

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BETHANY S. IRBY,)	
)	
Plaintiff,)	
)	
v.)	
)	No. 14-cv-2933-SHM-tmp
SELECT PORTFOLIO SERVICING,)	
INC. ,)	
)	
Defendant.)	
)	

REPORT AND RECOMMENDATION

Before the court is defendant Select Portfolio Servicing, Inc.'s ("SPS") Motion to Dismiss, filed on July 7, 2015. (ECF No. 26.) Plaintiff Bethany Irby did not file a response in opposition to SPS's Motion to Dismiss. Based on the entire record, the court submits the following proposed findings of fact and conclusions of law, and recommends that defendant's Motion to Dismiss be granted.

I. PROPOSED FINDINGS OF FACT

In this case, Irby seeks to prevent SPS from foreclosing on real property in which she resides and to recover damages relating to SPS's conduct with regards to the property. On January 20, 2015, SPS served Irby with its first set of discovery requests. Irby, however, did not provide timely

responses to these requests. As a result, on February 25 and again on March 11, counsel for SPS attempted to contact counsel for Irby regarding the late discovery. On March 12, counsel for SPS consulted with Irby's counsel, at which time Irby's counsel requested until March 27 to provide discovery responses.

Due to Irby's failure to cooperate in discovery, SPS filed a motion to compel discovery on March 12, 2015. Irby never responded to the motion, and as a result, the court granted the motion on March 31. When Irby failed to comply with the order on SPS's motion to compel, SPS filed a "Notice of Plaintiff's Failure to Comply with Discovery Order dated March 31, 2015" on April 27. On May 22, the court issued an order providing Irby with an additional eleven days to comply with the March 31 order and ordering her to show cause why sanctions should not be imposed. Irby did not produce discovery responses or respond to the show cause order within the additional eleven-day deadline.

On June 9, 2015, Irby filed a motion requesting that the deadline to provide her discovery responses and to respond to the show cause order be extended until June 15. The court granted this request the same day. On June 15, Irby requested that the deadline to provide discovery responses be extended until June 22. The court again granted this request, but further ordered that a joint status report be filed by June 25 indicating whether Irby had provided responses. Irby failed to

provide discovery responses by June 22. On June 25, the parties filed a joint status report noting Irby's failure to provide the responses.

On July 7, SPS filed the present Motion to Dismiss. SPS argues that Irby's claim should be dismissed under Federal Rules of Civil Procedure 41 and 37. SPS also states that dismissal is warranted because the court previously warned Irby on several occasions that sanctions, including dismissal with prejudice, could be imposed if she failed to produce the documents requested. To date, Irby has not filed a response to the Motion to Dismiss.

II. PROPOSED CONCLUSIONS OF LAW

Rule 41(b) provides for dismissal of actions "[f]or failure of the plaintiff to prosecute or to comply with [the Federal Rules of Civil Procedure] or any other order of the court" Fed. R. Civ. P. 41(b). A Rule 41(b) dismissal "operates as an adjudication on the merits." Id. The authority to dismiss a case under Rule 41(b) "is available to the district court as a tool to effect management of its docket and avoidance of unnecessary burdens on the tax-supported courts and opposing parties." Knoll v. Am. Tel. & Tel. Co., 176 F.3d 359, 363 (6th Cir. 1999) (citations and internal quotations omitted). District courts are permitted substantial discretion in determining whether dismissal is appropriate. Id.

Additionally, Federal Rule of Civil Procedure 37 empowers the court, upon motion, to sanction a party for failing to cooperate in discovery. See Fed. R. Civ. P. 37(b)(2). The rule provides in part as follows:

(b)(2) Sanctions in the District Where the Action is Pending. (A) For Not Obeying a Discovery Order. If a party . . . fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following: . . . (v) dismissing the action or proceeding in whole or in part; . . .

Id. Thus, Rule 37(b)(2)(A) expressly authorizes the court to dismiss an action for a party's failure to comply with a court order compelling discovery. Id.; see also Tech. Recycling Corp. v. City of Taylor, 186 F. App'x 624, 640 (6th Cir. 2006) (affirming order of dismissal pursuant to Rule 37(b)(2)); Bullard v. Roadway Express, 3 F. App'x 418, (6th Cir. 2001) ("When dismissal is based upon the failure to provide discovery, the Supreme Court has indicated that dismissal is properly brought under Fed. R. Civ. P. 37(b).") (citing Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 210 (1958)).

The Sixth Circuit has articulated four factors to be addressed by the court in assessing whether dismissal for failure to prosecute is warranted:

The first factor is whether the party's failure to cooperate in discovery is due to willfulness, bad

faith, or fault; the second factor is whether the adversary was prejudiced by the party's failure to cooperate in discovery; the third factor is whether the party was warned that failure to cooperate could lead to the sanction; and the fourth factor in regard to a dismissal is whether less drastic sanctions were first imposed or considered.

Freeland v. Amigo, 103 F.3d 1271, 1277 (6th Cir. 1997); see also Mulbah v. Detroit Bd. of Educ., 261 F.3d 586, 589 (6th Cir. 2001). Prior notice to the party that his or her failure to cooperate may result in dismissal is important to support that sanction. See Vinci v. Consol. Rail Corp., 927 F.2d 287, 288 (6th Cir. 1991).

With regard to the first factor, the court finds that Irby's repeated failures to provide discovery, comply with the court's orders, and file responses to SPS's motions have been willful and in bad faith. With regard to the second factor, "defendant[] cannot be expected to defend an action which plaintiff has apparently abandoned, not to mention the investment of time and resources expended to defend this case." White v. Bouchard, No. 05-73718, 2008 WL 2216281, at *5 (E.D. Mich. May 27, 2008); see also Mohammed v. Fed. Home Loan Mortg. Corp., No. 14-CV-10039, 2014 WL 5817288, at *2 n.2 (E.D. Mich. Nov. 10, 2014). SPS has suffered prejudice as it has incurred the cost of filing multiple motions with the court to compel Irby to respond to its discovery requests. Irby was warned that her case would be dismissed if she failed to comply with the

court's orders or to cooperate in discovery, and under the circumstances, the court submits that no sanction short of dismissal will cure her failure to prosecute this matter. Therefore, the court recommends that Irby's complaint be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(b) and 37(b)(2). See Lee v. Glaxosmithkline, LLC, No. 2:12-cv-02393-JTF-cgc, 2014 WL 691192, at *2 (W.D. Tenn. Feb. 21, 2014) (dismissing for failure to prosecute because plaintiff had "failed to comply with several orders of the Court including . . . to respond to an Order to Show Cause"); Marchand v. Smith & Nephew, No. 11-2621-STA-cgc, 2013 WL 6780559, at *3 (W.D. Tenn. Dec. 19, 2013) (dismissing case for failure to prosecute when plaintiff failed to respond to discovery requests); McGuire v. Mortg. Elec. Registration Sys., No. 09-14917, 2010 WL 4386970, at *2 (E.D. Mich. Sept. 29, 2010) (dismissing for failure to prosecute after plaintiffs repeatedly failed to respond to orders to show cause).

Respectfully submitted,

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s/ Tu M. Pham

TU M. PHAM
United States Magistrate Judge

August 11, 2015

Date

NOTICE

WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THIS REPORT AND RECOMMENDED DISPOSITION, ANY PARTY MAY SERVE AND FILE SPECIFIC WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS. ANY PARTY MAY RESPOND TO ANOTHER PARTY'S OBJECTIONS WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(2); L.R. 72.1(g)(2). FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.