

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION AA
CASE NO: 502015CA010548XXXXMB

PENNY PERLMUTTER,
Plaintiff,

v.

OLYMPUS INSURANCE COMPANY,
Defendant.

ORDER OF INVOLUNTARY DISMISSAL

THIS MATTER came before the court for hearing on August 1, 2017, on Defendant's Amended Motion to Compel Entry Upon Land and for Sanctions (the "Motion for Sanctions"). For the reasons that follow, the court finds the Motion for Sanctions has merit and that the case should be involuntarily dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

1. Plaintiff, PENNY PERLMUTTER, filed this action for breach of contract and declaratory relief on September 17, 2015, for claims arising out of a fire loss sustained at Plaintiff's residence that was insured by Defendant, OLYMPUS INSURANCE COMPANY ("Olympus"). Defendant acknowledged coverage and paid the claim but Plaintiff avers that she was underpaid for her loss. On October 31, 2016, the court entered an Order Setting Case for a Jury Trial and Directing Pretrial and Mediation Procedures (the "Pre-Trial Order") As a result, the case was set for trial for the docket beginning July 17, 2017 through September 15, 2017. Following calendar call, the case was set for trial on August 7, 2017.

2. Since October 26, 2016, the date that Olympus filed a Request for Entry Upon Land (the "Inspection") in this case, Olympus has been continually frustrated and delayed in its attempt to obtain the needed Inspection and related production. The Inspection is necessary in order that Olympus may ascertain the extent of the damage and destruction to the residence and its contents as a result of the fire.

3. Prior to the Inspection taking place, Olympus attempted to confirm the whereabouts and availability of the claimed contents. Counsel for Olympus attempted to informally obtain the information through repeated email requests that spanned several months. After receiving no reply from Plaintiff's counsel, Olympus was forced to propound Interrogatories upon Plaintiff on February 6, 2017. After Plaintiff once more failed to timely respond or reply in any way, Olympus moved to compel Plaintiff's responses. Plaintiff finally responded on March 21, 2017, but the responses were incomplete. Defendant's written requests for better and complete answers were ignored, prompting Defendant to file another motion to compel. One day prior to the hearing on the motion to compel, Plaintiff agreed to provide complete responses which were finally served on May 18, 2017.

4. As a result of Olympus not obtaining the completed responses in a timely fashion, Defendant moved to continue the August 7, 2017, trial setting. Rather than grant the Unopposed Motion to Continue, the court entered an Order on June 27, 2017, which required, among other things, that "Plaintiff shall permit Defendant's consulting experts to conduct an inspection of the dwelling and personal property at issue in this action within twenty (20) days" (emphasis supplied). Thus, the Order unequivocally mandated that the inspection take place no later than July 17, 2017. The Order further provided that any remaining depositions, including those of Defendant's field adjuster and corporate representative shall all occur "no later than twenty (20) days after the inspection is completed. It was the purpose of the Order to provide a viable schedule to allow for the completion of the Inspection and any remaining discovery so as to avoid having to continue the trial and placing it on another docket.

5. Almost immediately after the court's ruling, counsel for Olympus made repeated and diligent attempts to schedule the Inspection, mediation and the depositions of any remaining witnesses. Attached as Exhibit "B" to Defendant's Renewed Motion to Strike Case from Trial Docket, or in the Alternative, Motion to Continue Trial are 49 pages of emails, most of which are from Defendant's counsel or legal assistant desperately seeking proposed dates for the Inspection and the taking of depositions. Despite the urgency of the situation, these emails were, for the most part, totally ignored. In those rare instances where there was a response from the Plaintiff, it was to reject the dates proposed by the Defendant without any suggestion of alternate dates. Plaintiff was equally uncooperative in scheduling dates for depositions and never replied at all in response to Defendant's efforts to retain a mediator.

6. The end result was that the court imposed deadlines for discovery and mediation came and went. Through no fault of his own, the attorney for Olympus is unprepared for the trial now only days away and was forced to file the instant Motion for Sanctions.

7. At the hearing on the Motion for Sanctions, counsel for the Plaintiff did little to dispute any of above other than to indicate that scheduling issues were made difficult as a result of his long-standing inability to contact his client, despite numerous attempt to get in touch with her. She either did not answer the phone or she insisted that her son be involved in the litigation, even though his presence is not necessary to conduct the Inspection. There was little discussion or explanation regarding Plaintiff's allegation contained in her for Motion for Extension of Time to Conduct Re-Inspection and/or Motion for Continuation of Trial that she had "recently underwent surgery and is in the process of recovery". No other details were provided. Plaintiff's counsel failed to explain how the prior surgery would prevent an Inspection of the residence expected to last only for a number of hours. In any event, Plaintiff's physical condition has little or nothing to do with her failure to schedule depositions or comply with the Pre-Trial Order.

II. LEGAL ANALYSIS

8. In determining whether dismissal is appropriate for the discovery violations at issue, it is incumbent on this court to consider and weigh each of six so-called *Kozel* factors. *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993). The court addresses each factor as follows:

A. Whether the attorney's disobedience was willful, deliberate, or contumacious.

Defendant's long standing quest for discovery beginning with the October 26, 2016, Request for Entry Upon Land has been met with either utter indifference or outright resistance. By way of example, it took two motions to compel and more than three months before Defendant finally received completed responses to interrogatories. Emails were routinely ignored and court ordered deadlines were disregarded. To date, the court-ordered Inspection has not taken place and not a single deposition has been taken. The Pre-Trial Order not only requires all parties to participate in mediation but provides for significant sanctions in the event mediation is not conducted in a timely fashion. Although the Pre-Trial Order places the responsibility for scheduling mediation on the Plaintiff's attorney, it was Defendant's attorney who repeatedly reached out to Plaintiff's attorney in a vain attempt to obtain agreement on a mediator. The

court can only conclude, therefore, that such conduct was neither accidental, inadvertent, nor justified, but was willful and deliberate in an attempt to delay these proceedings and to frustrate Defendant's ability to obtain meaningful discovery and move this case toward a resolution.

B. Whether the attorney has been previously sanctioned. Although Plaintiff's counsel has not been previously sanctioned by this court, the court reserved ruling on sanctions following entry of an Agreed Order on Defendant's Motion to Compel Better Responses to Defendant's Second Set of Interrogatories and for Sanctions (D.E. #72). This was in response to a prior Ex Parte Order Compelling Plaintiff's Responses to Discovery (D.E. # 59).

C. Whether the client was personally involved in the act of disobedience. It appears that the client, PENNY PERLMUTTER, must assume some, if not the majority of the responsibility for the delays in obtaining discovery by not allowing or permitting inspection of her residence and by not being responsive to her attorney's numerous requests for information and dates.

D. Whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion. The failure to provide discovery has left the Defendant totally unprepared for a trial that is only days away. To cancel and reset the trial would only serve to reward Plaintiff for her flagrant disregard of court orders and encourage similar conduct in the future. Moreover, Plaintiff has had to incur additional expense in an unsuccessful attempt to obtain an Inspection and discovery, as evidenced by the numerous emails and motions that had to be filed on Defendant's behalf.

E. Whether the attorney offered reasonable justification for noncompliance. The excuses and justifications advanced by Plaintiff's counsel are, as noted above, unavailing and unsatisfactory.

F. Whether the delay created significant problems of judicial administration. This case is now 686 days old and well outside the Supreme Court established guidelines for the disposition of civil cases. Fla. R. Jud. Admin., Rule 2.250(a)(1)(B). If the case is not dismissed, it will have to be rolled over to another docket and probably will not be able to be heard until sometime in 2018, creating a further and unnecessary drag on the court's crowded docket.

III. CONCLUSION

This court is mindful that dismissal, even without prejudice, is a severe sanction and should be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result. *Id.* at 818. This is such a case. Plaintiff has filed this action seeking affirmative relief but has frustrated Defendant's attempt to ready itself for trial and willfully and without justification violated this court's Orders.

Based on the foregoing, it is hereby **ORDRED** and **ADJUDGED** that Defendant's Motion for Sanctions is **GRANTED** and this case is **DISMISSED**. All other requests for relief are **DENIED**. The court reserves jurisdiction to consider any issues relating to attorney's fees and costs.

DONE and ORDERED in chambers in Palm Beach County, Florida, this 3rd day of August, 2017.



RICHARD L. OFTEDAL
Circuit Judge

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