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United States District Court,
N.D. New York.

Nichole Marie MCDANIEL, individually and on behalf of a class of others similarly situated, et al.
Plaintiffs,
v.
THE COUNTY OF SCHENECTADY, et al.,
Defendants.

No. 1:04 CV 757 GLS/RFT. | July 21, 2005.

Attorneys and Law Firms

Elmer Robert Keach, III, Amsterdam, New York, for the Plaintiffs, Elmer Robert Keach, III, of counsel.

Goldberg Segalla LLP, Albany, New York, for the Defendants, William J. Greagan, of counsel.

Opinion

REPORT-RECOMMENDATION AND ORDER

TREECE, Magistrate J.

***1** This lawsuit is a 42 U.S.C. § 1983 putative class action in which the purported class alleges that the Defendants violated misdemeanor pretrial detainees' Fourth Amendment rights to be free from illegal strip searches. Dkt. No. 1, Compl. This litigation has been extraordinarily active, notwithstanding the fact that it is currently within the pre-certification stage.[1] Currently before this Court is Defendants' Motion for Sanctions pursuant to FED. R. CIV. P. 26 and 37(c). Dkt. No. 57.[2] Because Lead Plaintiff, Nichole McDaniel, failed on three occasions to appear for her deposition, Defendants ask this Court not only to dismiss her as class representative but to remove her from the putative class as well. Precluding McDaniel from the class poses a novel issue, if indeed not a matter of first impression. For the foregoing reasons, we recommend that the Defendants' Motion be granted in part and denied in part.

I. PROCEDURAL HISTORY ON MCDANIEL'S DEPOSITION

Attempts to hold McDaniel's deposition have traveled a long and unproductive route. Because of this Court's liberality toward McDaniel in extending several opportunities to her in order for her to be deposed and a number of other intervening events, we are now approaching the moment of reckoning of whether her failure to comply with previous Court Orders will be met with dire consequences.

This action was commenced on July 19, 2004, with Nichole McDaniel and Lessie Lee Davies being named as proposed Lead Plaintiffs. Dkt. No. 1, Compl. Issues were joined on August 9, 2005. Dkt. No. 3, Ans. Early in the litigation a Notice to Depose the two proposed class representatives had been served. Then, in January 2005, a host of discovery disputes arose, which this Court resolved by an omnibus Order. Dkt. No. 25, Order, dated Jan. 10, 2005; *see also* Dkt. No. 51, Discovery Proceeding Transcript. One of those disputes dealt with McDaniel's deposition. Apparently she did not appear when required and her attorney attempted, both in writing and at a discovery hearing on the record, to derail a motion to compel and create a more convenient forum for her deposition, or, maybe for them. The Court was unpersuaded by their entreaties and denied the Plaintiffs' request to hold McDaniel's deposition in Washington, D.C. as opposed to Schenectady, New York. We further wrote that:

> [b]ecause of scheduling issues, this Court will extend the time to depose [McDaniel] to a date and time on or before January 28, 2005, *but only if the parties can agree.* If they cannot agree, then Ms. McDaniel[ ] shall be deposed on or before January 21, 2005.

Dkt. No. 25, Order, dated Jan. 10, 2005 at pp. 5-6 (emphasis in original).

Apparently McDaniel was unable to comply with this Court's directives and the matter of when to hold her deposition was discussed, once again, with the Court. After a hearing held, on the record, on February 9, 2005, the Court issued another Order graciously extending McDaniel's time to be deposed to February 22, 2005, however, this time with a stronger admonition: "In the event Ms. McDaniel[ ] is not deposed on or before February 22, 2005, the Defendants may file a motion for sanction without seeking further court approval." Dkt. No. 40, Order, dated Feb. 9, 2005 at p. 2. Ostensibly, McDaniel, once again, failed to appear for her deposition, provoking the Defendants to seek this Motion for Sanctions; said Motion's return date was May 6, 2005. Dkt. No. 57, Defs.' Mot. for Sanctions. Pursuant to our Local Rules, as noted on the docket report, McDaniel was

required to serve and file her opposition to this Motion on or before April 19, 2005. As of April 19, 2005, Plaintiffs had not timely responded to the Motion for Sanctions and, therefore, were in default.

***2** In the interim, the parties asked this Court to assist them in a settlement conference, which was set for May 17, 2005. Dkt. No. 60, Order, dated Apr. 26, 2005. A settlement conference was held on May 17th but with little success. Surprisingly, on May 27, 2005, Plaintiffs' counsel wrote this Court wishing to address two issues, but particularly, whether they would have an opportunity to provide opposition to the Defendants' Motion for Sanctions. Dkt. No. 61, Elmer R. Keach, Esq., Lt., dated May 27, 2005. The request to submit opposition to Defendants' Motion was framed as follows:

> This motion has been held in abeyance by the Court pending the settlement conference held by the Court last week. Plaintiffs' counsel would like to provide a short response to this motion, and requests that the Court provide a date by which such a response can be filed as well as a return date for the motion.

Id.

The Plaintiffs were clearly mistaken on the facts. On the same day that the Court received Plaintiffs' request, the Court issued a Text Order clarifying the status of the Defendants' Motion. Therein, the Court noted that Plaintiffs had defaulted in opposing the Motion prior to any request to this Court to participate in settlement negotiations. If any action was held in abeyance, it was only the issuance of an order on the Motion. Text Order, dated May 27, 2005; *see* Dkt. No. 62, William J. Greagan, Esq., Lt., dated June 1, 2005 (concurring with the Court's recollection of the Motion's status). However, the Court was concerned about the novel issue of whether McDaniel, if dismissed from this action as class representative, could be precluded from joining the class and, therefore, asked the parties to provide letter-memorandums addressing this singular issue. Text Order, dated June 2, 2005. Both parties complied and file letter-memoranda. *See* Dkt. Nos. 67 & 69.

II. DISCUSSION

As stated above, by failing to timely oppose the Defendants' Motion for Sanctions, the Plaintiffs' have defaulted and this Motion could be decided on this procedural faux pas alone, thereby imperiling her status as class representative. However, because of the Defendants wish to eliminate McDaniel completely from this litigation inasmuch as she failed to participate in her deposition, which would be a fatal diminution of her claim, and this Court's invitation to the parties to provide legal precedent for such sanctions, we will address this matter on the merits.[3]

A. Class Representative

One or more members of a putative class may act as class representative on behalf of the class if certain prerequisites are met. FED. R. CIV. P. 23(a). Two essential prerequisites for designation as class representative that a court must ponder are whether the claims of the representative party are typical of the claims of the class and will the representative party "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(3) & (4). In order to have standing as a class representative, it is essential that she possess the same interest and suffer the same injuries shared by all members of the class. *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 216 (1974) (citations omitted). "Rule 23(a)(3) is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *In re Drexel Burnham Lambert Group, Inc.,* 960 F.2d 285, 291 (2d Cir.1992) (citations omitted). In essence, the class representative is a fiduciary and the promotion of the class's interests are "dependent upon his diligence, wisdom and integrity." *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 549 (1949) (quoted in *Kline v. Wolf,* 702 F.2d 400, 403 (2d Cir.1983)). In order to determine if the class representative will discharge her fiduciary obligations faithfully in fairly and adequately representing the class, a court must examine various factors such as credibility, reliability, and potential conflicts. *Koenig v. Benson,* 117 F.R.D. 330, 333-34 (E.D.N.Y.1987). Where the credibility of a person seeking to be a class representative is under serious attack, that person can be disqualified as lead plaintiff. *Abrams v. Interco Inc.,* 719 F.2d 23, 33 (2d Cir.1983); *see also In re Frontier Ins. Group., Inc. Sec. Litig.,* 172 F.R.D. 31, 47 (E.D.N.Y.1997) (citing *Panzier v. Wolf,* 663 F .2d 365 (2d Cir.), *vacated on other grounds sub nom,* 459 U.S. 1105 (1982), for the proposition that a class representative can be disqualified for lack of credibility).

***3** Assuming this fiduciary role, the class representative must vigorously pursue all facets of the litigation in the interest of the class. MANUAL OF COMPLEX LITIG. § 21.26 (4th ed.2004). This vigorous representation includes complying with reasonable discovery obligations and failure to do so strongly intimates that the class representation is inadequate. 6 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 23.25[c][1] (3d ed.2005). Refusing to answer proper

discovery inquiries inexpugnably suggests that the representative would be less than adequate. *Kline v. Wolf,* 702 F .2d at 403. "One who will not comply wholeheartedly and fully with the discovery requirements of modern federal practice, is not to be regarded by this Court as one to whom the important fiduciary obligation of acting as a class representative should be entrusted." *Norman v. Arcs Equities Corp.,* 72 F.R.D. 502, 506 (S.D.N.Y.1976). This is especially true when the class representative refrains from appearing at her deposition. *McGowan v. Faulkner Concrete Pipe Co.,* 659 F.2d 554, 559 (5th Cir.1981) (failing to appear for deposition); *In Re Lloyd's Am. Trust Fund Litig.,* 1998 WL 50211, at *11 (S.D.N.Y. Feb. 6, 1998) (disqualifying a class representative who gave "garbled" testimony at a deposition).

Here, on no less than three occasions, this Court directed McDaniel to participate in a deposition. For whatever her reasons, McDaniel neglected to do so. Moreover, Plaintiffs' counsel now admits that they are unable to locate her. Dkt. No. 61. Not only has she failed to meet her obligations in prosecuting this matter, but she also appears to have questionable judgment and credibility. *Abrams v. Interco Inc.,* 719 F.2d at 33. For this reason, we recommend that Ms. McDaniel be dismissed as class representative.

B. Dismissal of the Complaint

The Defendants bring this Motion for Sanctions pursuant to FED. R. CIV. P. 37(d). This statute reads in relevant parts as follows:

> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (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. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In 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.

***4** To be clear, in addition to making such an order that is just for such failures, a court may consider the following possible course of action set forth in FED. R. CIV. P. 37(b)(2):

(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 that party 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.

Obviously, sanctions serve several useful purposes: (1) ensure that the offending party will not be able to profit from her failure to comply; (2) provide a strong deterrence to the non-compliant party and to others in the public; and (3) secure compliance with an order. *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.,* 602 F.2d 1062, 1066 (2d Cir.1979).[4]

The imposition of sanctions under Rule 37 is within the discretion of the court. *Valentine v. Museum of Modern Art,* 29 F .3d 47, 49 (2d. Cir.1994); *Bobal v. Rensselaer Polytechnic Inst.,* 916 F.2d 759, 765 (2d. Cir.1990); *Scott v. Town of Cicero Police Dep't,* 1999 WL 102750 (N.D.N.Y. Feb. 24, 1999) (Munson, J.). Before imposing sanctions the court may consider: (1) the history of the party's failure to comply with court orders; (2) whether the party violating the order was given ample time to respond; (3) the effectiveness of alternative sanctions; (4) whether the non-complying party was warned and given an opportunity to argue the impending sanctions; (5) the

prejudice to the adversary caused by the failure to comply; (6) whether the document at the issue would normally be readily obtainable; and (7) the extent of the party's personal responsibility. *Bambu Sales, Inc. v. Ozak Trading Inc.,* 58 F.3d 849, 852-54 (2d Cir.1995); *Momah v. Messina Mem'l. Hosp. & Bond,* 1998 WL 129045, at *5 (N.D.N.Y. Mar. 6, 1998).

The imposition of sanctions is a drastic remedy and should be considered when it has been established that a party's noncompliance or failure was due to wilfulness, bad faith or a callous disregard of the responsibilities mandated by the Federal Rules of Civil Procedure or a court order. *Nat'l Hockey League v. Metro. Hockey Club, Inc.,* 427 U.S. 639, 639-40 (1976) (citing *Societe Internationale v. Rogers,* 357 U.S. 197, 212 (1958)); *State of New York v. Almy Bros., Inc.,* 1998 WL 57666, at *9 (N.D.N.Y. Feb. 4, 1998) (McCurn, J); *Hinton v. Patnaude,* 162 F.R.D. 435, 439 (N .D.N.Y.1995) (McAvoy, J) (flagrant bad faith). Moreover, gross negligence on the part of a non-compliant party can suffice as wilful and flagrant bad faith, and in some instances, ordinary negligence may be sufficient as well. *Cine Forty-Second Street Theatre Corp.,* 602 F.2d at 1062 (deliberate tactical intransigence and/or gross negligence); *see also Residential Funding Corp. v. DeGeorge Fin. Corp.,* 306 F.3d 99 (2d Cir.2002) (ordinary negligence); *Burks v. Eagan Real Estate Inc.,* 742 F.Supp. 49, 51-52 (N.D.N.Y.1990) (drastic remedy of a default judgment should not be considered unless the failure to comply was the result of bad faith or gross negligence).

***5** In order for an act to constitute wilfulness, the court's order must be clear and there is no misunderstanding of the intent of the order, and, further, there is no other factor beyond the party's control which contributed to the non-compliance. *Bambu Sales,* 58 F.3d at 852-53. And a party's " 'persistent refusal to comply with a discovery order' presents sufficient evidence of willfulness or bad faith." *Handwerker v. AT & T Corp.,* 211 F.R.D. 203, 209 (S.D.N.Y.2002) (quoting *Monaghan v. SZS 33 Assoc., L.P.,* 148 F.R.D. 500, 509 (S.D.N.Y.1993)). However, Rule 37 permits the saving grace of substantial justification or harmlessness to blunt the impact of sanctions. *Grdinich v. Bradlees,* 187 F.R.D. 77, 79 (S.D.N.Y.1999) (citing *Hinton v. Patnaude,* 162 F.R.D. at 439). Substantial justification in this context means "justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request." *Jockey Int'l Inc. v. M/V "Leverkusen Express",* 217 F.Supp.2d 447, 452 (S.D.N.Y.2002) (quoting *Henrietta D. v. Giuliani,* 2001 WL 1602114, at *5 (S.D.N.Y. Dec. 11, 2001)).

There is no exception to honoring and respecting discovery orders. For example, all litigants and litigators, including *pro ses,* must comply and when they flout their obligation, they must suffer the consequences of such action. *Baker v. Ace Advertisers' Serv. Inc.,* 153 F.R.D. 38, 40 (S.D.N.Y.1992); *see also Valentine v. Museum of Modern Art,* 29 F.3d at 50 (imposing sanctions on *pro se* plaintiff); *Scott v. Town of Cicero,* 1999 WL 102750 (providing *pro se* plaintiff an additional opportunity to be heard before imposing sanctions).

Furthermore, a court may turn to those inherent powers, which are innate to its creation, to impose respect for its lawful mandates. *United States v. Seltzer,* 227 F.3d 36, 39-42 (2d Cir.2000); *DLC Mgmt. Corp. v. Town of Hyde Park,* 163 F.3d 124, 136 (2d Cir.1998). Federal courts have always had the inherent power to manage their own proceedings and to control the conduct of those who may appear before them, and when a party acts "in bad faith, vexatiously, wantonly, or for oppressive reasons," the courts may exercise their discretion in fashioning a remedy. *Chambers v. NABSCO, Inc.,* 501 U.S. 32, 45-46 (1991) (internal quotation marks and citations omitted). Even in the absence of a discovery order, a court may impose sanctions for misconduct during discovery through this inherent power to manage its affairs. *Residential Funding Corp.,* 306 F.3d at 106-07. However, before a court can exercise this enormous power, it should do so with restraint and upon the finding of bad faith and where abuse of litigation practices are evident. *DLC Management Corp.,* 163 F.3d at 136; *see also Sanders v. City of New York,* 218 F.Supp.2d 538, 542-43 (S.D.N.Y.2002) (citing *Reilly v. Natwest Markets Group, Inc.,* 181 F.3d 253, 267 (2d Cir.1999), for the proposition that when a court exercises its inherent power to impose sanctions for the discovery abuse of spoilation, neither bad faith nor intentional misconduct is necessary).

***6** From the record before this Court, evidently, the Defendants and the Court graciously gave McDaniel significant opportunities to comply with discovery requests. Although we cannot conclude that she acted entirely with bad faith or with intentional misconduct in mind, she has, nonetheless, failed on at least three occasions, to make an effort to appear for her deposition, without apology or explanation. Persistent refusals to comply with discovery orders, after being forewarned, is tantamount to wilfulness. The Court recalls that her attorneys repeatedly asked for more concessions to accommodate her presence at her deposition, in which most of those importunes were granted. Certainly, considering the number of Orders from this Court addressing McDaniel's depositions, there could not be any confusion as to what was required of her and what the consequences would be if she failed to oblige not only the notice of deposition but this Court's orders. McDaniel's repeated failures to appear, under these circumstances, evidences a flouting of her obligation, and, to an ineluctable extent, she must suffer some consequence. Moreover, no substantial justification for her recalcitrance nor gross negligence has been satisfactorily proffered.

And now, her present disappearance only exacerbates her non-compliance with the Court's mandates. Although this is a drastic remedy, we recommend that those allegations set forth within the Complaint which specifically refer to her circumstances be deleted from the Complaint. Dkt. No. 1 at ¶¶ 3 & 39-44.

However, this Court is not prepared to eliminate all of her association with this lawsuit, at least at this moment. As a broad principle of class action litigation, rarely are class members required to submit to discovery. MANUAL OF COMPLEX LITIG. at § 21.41. If we were to assume that McDaniel was not being considered as the class representative in the first instance and was contemplated only as a member of the class, it would be safe to presume that she would not be subject to a deposition, even though she may be required to show that she has a viable claim that could be prosecuted by this class action. Under those circumstances, she would not be a victim of the nuclear option recommended above. McDaniel should still be given one last chance to prove her claim as a class member if the class is certified by the District Court. The moment when a definitive definition of the class is secured so that the District Court can determine whether a particular individual is or is not a member of the proposed class would be the best opportunity to determine if McDaniel should be included within the class. *Adames v. Mitsubishi Bank, Ltd.,* 133 F.R.D. 82, 88 (E.D.N .Y.1989); 6 MOORE'S FEDERAL PRACTICE § 23.32[2]. The juncture where proposed claims are determined to be viable should be the moment when a decision should be made whether she can prevail and participate as a class member.

WHEREFORE, based on the foregoing, it is hereby

***7** RECOMMENDED, that Nichole McDaniel not be classified as putative class representative; and it is further

RECOMMENDED, that her cause of action be stricken from the Complaint; and it is further

RECOMMENDED, that Nichole McDaniel be allowed an opportunity to file a proposed claim in this action should this case be certified as a class action pursuant to FED. R. CIV. P. 23, and at the moment she is required, along with all of the other prospective members of the class, to submit her claim to the District Court, the District Judge may determine if she should be permitted to participate as a class member; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Report-Recommendation and Order, by regular mail, upon the parties to this action.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have ten (10) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. *FAILURE TO OBJECT TO THIS REPORT WITHIN TEN (10) DAYS WILL PRECLUDE APPELLATE REVIEW. Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Sec'y of Health and Human Servs.,* 892 F.2d 15 (2d Cir.1989)); *see also* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b), 6(a), & 6(e).

IT IS SO ORDERED

Footnotes

1 Currently pending before the Honorable Gary L. Sharpe, United States District Judge, are several interconnected matters:
(1) Defendants' Motion for Summary Judgment. *See* Dkt. Nos. 33, 35, 36, 38, 48, & 55.
(2) Defendants' Appeal of this Court's Discovery Order, dated January 10, 2005. *See* Dkt. No. 25, 29 & 47.
(3) Plaintiffs' Appeal of this Court's Discovery Order, dated February 9, 2005. *See* Dkt. Nos. 40, 43, & 56.
(4) Defendants' Motion To Amend Answer and for Partial Summary Judgment. *See* Dkt. Nos. 58, 66, & 68.
All of these Motions have been adjourned several times and the new return date for all is September 29, 2005. *See* Dkt. No. 72.

2 The Defendants originally noticed this Motion before District Judge. Dkt. No. 57. In accordance with the Local Rules of this District, Judge Sharpe re-noticed the Motion to the undersigned. N.D .N.Y.L.R. 72.1(a). However, due to the dispositive nature of the relief sought, it is prudent to recommend a course of action for the District Court.

3 Neither party was able to cite any legal precedent to assist us in the discussion of whether a dismissed class representative can be permanently removed from all phrases of the class action.

4 There is a spectrum of sanctions ranging from the mildest of reimbursing for expenses to the harshest, order of dismissal or default. *Cine Forty-Second Street Theatre,* 602 F.2d at 1066; *see also Valentine v. Museum of Modern Art,* 29 F.3d 47 (2d Cir.1994).