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United States District Court, D. Kansas.

Saul ZAPATA, et al., Plaintiffs,  
v.  
IBP, INC., Defendant.

No. Civ.A. 93-2366-EEO.  
|  
May 7, 1998.

#### Attorneys and Law Firms

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P. John Brady, R Lawrence Ward, James C Sullivan, John L. Hampton, (See above), for Gustavo Adolfo Vasquez, individually and on behalf of others similarly situated, plaintiff.

P. John Brady, R Lawrence Ward, James C Sullivan, John L. Hampton, (See above), for Francisco Ponce, individually and on behalf of others similarly situated, plaintiff.

P. John Brady, R Lawrence Ward, James C Sullivan, John L. Hampton, (See above), for Antonio Martinez, individually and on behalf of others similarly situated, plaintiff.

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#### MEMORANDUM AND ORDER

OCONNOR, J.

\*1 This matter is before the court on the motion of defendant IBP, Inc. ("IBP") to dismiss with prejudice all claims of plaintiff Antonio Ponce due to his repeated failure to appear for court-ordered depositions (Doc. # 617). Plaintiff's counsel has filed a response, and IBP has filed a reply. The matter is now ready for ruling. For the reasons set forth below, defendant's motion is granted.

Antonio Ponce has failed to appear for court-ordered, properly noticed depositions on two occasions. The first

instance occurred after we denied plaintiff's initial motion for class certification. On December 27, 1996, Magistrate Judge Rushfelt ordered that plaintiffs could be re-deposed, in light of the fact that plaintiffs' original depositions were limited to issues regarding class certification. It is undisputed that Ponce failed to appear on the date chosen by his attorneys, or on any other date within the time period allowed for discovery.

On March 31, 1997, IBP filed a motion seeking the sanction of dismissal with prejudice against Ponce. The matter was referred to the magistrate judge, who recommended a lesser sanction than dismissal. This court adopted the recommendation of the magistrate judge. We imposed a monetary sanction and ordered Ponce to appear for his deposition within thirty days of entry of the order. We also specifically cautioned plaintiffs that "any further failure to appear or to comply with the orders of this court, or with discovery, may result in imposition of harsher sanctions, including dismissal of their action." *Zapata v. IBP, Inc.*, No. Civ.A. 93-2366-EEO, 1997 WL 764513, at \*3 (D.Kan. Nov.3, 1997).

On November 28, 1997, Ponce filed a motion for protective order, seeking an additional extension of time to appear for his deposition. In ruling on the motion, we granted plaintiff "one final extension within which to complete [his] deposition[ ]." *Zapata v. IBP, Inc.*, January 6, 1998 Mem. & Order. We further stated in our order that "the deposition[ ] must be completed by February 20, 1998" and "[n]o further extensions will be granted." *Id.* IBP now represents, and the court file reflects, that IBP served a notice for Ponce's deposition to take place on February 16, 1998. It is undisputed that Ponce failed to appear at the specified time and location, and that he never appeared at any other time during the period allotted by the court.

IBP now contends that Ponce's repeated failure to appear for his deposition justifies imposition of the "last resort" sanction of dismissal. "Because dismissal with prejudice 'defeats altogether a litigant's right to access to the courts,' it should be used as 'a weapon of last, rather than first, resort.'" *Meade v. Grubbs*, 841 F.2d 1512, 1520 n. 6 (10th Cir.1988) (citations omitted). Before dismissing an action pursuant to 37(b)(2)(C), a court should consider a number of factors, including: (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions. *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir.1992). See also *Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir.1993). "These factors do not constitute a rigid

test; rather, they represent criteria for the district court to consider prior to imposing dismissal as a sanction." *Ehrenhaus*, 965 F.2d at 921. "Only when the aggravating factors outweigh the judicial system's strong predisposition to resolve cases on their merits is dismissal an appropriate sanction." *Meade*, 841 F.2d at 1521 n. 7 (citations omitted).

\*2 IBP argues that each of the *Ehrenhaus* factors has been met in this case. First, IBP asserts it has been prejudiced, in time and expense, by having to correspond and confer with plaintiff's counsel "about repeated rescheduling, in going to the expense of noticing, appearing at, and arranging for a court reporter to appear for the properly noticed depositions, and in preparing this motion." IBP's Brief at 3. The Tenth Circuit has recognized that "[t]he increase in time and attorney's fees occasioned by plaintiffs' dilatory behavior" can constitute prejudice to defendant. See *Killen v. Reed & Carnick*, 105 F.3d 669, 1997 WL 8866 at —1 (10th Cir.1997) (citing *Ehrenhaus* for its recognition that delay and mounting attorney's fees can constitute prejudice).

Next, IBP asserts that Ponce's failure to appear at court-ordered depositions "*a fortiori* interferes with the judicial process," and thus satisfies the second *Ehrenhaus* factor. IBP's Brief at 4. Under the circumstances, the court agrees. Ponce twice has failed to comply with direct court orders regarding discovery. As to the third factor, IBP maintains that Ponce is "culpable," because his failure to remain in communication with his attorneys and his failure to respond to all efforts to locate him demonstrate his lack of interest in this case. IBP has made a sufficient showing of "culpability" to satisfy this factor.

The fourth *Ehrenhaus* factor is also clearly met, because plaintiff was specifically warned in our November 3, 1997, order that failure to appear at his deposition could result in dismissal of his case. With regard to the fifth factor, the efficacy of lesser sanctions, IBP contends that in light of plaintiff's history of non-cooperation in discovery, dismissal is the only appropriate sanction. We must agree. The court has previously issued monetary sanctions and warnings to Ponce that failure to heed the court's orders would result in harsher sanctions. These lesser sanctions have not compelled Ponce's compliance with our discovery orders. We find, based on the facts and circumstances of this case, that the aggravating factors outlined above outweigh the judicial system's strong predisposition to resolve cases on their merits. Moreover, we conclude that dismissal with prejudice is appropriate in this case, given plaintiff's apparent failure to communicate with his lawyers in over a year and his evident indifference to continued prosecution of his lawsuit. Accordingly, IBP's motion to dismiss, with

prejudice, all claims of plaintiff Antonio Ponce should be and hereby is granted.

IT IS THEREFORE ORDERED that defendant IBP's motion to dismiss, with prejudice, all claims of plaintiff Antonio Ponce due to his repeated failure to appear for court-ordered depositions (Doc. # 617) is granted.

**All Citations**

Not Reported in F.Supp., 1998 WL 289344