IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2075

Summary Calendar

LOGIC LEASING & FINANCE CO.,
NATIONAL LABOR SYSTEMS-TEXAS CO., and
DONALD L. RICHARDSON,

Plaintiffs-Appellants,
Cross-Appellees,

versus

ADMINISTRATIVE INFORMATION
MANAGEMENT GROUP, INC., ET AL.,

Defendants-Appellees

SPENCER V. BELL, DALLAS E. SMITH, and
FUND ADMINISTRATORS OF TEXAS, INC.,
d/b/a TRUST MANAGEMENT GROUP,

Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

(CA H 90 2673)

November 27, 1992

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The plaintiffs appeal the district court's dismissal of their complaint and entry of default judgment against them as a sanction for violation of discovery orders. We affirm.

I.

The complaint alleges that Logic Leasing developed computer software designed for the management of labor union trust funds; that Logic Leasing had licensed National Labor Systems to provide management services to trust fund managers through the use of this software; and that defendants Spencer V. Smith and Dallas E. Bell, with the assistance of the other defendants, formed another company, Administrative Information Management Group, Inc., for the purpose of competing against Logic Leasing through the use of its computer software. Plaintiffs also contend that Fund Administrators of Texas (d/b/a Trust Fund Management Group) was under license with National Labor Systems to use its software to manage the trust funds and had encouraged Smith to copy the software for Administrative Information Management Group so that Fund Administrators could manage its trust funds through the new company. Plaintiffs allege copyright infringement, unfair competition, breach of fiduciary duty, conversion, and conspiracy. Smith, Bell and Fund Administrators filed a counterclaim, and joined Donald L. Richardson as a counter-defendant. Richardson owns Logic Leasing and part of National Labor Systems.

Discovery did not proceed smoothly. Less than a month after filing suit, Logic Leasing and National Labor Systems asked the district court for expedited discovery--15 days notice for document

requests and interrogatory responses, and 5 days notice for depositions. At the court's direction, the parties agreed on a discovery schedule and deadlines. The court eventually ordered that all discovery be completed by January 21, 1991. The defendants noticed Richardson for deposition as the corporate representative for Logic Leasing and National Labor Systems and asked him to produce certain documents at the deposition. Richardson appeared without the documents. In addition, Logic Leasing served discovery requests after the court's discovery deadline, and the defendants moved to quash the discovery or to obtain a protective order.

At a hearing to resolve these problems, the parties agreed that Fund Administrators was merely a stakeholder and that two issues were left in the case: which party owned the copyrighted software, and whether Smith and other defendants had diverted a corporate opportunity or otherwise breached their fiduciary duties to the two plaintiff corporations through their use of the copyright. For that reason, the court quashed all the outstanding discovery and limited future discovery to those two issues. The court limited discovery to Logic Leasing, National Labor Systems, and defendants Smith and Bell, issued new deadlines for discovery requests and responses, and ordered the parties to submit a detailed, proposed discovery plan.

Within the required time limits, Smith again served Richardson, National Labor Systems, and Logic Leasing with requests for documents. Richardson and the companies' objected, contending

that delivering the documents to Smith's counsel would be unduly burdensome, expensive, and inconvenient, because the documents were in ten filing cabinets. They offered instead to permit the defendants to visit the companies and make their own inspection. However, Richardson's ten-cabinet filing system was not organized in any fashion. Smith then filed a motion to compel production of documents in a reasonable and responsive manner and in the alternative for sanctions.

At the hearing on this motion, the court issued its first warning regarding Richardson's failure to comply with discovery and to provide a discovery plan: "I'm going to strike the complaint and any answers to any counterclaims if everything is not immediately forthcoming." The court ordered plaintiffs to produce the requested documents by noon on April 11, 1991 and to disclose the information necessary to develop a joint discovery plan by April 16, 1991.

Richardson and plaintiffs' counsel contacted Smith's counsel at 11:00 a.m. on April 11, advising that Richardson would appear at noon with three boxes of original documents and that counsel would have to review these documents immediately, in Richardson's presence, without his counsel. Smith's counsel objected to such short notice and said they could not review the documents immediately because of prior appointments. Richardson arrived at Smith's counsel's office around noon with three boxes, which he said had not been categorized. Richardson also said that he had not personally reviewed any document requests, and that the

documents he had brought were not all the documents that existed which might be responsive to the defendants' requests or the court's orders. He would not agree to leave the documents. Instead, he stayed 1-1/2 hours and then left without leaving the documents. Smith then filed another motion to compel the production of documents and for sanctions. In response, the court ordered: "The plaintiffs shall comply fully with all discovery requests by May 6, 1991 or their claims will be dismissed."

On May 6, Richardson appeared at Smith's counsel's office with copies of documents. Richardson claimed he had never seen the document list attached to his deposition notice, and that his attorney had not reviewed the documents that he had with him. Smith then reurged his motion to compel, again requesting sanctions. Bell also filed a motion for sanctions for the failure of Richardson and his companies to cooperate in preparation of the joint discovery plan.

The court held another hearing to resolve these matters. The court gave a third warning that if Richardson did not comply his claims would be struck. The court directed Richardson to organize the remaining documents and let his attorneys deliver them to the defendants' counsel by August 16. The court also directed defendants' counsel to provide "a brief statement of an approximate amount of attorneys' fees that they have had to expend just with Mr. Richardson's lack of cooperation, not with the whole suit." The defendants were to deliver the fee statement to plaintiffs' counsel by August 16, and the plaintiffs were to pay by August 21.

If there was a dispute about the amount, it would be subject to post-payment adjustment.

Richardson and his companies produced some documents by having Richardson personally deliver them to defendants' counsel, but they failed to produce corporate documents regarding ownership and other critical matters, even though they admitted having them within their custody or control. Defendants' counsel delivered their attorneys fees statements, totaling $43,000. Richardson and plaintiffs did not pay the fees by August 21, but instead filed a motion for reconsideration on August 20. The court denied the motion.

The defendants filed a joint motion for dismissal, for contempt, and for sanctions. They requested an order striking the plaintiffs' pleadings, dismissing plaintiffs' claims with prejudice, and rendering judgment by default against plaintiffs. At the hearing on this motion, the court concluded that Richardson's "behavior has been the equivalent of contempt" and "that his behavior in this litigation has persistently and consistently exceeded the bounds of [what] any court or any litigants ought to have to tolerate" and that Richardson "has directly and willfully violated the orders of this court, which were performance." The court granted the defendants' motion and entered judgment in their favor. Plaintiffs have appealed.[1]

II.

[1]Bell, Smith, and Fund Administrators cross-appealed. However, they have dismissed their appeal pursuant to F.R.A.P. 42(b).

F.R.C.P. 37(b)(2)(C) authorizes a court to dismiss a complaint and render a default judgment as sanctions for failure to comply with discovery orders. We review discovery sanctions for abuse of discretion. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976). To determine whether a district court abused its discretion by imposing these sanctions we focus on a number of considerations:

> First, dismissal is authorized only when the failure to comply with the court's order results from willfulness or bad faith, and not from the inability to comply. Next, dismissal is proper only in situations where the deterrent value of Rule 37 cannot be substantially achieved by the use of less drastic sanctions. Another consideration is whether the other party's preparation for trial was substantially prejudiced. Finally, dismissal may be inappropriate when neglect is plainly attributable to an attorney rather than a blameless client, or when a party's simple negligence is grounded in confusion or sincere misunderstanding of the court's orders.

Bluitt v. Arco Chemical Co., 777 F.2d 188, 190-91 (5th Cir. 1985); see also Prince v. Poulos, 876 F.2d 30, 32 (5th Cir. 1989) (dismissal of complaint); United States for Use of M-Co Constr., Inc. v. Shipco General, Inc., 814 F.2d 1011, 1013 (5th Cir. 1987) (default judgment). These factors show that dismissal and judgment of default were warranted in this case.

The district court found that Richardson "directly and willfully violated the orders of this court." (emphasis added). This finding is supported by the record. On three separate occasions, the court warned Richardson that if he did not comply with the court's orders the court would strike his complaint. Richardson disobeyed all three. Richardson did not shown an inability to comply. See Adkins v. United States, 816 F.2d 1580,

1582 n.4 (Fed. Cir. 1987) (burden on disobedient party to justify noncompliance).

The district court also considered lesser sanctions. It first warned Richardson. See Prince, 876 F.2d at 32 (failure to head warnings shows that lesser sanctions are ineffective). After considering and rejecting the possibility of sending Richardson to jail, the court ordered payment of the defendants' attorney fees caused by Richardson's noncompliance "since I'm going to postpone any drastic remedy." The court told Richardson that he must pay the fees first and argue about the amount later; however, Richardson did not pay any amount toward the fees. See Coane v. Ferrara Pan Candy Co., 898 F.2d 1030, 1033 (5th Cir. 1990) (refusal to pay fees shows the inefficacy of lesser sanctions).

Richardson argues that the district court abused its discretion by requiring him to pay an amount unilaterally submitted by the defendants' attorneys without an opportunity to argue that the amount was excessive. See McFarland v. Gregory, 425 F.2d 443 (5th Cir. 1970) (opposing party is entitled to cross-examination on the amount of the fee); Carlucci v. Piper Aircraft Corp., Inc., 775 F.2d 1440 (11th Cir. 1985) (record must set forth an accounting to demonstrate the reasonableness of the fee). However, the district court told Richardson that he would be given the opportunity to seek an adjustment in amount later. The fact that Richardson did not have an immediate chance to attack the fees does not change our conclusion that dismissal of his complaint and a default judgment were proper. He did not cooperate with the court's directions to

pay first; that was enough to show that lesser sanctions were ineffective and to justify the more drastic sanctions of dismissal and default judgment.

Richardson's failure to comply with discovery also prejudiced the defendant's trial preparation. He failed to produce documents relevant to the case, corporate and financial records of Logic Leasing and National Labor Systems, as well as documents regarding ownership of the software copyrights. Richardson complains that only Smith requested documents, and therefore the court should not have imposed sanctions in favor of all defendants. However, the record shows that Smith served a notice of deposition duces tecum on behalf of all defendants. Moreover, the requested documents were relevant to Richardson's claims against all defendants; thus, all were prejudiced. Finally, a court can impose Rule 37 sanctions in favor of parties who have not participated in discovery, Aztec Steel Co. v. Florida Steel Corp., 691 F.2d 480, 482 (11th Cir. 1982), and without a formal motion to compel, McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1485 (5th Cir. 1990).

Finally, Richardson's conduct is not plainly attributable to his attorney rather than to himself. The district court stated that Richardson's conduct had no bearing on his lawyer. Additionally, Richardson had four different counsel during the suit. Richardson also personally signed pleadings even though he is not an attorney, and he produced some documents without first having his counsel review them. Richardson also cannot claim

confusion or a misunderstanding of the court's orders. In addition to several warnings, the court asked Richardson if he understood its instructions, and he responded that he did. The district court did not abuse its discretion. We affirm.