed injuries to his wife, Natalie White Lesser, his co-plaintiff.

On October 30, 1998, this Court entered an Order compelling the Plaintiffs serve on defense counsel "each and every document responsive to Defendant's Request for Production within twenty (20)

days of the date of this Order.”<sup>1</sup> The Defendant alleges that the Plaintiffs have not complied with that Order. Neither plaintiff argues to the contrary. On November 25, 1998, Aseron filed a Motion for Sanctions against the Plaintiffs requesting this Court to dismiss the Plaintiffs’ action. On November 30, 1998, Harvey Lesser filed a Motion for Sanctions against co-Plaintiff, Natalie White Lesser, moving this Court to preclude Natalie White Lesser from offering any evidence or testimony regarding her injuries and damages in this case. On November 30, 1998, Harvey Lesser also filed a Response to the Defendant’s Motion to Dismiss the Plaintiffs’ Case, where he joins in the motion of Aseron “for dismissal of the Plaintiffs’ case as to Natalie White Lesser only.” On December 3, 1998, the Defendant filed her response to Harvey Lesser’s Motion for Sanctions. Harvey Lesser filed his Memorandum of Law in Support of the Motion for Sanctions on December 17, 1998.

## **II. DISCUSSION**

Rule 37(d) empowers the Court to impose sanctions upon parties who fail to attend a properly noticed deposition, to serve answers to interrogatories, or to respond to requests for production of documents. See Fed. R. Civ. P. 37(d) (1994). Indeed, the Court may dismiss the action for such failures. Fed. R. Civ. P. 37(d);

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<sup>1</sup>Defendant’s Motion was considered “unopposed.” On October 28, 1998, Plaintiff Harvey Lesser filed a response to the Defendant’s motion, wherein he stated that he did not oppose the Defendant’s Motion. Furthermore, Plaintiff Natalie White Lesser did not file a response to the Defendant’s Motion.

Fed. R. Civ. P. 37(b)(2)(C); Hicks v. Feeney, 850 F.2d 152, 155 (3d Cir. 1988), cert. denied, 488 U.S. 1005 (1989). Whether to dismiss a case for failure to prosecute or abide by court orders is a matter of discretion for the trial court. Curtis T. Bedwell & Sons, Inc. v. International Fidelity Ins. Co., 843 F.2d 683, 691 (3d Cir. 1988) (citing National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam)). Nevertheless, "[d]ismissal is a drastic sanction and should be reserved for those cases where there is a clear record of delay or contumacious conduct by the plaintiff." Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 866 (3d Cir. 1984).

In exercising its discretion under Rule 37(d), the Court must employ the balancing test set forth in Poulis. Specifically, the Court must weigh the following six factors: (1) the extent of the party's personal responsibility; (2) prejudice to the adversary; (3) whether there has been a history of dilatoriness in the case; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of alternative sanctions; and (6) the meritoriousness of the claim or defense. Id. at 867-68.

#### **A. Plaintiff Natalie White Lesser's Case**

On every factor, dismissal is warranted.<sup>2</sup> First, Natalie

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<sup>2</sup>Moreover, as of the date of this Order, Natalie White Lesser has not filed a response to the Defendant's Motion. Thus, the Court treats the motion as an uncontested pursuant to Rule 7.1(c) of the Local Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania. E.D. Pa. R. Civ. P. 7.1(c). Rule 7.1(c) states that, except for summary judgment

White Lesser was served with the discovery requests. Therefore, she is personally responsible for the failure to produce the requested discovery materials. Second, the record evidences a history of dilatoriness. Despite repeated efforts by the Defendant, Natalie White Lesser has ignored Aseron's requests for production and this Court's Order to Compel Discovery. Indeed, Natalie White Lesser did not file a response to the Defendant's Motion to Compel and has even failed to respond to the instant motion. These first two factors strongly indicate the third factor as well--that Natalie White Lesser's conduct has been willing or in bad faith.

The remaining factors also weigh heavily in favor of dismissal. The Defendant is effectively precluded from completing discovery and is therefore hindered from mounting any defense to Plaintiffs' claims. Defendant has repeatedly stated that she intends to pursue the defense theory that the Plaintiffs' claims are for injuries suffered in an earlier motor vehicle accident.<sup>3</sup> The Plaintiffs' failure to comply with the Court's Order makes the

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motions, "any party opposing the motion shall serve a brief in opposition, together with such answer or other response which may be appropriate, within fourteen (14) days after service of the motion and supporting brief. In the absence of a timely response, the motion may be granted as uncontested . . . ." Id.

Harvey Lesser also joins in the Defendant's motion for dismissal of the Plaintiffs' claims as to his wife's claim. (See Resp. of Third-Party Def. at 1.)

<sup>3</sup>In his Motion for Sanctions, Harvey Lesser also avers that Natalie White Lesser was involved in a motor vehicle accident in 1993, in which she sustained similar injuries. (See Mot. for Sanctions ¶ 3-4.)

defense of the action impossible.

Finally, it appears that other sanctions would prove ineffective. If this Court were to preclude the Plaintiffs from presenting any medical evidence and from contesting any claim, testimony, or documentation presented by Aseron regarding the Plaintiffs' medical condition, the trial would be entirely pointless. Plaintiffs may not dictate the outcome of the case by choosing not to provide necessary information or using more frivolous motions to exhaust this Court's resources and patience. Dismissal of Natalie White Lesser's case is the only proper sanction.

**B. Plaintiff Harvey Lesser's Case**

The defendant has adequately cited behavior by Plaintiff Harvey Lesser that tips the Poulis factors in favor of dismissal. In the present motion, the defendants point to the Plaintiffs' failure to produce mandatory discovery. The Defendant seeks the medical records of Natalie White Lesser, of which Harvey Lesser is not authorized to release without his wife's consent. Consequently, Harvey Lesser bears no personal responsibility for the failure to produce such documents. Thus, this Court can not find that Harvey Lesser has engaged in dilatory behavior or that his conduct has been willing or in bad faith.

Nonetheless, the remaining factors weigh heavily in favor of dismissal. As stated above, Aseron is effectively precluded from

mounting her defense that the Plaintiffs' injuries were caused by a previous car accident. In his Motion for Sanctions, Harvey Lesser also avers that Natalie White Lesser was involved in a motor vehicle accident in 1993, in which she sustained similar injuries. (See Mot. for Sanctions ¶ 3-4.) He admits that a significant issue in this case is the nature and extent of the injuries sustained by Natalie White Lesser in the instant accident and the relationship between any present complaints and the present accident as well as the 1993 accident. (Id.) Furthermore, it appears that other sanctions would prove ineffective. If this Court were to preclude Harvey Lesser from presenting any medical evidence and from contesting any claim, testimony, or documentation presented by Aseron regarding Natalie White Lesser's medical condition, the trial would be entirely pointless.<sup>4</sup> Harvey Lesser's claim for damages is dependent on the claim of his wife, for although he was in the vehicle, he did not sustain any physical injury requiring medical attention. Rather he claims consortium damages and a worsening of his pre-existing depression brought on by his reaction to the claimed injuries to his wife, Natalie White Lesser, his co-plaintiff. Dismissal of Harvey Lesser's case is therefore the only

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<sup>4</sup>In his Motion for Sanctions Harvey Lesser moves the Court to preclude her "from offering any evidence or testimony regarding her injuries and damages in this case." (Mot. for Sanctions at 3.) Harvey Lesser alleges that a representative of his scheduled with counsel for Natalie White Lesser three medical examinations with the following physicians: Dr. Bertram Weiss, a neuropsychologist, Dr. Michael Partnow, a neurologist, and Dr. Wasdon Holl, a psychiatrist. Despite repeated attempts to reschedule appointments, Harvey Lesser alleges that Natalie White Lesser failed to appear for any examinations and gave no reason for the failure. (Id. at 2-3.)

proper sanction.

### **III. CONCLUSION**

For the foregoing reasons, the Court finds that the extreme sanction of dismissal is the only proper sanction.

This Court's Final Judgment follows.

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CARMENCITA ASERON, a/k/a : NO. 96-8121  
CARMEN ASERON : NO. 97-6070

**FINAL JUDGMENT**

AND NOW, this 11th day of January, 1998, upon consideration of Defendant Carmencita Aseron's Motion for Sanctions against Plaintiffs Natalie White Lesser and Harvey Lesser (Docket No. 28), Plaintiff Harvey Lesser's Motion for Sanctions against Plaintiff Natalie Lesser (Docket No. 29), Plaintiff Harvey Lesser's Response to the Defendant's Motion for Sanctions (Docket No. 30), Defendant's Response to Motion for Sanctions of Plaintiff Harvey Lesser (Docket No. 31) and Plaintiff Harvey Lesser's Memorandum of Law in Support of Motion for Sanctions against Plaintiff Natalie Lesser (Docket No. 32), IT IS HEREBY ORDERED that Defendant's Motion for Dismissal is **GRANTED**.

IT IS FURTHER ORDERED THAT **JUDGMENT** is entered in **FAVOR** of the Defendant Carmencita Aseron and **AGAINST** the Plaintiffs Natalie White Lesser and Harvey Lesser.

BY THE COURT:

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HERBERT J. HUTTON, J.