IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

CIVIL ACTION NO. 73 C 1529

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRED C. TRUMP, et. al.,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS

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INTRODUCTORY STATEMENT

The United States has moved this Court for appropriate sanctions pursuant to Rule 37 of the Federal Rules of Civil Procedure because of defendants' continual, unexcused, and almost total failure to make discovery and to comply with the orders of this Court. Defendants have wholly ignored two deadlines - one set by the Federal Rules, a later very generous one agreed to by the parties and ordered by the Court - to answer interrogatories, and have filed neither objections nor any protective motions with respect to them. In spite of continuous efforts by plaintiff to schedule discovery as to accommodate the convenience of defendants' principal counsel, Roy Cohn, Esq., only one abbreviated deposition has been taken to date. Moreover, Donald Trump, president of defendant, disclosed in that deposition that defendants have had the practice of destroying company records to save space, and that he was unaware of any orders to his employees to discontinue this practice since the litigation began or since plaintiff's interrogatories were served on him. Accordingly, plaintiff has been almost totally frustrated in its attempts to conduct this litigation expeditiously in compliance with 42 U.S.C. 3614, and, half a year after the complaint was filed, the suit has gone nowhere.

Defendants' noncompliance as to plaintiff's interrogatories has included, among other things, blithe disregard of this Court's very generous Order of February 5, 1974 granting defendants an unusually long time to answer, and we believe that meaningful sanctions would be appropriate. Nevertheless, courts abhor forfeitures, and we do not press the Court to preclude defendants from defending in the merits without one last chance. Accordingly, we ask the Court to enter an Order barring defendants from asserting any defense with respect to matters which are the subject of unanswered interrogatories unless defendants come into compliance as to all of their discovery obligations immediately.

HISTORY OF THE CASE */

The Complaint in this action was filed on October 15, 1973. On December 12, 1973, after no fewer than three stipulated extensions, defendants filed motions to dismiss and, in the alternative, for a more definite statement. They further asserted a patently frivolous counterclaim against the United States seeking damages in the amount of 100 million dollars on the basis of claims explicitly barred by the Federal Tort Claims Act. On February 5, 1974, defendants' motions were denied and their counterclaim was dismissed.

On November 7, 1973, plaintiff served on defendants, by mail, a set of interrogatories. These interrogatories were neither answered nor objected to within the thirty days prescribed in the Federal Rules

*/ Elyse Goldweber, one of the attorneys for plaintiff, has sworn in the attached affidavit that the history that follows is true.

of Civil Procedure. Instead, they were ignored. On January 21, 1974, after having sought informal compliance pursuant to Local Rule 9(f), the United States served a motion to compel defendants to answer interrogatories. On February 5, 1974, this Court, after disposing of defendants' motions and counterclaims, entered an Order implementing an agreement of the parties as to when various interrogatories were to be propounded and answered. Defendants were directed to propound initial interrogatories to plaintiff on or before February 8, 1974. Plaintiff was directed to answer the interrogatories in 20 days. Finally, defendants were directed to respond to plaintiff's original interrogatories, filed four and a half months earlier on or before April 1, 1974. Plaintiff was reluctant to agree to this unusually generous time frame for defendants to respond to interrogatories which they had previously ignored, but consented nevertheless in the hope that the case would then proceed expeditiously. Unfortunately, this did not happen.

Plaintiff complied fully with its obligations under the foregoing Order and, on February 28, 1974, served detailed answers to defendants' interrogatories which disclosed alleged discrimination at seven of defendants' buildings, */ as well as a number of extra-judicial admissions of a discriminatory policy. Such proof easily meets the standards for relief in cases under 42 U.S.C. 3613. See,

*/ At his deposition, Donald Trump testified that defendants did not own the part of the complex involved in one of the incidents.

e.g. United States v. Pelzer Realty Co., 484 F. 2d 438 (5th Cir. 1973), cert. den. ____ U.S. ____ (April 15, 1974) (refusal to sell to two blacks is a pattern and practice); United States v. Reddoch, P.H. E.O.H. Rptr. Para. 13,569 (Conclusions of Law Nos. 11, 13-15) (S.D. Ala. 1972), aff'd per curiam 467 F. 2d 897 (5th Cir. 1972) (discriminatory instructions and admissions are a pattern and practice); United States v. Gilman, 341 F. Supp. 891 (S.D. N.Y. 1972) (pattern and practice found as to large operator of apartments based on two incidents at a single building). April 1 passed, however, with not a word from defendants in response to plaintiff's interrogatories.

On April 11, 1974, pursuant to Local Rule 9(f), Elyse S. Goldweber, an attorney for the United States, telephoned Jeffrey Shuman, an attorney for the defendants to discuss defendants' failure to respond to plaintiff's interrogatories. Mr. Shuman informed her that the defendants were not in the process of answering the interrogatories and were unsure of when they would begin answering them. He stated that they might possibly do so some time in May, 1974. As of the date of this motion, plaintiff has not received any response to its interrogatories, and no motion for a protective order has been filed.

Plaintiff's difficulty in securing answers to its interrogatories has been compounded by its inability to bring the defendants, their agents, and their counsel, into any room for any length of time sufficient to take appropriate depositions. After extensive efforts

by plaintiff to accommodate counsel for defendants, who first agreed on and then cancelled depositions which were scheduled for March 22 and 25, 1974, an agreement was reached to depose both Donald and Fred Trump, the two named defendants, on March 28 and 29. Two Departmental attorneys travelled to New York on March 27, but learned on arrival that Mr. Cohn, the lead counsel for defendants, would be available only for about two hours on the morning of March 28th and for about two hours on the afternoon of the 29th. One abbreviated deposition was taken during that time. */ An attempt was then made, and a stipulation reached, scheduling additional depositions for April 17 through 22, including that of defendant Fred Trump, but counsel for defendants advised Ms. Goldweber on April 15, on 48 hours notice that these depositions would have to be cancelled too. After being advised that plaintiff would apply for sanctions, **/ Mr. Cohn offered to hold depositions on April 23 and 24. While Mr. Schwelb had to reschedule a trip to Texas, plaintiff immediately agreed to these revised dates, subscribing to the ditty that "hope beats eternal in the human breast." Within hours of the new agreement,

*/ Plaintiff's counsel suggested that progress could be made if only junior counsel, Ms. Goldweber and Mr. Shuman, participated in depositions while Mr. Cohn was unavailable. Even though the two juniors were classmates, Mr. Cohn declined this offer, but generously advised plaintiff's senior counsel, Mr. Schwelb, that he could do as he chose.

**/ See Attachment "A."

however, Mr. Cohn cancelled the depositions scheduled for April 24, citing imperative business which would take him to Europe, back to New York, and to St. Louis in less than a week. This left him only one day for a case dealing with rights to which Congress has accorded "the highest national priority." Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972).

Plaintiff also proposes to conduct discovery pursuant to Rule 34, F.R.Civ.P., and hopes soon to inspect and copy pertinent records. Mr. Donald Trump and his attorney were fulsome in their assurances that this would be permitted. Since defendants have not responded to interrogatories seeking a description of their records, and since Donald Trump disclaimed detailed knowledge of these records during his deposition, */ plaintiff has been hampered in serving a proper request pursuant to Rule 34.

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*/ Mr. Trump described certain employees, including Stuart Hyman, as being the persons with this and other pertinent information. Mr. Hyman is among those who were scheduled to be deposed on April 18 pursuant to stipulation, but whose depositions were cancelled on short notice by counsel for defendants.

ARGUMENT

As related in our introduction, Congress has decreed that this kind of case be "in every way expedited." 42 U.S.C. 3614. In view of the national priority given to equal housing opportunity, Trafficante, supra, these cases, like employment discrimination suits, are "pregnant with an urgency" which precludes the kinds of delays to which defendants have been subjecting this litigation. United States v. Ironworkers Local No. 1, 438 F. 2d 679, 681-82 (7th Cir. 1971), cert. den. 404 U.S. 830 (1971); see also United States v. Gustin Bacon, 426 F. 2d 539, 543 (10th Cir. 1970); cert. den. 400 U.S. 832 (1970). The right to equal opportunity is a "warrant for the here and now," and not for some distant hereafter. Watson v. Memphis, 373 U.S. 526 (1963). While we appreciate that any litigant is entitled to counsel of his own choice, and while the United States is prepared to make any reasonable accommodation to counsel's schedule consistent with the statutory directive of expedition, it is obvious that, on defendants' current schedule, we will be lucky to have a case of this magnitude resolved by 1984. It is particularly in cases like this one that the procedures outlined in the Federal Rules must be followed, so that each party can enjoy its full procedural and substantive rights in orderly fashion.

Accordingly, in the light of the record of consistent, unexcused noncompliance, the sanctions prescribed in Rule 37 are particularly appropriate.

Rule 37(d) of the Federal Rules of Civil Procedure provides in pertinent part that

> if a party . . . fails to serve answers or objections to interrogatories submitted under Rule 33, after proper service . . . the court . . . may make such orders in regard to the failure as are just . . . .

The Rule cites as examples any action authorized under paragraphs "A", "B" and "C" of Rule 37(b)(2), which include

> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

These sanctions are authorized even without a pre-existing Order compelling discovery, where, as here, a party has inexcusably failed to answer or object to properly served interrogatories and where no protective order has been sought. Moreover, "the failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c)." See Rule 37(d). While we do not see how defendants' repeated noncompliance, at least to the interrogatories, can be described as other than willful, the 1970 amendment to Rule 37(d) eliminated the requirement of "willfulness" as a condition precedent to the imposition of sanctions for failure to answer interrogatories. Presently, the only relevance of "willfulness" is "in determining the severity of the sanction chosen by the Court." 4A Moore's Federal Practice, 2nd Ed., para. 37.05, p. 37-95. In deciding the issue of severity, the Court might consider that these sanctions would be applicable even if defendants had not ignored this Court's Order of February 5, and must be even more appropriate since they have ignored it. Cf. Rule 37(b).

Sanctions under Rule 37(d), in cases involving inexcusable failure to answer interrogatories, have included dismissal and entry of default judgment. Weiss Noodle Co. v. Aprile, 272 F. 2d 923 (6th Cir. 1959) (unconditional default for failure to answer interrogatories); Brookdale Mill, Inc. v. Rowley, 218 F. 2d 728 (6th Cir. 1954) (unconditional dismissal for failure to answer interrogatories); Sivelle v. Maloof, 373 F. 2d 520 (1st Cir. 1967) (unconditional default for failure to answer interrogatories); Hesse v. Brunner, 172 F. Supp. 284 (S.D. N.Y. 1959) (conditional default judgment for failure to answer interrogatories); See 4A Moore's Federal Practice, 2nd Ed., para. 37.05, p. 37-102 and cases cited therein. Some courts have imposed as the proper sanction a prohibition against the introduction of certain evidence relating to the issues as to which the opponent has failed to make discovery, Life Music, Inc. v. Broadcast Music, Inc., 41 F.R.D. 16 (S.D. N.Y. 1966); Bernat v. Pennsylvania RR, 14 F.R.D. 465 (E.D. Pa. 1953), and have designated that certain facts, with respect to such issues, be taken as established. McMullen v. Travelers Ins. Co., 278 F. 2d 834 (9th Cir. 1960); Life Music, Inc. v. Broadcast Music, Inc., 41 F.R.D. 16 (S.D. N.Y. 1966).

It appears from the foregoing that litigants have forfeited unconditionally their rights to litigate on the merits for non-compliance no more sustained than that of defendants in this case. Accordingly, we think the Court has the authority to strike defendants' answer and enter default judgment without any further opportunity for defendants to respond. Nevertheless, in the interest of fair play, plaintiff has no objection to defendants having another brief opportunity to come into compliance before more draconian measures striking their defenses are made absolute. We believe that if the interrogatories are answered immediately, and depositions taken without further dealy, the case can still be litigated on the merits.

While plaintiff does not presently seek a forfeiture, but rather an ironclad assurance that defendants will make discovery immediately, we believe that the availability under the Rules of the sterner unconditional remedy, suggests that further unilateral disregard of the Rules by defendants should be dealt with promptly and finally. Defendants should be required to make full and complete discovery <u>now</u>; failing that, they should be held to be in default.

We wish to observe, in connection with defendants' obligations now, that their failure to make timely objection, or indeed any objection, to plaintiff's interrogatories waived their right to do so even if any objection were substantively well taken, see Rule 37(d), quoted at p. 9 , supra. As the court said in Davis v. Romney, 53 F.R.D. 247, 248 (E.D. Pa. 1971), in which the defaulting party was far more diligent than the Trumps have been in this case,

> The passing of the forty-five day period without any objection being made to the questions set forth in the interrogatories clearly must be considered a waiver by the defendants of any objections they might have had. Cephus v. Busch, 47 F.R.D. 371 (E.D. Pa. 1969). Regardless of how outrageous or how embarrassing the questions may be, the defendants have long since lost their opportunity to object to the questions. If they feel that the questions are unfair they have no one to blame but themselves for being required to answer them now. If discovery rules are to have "any effect or meaning, the failure to serve such objections within the time prescribed * * * should be considered a waiver of such objections." Bohlin v. Brass Rail, Inc., 20 F.R.D. 224 (S.D. N.Y. 1957). The plaintiffs' patience in agreeing to wait for answers beyond the forty-five day period cannot be considered as a stay or an extension of the time for filing objections. Sturdevant v. Sears, Roebuck and Co., 32 F.R.D. 426 (W.D. Mo. 1963).

CONCLUSION

For the foregoing reasons, plaintiff prays that its motion for sanctions be granted, with the defendants being provided the opportunity described in the motion to come into compliance by

(1) fully answering all interrogatories;

(2) making themselves and their agents promptly available for deposition; and

(3) providing the Court with an assurance of full future cooperation.

In the event that defendants fail to take these steps, we ask that the answer be stricken and the defendants be precluded from contesting the allegations of discrimination.

We further suggest that, if the defendants come into prompt compliance as to the immediate controversy, the Court set a schedule for future discovery which both permits each party to prepare fully and ensures compliance with the expedition provisions

of 42 U.S.C. 3614. The schedule will then be clear, and any attorney on either side */ who is unable to meet this schedule will then be required to withdraw or delegate accordingly.

Respectfully Submitted

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*/ Mr. Cohn is not alone in being busy. Mr. Schwelb is in charge of the Housing Section's entire litigation program and active in many of the cases. 67 fair housing suits or amicus participations were initiated by the Housing Section in 1973 alone, and earlier and later cases remain open.

ATTACHMENT A

JDP:HAB:cc
F. #730959

BY HAND

April 16, 1974

Sane, Bacon, Bolan & Manley, Esqs.
39 East 68th Street
New York, New York 10021

Attn: Roy M. Cohn, Esq.

Re: United States v. Fred C. Trump, et al.
U.S.D.C., E.D.N.Y.
Civil Action No. 73 C 1529

Dear Sirs:

We are sorry to learn from your associate Jeffrey Schuman, Esq. that you will not honor your commitment to produce previously designated officers, agents and employees of defendants in the above action for depositions on April 17, 18, 19 and 22, 1974, notwithstanding your written stipulation, by Mr. Schuman, so ordered by the Court on April 1, 1974, and the oral representation of Mr. Cohn of your firm to Government counsel on March 29, 1974. To avoid obviously futile expenditure, we have cancelled our request for a stenographer to record the depositions on those dates.

We regret, too, that defendant has chosen to violate the Court's order of February 5, 1974 which ordered defendants to answer plaintiff's interrogatories on or before April 1, 1974.

We will, of course, apply for appropriate sanctions against defendants.

Very truly yours,

EDWARD JOHN BOYD V
United States Attorney

By: [signature]
HENRY A. BRACHTL
Assistant U. S. Attorney

cc: The Honorable Edward R. Neaher
United States District Judge
225 Cadman Plaza East
Brooklyn, New York 11201