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“Knock-Knock, I Know You’re in There”: Willful Unresponsiveness and the Imposition of Sanctions under FRCP Rule 37

To function effectively, our litigation system requires cooperation, communication, and good faith among parties and counsel. When those do not occur, the Federal Rules of Civil Procedure give the courts broad discretion to impose sanctions under Rule 37. What sanctions are appropriate when an attorney tries to comply with his litigation obligations, but is stymied by his client’s unresponsiveness? A recent case from the Southern District of New York examines this issue within the context of a party’s failure to produce a deposition witness, stopping just short of striking a pleading for the party’s repeated abuse of the litigation process.

The Case: *Charles G. Bateman III v. The Permanent Mission of Chad to the United Nations in New York, et al.*

In *Charles G. Bateman III v. The Permanent Mission of Chad to the United Nations in New York et al*, 2021 WL 964272 (S.D.N.Y. Mar. 15, 2021), the plaintiff brought suit against the defendant, a diplomatic entity, in the Southern District of New York for negligence and violations of New York Labor Law 240 and 241, related to an accident at the defendant’s construction site. Following discovery, the parties cross-moved for summary judgment. [Sidebar: The court denied the defendant’s motion for summary judgment under the Foreign Sovereign Immunities Act.] The plaintiff also moved to strike the defendant’s answer pursuant to Rule 37, on the ground the defendant “failed and refused to ever produce a single witness for a deposition in the action, notwithstanding multiple [Court] Orders to do so.” In analyzing the motion for sanctions, the court considered: 1) the willfulness of the noncompliant party, 2) the efficacy of lesser sanctions, 3) the duration of the period of noncompliance, and 4) whether the noncompliant party had been warned of the consequences of noncompliance. Ultimately, Judge Philip Halpern determined the defendant’s actions were willful and so sanctions were appropriate because the defendant’s counsel made multiple attempts to procure a witness from his client, but the defendant remained unresponsive, causing a year-long delay in the litigation. While Judge Halpern declined to impose the ultimate sanction of striking the defendant’s answer, the court exercised its broad discretion to preclude the defendant from offering a witness on its behalf at trial and instructed that a “missing witness” charge be delivered.

Finally, the court analyzed whether attorney's fees and expenses should be imposed on the defendant under Rule 37(d)(3) and answered in the affirmative. Interestingly, the court distinguished between the defendant and its counsel, explicitly ordering the defendant to pay the plaintiff's reasonable expenses for the deposition at which the defendant did not appear, because defense counsel "undertook several good-faith efforts to contact [the defendant] and urged it to produce a witness but was unable to do so as a result of [the defendant's] conduct."

Takeaway

Two things that keep litigators up at night: difficult clients and the threat of sanctions. The Bateman case is a valuable illustration of the breadth of the court's discretionary power to award sanctions under the Federal Rules and an important reminder that attorneys have an obligation to act in good faith, independent of their clients.