UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ROBERT D WILSON, Plaintiff, v. ROBERT CARTER, et al., Defendants.	CASE NO. 3:20-CV-586-JD-MGG

ORDER

Pending before the Court is Plaintiff's request, pursuant to Fed. R. Civ. P. 37, for the sanction of default judgment against Defendants. [DE 65]. As is well-documented in this case, Plaintiff has waged quite a battle to secure complete discovery responses from Defendants. Defendants—through counsel—have provided no persuasive explanation for their delay. Instead, defense counsel has repeatedly promised complete production but did not do so within the time provided through the Federal Rules of Civil Procedure and this Court's orders. Following a status conference on June 8, 2022 [DE 73 & 81], and one last order attempting to bring closure to discovery [DE 78], the Court's attention now turns to the question of what sanctions, if any, are appropriate based upon Defendants' and their counsel's behavior during discovery.

I. RELEVANT BACKGROUND

At issue have been Plaintiff's discovery requests propounded on Defendants between May and November 2021. Changes in Defendants' counsel seemed to interfere with Defendants' timely production in response to those requests. At the start of the

case in July 2020, one Deputy Attorney General ("DAG") represented Defendants. Her activity in this case ended when a second DAG entered his appearance for Defendants on December 29, 2021. Shortly thereafter, his activity in this case ended and a third DAG—Julie Tront—entered her appearance on January 14, 2022. Ms. Tront worked alone on the case after her appearance but the appearances of the first two DAGs, who apparently were no longer employed by the Attorney General's Office, were not withdrawn until June 21, 2022.

Ms. Tront inherited the ongoing disputes over Defendants' outstanding discovery responses. Plaintiff had filed two motions to compel, one on November 1, 2021 [DE 49], and another on January 13, 2022 [DE 58]. In response to both motions, Defendants did not explain their delay in responding to Plaintiff's discovery requests but stated they would produce the outstanding responses and even proposed what sounded like reasonable timelines for production.

Based on Defendants' representations, the Court granted Plaintiff's first motion to compel related to his May 2021 discovery requests on December 16, 2021. [DE 53]. In that order, the Court specified deadlines for Defendants to do three things: (1) produce complete responses to Plaintiff's First Request for Production of Documents; (2) provide a certification that they had conducted a complete search and produced all responsive information; and (3) file a brief regarding the potential award of fees to Plaintiff under Fed. R. Civ. P. 37(a)(5)(A). [DE 53 at 1–2]. The Court also advised that failure to timely comply with any provision of the order would result in Defendants being "barred from relying on information in any later-produced materials that are responsive to Plaintiff's

First Request for Production of Documents to support any claim or defense in this case." [*Id.* at 2, ¶ 5].

Yet as the Court-established deadlines approached, Defendants sought, and received in an order dated January 13, 2022, extensions of the deadlines over "Plaintiff's reasonable objection." [DE 57 at 4]. Despite finding that Defendants had not demonstrated good cause for the requested extensions, the Court extended the deadlines in the interest of truth and justice citing Fed. R. Civ. P. 1. The Court also extended the overall discovery deadline to March 15, 2022, to ensure Plaintiff would not be unduly prejudiced by the production extensions in litigating the merits of his claims.

In doing so, the Court rejected Defendants' excuse that changes in the attorneys assigned by the Attorney General's Office necessitated the extensions noting that failure to provide for staffing continuity "should not be rewarded, especially in cases where discovery is not propelled forward in a timely manner." [*Id.* at 3]. The Court also described in detail how Defendants failed to show due diligence throughout discovery regardless of the changes in counsel. [*Id.*]. Concerned about limiting the prejudice Plaintiff would face if Defendants delayed further, the Court then warned the parties that "additional extension requests [would] not be considered favorably absent a showing of circumstances beyond their control and their inability to negotiate those circumstances in the exercise of due diligence." [*Id.* at 5]. The Court explicitly stated that "[c]hange of counsel is not likely to justify further extensions." [*Id.*].

With many of Defendants' responses related to the first motion to compel still outstanding, Plaintiff filed his second motion to compel on January 13, 2022, seeking the

Court's assistance in getting responses to his June, October, and November 2021 discovery requests. [DE 58]. On the deadlines for Defendants' production related to the first motion to compel, Defendants filed motions seeking further extension of the production deadlines and an extension of the overall discovery deadline. [DE 61 & 66]. While the extension motions were under advisement, Plaintiff filed a motion on March 4, 2022—about ten days before the overall discovery deadline—asking that Defendants be ordered to show cause why they should not be sanctioned with default judgment for their failure to comply with this Court's discovery orders and the Federal Rules of Civil Procedure. [DE 65]. Plaintiff reported that Defendants still had not fulfilled their production obligations making it impossible to litigate his case fairly, especially with the March 15th discovery deadline looming.

On May 19, 2022, the Court addressed the parties' pending motions. [DE 71]. Consistent with the Court's previous warning, Defendants' extension motions were denied because they did not establish a "sufficient showing of due diligence in discovery before, during, and after the pendency of Plaintiff's motion to compel and request for sanctions." [*Id*. at 3]. As a result, discovery had closed upon expiration of all deadlines. Plaintiff's second motion to compel was also granted because Defendants employed the same strategy of promising production without any explanation for the delay. Labeling Defendants' ongoing behavior as "elusive," the Court recognized the prejudice they had caused to Plaintiff and acknowledged that sanctions had to be considered in light of Defendants' failure to comply with court orders and the governing procedural rules. [*Id.* at 4]. Defendants were then ordered to file certification

regarding their discovery production to date and to show cause why sanctions should not be imposed. [*Id.* at 4–5]. The Court also scheduled a status conference to discuss the status of Defendants' discovery production and sanctions.

On June 3, 2022, Ms. Tront as current defense counsel timely filed a response to the order to show cause and a discovery certification. [DE 72, 72-1]. She asked that sanctions not be imposed focusing on her attempts to ascertain what had transpired in the case before she entered her appearance plus her own efforts to bring all discovery responses current. Ms. Tront also reported regular communication with Plaintiff's counsel as supplemental production was made. Further, the Defendants' response explicitly acknowledged and apologized for the discovery delays suggesting that all discovery was complete. At the status conference on June 8, 2022, however, Plaintiff's counsel identified four outstanding discovery matters. [*See* DE 74 at 2].

At the conference, argument regarding sanctions reflected the parties' disagreement as to the appropriate legal standard that should govern the Court's decision. In concluding the conference, the undersigned directed the parties—through counsel—to work together to clear up any outstanding discovery promptly while taking the sanctions question under advisement. [DE 81 at 20–21]. The parties were also advised that Defendants' conduct during discovery was egregious and would be taken very seriously with at least some award of fees likely. [*Id.* at 21–23].

The parties' joint status report dated June 17, 2022, showed that counsel had been working toward resolution of the four outstanding discovery matters but that three of

the four still required additional attention. [DE 75]. Defendants' counsel was still investigating the status of outstanding items as well.

Surprised that the four discovery matters had not been fully resolved, the Court issued one more order on June 24, 2022. [DE 78]. Defendants were afforded one final opportunity to comply with their discovery obligations and the Court's orders. Specifically, Defendants were ordered to produce complete discovery responses as specified and a certification regarding the document requests subject to Plaintiff's first motion to compel by July 1, 2022. [*Id.*]. Plaintiff was ordered to file a status report on July 5, 2022, after review of Defendants' anticipated supplemental production. [*Id.*].

On July 5, 2022, two status reports were filed. Defense counsel reported having tendered all discovery responses except those related to Plaintiff's Request for Production #7 asking for assorted documents related to staffing of the locations within the prison where Plaintiff was housed in 2019, 2020, and 2021. [DE 79]. Counsel explained that Defendants had already produced a list of employees during that time but gathering the requested staffing logs and timesheets was a labor-intensive process expected to produce thousands of documents. [*Id.*]. Defense counsel promised to supplement the response to RFP #7 "as quickly as possible" without any mention of the ordered certification.

Separately, Plaintiff described additional deficiencies in Defendants' recent supplemental production while arguing that Defendants still had not complied with the Court's orders. [DE 80]. Plaintiff rejected Defendants' "burden of production" argument related to staffing logs and timesheets given the passage of excessive time since RFP #7

was originally propounded. Additionally, Plaintiff noted that Defendants did not identify gang members and their locations in the prison as requested in RFP #12. Plaintiff further complained of redactions without authorization and duplicates within Defendants' supplemental production, brief interrogatory answers from Defendant Hawk, and disorganized production preventing him from matching responses to particular requests. As a result, Plaintiff indicated he was unable to trust that Defendants had produced all the responsive information they possessed or controlled. Plaintiff then contended that default judgment would be the only way to eliminate the risk of unjust result for him in this litigation.

In September 2022, before the Court could rule on the outstanding question of sanctions, the parties filed more status reports following another round of supplemental production by Defendants on August 1, 2022. [DE 82, 83]. In those responses were twelve sets of shift rosters showing officers working at MCF in 2019 but no certification of a complete search and production and no relevant gang member information. Unaware of Plaintiff's allegations of deficiency, apparently raised for the first time in Plaintiff's September report, Defendants responded stating that they "produced all documents within their possession or control that are responsive to Plaintiff's requests." [DE 83 at 1, ¶ 2]. Defendants also explained that they do not control the requested confidential gang member information, that locating gang members requires looking up each inmate by name to determine any gang affiliation, and that the shift rosters produced are "a complete recording of all shift rosters in the areas where Mr. Wilson was located during his time at Miami Correctional Facility." [*Id.* at ¶ 4].

II. DISCUSSION

This long recitation of facts paints a picture of inefficiency rarely seen in litigation before this Court. Fortunately, the appearance of Attorney Tront on behalf of Defendants in January 2022 generated progress toward completion of discovery. Unfortunately, however, Ms. Tront's efforts do not compensate for the delays and resulting prejudice caused by defense counsel's conduct before she entered her appearance. Moreover, resolution of Defendants' outstanding discovery responses since Ms. Tront entered her appearance has taken longer than contemplated by the Federal Rules of Civil Procedure and this Court's orders. Thus, sanctions must be considered as alluded to during the June 8th status conference.

A. Discovery-Related Sanctions

1. Fee Shifting for Motions to Compel

Federal Rule of Civil Procedure 37 governs discovery-related disputes. When a motion to compel is granted,

> the court must, after giving an opportunity to be heard, require the party . . . whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees [unless] the opposing party's nondisclosure . . . was substantially justified; or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(5)(A). Here, Defendants have been afforded multiple opportunities to demonstrate that their nondisclosure, or delayed disclosure, was substantially justified or that other circumstances make an award of expenses related to Plaintiff's two motions to compel unjust but have not.

No one disputes that Defendants' nondisclosure and delay in response to Plaintiff's 2021 discovery responses forced Plaintiff to file both motions to compel. Moreover, Defendants still have not explained what caused the discovery problems before Attorney Tront took over their case. Since entering her appearance, Ms. Tront has produced some responsive information to Plaintiff on behalf of Defendants but did not identify fully the gaps in production or produce all the responsive information before the "final deadline" of July 1, 2022, as ordered by this Court. [*See* DE 78]. Taking Ms. Tront at her word, gathering some of the requested information was difficult and created a burden. While that burden may have reasonably prevented Defendants from producing the requested information within 30 days as prescribed by Fed. R. Civ. P. 34, it need not have delayed production until August 1, 2022, had Defendants and their former counsel pursued discovery with due diligence keeping Plaintiff's counsel more informed along the way.

Thus, Defendants have not established that the discovery conduct, particularly of their attorneys, prior to the filing of the two motions to compel was substantially justified or that other circumstances make an award of expenses under Rule 37(a)(5)(A) unjust. Accordingly, Plaintiff is **AWARDED** his reasonable expenses, including attorney's fees, incurred in bringing his motions to compel dated November 1, 2021 [DE 49], and January 13, 2022 [DE 58]. The Indiana Attorney General's Office is **ORDERED** to pay Plaintiff's award as it had control over the flow of discovery in this case, regardless of any changes to the staff assigned to this case.

2. Other Sanctions

Fed. R. Civ. P. 37(b)(2)(A) provides for sanctions, up to and including dismissal of the action, when a party fails to comply with a court order. Dismissal for failure to comply with discovery obligations should not be undertaken lightly and only upon a finding "that the responsible party acted or failed to act with a degree of culpability that exceeds simple inadvertence or mistake . . . ." *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 776 (7th Cir. 2016). "Sanctions may be imposed when a party persistently fails to comply with a discovery order and displays wilfulness, bad faith or fault in doing so. " *Crabtree v. Nat'l Steel Corp.*, 261 F.3d 715, 720 (7th Cir. 2001) (internal citations and quotations omitted).

"Rule 37 should not be construed to authorize dismissal of an action when a [party's] failure to comply with his discovery obligations was due to his inability to comply rather than his willfulness, bad faith, or any fault." *Ramirez*, 845 F.3d at 776 (internal quotations omitted) (citing *Societe Internationale pour Participations Industrielles et Commercialaes, S.A. v. Rogers*, 357 U.S. 197, 212 (1958); *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 640 (1976) (per curiam)). "Fault, in contrast to wilfulness or bad faith, does not require a showing of intent, but presumes that the sanctioned party was guilty of extraordinarily poor judgment or gross negligence rather than mere mistake or carelessness." *Id.* (internal quotations omitted); *see also Long v. Steepro*, 213 F.3d 983, 987 (7th Cir. 2000) ("Fault . . . suggests objectively unreasonable behavior; it does not include conduct that we would classify as a mere mistake or slight error in judgment.").

The court also retains the "inherent power to sanction a party who has willfully abused the judicial process or otherwise conducted litigation in bad faith." *Secrease v. W. & S. Life Ins. Co.*, 800 F.3d 397, 401 (7th Cir. 2015) (internal quotation and citation omitted). To impose sanctions under its inherent authority, a court "must first make a finding of bad faith, design to obstruct the judicial process, or a violation of a court order." *Fuery v. City of Chicago*, 900 F.3d 450, 463–64 (7th Cir. 2018) (internal quotation and citation omitted). Imposition of judgment should only be used as a sanction "after determining that there is a clear record of contumacious conduct after considering the egregiousness of the conduct in question in relation to all aspects of the judicial process and considering whether less drastic sanctions are available." *Id.* at 464 (internal quotation and citations omitted). "Negligence . . . is not enough to support a finding of bad faith." *Trade Well Int'l v. United Cent. Bank*, 778 F.3d 620, 627 (7th Cir. 2015).

Plaintiff requests default judgment against Defendants based upon their indifferent approach to the discovery-related deadlines imposed by the Federal Rules of Civil Procedure, this Court's orders, and even Defendants' own proposed deadlines for production that were incorporated into those orders. As outlined above, Defendants have indeed delayed discovery without meaningful explanation and also failed to comply both with the self-enforcing deadlines set forth in the Federal Rules of Civil Procedure and this Court's orders. Defendants' conduct—through their counsel—has fallen short of the Rule 1 obligation imposed upon them to facilitate a "just, speedy, and inexpensive determination" of all proceedings in this action. Yet Plaintiff has produced no direct evidence of willful abuse of the judicial process or conducting this litigation in

bad faith by Defendants or their counsel. *See Secrease*, 800 F.3d at 401. Thus, neither default judgment nor any other sanctions are warranted pursuant to the Court's inherent authority. *See Fuery*, 900 F.3d at 463–64.

With that said, the question of discovery-related sanctions under Fed. R. Civ. P. 37(b) for failure to comply with a court order is a closer call. No party disputes that Defendants have failed to comply with deadlines established by this Court's orders on multiple occasions. Such persistent conduct presumably justifies some type of sanction with a showing of fault alone. *See Crabtree*, 261 F.3d at 720; Fed. R. Civ. P. 37(b). The record here supports such a finding.

Defendants have produced nothing to explain their counsel's conduct before January 14, 2022, when Ms. Tront entered her appearance. Thus, the record forces a conclusion that little to nothing was being done with regard to Plaintiff's written discovery requests propounded between May and November 2021. With Ms. Tront's appearance, attention to Plaintiff's discovery requests increased exponentially. For that, Ms. Tront—faced with a difficult situation—should be credited. However, her efforts do not excuse the Indiana Attorney General's Office's failure to facilitate continuity in the defense of this case while managing multiple staffing changes. Additionally, the apparent lack of due diligence in discovery before Ms. Tront arrived creates an inference that the Attorney General's Office did not prioritize this case and instills fear that other cases brought by prisoners were similarly ignored. Thus, the Attorney General's indifferent approach to this case, especially before January 14, 2022, is subjectively unreasonable. *See Long*, 213 F.3d at 987.

Unfortunately, however, Ms. Tront's appearance did not bring discovery to a close quickly. More Court-ordered deadlines passed without complete production. At least Ms. Tront communicated more effectively with both Plaintiff's counsel and this Court about her efforts and the obstacles she faced in gathering complete discovery responses. As a result, the record demonstrates due diligence on Ms. Tront's part even if she failed to comply with every deadline and even if Plaintiff remains dissatisfied with Defendants' discovery responses.

Looking at the conduct of defense counsel over the entire course of this case, default judgment is an excessive sanction. Nevertheless, Plaintiff has established sufficient fault to warrant some form of sanctions.

First, the Court is once again constrained by the requirements of Rule 37, which mandates that the party disobeying court orders, "the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C). The Attorney General's Office has already been held responsible for Plaintiff's expenses arising from his two motions to compel. However, defense counsel's behavior also forced Plaintiff to incur unanticipated expenses litigating motions for extension of time [DE 55, 61, 66] plus his request for sanctions [DE 65, 70, 73, 75, 80, 82]. Unable to overcome the lack of due diligence before January 2022 that drove delay even in Ms. Tront's conduct, defense counsel have not established substantial justification or extenuating circumstances to prevent an award of Rule 37(b)(2)(C) expenses against them.

Second, Plaintiff's request at the June 8, 2022, status conference for alternative sanctions in the form of unilateral discovery must now be considered. Yet unilateral discovery is also excessive given the current state of discovery. As discussed in more detail below, a more targeted and narrowly focused approach to the limited outstanding discovery that remains will allow Plaintiff to build a record that should facilitate a fair decision on the merits either by dispositive motion or trial in this action. Moreover, Plaintiff is not precluded from seeking further evidentiary relief via other procedural mechanisms including but not limited to motions in limine and jury instructions.

Therefore, sanctions beyond the mandatory award of fees under Fed. R. Civ. P. 37(b)(2)(C) are not warranted at this time.

B. Discovery and Case Management

Based upon the parties' most recent status reports in September 2022, discovery is very nearly complete. According to Plaintiff, two issues remain unresolved: (1) Defendants' certification, ordered by this Court to be produced by January 28, 2022, that they searched their files, and their production is complete, and (2) Defendants' response to discovery requests related to RFP #12 seeking relevant gang member information[1]. To date, the Court has not seen a certification from Defendants in the form envisioned by the order granting Plaintiff's first motion to compel. However, Defendants attested

[1] Plaintiff also expressed disappointment with Defendants' belated production of shift rosters in response to RFP #7. [DE 82 at 1]. However, Defendants subsequently explained that the rosters "are a complete recording of all shift rosters in the areas where Mr. Wilson was located during his time at Miami Correctional Facility." [DE 83 at 1]. Moreover, Plaintiff made no argument challenging the sufficiency of the rosters in response to RFP #7. As a result, the Court can only assume that any issue surrounding Defendants' response to RFP #7 has been resolved.

in their September 2022 report that they "produced all documents within their possession or control that are responsive to Plaintiff's requests." [DE 83 at 1]. Thus, Defendants indicate finality as to their discovery responses and thereby satisfy the intent of the Court's certification requirement. Should Plaintiff become aware of any shortcoming in Defendants' search or production, he may seek redress through the range of evidentiary mechanisms provided in the applicable procedural rules.

As to the outstanding gang member information, Defendants report that confidential gang member information is maintained outside their control. Further, Defendants indicate that Plaintiff's counsel was informed that gang member locations within the prison can only be determined by inputting inmate names into a system that shows gang affiliations. Given the nature of Plaintiff's claims, the requested gang information is clearly relevant such that Plaintiff should not be precluded from gathering it. Therefore, discovery will be **REOPENED** for a limited time for the limited purpose of allowing Plaintiff to subpoena the necessary information from any non-party that controls it. While Defendants may not maintain control of the relevant gang information, their September 2022 report shows that they have knowledge about the process for securing that information. Accordingly, Defendants are **ORDERED** to assist Plaintiff as needed. Presumably, Defendants should at the least identify the proper non-party to Plaintiff and produce any data or information needed by the non-party to comply with Plaintiff's subpoena.

III. CONCLUSION

In summary and for the reasons discussed above, Plaintiff is **AWARDED** his reasonable expenses, including attorney's fees, incurred in bringing his motions to compel dated November 1, 2021 [DE 49], and January 13, 2022 [DE 58]; responding to Defendants' extension motions [DE 55, 61, 66]; and litigating his request for sanctions [DE 65, 70, 73, 75, 80, 82]. Plaintiff is **ORDERED** to file a statement of expenses, including attorney fees, by **January 13, 2023**. Any objection to the reasonableness of Plaintiff's reported expenses must be filed on or before **January 27, 2023**.

Additionally, discovery is **REOPENED** for the limited purpose of subpoenaing relevant non-parties for information as to gang member affiliation and locations within the prison at the times relevant to Plaintiff's claims. The parties are **ORDERED** to meet and confer no later than **December 23, 2022,** then file a proposed schedule for Plaintiff's remaining non-party discovery on or before **January 3, 2023**. The Court will then establish final deadlines to conclude discovery but expects the targeted discovery remaining can be completed by February 15, 2023.

SO ORDERED this 13th day of December 2022.

s/Michael G. Gotsch, Sr.
Michael G. Gotsch, Sr.
United States Magistrate Judge