

FILED BY *g* D.C.

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

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ROBERT R. DI TROLIO  
CLERK, U.S. DIST. CT.  
W.D. OF TN, MEMPHIS

AMERIGO V. STEVENSON, )  
)  
Plaintiff, )  
)  
v. )  
)  
RAYLOC, )  
)  
Defendant. )

03-2889 M1/P

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO DISMISS AND  
MOTION FOR SANCTIONS

Before the Court is Defendant Rayloc's Motion to Dismiss and Motion for Sanctions, filed on November 15, 2004 (Dkt #33).<sup>1</sup> In its motion, Rayloc contends that Plaintiff Amerigo V. Stevenson has continued to abuse the discovery process by failing to appear for his own deposition, which was supposed to take place on November 10, 2004. Rayloc asks that the Court sanction Stevenson by dismissing his complaint with prejudice and awarding Rayloc its attorney's fees and expenses incurred as a result of appearing for the November 10 deposition and filing the present motion to dismiss.

<sup>1</sup>Defendant's supporting memorandum is erroneously titled "Defendant's Memorandum In Support of Its Second Motion to Compel and Motion for Sanctions." (Dkt. #34)

The motion was referred to the Magistrate Judge for a report and recommendation. For the reasons below, it is submitted that Stevenson willfully failed to appear for his deposition on November 10, despite being ordered by the Court to appear. It is recommended that Rayloc's motion to dismiss be granted, and furthermore, that Stevenson be ordered to pay Rayloc's attorney's fees and expenses associated with the filing of this motion.

#### I. PROPOSED FINDINGS OF FACT

The discovery problems encountered by Rayloc during this litigation was previously described by the Court in its first report and recommendation, which was entered on October 26, 2004 and adopted by the District Judge on December 28, 2004.

In summary, on June 10, 2004, the Court granted Rayloc's first Motion to Compel. In that order, the Court warned that "Plaintiff is cautioned that future failure to timely comply with discovery or this Court's order may result in dismissal of this case with prejudice," and "Plaintiff is warned that future failure to participate in discovery may result in sanctions." Order Granting Defendant's Motion to Compel (dkt #22). Stevenson was instructed to produce the requested documents within eleven days from the date of the order. Rayloc received some, but not all, of the discovery documents, and after unsuccessfully trying to contact Stevenson on multiple occasions, Rayloc filed a Second Motion to Compel on September 13, 2004.

On October 19, 2004, the Court held a telephonic hearing with the parties to address Rayloc's second motion to compel. At the conclusion of the hearing, the parties discussed Stevenson's upcoming deposition.<sup>2</sup> Rayloc reiterated to Stevenson that, as stated in the notice, the deposition would take place on November 10, 2004 at 9:00 a.m. at local counsel's law office in Memphis, Tennessee.<sup>3</sup> Stevenson expressed concern to the Court that, because he was pro se, he would not be able to effectively defend himself at his own deposition. At that time, the Court instructed Stevenson that he "must appear for his deposition" on November 10, regardless of whether or not he had counsel by that time. Stevenson acknowledged to the Court that he understood.

Following that hearing, on October 26, 2004, the Court entered its report and recommendation on Rayloc's second motion to compel. The Court concluded that Stevenson failed to timely provide discovery to Rayloc, and did not fully comply with this Court's June 10 order compelling production of documents, until September 2004. The Court, however, denied Rayloc's request to dismiss the complaint, but instead sanctioned Stevenson by awarding Rayloc its attorney's fees in the reduced amount of \$100.00. In that report,

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<sup>2</sup>Stevenson received the deposition notice on October 14, 2004 (Decl. of Patricia Simon ¶ 6; Ex. B to Mot. to Dismiss).

<sup>3</sup>Rayloc stated at the hearing that this is the same law office location where Stevenson was deposed in his first lawsuit against Rayloc, Case No. 01-2813.

the Court stated that "Plaintiff Stevenson is again warned that failure to timely comply with this Court's orders will result in dismissal of his complaint with prejudice." As noted above, the District Judge adopted this report, as neither party filed any objections.

Despite receiving the deposition notice on October 14, and despite the Court's order at the October 19 hearing requiring Stevenson to appear for his deposition, Stevenson did not show up for his deposition on November 10, and made no attempts to contact Rayloc to explain why he was not going to appear. Counsel for Rayloc, Rayloc's corporate representative, and a court reporter appeared at local counsel's office for the deposition.

Based on Stevenson's failure to appear, Rayloc filed its motion to dismiss and motion for sanctions on November 15, 2004. Pursuant to Local Rule 7.2(a)(2), Stevenson's response was to be filed within fifteen days after service of the motion. Stevenson did not respond to the motion. As a result, the Court entered an Order to Show Cause on December 13, 2004, instructing Stevenson to show cause by December 22, 2004, why Rayloc's motion to dismiss should not be granted. The Court informed Stevenson that "failure to respond to this show cause order may result in dismissal of the action without further notice from the court." To date, Stevenson has not responded to the show cause order.

## II. PROPOSED CONCLUSIONS OF LAW

Rayloc requests that the Court dismiss the complaint with prejudice and award attorney's fees and expenses incurred as a result of having to appear for the November 10 deposition and having to file this motion. Federal Rule of Civil Procedure 37 sets forth various sanctions that may be imposed against a party who abuses the discovery process, and more specifically, who fails to appear for his deposition. Rule 37(d) provides that,

If a party . . . fails (1) 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. . . . In lieu of or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(d). Subparagraph (C) of this rule provides that the Court may issue an order "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); see also Bank One of Cleveland, N.A. v. Abbe, 916 F.2d 1067, 1073 (6th Cir. 1990). "The use of dismissal as a sanction for failing to comply with discovery has been upheld because it accomplishes the dual purpose of punishing the offending party and deterring similar litigants from such misconduct in the future." Bass v. Jostens,

Inc., 71 F.3d 237, 241 (6th Cir. 1995).

In deciding whether to dismiss a lawsuit as a sanction under Rule 37, this Court considers several factors: (1) whether the party's failure to cooperate in discovery is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the party's failure to cooperate in discovery; (3) whether the party was warned that failure to cooperate could lead to the sanction; and (4) whether less drastic sanctions were first imposed or considered. Freeland v. Amigo, 103 F.3d 1271, 1277 (6th Cir. 1997) (citing Regional Refuse Systems, Inc. v. Inland Reclamation Co., 842 F.2d 150, 154-55 (6th Cir. 1988)); Bass, 71 F.3d at 241 (citing Bank One of Cleveland, 916 F.2d at 1073). The sanction of dismissal should be used as a last resort. Beil v. Lakewood Eng'g and Mfg. Co., 15 F.3d 546, 552 (6th Cir. 1994).

The Court submits that Stevenson willfully failed to appear for his deposition. He received notice of the deposition on October 14, 2004, which informed him that his deposition would take place on November 10, 2004, at 9:00 a.m. at Rayloc's local counsel's law office in Memphis. At the October 19 hearing, his deposition was discussed, and the Court specifically instructed him to appear for his November 10 deposition. Despite this order, Stevenson failed to appear for his deposition, without any explanation. Moreover, Stevenson did not respond to Rayloc's motion to dismiss, and even after the Court ordered him to show

cause by December 22 why the motion to dismiss should not be granted, Stevenson continued to be nonresponsive.

Second, Rayloc has been prejudiced by Stevenson's nonappearance. The discovery period has closed, and currently, trial is set for February 14, 2005. Rayloc's counsel had to prepare for the deposition, travel to Memphis, and hire a court reporter for a deposition that never occurred. Third, the Court has warned Stevenson on several prior occasions that his failure to timely comply with discovery or the Court's orders may result in dismissal of his case. In the Court's June 10 order granting Rayloc's motion to compel, the Court denied Rayloc's request for attorney's fees, but gave Stevenson a warning. In the Court's December 28 report and recommendation, the Court recommended denying Rayloc's request to dismiss the lawsuit, and again warned Stevenson. When Stevenson failed to respond to Rayloc's motion to dismiss, plaintiff was once again warned by the Court in its order to show cause.

Fourth, the Court has considered (and, in fact, has imposed) less drastic sanctions for Stevenson's discovery abuses. However, Stevenson has repeatedly refused to timely comply with discovery, and despite the Court's instructions to him at the October 19 hearing and in the Court's show cause order, he has disobeyed the orders of the Court. It is submitted that, at this point, dismissal of the complaint with prejudice is the appropriate sanction.

Finally, the Court submits that under Fed. R. Civ. P. 37(d),

the additional sanction of reasonable attorney's fees and expenses is appropriate. Stevenson's nonappearance at his deposition was not substantially justified. The Court submits, however, that to avoid making an award of expenses unjust in this particular case, the attorney's fees award should be limited only to the fees associated with the filing of the motion to dismiss. Stevenson's failure to appear at his deposition - and the travel and court reporter costs associated with that nonevent - should be sanctioned by the Court through an order of dismissal.

**III. RECOMMENDATION**

It is recommended that the complaint be dismissed with prejudice. It is further recommended that Stevenson pay Rayloc's attorney's fees and expenses associated with the filing of the motion to dismiss. Counsel for Rayloc shall file with the Court within seven (7) days from the date of this report and recommendation an affidavit setting forth in detail its attorney's fees and expenses associated with the filing of the motion to dismiss.

Respectfully submitted,

  
\_\_\_\_\_  
TU M. PHAM  
United States Magistrate Judge

1/4/05  
Date



NOTICE

IF EITHER OR BOTH PARTIES HAVE ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT AND RECOMMENDATION, THE PARTIES MUST FILE THEIR OBJECTIONS WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT AND RECOMMENDATION. 28 U.S.C. §636(b)(1)(C). FAILURE TO FILE OBJECTIONS WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.



## Notice of Distribution

This notice confirms a copy of the document docketed as number 42 in case 2:03-CV-02889 was distributed by fax, mail, or direct printing on January 4, 2005 to the parties listed.

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