

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TIMOTHY SCOTT ACKERMANN,

Plaintiff,

v.

JOHN POWERS,

Defendant.

OPINION AND
ORDER

04-C-845-C

This case is before the court on defendant John Powers's motion entitled "motion to dismiss for failure to prosecute and to accept the requests for admission as proven." This case's convoluted procedural history is as follows. Plaintiff Timothy Ackermann filed a pro se complaint in January 2005 contending that defendant, who was a physician's assistant at the Tomah Veterans Administration Hospital, had sexually assaulted him during medical appointments in 1999. Defendant filed his first motion to dismiss in June 2005, arguing that plaintiff had failed to respond to defendant's March 28, 2005 interrogatories and request for documents and defendant's April 21, 2005 requests for admission. I denied defendant's motion, instructing the parties to resolve discovery disputes by filing discovery

motions. In July 2005 defendant filed a motion to compel discovery. I issued an order on August 1, 2005, staying discovery in the case and appointing counsel for plaintiff. I lifted the stay in an order dated October 18, 2005, in which I instructed plaintiff that he was to proceed pro se because he had been unwilling to work with the attorney the court had appointed him.

On November 15, 2005, Magistrate Judge Crocker held a telephone status and scheduling conference with both parties. Excerpts from the transcript of the telephone conference appear below.

The Court: Now they've [defendant] been unhappy with the way you've [plaintiff] provided discovery and I know it's not easy for you. I know you're dealing with a lot of issues. You're not an attorney. I know you have mental health issues. That's why we got you an attorney in the first place. But that didn't work out so now you're back on your own.

Mr. Ackermann: Right.

The Court: But that doesn't mean that you cannot follow the rules.

Mr. Ackermann: Yeah.

The Court: When you make serious allegations like this, the defendant is entitled to find out what proof you've got of this and how you're going to pursue this so that he can prepare to defend against it. So it is very important that when you get this revised or supplemental request from the defendant that you treat it seriously and you give them everything you've got that's responsive so that they know exactly what they're facing here. Does that make sense?

Mr. Ackermann: Yeah, it makes sense.

The Court: Again, I want to make this as clear to you as I possibly can. We're treating your allegations seriously. You're entitled to a trial if in fact the rules and the evidence suggest that you're entitled to a trial, but you've got to play by the rules. And already several times the defendant has asked us to throw your whole lawsuit out because you're not following the discovery rules and I'm giving you a chance to make amends, to make it better. Don't blow it. Give them what you've got. Make sure you answer their questions. If you don't –

Mr. Ackermann: And I always do, but like they said, Oh, we lost it, you know, we misplaced it.

The Court: Well –

Mr. Ackermann: A letter –

The Court: I'm not going to worry about what may have happened in the past because I'm sure each side has a different perspective on what happened before and I'm not prejudging what might happen in the future. I'm hopeful things will work out. If they don't, I know that I'm going to get a motion from somebody, either from Mr. Ackermann for protection or from the defendant for some other sanction or a motion to compel. I just want everyone to be clear that now that we're at this stage, now that we've pretty much gone through two different iterations or versions of this case, first Mr. Ackermann pro se, then Mr. Ackermann with an attorney, now Mr. Ackermann pro se again, and now that we've extended the trial date out to August the Court is going to be firmer and stricter about requiring the parties to follow the rules.

Mr. Ackermann: All right.

...

The Court: ... So again, Mr. Ackermann, I don't want to overemphasize this but I do want to make sure that it's clear to you that notwithstanding the difficulty you're going to have preparing all this and doing what you're supposed to do, you're on your own now and you've got to make it work

because we can only cut you so much slack as a pro se litigant. Understood?

Mr. Ackermann: Yes, sir.

On November 15, immediately following the telephone conference, the court issued an Amended Scheduling Order which stated:

As for the pending discovery disputes, I directed defendant, by counsel, to gather his discovery concerns into one document and re-serve it on plaintiff. Plaintiff will then have thirty days within which to provide a complete response.

Dkt. # 31, at 2.

On November 22, 2005, defendant mailed to plaintiff a “Second Set of Interrogatories and Request for Production of Documents” and a “Request to Admit.” (Defendant attached a copy of these documents, together with a certificate of service, to his present motion.)

1. Motion to dismiss

Defendant has now moved the court to dismiss plaintiff’s complaint because plaintiff has not responded to the discovery requests defendant mailed to plaintiff on November 22, 2005. On January 10, 2006, plaintiff filed a statement acknowledging receipt of defendant’s motion to dismiss. In his statement plaintiff made several declarations regarding his medical care and defendant’s alleged behavior but still did not respond to defendant’s discovery

requests.

Proceedings in this court are governed by the Federal Rule of Civil Procedure. Rule

16(f) states:

If a party or party's attorney fails to obey a scheduling or pretrial order . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D).

Rule 37(b)(2) states:

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . .

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Rule 41(b) states:

For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits.

The Court of Appeals for the Seventh Circuit has stated that involuntary dismissal pursuant to Rule 41(b) is appropriate when the non-moving party has persistently failed to comply with discovery and scheduling orders. Ladien v. Boris Astrachan, 128 F.3d 1051,

1056 (7th Cir. 1997) (quoting Patterson v. Coca-Cola Bottling Co., 852 F.2d 280, 285 (7th Cir. 1988)). This court has taken a number of steps to enable plaintiff to prosecute his case, but it cannot allow him to proceed when he does not abide by the Federal Rules of Civil Procedure and the court's orders. It was made clear to plaintiff in the November 15, 2005, telephone conference and written order that he would have to follow the rules of procedure and would have to respond to defendant's discovery request within 30 days. Magistrate Judge Crocker told plaintiff, "I'm giving you a chance to make amends, to make it better. Don't blow it. Give them what you've got. Make sure you answer their questions." Because plaintiff has provided no responses to defendant's discovery requests since March 2005 and failed to obey the court's order of November 15, 2005, I will dismiss plaintiff's claims against defendant pursuant to Fed. R. Civ. P. 16(f), 37(b) and 41(b).

2. Motion to accept requests for admission as proven

Defendant's motion asks the court to accept defendant's November 22, 2005, unanswered requests for admission as proven. I will deny this motion as moot because plaintiff's complaint against defendant will be dismissed.

ORDER

IT IS ORDERED that defendant John Powers's motion to dismiss plaintiff Timothy Ackermann's complaint is GRANTED and plaintiff's complaint against defendant is dismissed with prejudice. Defendant's motion to accept the requests for admission as proven is DENIED as moot.

The clerk of court is directed to close the file.

Entered this 13th day of February, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge