FILED

JUL 11 2002

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
vs.	)	**CIVIL ACTION NO. SA-00-CA-1081-FB**
FERASA, INC. d/b/a GAUCHOS RESTAURANT,	)	
Defendant.	)	

ORDER STRIKING DEFENSIVE PLEADINGS AND ENTRY OF DEFAULT JUDGMENT

The Court considered the status of the above-styled and numbered cause. The Court has this date granted the motion of Michael J. Hengst, Esquire, to withdraw as attorney for defendant Ferasa, Inc. d/b/a Gauchos Restaurant ("Ferasa") due to Ferasa's failure to cooperate in the defense of this matter, including an intentional disregard of the Court's Scheduling Recommendations orders and the discovery process. After careful consideration, the Court is of the opinion the defensive pleadings filed in this case should be stricken and a default judgment should be entered in favor of plaintiff and against defendant in the amount of $100,000, plus costs of court.

In his motion to withdraw, Mr. Hengst represents to the Court that despite his best efforts, Ferasa has failed to assist its counsel in the defense of this lawsuit. Mr. Hengst states:

> This motion is based on good cause . . . . Defendant's failure to [assist] is evidenced by the following: it has failed to cooperate with counsel; it has failed to assist counsel in responding to Plaintiff's discovery requests; it has not responded to letters from the undersigned counsel; and it has failed to pay the attorney's fees and expenses charged by the undersigned counsel. The undersigned counsel has had no contract with Defendant since February 20, 2002.

26

> On January 28, 2002, Plaintiff served Plaintiff's Second Set of Interrogatories upon Defendant's counsel. The undersigned forwarded the requests to Defendant and requested assistance in completing the requests. Defendant has not responded to the undersigned's request to sign the Interrogatories.

"Exhibit A" attached to the motion reflects that Ferasa was served with a copy of the motion and notified "if you are opposed to this Motion you must file a response with the Court." Ferasa did not respond to the motion nor is there any indication it responded to plaintiff's interrogatories, although the extended discovery deadline has now passed.

This Court finds good cause to strike the defensive pleadings of, and enter a default judgment against, Ferasa. A Court may impose sanctions for a party's failure to answer interrogatories and failure to comply with scheduling orders. See FED. R. CIV. P. 37(b)(2). This includes the striking of pleadings and the entry of a default judgment against the party which fails to comply. Id. 37(b)(2)(C). A finding of such extreme sanctions, however, must be based on evidence of the sanctioned party's willfulness, bad faith or fault in failing to comply with the judicial process. E.E.O.C. v. Troy State Univ., 693 F.2d 1353, 1354 (11th Cir. 1982). A party's simple negligence or other action grounded in the misunderstanding of a discovery order does not justify the remedy of dismissal. Marshall v. Segona, 621 F.2d 763, 767 (5thCir. 1980).

The Fifth Circuit has enumerated four factors which a district court should consider before striking defensive pleadings and entering a default judgment: (1) whether the violation was willful or in bad faith rather than simply due to the inability to comply; (2) whether less drastic sanctions would effect the deterrent goal of rule 37(b); (3) whether the violation prejudiced the opposing party's trial preparation; and (4) whether the client know of or participated in the violation or simply misunderstood a court order or innocently hired a derelict attorney. Batson v. Neal Spelce Assocs.,

765 F.2d 511, 514 (5th Cir. 1985). Although dismissal and default judgment are "draconian" sanctions which the district court should impose only as a last resort, id. at 515, their use might deter litigants from flouting discovery orders in the future. National Hockey League v. Metro Hockey Club, Inc., 427 U.S. 639, 643 (1976).

As to the first factor, Ferasa failed to communicate with counsel, failed to assist counsel in responding to plaintiff's discovery requests, and failed to explain its behavior in refusing to cooperate with counsel. In addition, Ferasa violated the Court's valid Scheduling Recommendations orders by failing to return the interrogatories so discovery could be completed by the deadline. This conduct appears to be willful and in bad faith or fault, as opposed to simple negligence. It is also true that counsel expressly informed Ferasa it was obligated to sign and date the interrogatories, thereby negating any argument of a misunderstanding on the part of Ferasa of what it was to do pursuant to counsel's request and under the Court's order. Finally, the record contains no evidence of an inability to comply, especially in light of the fact that Ferasa failed to file a response to counsel's assertions demonstrating intentional disregard by Ferasa.

Regarding the second factor, a district court must consider expressly the effectiveness of less severe sanctions. Batson, 765 F.2d at 516. An argument can be made less severe sanctions are warranted in the absence of a formal motion to compel from plaintiff. Although a motion to compel generally precedes the imposition of rule 37(b) sanctions, a formal motion is not always necessary. McLeod, Alexander, Powel & Apffel v. Quarles, 894 F.2d 1482, 1485 (5th Cir. 1990) (quotation omitted). Usually, when a party has received adequate notice that specific discovery proceedings are to occur by a certain date, and the party fails to comply, a court may impose sanctions without a formal motion to compel discovery from the opposing party. Id.. Although no order to compel has

been granted here, Ferasa was on notice from its counsel that the interrogatories must be answered. Additionally, Ferasa did violate an order of the Court requiring that discovery be completed by a date certain.

The Court does not believe a less severe sanction would be effective or serve the best interest of justice in this case. Delay of the trial would not be appropriate as there is no assurance Ferasa would comply with discovery if given additional opportunities. The undisputed record reflects Ferasa was asked numerous times by Mr. Hengst to prepare needed information and to assist in the defense of the case but refused. Nor is there any indication Ferasa would respond promptly and completely given an extension of time. It has already refused to communicate with its counsel since February of this year. Moreover, it now has no legal representation.

Nor is there reason to believe Ferasa would comply with the judicial process if monetary sanctions were levied. Mr. Hengst states that Ferasa has declined to pay him his attorney's fees and expenses incurred to date. Given Ferasa's failure to pay its own attorney, the Court declines to conclude that a monetary fine would instill upon Ferasa a bona fide intent to defend itself against plaintiff's claims. As stated by our sister court:

> Imposing a fine under these circumstances would introduce into litigation a sporting chance theory encouraging parties to withhold vital information from the other side with the hope that the withholding may not be discovered and, if so, that it would only result in a fine.

Batson v. Neal Spelce Assocs., 112 F.R.D. 632, 638 (W.D. Tex. 1986). For the foregoing reasons, the Court concludes the striking of Ferasa's pleadings and the entry of a default judgment is the appropriate remedy over a lesser sanction.

Concerning the third factor, plaintiff was clearly prejudiced. Withholding the interrogatory information presumably precluded plaintiff's timely evaluation of its Ferasa's potential liability. Additionally, absent this information, Ferasa's own counsel could not evaluate settlement possibilities, the potential for summary judgment or otherwise evaluate the potential claim and the costs to be devoted to defense. Moreover, Ferasa's failure to cooperate with its attorney not only denied plaintiff discovery as to relevant, material evidence necessary for trial preparation, it also caused substantial inconvenience to the limited resources of this Court. As Ferasa was informed in the Court Advisory Concerning Docket Status (docket no. 17) issued in this case, precedence must be given to the ever growing criminal docket. The Court therefore relies upon the parties to seek creative ways to resolve their disputes, including mediation, arbitration, summary jury trial, settlement between the parties and stipulations as to facts and submission on legal issues. Ferasa's lack of cooperation necessarily frustrated any resolution of this case as contemplated by the Court's advisory. As the Fifth Circuit has stated:

> [Intentional discovery] delays are a particularly abhorrent feature of today's trial practice. They increase the cost of litigation, to the detriment of the parties enmeshed in it; they are one factor causing disrespect for lawyers and the judicial process; and they fuel the increasing resort to means of non-judicial dispute resolution.

Geiserman v. MacDonald, 893 F.2d 787, 792 (5th Cir. 1990).

As to the final factor, there is no question Ferasa knew of and participated in the violation of the discovery process, as opposed to misunderstanding a Court order or innocently hiring a derelict attorney. To the contrary, the record reflects Ferasa's counsel diligently informed Ferasa of its duty to cooperate and, indeed, repeatedly attempted to get Ferasa to respond to plaintiff's interrogatories. In response, Ferasa broke further communications with counsel. The circumstances

do not justify Ferasa's actions in this instance nor does their conduct persuade the Court that Ferasa misunderstood the judicial process or was innocent in its failure to cooperate.

For the foregoing reasons, the facts have convinced this Court that Ferasa's failure to cooperate with its attorney, failure to respond to discovery and failure comply with the Court's Scheduling Recommendations orders was the result of deliberate and willful misconduct which demonstrates bad faith and caused substantial prejudice to plaintiff. The Court further finds, while the striking of defensive pleadings and entry of default judgment is a harsh remedy, any lesser sanction would not serve the deterrent purposes of rule 37 or the best interests of justice.

IT IS THEREFORE ORDERED that the defensive pleadings filed in the above-styled and numbered cause are STRICKEN from the record and a DEFAULT JUDGMENT is entered in favor of plaintiff and against defendant in the amount of $100,000, plus costs of court. The above-styled and numbered cause is DISMISSED. Motions pending, if any, are dismissed as moot.

It is so ORDERED.

SIGNED this 11th day of July, 2002.

FRED BIERY
UNITED STATES DISTRICT JUDGE