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United States District Court,
N.D. Texas, Dallas Division.

Oscar D. WILLIAMS, et al. Plaintiffs,
v.
KAUFMAN COUNTY, et al. Defendants.

No. 3–97–CV–0875–L. | Sept. 18, 1998.

**Attorneys and Law Firms**

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**Opinion**

***FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE***

KAPLAN, Magistrate J.

***1** Defendants Kaufman County, Texas and Sheriff Robert Harris have filed a renewed motion to dismiss the claims brought by Plaintiff Sylvester Lewis and for contempt. The motion has been referred to United States Magistrate Judge Jeff Kaplan for recommendation pursuant to 28 U.S.C. § 636(b).

**I.**

This is a civil rights action brought under 42 U.S.C. § 1983 with pendent state claims for assault and battery, intentional infliction of emotional distress, and civil conspiracy. Sylvester Lewis is one of fifteen plaintiffs who were allegedly strip searched, detained, and verbally abused by Kaufman County law enforcement officers during a raid on the Classic Club in Terrell, Texas. Defendants sent written discovery to Lewis and noticed him for a deposition. Lewis did not timely respond to interrogatories and a request for production of documents. He also failed to appear for his deposition on February 10, 1998. This prompted defendants to file a motion to compel and for sanctions. The Court ordered Lewis to appear for his deposition on May 7, 1998 at 2:00 p.m. at the offices of Wayne Gent, 113 Mulberry, Kaufman, Texas.[1] *See* ORDER, 4/28/98. No sanctions were imposed at that time.

[1] The parties subsequently agreed to change the location of this deposition to the Grand Jury Room in the Kaufman County Courthouse.

Lewis once again failed to appear for his deposition as required. This time, defendants filed a motion to dismiss and for sanctions. The Court set the motion for a hearing on July 17, 1998 and ordered Lewis to appear in person. Lewis did not attend the hearing and offered no excuse for his failure to comply with the court order. The Court denied the motion to dismiss but imposed monetary sanctions. Specifically, Lewis was ordered to pay: (1) $625.00 to defendants for failing to appear twice for his deposition; (2) $1,500.00 to the district clerk for his failure to appear at the second deposition; and (3) $3,000.00 to the district clerk for failing to appear at the hearing on the motion to dismiss. Lewis was warned that the failure to remit these payments within thirty days may result in the dismissal of his claims with prejudice. *See* ORDER, 7/24/98. The Court also prohibited Lewis from testifying at trial or offering evidence unique to his claims. *Id.*

Incredibly, Lewis has failed to remit any of the payments ordered by the Court or indicated his financial inability to do so. This prompted defendants to file a renewed motion to dismiss and for contempt. Defendants argue that dismissal is warranted in light of "Lewis' continued disregard for the Orders of this Court as well as the overwhelmingly apparent disinterest in the continued prosecution of his case ..." (Def. Motion at 2). Lewis has not filed a response to the motion.[2] Accordingly, this matter is ripe for determination.

[2] The certificate of conference recites that counsel for plaintiff "has reviewed the foregoing Motion and has indicated that he does not intend to file a response to the Motion." (Def. Motion at 3).

**II.**

A district court has the authority to dismiss a case for failure to comply with a discovery order. *See Link v. Wabash Railroad Co.,* 370 U.S. 626, 630–33, 82 S.Ct. 1386, 1389–90, 8 L.Ed.2d 734 (1962); *Bonaventure v.*

*Butler,* 593 F.2d 625, 626 (5th Cir.1979). However, dismissal is an extreme sanction and should only be imposed "in the face of a clear record of delay or contumacious conduct by the [party]." *SEC v. First Houston Capital Resources Fund, Inc.,* 979 F.2d 380, 382 (5th Cir.1992), *quoting Durham v. Florida East Coast Railway Co.,* 385 F.2d 366, 368 (5th Cir.1967). The Court should not dismiss a case "unless [it] first finds that a lesser sanction would not have served the interests of justice." *First Houston,* 979 F.2d at 382, *quoting McNeal v. Papasan,* 842 F.2d 787, 793 (5th Cir.1988); *see also Hornbuckle v. ARCO Oil & Gas Co.,* 732 F.2d 1233, 1237 (5th Cir.1984).

**III.**

***2** The record in this case documents a clear history of delay and contumacious conduct on the part of Plaintiff Sylvester Lewis. He did not timely respond to written discovery and failed to appear for his deposition on February 10, 1998 and May 7, 1998. Moreover, Lewis ignored a court order requiring him to attend a show cause hearing on July 17, 1998. The Court has already imposed monetary sanctions and prohibited Lewis from testifying at trial or offering evidence in support of his claims. Lewis has not made the required payments to defendants and the district clerk or offered an explanation for his failure to do so. Significantly, Lewis does not claim that he lacks the ability to make these payments. He has not even responded to the renewed motion to dismiss.

The Court has considered the imposition of alternate sanctions. However, lesser sanctions would not serve the interests of justice or advance the disposition of this case on the merits. The Court has already imposed monetary sanctions and prohibited Lewis from presenting evidence at trial. No sanction short of dismissal would enable the Court to enforce its lawful orders.

***RECOMMENDATION***

Defendants' renewed motion to dismiss should be granted. The claims asserted by Plaintiff Sylvester Lewis should be dismissed with prejudice.

***INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO OBJECT***

On this date the United States magistrate judge made written findings and a recommended disposition of defendants' renewed motion to dismiss and for contempt in the above styled and numbered cause. The United States district clerk shall serve a copy of these findings and recommendations on all parties by certified mail, return receipt requested. Pursuant to 28 U.S.C. § 636(b)(1), any party who desires to object to these findings and recommendations must file and serve written objections within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings and recommendations to which objections are being made. The district court need not consider frivolous, conclusory or general objections. The failure to file such written objections to these proposed findings and recommendations shall bar that party from obtaining a *de novo* determination by the district court. *Nettles v. Wainwright,* 677 F.2d 404, 410 (5th Cir.1982). *See also Thomas v. Arn,* 474 U.S. 140, 150, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). Additionally, the failure to file written objections to proposed findings and recommendations within ten (10) days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error or manifest injustice. *Douglass v. United Services Automobile Ass'n,* 79 F.3d 1415, 1417 (5th Cir.1996).