

Rooks v. Thigpen

United States District Court for the Southern District of Alabama, Southern Division
November 10, 1993, Decided ; November 10, 1993, Filed
CIVIL ACTION NO. 92-0316-AH-M

Reporter: 1993 U.S. Dist. LEXIS 17794

KEVIN P. ROOKS, et al., Plaintiffs, v. MORRIS THIGPEN, et al., Defendants.

Subsequent History: [*1] Adopting Order of December 10, 1993, Reported at: [1993 U.S. Dist. LEXIS 17683](#).

Judges: MILLING, JR.

Opinion by: BERT W. MILLING, JR.

Opinion

REPORT AND RECOMMENDATION

This action is before the Court on the defendants Conecuh County, Freddie Stallworth, Jerold Dean, Leonard Millender, Hugh Barrow, Frank Pate, Edwin L. Booker, and Leroy Ferrell's (hereinafter "defendants") Motion for Sanctions (Doc. 89), which has been referred to the undersigned pursuant to [28 U.S.C. § 636\(b\)\(1\)\(B\)](#). It is recommended that defendants' motion be granted and that plaintiff Curtis Sexton's claims, as an individual and as a class member, be dismissed with prejudice.

In their motion, the defendants seek sanctions pursuant to [Fed.R.Civ.P. 37\(d\)](#) for the failure of plaintiff Curtis Sexton, a class representative, to appear and to be deposed each time his deposition was noticed. The defendants request that the sanction imposed be the dismissal of plaintiff Sexton's claims, as an individual and as a member of the class. Attached to the motion are four notices of plaintiff Sexton's deposition which were filed over an eight-month period.

Plaintiffs' counsel responded to the defendants' motion (Doc. 90) stating that even though plaintiff Sexton's deposition was noticed four times, [*2] the deposition was convened only twice despite plaintiffs' counsel advising the defendants prior to the depositions that counsel did not expect plaintiff Sexton to appear. The remaining plaintiffs assert that every attempt had been made to contact plaintiff Sexton, but they were unsuccessful. The remaining plaintiffs request that neither they nor plaintiffs' counsel be subjected sanctions.

A considerable period of time has elapsed from the filing of the first notice of plaintiff's Sexton deposition on December 9, 1992 to the filing of defendants' Motion for

Sanctions on August 10, 1993 (Doc. 89). Plaintiffs' counsel have admitted not being able to contact plaintiff Sexton for his deposition and have not offered that they otherwise have been in contact with him then or recently. The undersigned therefore concludes that plaintiff Sexton has lost interest in his claims in this action and has abandoned prosecution.

When considering the alternatives available to the Court, the Court notes that in addition to plaintiff Sexton's lack of contact, plaintiff Sexton initially sought leave to proceed *in forma pauperis* in this action (Doc. 3) and that he was incarcerated at the time of the [*3] complaint's filing. The imposition of a monetary sanction based on the expenses associated with the scheduling and the taking of plaintiff Sexton's deposition thus would be a futile measure in view of the present facts. Nor would the imposition of such a monetary sanction on the plaintiffs or plaintiffs' counsel be warranted, as they have no control over this type of conduct by plaintiff Sexton and plaintiffs' counsel cooperated with the defendants by advising that they did not anticipate plaintiff Sexton appearing for his deposition. Moreover, the defendants have not requested a monetary sanction or submitted evidence of their expenditures related to the never-taken depositions and this motion. Rather, the defendants seek the dismissal of plaintiff Sexton's claims as an individual and as a member of the class. See [Mingo v. Sugar Cane Growers Co-op of Florida](#), 864 F.2d 101, 102 (11th Cir. 1989) (lesser sanctions should be shown to have been considered).

The type of sanctions which the defendants request is appropriate for the conduct that they strive to sanction. Because plaintiff Sexton has obstinately refused to participate in the litigation of his [*4] claims and those claims of the class through his apparent loss of interest, and due to the difficulty in the enforcement of any other type of sanction and to the additional expenses associated with such a sanction, the appropriate sanction for this type of conduct is dismissing plaintiff Sexton's claims with prejudice. [Moon v. Newsome](#), 863 F.2d 835, 839 (11th Cir. 1989), *cert. denied*, 493 U.S. 863, 110 S. Ct. 180, 107 L. Ed. 2d 135 (1989) (prisoner's refusal to be deposed resulted in the dismissal with prejudice of his action); [Gates v. United States](#), 752 F.2d 516, 517 (10th Cir. 1985) (plaintiff's action dismissed with prejudice for failure to appear at deposition with the Court noting at one time there had been no contact with counsel for 60 days). The

dismissal with prejudice would impact upon plaintiff Sexton should he regain interest in his claims and bring them again. Whereas, a dismissal without prejudice more than likely would have no effect on plaintiff Sexton due to the nature of the dismissal and to the tolling statute, Ala. Code § 6-2-8, and cause [*5] the defendants to undergo additional expenses of a new action. A dismissal without prejudice is essentially no sanction for plaintiff Sexton's conduct. Accordingly, it is recommended that the defendants' motion be granted and that plaintiff Curtis Sexton's claims, as an individual and as a member of the class, be dismissed with prejudice from this action.

An alternate basis for dismissing with prejudice plaintiff Curtis Sexton's claims is the Court's inherent power to dismiss, *sua sponte*, those claims that have been abandoned. Link v. Wabash Railroad Co., 370 U.S. 626, 630, 82 S. Ct. 1386, 1388-89, 8 L. Ed. 2d 734 (1962). It appears to the Court that plaintiff Curtis Sexton has willfully abandoned his claims. Plaintiff Sexton commenced this action with the other plaintiffs. Thus, he is aware that this action is pending. His failure to communicate with class counsel over at least an eight-month period, which is implicit in the plaintiffs' response that they tried unsuccessfully to contact plaintiff Sexton, is more than negligent conduct, but conduct that evinces a willful disregard for the proceedings which he helped to [*6] initiate.

As discussed above in regard to sanctions under Fed.R.Civ.P. 37, the other less drastic sanctions which are available to the Court are not appropriate in this instance. The plaintiff will not be affected by most other sanctions due to the course of conduct that he has chosen. This Court should impose a sanction which is efficient in that the sanction should not cause the parties to incur more expenses and the Court to expend additional time and resources until the time, if ever, that plaintiff Sexton is interested in his claims again. Therefore, imposing the sanction of dismissing with prejudice plaintiff Sexton's claims, as an individual and as a member of the class, is well-tailored to conduct sought to be sanctioned. This sanction would prevent plaintiff Sexton from invoking this Court's resources again to hear these claims since he disregarded the present proceedings which have resulted from the filing of his claims. Accordingly, it is recommended that plaintiff Curtis Sexton's claims, as an individual and as a member of the class, be dismissed with prejudice pursuant to Fed.R.Civ.P. 41(b) for lack of prosecution.

The attached sheet contains important information [*7] regarding objections to this Report and Recommendation.

DONE this 10th day of November, 1993.

BERT W. MILLING, JR.

UNITED STATES MAGISTRATE JUDGE

MAGISTRATE JUDGE'S EXPLANATION OF PROCEDURAL RIGHTS AND RESPONSIBILITIES FOLLOWING RECOMMENDATION, AND FINDINGS CONCERNING NEED FOR TRANSCRIPT

1. *Objection.* Any party who objects to this recommendation or anything in it must, within ten days of the date of service of this document, file specific written objections with the clerk of this court. Failure to do so will bar a *de novo* determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the Magistrate Judge. See 28 U.S.C. § 636(b)(1)(C); Lewis v. Smith, 855 F.2d 736, 738 (11th Cir. 1988); Nettles v. Wainwright, 677 F.2d 404 (5th Cir. Unit B, 1982) (en banc). The procedure for challenging the findings and recommendations of the Magistrate Judge is set out in more detail in Local Rule 26(4)(b), which provides that:

Any party may object to a magistrate judge's proposed findings, recommendations or report [*8] made under 28 U.S.C. § 636(b)(1)(B) within ten (10) days after being served with a copy thereof. **The appellant shall file with the Clerk, and serve on the magistrate judge** and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his discretion or where required by law, and may consider the record developed before the magistrate judge, making his own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

A Magistrate Judge's recommendation cannot be appealed to a Court of Appeals; only the District Judge's order or judgment can be appealed.

2. *Transcript (applicable [*9] Where Proceedings Tape Recorded).* Pursuant to 28 U.S.C. § 1915 and FED.R.CIV.P. 72(b), the Magistrate Judge finds that the tapes and original records in this case are adequate for

purposes of review. Any party planning to object to this recommendation, but unable to pay the fee for a transcript, is advised that a judicial determination that transcription is necessary is required before the United States will pay the cost of the transcript.

Bert W. Milling, Jr.

UNITED STATES MAGISTRATE JUDGE