

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ALLISON WILLIAMS,

Plaintiff,

v.

// Civil Action No. 1:05cv51
(Judge Keeley)

ADVERTISING SEX LLC, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER
GRANTING PLAINTIFF'S MOTION FOR DEFAULT
JUDGMENT OVER THE CASTLE CO. DEFENDANTS

On May 30, 2008, the plaintiff Allison Williams ("Williams") moved this Court for default judgment as to defendants the Castle Co. Pty. Ltd. ("Castle Co."), The Moles Trust, Russell M. Moles ("Mr. Moles"), and Gwendoline E. Moles ("Ms. Moles") (collectively the "Castle Co. Defendants"). For the reasons stated below, the Court **GRANTS** the motion, **PROHIBITS** the Castle Co. Defendants from asserting the defense of lack of personal jurisdiction, **ENTERS** default judgment for Williams as to each of the Castle Co. Defendants, and **STAYS** its order until August 1, 2008.

I. Background

On March 18, 2005, Williams sued fifty-nine (59) defendants, alleging that they participated in a conspiracy to defame her. Specifically, Williams alleges that these defendants falsely identified her as the participant in a graphic Internet video they

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had circulated and advertised on multiple websites. That video juxtaposed her image as Miss West Virginia 2003, with pornographic images. Williams seeks legal and equitable relief from numerous foreign and domestic defendants under a number of West Virginia common law theories, including defamation, false light invasion of privacy, appropriation of identity invasion of privacy, unjust enrichment through usurpation of right of publicity, outrage, civil conspiracy, veil-piercing, and vicarious liability. She also seeks permanent injunctive relief.

On March 22, 2005, Williams mailed each defendant a notice of lawsuit and request for waiver of service of process. The notice informed defendants that they were allowed 30 days from March 22, 2005 to file the executed waiver form. If the defendants failed to execute the waiver, the notice stated that Williams would take "appropriate steps to effect formal service in a manner authorized under the Federal Rules of Civil Procedure and [would] then, to the extent authorized by those rules, ask the Court to require [the defendant] to pay the full costs of such service."

On June 8, 2005, Castle Co. was served by means of private personal service. On June 14, 2005, the remaining Castle Co. Defendants were served by means of private personal service. On

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July 5, 2005, local counsel entered its appearance on behalf of the Castle Co. Defendants. On July 14, 2005, the Court admitted three other attorneys pro hac vice to represent the Castle Co. Defendants.

On August 11, 2005, the Castle Co. Defendants filed a motion to dismiss for lack of personal jurisdiction and failure to state a claim. In her response, Williams moved for jurisdictional discovery. The Court entered an order on February 17, 2006 denying the motion to dismiss subject to renewal and granting Williams's motion for jurisdictional discovery. Subsequently, on April 10, 2006, the Castle Co. Defendants filed an answer to the complaint in which they specifically preserved the affirmative defense of lack of personal jurisdiction.

On July 5, 2006, Williams served her first set of combined jurisdictional discovery requests on the Castle Co. Defendants. Two days later, on July 7, 2006, all five attorneys who had made appearances for the Castle Co. Defendants moved to withdraw from the case. On July 10, 2006, these attorneys participated in a status conference at which the Court ordered them to inform the Castle Co. Defendants of the continuing obligations in this case. On July 31, 2006, the attorneys filed a notice with the Court

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indicating that they had so advised their clients. On August 4, 2006, therefore, the Court granted the motion to withdraw. Since that time, no attorney has made an appearance for the Castle Co. Defendants.

On August 15, 2006, Williams received an e-mail from an Australian lawyer named Paul Tonkin requesting copies of all future documents in the litigation. On August 17, 2006, the Castle Co. Defendants, through Mr. Tonkin who has never entered an appearance before this Court, responded to Williams's first set of discovery requests.

After receiving the responses, Williams believed they were "rife with deficiencies." As a result, on September 6, 2006, she sent a letter to the Castle Co. Defendants requesting a meeting to work out their discovery differences. After the Castle Co. Defendants failed to respond, Williams filed a motion to compel discovery on October 11, 2006, which the Court referred to United States Magistrate Judge John S. Kaul.

On October 24, 2006, Magistrate Judge Kaul conducted a hearing on the motion. The next day, he entered an order granting the motion and ordering the Castle Co. Defendants to produce additional discovery or show cause why they did not respond to the

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discovery requests. The Castle Co. Defendants have never produced the additional discovery nor have they provided any explanation of their inaction.

On November 17, 2006, the Castle Co. Defendants mailed a letter to Williams indicating that they would no longer participate in the litigation due to the financial cost. It is unclear from the record when Williams received the letter. Nevertheless, on November 22, 2006, she filed a motion for attorneys' fees and costs associated with the motion to compel. The Castle Co. Defendants did not respond to the motion and failed to appear at the hearing on the motion that Magistrate Judge Kaul held on January 7, 2007.

On April 3, 2007, Magistrate Judge Kaul entered an order granting the motion and, pursuant to Fed. R. Civ. P. 37, ordered the Castle Co. Defendants to pay Williams \$2,787.50 in attorneys' fees and costs. The Castle Co. Defendants have never paid one cent of this amount to Williams.

On May 14, 2007, April 22, 2008, and June 24, 2008, this Court conducted status conferences in this case at which the Castle Co. Defendants did not appear or participate. In short, they have completely ignored this litigation, including the orders of this

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Court, since November 17, 2006 when they unilaterally decided to withdraw active participation from this litigation.

II. Legal Standard

Fed. R. Civ. P. 37(b) states, in relevant part, "if a party or a party's officer, director, or managing agent . . . fails to obey an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders." Fed. R. Civ. P. 37(d) states, in relevant part, that this Court may order sanctions "[i]f a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response."

Among the sanctions the Court can impose for either of these violations are

[1] directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

[2] prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

[3] striking pleadings in whole or in part;

. . .

[4] rendering a default judgment against the disobedient party; or

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[5] treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2).

One of the most drastic of these sanctions is default judgment. When exercising its discretion to determine whether to enter default judgment for failure to comply with discovery orders, this Court must consider the following four factors:

(1) whether the noncomplying party acted in bad faith; (2) the amount of prejudice his noncompliance caused his adversary, which necessarily includes an inquiry into the materiality of the evidence he failed to produce; (3) the need for deterrence of the particular sort of noncompliance; and (4) the effectiveness of less drastic sanctions.

Mutual Fed. Sav. & Loan Ass'n v. Richards & Assocs., Inc., 872 F.2d 88, 92 (4th Cir. 1989).

"[I]n all but the most egregious cases," this Court must give a warning to the offending party that it risks default judgment if it disobeys the order. Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 40 (4th Cir. 1995). The Fourth Circuit counsels that this Court should impose a lesser sanction before it later imposes default judgment. See Anderson v. Foundation for Advancement, Educ., and Employment of Am. Indians, 155 F.3d 500, 505 (4th Cir. 1998).

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III. Analysis

Although rarely an appropriate sanction, the Court finds that under the facts in this case default judgment against the Castle Co. Defendants is warranted. This Court dismissed their motion to dismiss for lack of personal jurisdiction, subject to renewal at the close of discovery. Since that time, they have engaged in a pattern of bad faith activity beginning with evasive and incomplete discovery responses and ending with a complete disregard of this Court's authority. They have repeatedly ignored lawful orders of this Court, including an order to compel and an order awarding attorneys' fees and costs as a lesser discovery sanction.

This noncompliance greatly prejudiced Williams. The purpose of the discovery was to establish whether or not this Court has personal jurisdiction over the Castle Co. Defendants. Specifically, they were to provide Williams with information that would allow her, and later the Court, to determine what connection, if any, they had to other defendants and what role, if any, they played in the alleged defamation of Williams. The evidence requested is material because, had the Castle Co. Defendants complied, the evidence may have shown that this Court lacked grounds to assert personal jurisdiction over them. The evidence

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may also have shown, conversely, that personal jurisdiction is proper. By frustrating the Court's discovery orders, these defendant have prevented Williams and the Court from obtaining information necessary to determine the proper role of the various defendants in this case. For that reason, the discovery sanction of prohibiting the Castle Co. Defendants from asserting the defense of lack of personal jurisdiction, pursuant to Fed. R. Civ. P. 37(b)(2), is appropriate and warranted.

Courts need to deter this particular sort of noncompliance. Were this Court to allow litigants to drop out of a lawsuit whenever they no longer chose to participate, and to repeatedly ignore its orders, the Court's ability to resolve disputes among parties would be irrevocably damaged. Orders are mere pieces of paper unless there is some potential sanction for disobedience. This sort of disregard of judicial authority goes to the very heart of the reason courts exist.

Less drastic sanctions have been completely ineffective in compelling the Castle Co. Defendants to fulfill their obligations. Before their unilateral withdrawal, they filed responses to Williams's discovery requests, which Williams found unacceptable. Following the rules, she filed a motion to compel to which the

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Castle Co. Defendants never responded. Magistrate Judge Kaul conducted a hearing on the motion at which they did not appear. He entered an order the next day granting the motion and ordering them either to produce certain additional discovery or show good cause for not doing so. They completely ignored this order.

Subsequently, they mailed a letter to Williams purporting to unilaterally terminate their participation in this litigation. Williams next filed a motion for attorneys' fees and costs associated with the motion to compel. The Castle Co. Defendants once again did not respond to the motion and failed to appear at the hearing on the motion.

Magistrate Judge Kaul entered an order granting the motion and, pursuant to Fed. R. Civ. P. 37, ordered the Castle Co. Defendants to pay Williams \$2,787.50 in attorneys' fees and costs. They have completely ignored that order as well.

On May 14, 2007, April 22, 2008, and June 19, 2008, this Court conducted status conferences in which the Castle Co. Defendants did not participate. Despite the significant financial discovery sanction imposed by Magistrate Judge Kaul, the Castle Co. Defendants have continued to ignore the orders of this Court.

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The Court finds that the Castle Co. Defendants have received ample warning that they risked default judgment by disobeying this Court's orders. The initial June 24, 2005 scheduling order, for example included the following language in all capital letters in a large bold-faced font:

FAILURE ON THE PART OF COUNSEL TO APPEAR AT THE PRETRIAL CONFERENCE OR TO COMPLY WITH THE REQUIREMENTS OF THIS ORDER WILL SUBJECT THE PARTY OR ATTORNEY TO APPROPRIATE SANCTIONS UNDER THE RULES, AND MAY RESULT IN DISMISSAL OR STRIKING OF ALL PLEADINGS OF THE FAILING PARTY OR PERSON. COMPLIANCE WITH THIS ORDER INCLUDES TIMELY AND GOOD FAITH EFFORT BY ALL PARTIES TO MEET AND JOINTLY PREPARE THE FINAL PRETRIAL ORDER AND OTHER ITEMS DESCRIBED ABOVE.

Furthermore, on July 10, 2006, this Court conducted a status conference and considered the motion of the defendants' attorneys to withdraw from representation. At that hearing, and in the order entered the next day, this Court explicitly ordered counsel to inform the Castle Co. Defendants of "their rights and responsibilities to proceed in this case under applicable law." On July 31, 2006, counsel filed the required notice. In this notice, counsel states:

Following the July 10 Status Conference, undersigned counsel notified the [Castle Co. Defendants] on July 11 of the Court's instructions during that Conference with respect to counsel's withdrawal and their rights and responsibilities for appearing pro se or retaining

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substitute counsel. At that time, we also provided to the [Castle Co. Defendants] the following documents and Court Orders in the case: (1) Plaintiff's Proposed Discovery Plan on Jurisdictional Discovery, (2) Plaintiff's First Set of Combined Jurisdictional Discovery Requests, and (3) the operative Scheduling Order with all future Status Conference dates and deadlines. On July 12, the [Castle Co. Defendants] confirmed receipt of those documents and communications.

. . .

On July 24, 2006, the Court issued its "Order Governing Jurisdictional Discovery." On that same day, the undersigned counsel notified the [Castle Co. Defendants] of that Order and sent them a copy of same, along with our earlier communications with respect to their rights and responsibilities for appearing pro se or retaining substitute counsel under applicable U.S. law.

Although these communications, along with Fed. R. Civ. P. 37, should have amply warned the Castle Co. Defendants that they risked default judgment, out of an abundance of caution, the Court will stay the effective date of this order for thirty calendar days from the date of its entry to permit the defendants to show cause, if they can, why they should not be prohibited from asserting the defense of lack of personal jurisdiction and arguing that default judgment should not be granted to Williams. Should they fail to respond, this Order will take effect on **August 1, 2008**.

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IV. Conclusion

For the reasons discussed, the Court **GRANTS** Williams's motion for default judgment against the Castle Co. Defendants (dkt. no. 328), **PROHIBITS** the Castle Co. Defendants from asserting the defense of lack of personal jurisdiction, and **ENTERS** default judgment for Williams as to each of the Castle Co. Defendants. The Court **STAYS** the effective date of this Order until August 1, 2008.

It is so **ORDERED**.

The Clerk is directed to provide copies of this Order to the pro se defendants by certified mail, return receipt requested, and transmit copies electronically to all counsel of record and all appropriate agencies.

DATED: July 2, 2008.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE