

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

**CASE NO. : 07-60534-CIV-DIMITROULEAS
MAGISTRATE JUDGE: ROSENBAUM**

HOWARD K. STERN,

Plaintiff,

vs.

JOHN M. O'QUINN and
JOHN M. O'QUINN & ASSOCIATES PLLC
d/b/a The O'Quinn Law Firm

Defendants.

PLAINTIFF'S RESPONSE TO SHOW CAUSE ORDER

NOW COMES Plaintiff Howard K. Stern and hereby responds to this Court's September 15, 2008 Order to Show Cause Why Case Should Not Be Dismissed for Lack of Prosecution, showing the Court as follows:

INTRODUCTION

Plaintiff Howard K. Stern ("Stern") has diligently prosecuted this case since it was filed, and no action of Stern has caused either delay in this case being ready for trial on Monday, December 29, 2008 or prejudice to Defendants. Stern has propounded jurisdictional discovery; issued subpoenas to third-parties; and issued multiple discovery requests and notices of depositions to Defendants. Plaintiff filed multiple motions to compel when Defendants avoided fully responding, objected or moved for a protective order in response to such discovery. In short, as shown below, Stern has attempted to use discovery to discover the facts supporting Defendants' libelous statements and the

defenses hinted at in his responses to interrogatories. Defendants, however, have resisted discovery at every turn.

In stark contrast to Stern's actions, Defendants John M. O'Quinn ("O'Quinn") and John M. O'Quinn & Associates PLLC d/b/a The O'Quinn Law Firm ("The O'Quinn Law Firm") have not taken action other than to resist discovery. They have not even filed an Answer. Defendants have not issued any discovery requests to Stern. They have issued no notices of deposition. Instead, Defendants filed a motion for a protective order asking that Plaintiff be prohibited from deposing a witness, investigator Wilma Vicedomine, at all.

Once Defendant John M. O'Quinn, Don Clark, and Wilma Vicedomine are finally deposed after months of their attempts to avoid being deposed and once Defendants fully comply with this Court's August 29, 2008 Omnibus Order regarding written discovery, Stern will be ready for trial on December 29, 2008. Because Stern has filed an application for default as a result of Defendants' failure to answer the Amended Complaint [DE 174], the only question is whether the December trial of this case will be a trial on the merits or whether it will be a trial limited solely to damages. See Fed. R. Civ. P. 55(b)(2).

RELEVANT FACTUAL AND PROCEDURAL HISTORY

Stern filed this action on April 13, 2007, against Defendant John M. O'Quinn and has, since that time, diligently prosecuted this action through discovery and by applying to the Clerk of Court for an entry of default of Defendants O'Quinn and The O'Quinn Law Firm. Stern has not engaged in delay or willful contempt of court; instead Stern has pursued discovery as directed by the Court in the August 23, 2007 Order Setting Trial Date and Discovery Deadlines [DE 47]. See Hildebrand v. Honeywell, Inc., 622 F.2d

179, 181 (5th Cir. 179) [holding that a court may only dismiss a case with prejudice under Fed. R. Civ. P. 41(b) where “a clear record of delay or contumacious conduct by the plaintiff exists.” (internal quotations omitted).] Furthermore, dismissal of this case—even without prejudice—may operate as a dismissal with prejudice because of statute of limitations issues. The record of Stern’s prosecution of this case does not support this extreme sanction.

I. STERN HAS DILIGENTLY PURSUED DISCOVERY.

A. Stern Diligently Pursued Jurisdictional Discovery.

After Stern filed his Complaint in this action, on July 17, 2007, O’Quinn filed a motion to dismiss this action for lack of personal jurisdiction and for failure to state a claim [DE 17]. Approximately a week after O’Quinn filed his motion to dismiss, Stern immediately engaged in jurisdictional discovery by serving O’Quinn with a notice of his jurisdictional discovery deposition [DE 29]. O’Quinn was deposed concerning the limited issues of jurisdictional discovery on August 16, 2007.

During O’Quinn’s deposition, Stern learned that there existed a sufficient basis to add The O’Quinn Law Firm as a co-defendant in this action and, therefore, Stern amended his complaint to add The O’Quinn Law Firm [DE 64]. Stern noticed the Rule 30(b)(6) deposition of The O’Quinn Law Firm [DE 77] and took the deposition of Christian Steed on December 28, 2007. Stern also noticed the jurisdictional deposition of Don Clark, an agent of The O’Quinn Law Firm, [DE 78] which Clark sought to quash. Stern determined that he did not need Clark’s jurisdictional discovery deposition to respond to Defendants’ Motion to Dismiss for Lack of Personal Jurisdiction and, therefore, did not seek to compel the jurisdictional discovery deposition of Clark. On July

11, 2008, this Court denied Defendants' Motion to Dismiss for Lack of Personal Jurisdiction [DE 143].

B. Stern Diligently Pursued Third Party Discovery.

Throughout the time that Defendants' Motions to Dismiss were pending, Stern diligently pursued third party discovery. Stern served the following third parties with subpoenas duces tecum:

- Broward County Medical Examiner's Office (October 25, 2007);
- Seminole Police Department (October 25, 2007);
- Wilma Vicedomine (November 10, 2007)¹;
- Wilma Vicedomine (November 14, 2007);
- ABC News, Inc. (December 6, 2007);
- Melinda Burleson (December 6, 2007);
- Fox News Network, LLC (December 6, 2007);
- American Media, Inc. (December 14, 2007);
- California Department of Justice (December 14, 2007);
- Florida State Attorney (December 14, 2007);
- Wilma Vicedomine (April 30, 2008).

On numerous occasions, Stern had sought to take the deposition of Wilma Vicedomine as a third party in this action but was met with repeated obstruction by Defendants. Stern served the following subpoenas to take the deposition testimony of Vicedomine:

¹ As is detailed in Stern's various discovery motions, Vicedomine also acted as a purported agent of The O'Quinn Law Firm and is, therefore, also considered a party in this action.

- November 10, 2007;
- November 14, 2007; and
- April 30, 2008.

Through its Omnibus Order dated August 29, 2008, the Court has resolved the issues surrounding the document production from and deposition testimony of Vicedomine by explicitly outlining the documents Vicedomine is required to produce and the areas on which Vicedomine is required to testify [See DE 165].

C. Stern Diligently and Unilaterally Pursued Party Discovery.

Throughout the pendency of this action, Stern has diligently sought substantive discovery from Defendants through written discovery and by noticing the depositions of the Defendants and their agents. Stern served the following substantive written discovery on Defendants:

- First Set of Continuing Interrogatories to O'Quinn (April 4, 2008);
- First Request for Production of Documents to O'Quinn (April 4, 2008);
- First Request for Production of Documents to The O'Quinn Law Firm (April 4, 2008);
- First Requests for Admissions to O'Quinn (April 4, 2008).

Each of these sets of written discovery became the subject of Stern's various motions to compel filed with the Court on June 30, 2008 [DE 126, 128, 130, 131, 132]. The Court addressed these discovery motions through its Omnibus Order dated August 29, 2008. The Court, however, calendared an ex-parte hearing for September 15, 2008, to address additional issues concerning Defendants' production of documents [DE 169].

Stern also noticed the depositions of Wilma Vicedomine and Don Clark for June 2, 2008, and August 5, 2008, respectively, but agreed to postpone those depositions until the Court ruled on various work-product issues raised by Defendants. The Court addressed those issues in its August 29, 2008 Omnibus Order.

Stern has served several additional discovery requests to Defendants, the responses to which are pending:

- Second Set of Continuing Interrogatories to O'Quinn (August 19, 2008);
- Second Requests for Production to O'Quinn (August 19, 2008);
- First Set of Continuing Interrogatories to The O'Quinn Law Firm (August 19, 2008);
- Second Requests for Production to The O'Quinn Law Firm (August 19, 2008);
- Second Set of Continuing Interrogatories to The O'Quinn Law Firm (September 5, 2008);
- Third Requests for Production to The O'Quinn Law Firm (September 5, 2008).²

Though discovery in this action is calendared to close on September 19, 2008, on August 20, 2008—well within the discovery deadline—Stern noticed the depositions of Defendant John M. O'Quinn, Don Clark, and Wilma Vicedomine to take place prior to the close of discovery:

- John M. O'Quinn for September 18, 2008;

² The written discovery propounded by Stern on September 5, 2008, was specifically limited to documents and information the Court held Stern was entitled to in the August 29, 2008 Omnibus Order.

- Don Clark for September 8, 2008; and
- Wilma Vicedomine for August 28, 2008.

Though O'Quinn, Clark, and Vicedomine were under valid notice of deposition, at the request of counsel for Defendants, Stern agreed to postpone the taking of these three depositions until counsel for Defendants could identify dates that worked better for them. Stern still awaits those dates from counsel for Defendants.

Defendants have not served Stern with any written discovery or a notice of deposition.

II. STERN DILIGENTLY FILED AN APPLICATION FOR DEFAULT.

After Stern filed his Amended Complaint, Defendants filed two motions to dismiss the Amended Complaint [DE 79, 80]. On July 11, 2008, this Court denied the first of these motions, Defendants' Motion to Dismiss the Amended Complaint for Lack of Personal Jurisdiction [DE 143]. On August 8, 2008, this Court denied the second of these motions, Defendants' Motion to Dismiss the Amended Complaint for Failure to State a Claim [DE 156]. Therefore, according to Federal Rules of Civil Procedure 12(a)(4)(A) and 6(a)(2), Defendants' answers to the Amended Complaint were due on August 22, 2008. On September 15, 2008—approximately three weeks after Defendants' answer became past due—Stern timely applied to the Clerk of the Court for an entry of default of Defendants, pursuant to Federal Rule of Civil Procedure 55(a).

ARGUMENT AND CITATION OF AUTHORITIES

Stern respectfully submits that the record does not support dismissal based on Stern's lack of prosecution of this action. Even dismissal of this case without prejudice may, as a practical matter, operate as a dismissal with prejudice because of statute of

limitations issues. The legal standard to be applied under Federal Rule of Civil Procedure 41(b), which governs the dismissal of actions for want of prosecution, is:

whether there is a 'clear record of delay or willful contempt and a finding that lesser sanctions would not suffice.'

Goforth v. Owens, 766 F.2d 1533, 1535 (11th Cir. 1985); see Betty K Agencies, Ltd. v. M/V MONADA, 432 F.3d 1333 (11th Cir. 2005) (dismissal with prejudice is an extreme sanction that may be properly imposed only when (1) a party engages in a clear patten of delay or willful contempt; and (2) lesser sanctions would not suffice). This is not a case where a plaintiff failed to obey the orders of the court or failed to contact defendants' counsel for 18 months, see McIntosh v. Gauthier, 182 Fed. Appx. 884 (11th Cir. 2006); where a single interrogatory was served during 15 months of discovery on a pertinent issue in the case, see Kendrick v. Jefferson County Bd. of Educ., 932 F.2d 910 (11th Cir. 1991); or where the last pleading prior to the court's show cause order was filed 22 months before dismissal, see Harrelson v. U.S., 613 F.2d 114 (5th Cir. 1980). Furthermore, there is no indication that Defendants have been prejudiced by any action attributable to Stern. See McKelvey v. AT&T Techs., Inc., 789 F.2d 1518, 1521 (11th Cir. 1986). There simply exists no record of delay or willful contempt on the part of Stern. As set forth above in detail, Stern (i) has diligently pursued discovery in this action; (ii) has affirmatively sought to bring this action to a close as a result of Defendants' failure to file answers to Stern's Amended Complaint; and (iii) once Defendants comply with this Court's Omnibus Order dated August 29, 2008, Stern will be ready for trial. Therefore, dismissal of this case for lack of prosecution is unwarranted and unsupported by the record.

CONCLUSION

Stern has diligently prosecuted this case from its inception, and no act of Stern has resulted in either the delay of this case being tried on the date set forth in the Court's scheduling order or prejudice to the Defendants. Indeed, once Defendants comply with this Court's Omnibus Order and once John M. O'Quinn, Don Clark, and Wilma Vicedomine finally sit for their depositions, Stern will be ready for the trial of this action. Accordingly, Stern respectfully submits that the record does not support dismissing this case for Stern's lack of prosecution.

Dated: September 15, 2008.

/s/ L. Lin Wood

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2008, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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This 15th day of September, 2008.

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