

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION**

PLAINTIFF B, et al,

Plaintiffs,

vs.

CASE NO. 5:08cv79-RS/AK

JOSEPH FRANCIS, et al,

Defendants.

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SEALED REPORT AND RECOMMENDATION

After reading the transcript of the hearing held before District Judge Richard Smoak on March 19, 2009, (doc.125), and reviewing the transcript and videotape of Defendant Joseph Francis' deposition on April 22, 2009, (doc. 145), the undersigned is of the opinion that Plaintiffs' Motion for Default Judgment (doc. 103) should be **GRANTED.**

A ruling on the previously filed motion for default judgment (doc. 103) was deferred as a means of holding Defendant Francis and his new attorney to their commitment to fair play and cooperation in the discovery process, and counsel was told that the Court's intent was to "leave it hanging over the defendants' head for the time being in the hopes that it will encourage good behavior." (Doc. 125, p. 74). The attorney for Defendants, Frederick Bateman, represented at the hearing that he only agreed to represent Mr. Francis after Francis agreed to "honor both the conduct requirements, the

ethics requirements and the procedural requirements for moving this matter to trial.” (Doc. 125, p. 3). Mr. Bateman acknowledged that he was the “third and last batter up,” *i.e.* Defendants’ third attorney since this matter was filed a little over a year ago on March 20, 2008. Mr. Bateman was told, “...the only thing that is saving your client right now is the optimism I have that your appearance is going to be a turn for the better and that our old problems are over with.” (Doc. 125, p. 74).

So, pass on to your client that you have saved disaster for now. And if it hadn’t been on the promise that we’ve seen an end to what we’ve been dealing with, I really think that this was really heading toward a default if things didn’t change. And I saw it in the Pitts case, and I don’t think there’s really any excuse for it, because if it happens again, I’m convinced that it is just the type of willfulness that would warrant the entry of a default. I think the optimism that maybe we’ll get this thing on track that I’m willing to give it a try. (Doc. 125, p.75).

Following Mr. Francis’ deposition and the deadline set at the hearing for document production, Plaintiffs renewed their motion for sanctions and default, which was referred to the undersigned. A separate order on monetary sanctions has been entered this same date awarding fees and expenses incurred by Plaintiffs’ counsel in preparing for and attending Francis’ deposition and in filing the motions for sanctions, with addendums.

The undersigned finds as grounds for default the following:

It was clear to all at the hearing that an orderly progression was necessary to move the case along---document production first, expert discovery, then plaintiffs’ depositions, and finally the deposition of Joseph Francis and the 30(b)(6) designees. (Doc. 125, p. 53). The Court directed that document production take place prior to Francis’ deposition, and an order was entered following the hearing that it should take

place no later than April 17, 2009. (Doc. 128). Mr. Bateman acknowledged that objections to document production were waived and he was playing a hand he had already been dealt by previous counsel's shortcomings. (Doc. 125, pp. 3-4, 7). The only possible block to production of corporate and personal financial documents was a Fifth Amendment right that Mr. Bateman argued was not waived by a failure to assert timely objections to discovery and was instead a constitutional right based on the criminal charges levied by the IRS in a separate action proceeding in California. (Doc. 125, pp. 11-12). The Court allowed briefing on the issue, but concluded that the "right" was not applicable to any of the financial information and could not be asserted and all documents must be produced and all interrogatories answered by April 17, 2009. (Doc. 128). The Court expressed particular concern about Francis' upcoming deposition, referring to problems with his deposition in the Pitts case where Francis argued "the definition of what 'is' is, that type of thing." (Doc. 125, p. 55). Judge Smoak warned against similar "games" and admonished counsel to have "straight questions and straight answers." (Doc. 125, p. 55).

At his deposition, Joseph Francis was one hour late and showed up with no documents. (Transcript, doc. 145, p. 20, 54). Apparently only a few financial documents had been produced prior to the deposition, none of which concerned Francis' personal finances, despite the schedule set by the Court. (Doc. 145, p. 48-51). Although Francis admitted that he was aware Judge Smoak had found that he waived his Fifth Amendment rights, he asserted this right soon into the deposition responding, "My counsel has informed me that I have a Fifth Amendment right in Judge Otero's courtroom where a criminal case is pending. And as Judge Otero said—excuse me.

(Cell phone interruption). As Judge Otero said, quote, ‘Mr. Francis, the criminal case takes priority over the civil case.’ ” (Doc. 145, p. 63). He refused to answer many, many questions on this ground. (See Doc. 145, pp. 119-145).

It became clear early in the deposition that Francis did not intend to answer questions and used a tactic apparently used in the Pitts case where he pretended not to know the meaning of common words to avoid a straight answer:

Q. Have you ever been convicted of a felony?

A. I don’t understand what that means.

...

Q. You don’t understand what being a convicted felon is?

A. No. Can you explain it to me?

Q. Did you serve any time in jail?

A. What do you mean “serve”?

...

Q. Do you know what a prisoner is?

A. No.

Q. Do you know what a cellmate is in jail?

A. No.

Q. Do you know what a jail is?

A. Sort of.

He did not answer any questions about his “interests” in the various corporate defendants claiming he he did not understand the terms used, the structures of his

businesses, or what it meant to “create” a corporation. (Doc. 145, p. 119). He frequently pleaded ignorance, deferring to his attorneys for answers claiming they handled everything, had all his documents, prepared all his tax returns. When asked about the specific claims in the present lawsuit, he said he had never read the complaint contending it was all “BS” and “just a fabricated story,” according to his attorneys. (Doc. 145, pp. 32-33). When asked if was currently being sued anywhere else, he answered “I don’t really get involved, so I don’t know.” (Doc. 145, p. 38). When asked if he was a defendant in another lawsuit in Las Vegas, he responded, “I could be. And I don’t really pay attention to litigation.” (Doc. 145, p. 36).

When asked about paying two teenage girls to masturbate him and if there were witnesses who might confirm that he did not participate in the incident, Francis made the following comment and laughed:

A. I read a police report preparing for my deposition where PV clearly states that no one ever masturbated me and it was a complete lie. So I guess the two witnesses would be your two clients. (Doc. 145, pp. 88-89).

When asked what was funny, Francis made the following statement:

A. I think the absurdity of the allegations here is disgusting and laughable that you would be accusing a man like me of such disgusting allegations. Just the mere fact, yes, its laughable, that you would sit me in a room with a straight face, a man of my integrity, try to sit here and say that. Yes, it’s laughable and it’s funny. Because I am not that person. And that is absolutely disgusting and laughable and disgusting on the part of you, sir that you would try to do that to get money.

When asked if he ever paid girls to masturbate him, Francis asked counsel, “Do you?” (Doc. 145, p. 96). Francis then went on to say, “I’ve never paid myself to masturbate myself. Actually, I love to masturbate myself since I was like 14.” (Doc.

145, p. 97). Mr. Bateman's attempts to stop Francis went unheeded.

Other examples of obstructive behavior are as follows:

When asked to identify his signature on the state plea agreement signed on March 12, 2008, he was "not sure" and would not affirmatively acknowledge his signature. (Doc. 145, pp. 74, 75). When asked if he had physically appeared before Judge Costello for that hearing, he responded, "I think so." (Doc. 145, p. 77). In response to questions about his sentencing hearing before Judge Smoak on December 13, 2006, Francis responded that he was present in the courtroom "as an observer" upon "court request" and that he could recall nothing about the plea agreement. (Doc. 145, pp. 178-180). When asked about the statement he read at this proceeding, he stated that he was forced to read "pure hearsay" that was "absurd" and "ridiculous" and describes an exchange where Judge Smoak said that all women were stupid, but he, Francis, corrected the judge in open court. (Doc. 145, p. 185).

When Plaintiffs' counsel, after nearly four hours of the above noted "difficulties," decided to terminate the deposition and bring the issue to court, Francis insisted that he was there to answer all counsel's questions (affirmed in the background by his attorney) and then out of visual range of the camera he was heard requesting of the videographer a copy of the videotape to show his willingness to participate. Then, apparently Francis took the camera from the court videographer and began filming Ms. Rachel Pontikes, co-counsel for the Plaintiffs. (Doc. 145, pp. 197-201).

In summary, no information was obtained by this deposition. Francis asserted the Fifth Amendment in response to questions about his mental health, medications he may have taken or had been prescribed, (see pp. 29-30), his past criminal history, who

his attorneys were in past litigation, and when he was not asserting this privilege, he did not understand the question or know the answer.

Francis willfully failed to comply with the Court's previous Orders regarding document production and responses to interrogatories, as well as this Court's decision about assertion of the Fifth Amendment privilege. It is obvious from Mr. Francis' obstructionist posture at his deposition that his third set of attorneys can not or will not get his cooperation in the prosecution of this lawsuit despite clear warning from this Court that continued past practices will result in entry of a default judgment.

In light of the foregoing, it is respectfully **RECOMMENDED** that Plaintiff's Motion for Default Judgment (doc. 103) be **GRANTED**, and that default judgment be entered against Defendants pursuant to Rule 37(b)(2)(A)(vi) and Rule 55(b)(2), Federal Rules of Civil Procedure. It is further **RECOMMENDED** that a hearing be scheduled before the District Judge for a determination of damages.

IN CHAMBERS at Gainesville, Florida, this 11th day of June, 2009.

s/ A. KORNBLUM

ALLAN KORNBLUM
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

A party may file specific, written objections to the proposed findings and recommendations within 15 days after being served with a copy of this report and recommendation. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.