UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOBE O., et al.,	:	
Plaintiffs,	:	**MEMORANDUM AND ORDER**
-against-	:	03 Civ. 8331 (RCC)(KNF)
GEORGE PATAKI, in his official capacity as Governor of the state of New York; SHARON CARPINELLO, in her official capacity as Acting Commissioner of the New York State Office of Mental Health; WILLIAM GORMAN, in his official capacity as Commissioner of the New York State Office of Alcohol and Substance Abuse Services; and BRION TRAVIS, in his official capacity as Chairman and Chief Executive Officer, New York State Division of Parole,	:	
Defendants.	:	

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

I. INTRODUCTION

Plaintiffs Jobe O., Sabrina J. and James S. bring this action against defendants George Pataki ("the Governor"), Sharon Carpinello, William Gorman and Brion Travis, in their official capacities, alleging violations of the Americans with Disabilities Act, 42 U.S.C. § 12132 and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Before the Court are the Governor's motion for a protective order, made pursuant to Fed. R. Civ. P. 26(c), that would relieve him of the obligation of responding to the plaintiffs' discovery demands, and the plaintiffs' cross-motion, made pursuant to Fed. R. Civ. P. 37(d), seeking sanctions for the Governor's failure, repeatedly, to respond to their discovery demands. The Governor opposes

the plaintiffs' cross-motion. The Governor contends he should not be required to respond to the plaintiffs' discovery demands because, inter alia: (a) no allegations have been made that he had any personal involvement in the matters that are the focus of this litigation; (b) he was named as a defendant by the plaintiffs so that they might obtain injunctive relief; and (c) the responses provided by the other defendants represent the response of the executive branch and, therefore, any response by him would be duplicative of the responses made by the other defendants. The plaintiffs oppose the Governor's motion and, through their cross-motion, ask that the Court sanction the Governor by: (i) precluding him from introducing any evidence in his defense at the trial of the action; and (ii) requiring him to pay the expenses and reasonable attorney's fees they incurred in making this motion.

II. BACKGROUND AND FACTS

The plaintiffs, parole violators, commenced this action alleging that each has been incarcerated in New York City's jails, needlessly, while awaiting an opening in an appropriate treatment program that can address their respective serious and persistent mental health conditions, as well as their respective addictions to controlled substances. On January 23, 2004, the plaintiffs served their first set of interrogatories and document requests on the Governor. Identical interrogatories and document requests were served on the remaining defendants, who tendered their answers and responses in March 2004. On June 4, 2004, counsel to the defendants advised the plaintiffs that "since defendant Pataki acts through his Commissioners, who as you know are also defendants in this case, no separate response to your interrogatories will be prepared on behalf of defendant Pataki."

On February 17, 2006, at the request of the defendants' counsel, the plaintiffs sent him a copy of the discovery demands they had served on the Governor previously. At that time, the plaintiffs advised the defendants' counsel that, if "Pataki persists in his refusal to comply with his discovery obligations" sanctions would be sought pursuant to Fed. R. Civ. P. 37(d). On March 9, 2006, the Governor lodged objections to the plaintiffs' interrogatories by reaffirming his position that answers to the interrogatories prepared by him were unnecessary because the other defendants had answered identical interrogatories. In addition, the Governor informed the plaintiffs that he did not have any relevant documents to disclose to them. Twice more, on March 24 and May 19, 2006, in letters to the Governor's counsel, the plaintiffs expressed their concerns with his client's failure to respond to their discovery demands, advising him that if the Governor persisted in his position, they would seek sanctions from the court.

On May 23, 2006, the instant motion for a protective order was made by the Governor, seeking relief from his obligation to serve his own responses to the plaintiffs' discovery demands. Through the motion, the Governor explained that "[n]o new information could be provided by [him]" and "the responses [to the plaintiffs' discovery demands] provided by the other defendants represent the response of the executive branch in this action." The plaintiffs responded to the Governor's motion by making the cross-motion for sanctions that is before the Court.

As noted above, the Governor opposes the plaintiffs' cross-motion for sanctions. He contends that imposing sanctions on him is not warranted because the plaintiffs' discovery demands "were fully answered" by the other defendants and he "should not be required to duplicate the discovery provided by [those] defendants." Moreover, according to the Governor,

the plaintiffs' cross-motion for sanctions should be denied because the plaintiffs: (a) never obtained an order compelling him to respond to their discovery demands and, therefore, he never violated such an order; and (b) did not show bad faith or willfulness on his part in failing to respond to their discovery demands.

III. DISCUSSION

Protective Order

"Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claims or defenses of any party" and "[the] information [sought] need not be admissible at the trial if discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b). "Any party may serve upon any other party written interrogatories." Fed. R. Civ. P. 33(a). Thereafter, as Fed. R. Civ. P. 33(b)(3)(4) explain,

> [t]he party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.
>
> All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

Correspondingly, a party upon whom a request for production of documents has been served is required to respond or object to it within 30 days after service of the request has been effected. See Fed. R. Civ. P. 34(b). A party responding to discovery demands is not limited to serving an objection(s) if the party believes the discovery demands are improper. In such a circumstance, a party to an action may seek a protective order from the court, in accordance with Fed. R. Civ. P. 26(c). In its most pertinent part, that Rule provides the following:

> Upon motion by a party . . . from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court . . . may make any order which justice requires to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense.

However, as the Advisory Committee Notes to the 1970 amendment to Fed. R. Civ. P. 33(a) explain, a protective order must be sought timely: "Unless [the responding party] applies for a protective order, he is required to serve answers or objections in response to the interrogatories, subject to the sanctions provided in Rule 37(d)." Moreover, Fed. R. Civ. P. 26(c) informs that:

> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of the expenses incurred in relation to the motion.

Here, the Governor failed to respond or object to the plaintiffs' discovery demands within 30 days, as required by Fed. R. Civ. P. 33 and 34. Furthermore, he did not make a motion for a protective order timely, and failed to seek an enlargement of time, from the court, to respond or object to the plaintiff's discovery demands. In addition, no written agreement was executed by the parties extending the Governor's time to respond or object to the plaintiffs' discovery demands. Moreover, the Governor has failed to explain why neither his objections to the plaintiffs' discovery demands nor his motion for a protective order was made timely. The absence of such explanations is curious.

The Governor's contention, that the responses made to the plaintiffs' discovery demands by the other defendants should be considered his responses as well, is unavailing. While it is true that, in a circumstance such as exists here, where identical interrogatories have been served on multiple parties, they may designate one of their number to answer on behalf of all of them, such

a designation must be accompanied by an on-the-record-agreement that all will be bound by the answers. See Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2172 (2d ed. 1994). That was never done in this case. In addition, the Governor's assertions, that a violation of a discovery order is a prerequisite for imposing sanctions under Fed. R. Civ. P. 37(d) and that sanctions are only appropriate upon a finding that a party acted willfully or exhibited bad faith in failing to meet its discovery obligations, are wrong. See Brancaccio v. Mitsubishi Motors Co., Inc., No. 90 Civ. 7852, 1992 WL 189937, at *1 (S.D.N.Y. Aug. 31, 1992); On Stage Cosmetics, Inc. v. Make-Up Center of 55th St., Ltd., No. 89 Civ. 7160, 1990 WL 138980, at *2 (S.D.N.Y. Sept. 21, 1990); Fed. R. Civ. P. 37(d) & 37(b)(2).

The Court finds, based on the record as a whole, that the Governor has failed, unjustifiably, to meet his discovery obligations and that granting his untimely application for a protective order is inappropriate.

Sanctions

The plaintiffs urge the Court to sanction the Governor for failing to meet his discovery obligations. Fed. R. Civ. P. 37 grants to a court broad discretionary authority to impose a sanction(s) upon a party to a litigation that has failed to meet its discovery obligations. See Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99, 113 (2d Cir. 2002). Fed. R. Civ. P. 37(d) provides, in pertinent part, that:

> If a party . . . fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, 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.

One action a court may take, when a party fails to meet its discovery obligations, is to issue "[a]n order refusing to allow [that] party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence." Fed. R. Civ. P. 37(b)(2)(B). Additionally, Fed. R. Civ. P. 37(d) provides that:

> [i]n lieu of any order, 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 sanctions have three purposes: (1) to prevent a party from benefitting from its own failure to meet its discovery obligations; (2) to seek compliance with any previously issued discovery order; and (3) to deter a particular litigant and litigants in general from failing to meet discovery obligations. See Update Art, Inc. v. Modiin Publishing, Ltd., 843 F.2d 67, 71 (2d Cir. 1988). The harshest sanctions available are preclusion of evidence and dismissal of the action. Those sanctions "should be imposed only in rare situations." Id. Severe sanctions are justified when a party's failure to meet its discovery obligations is due to willfulness, bad faith or any fault of the party. See Societe Internationale, etc. v. Rogers, 357 U.S. 197, 212, 78 S. Ct. 1087, 1096 (1958); Daval Steel Products v. M/V Fakredine, 951 F.2d 1357, 1367 (2d Cir. 1991). However, while willfulness and bad faith may justify the imposition of a sanction(s), the express language of the Rule makes clear that they are not prerequisites to imposing a sanction(s) under Fed. R. Civ. P. 37(d). Rather, they are factors to be considered by a court in determining what sanction(s), if any, to impose on a party that has not met its discovery obligations. See Advisory Committee Notes to Rule 37(d), 1970 Amendment ('Wilfulness' continues to play a role, along with various other factors, in the choice of sanctions. Thus, the scheme conforms to Rule 37(b)

as construed by the Supreme Court in [Rogers, 357 U.S. at 208, 78 S. Ct. at 1093]).

Nothing in the record suggests the Governor acted in bad faith or willfully when he failed to respond to the plaintiffs' discovery demands. The Governor seems to have acted based on the erroneous belief that the responses to the plaintiffs' discovery demands provided by the other defendants should simply be deemed his responses as well. Standing alone, this erroneous belief does not amount to bad faith conduct or willfulness that would justify a drastic sanction such as precluding a party from offering evidence at a trial or rendering a judgment by default. In any event, precluding the Governor from offering evidence at the trial of this action would appear to be an empty sanction if, as he maintains, his evidence is the evidence that has and will come from the other defendants.

However, the Court finds that, given the amount of time the Governor has been out of compliance with his discovery obligations, and the fact that the plaintiffs have a right, under the Federal Rules of Civil Procedure, to obtain from any defendant a response to properly served discovery demands, imposing a sanction on the Governor that will act as a specific and general deterrent to any party to a litigation that fails to meet its discovery obligations is warranted. Therefore, the plaintiffs' cross-motion is granted. The Governor is directed to respond, on or before April 6, 2007, to the plaintiffs' outstanding discovery demands, without lodging any objections, all of which have been waived by his failure to respond to the plaintiff's discovery demands timely. See Fears v. Wilhelmina, No. 02 Civ. 4911, 2003 WL 21737808, at *1 (S.D.N.Y. July 25, 2003); Polokoff v. International Pantyhose, Inc., No. 96 Civ. 6100, 1997 WL 178621, at *1 (S.D.N.Y. April 11, 1997).

In addition, the Governor shall pay to the plaintiffs the expenses, including reasonable attorney's fees, they incurred in making this motion. Any challenge by the Governor to the reasonableness of the fees and expenses shall be presented to the Court within seven days of the date on which service of the plaintiffs' statement of their fees and expenses is effected. Any response to such a challenge shall be served and filed by the plaintiffs not later than seven days thereafter. Failure to comply with this order may expose the Governor to an additional sanction(s), including, but not limited to, a recommendation to the assigned district judge that a judgment by default be entered against him.

Dated: New York, New York
March 15, 2007

SO ORDERED:

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

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