IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CRAIG AMIN,

Plaintiff, OPINION AND ORDER

v. 05-C-543-C

LOYOLA UNIVERSITY CHICAGO,

Defendant.

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In this civil action, pro se plaintiff Craig Amin contends that defendant Loyola University Chicago breached its fiduciary duty to him by failing to adequately record and report benefits and to disclose documents relevant to his retirement plan as required under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. Trial is scheduled for Monday, July 24, 2006.

Now before the court are (1) plaintiff's motion for a protective order; (2) plaintiff's "Motion for the Court to Issue Its Ruling" on plaintiff's motion for partial summary judgment; (3) plaintiff's objections to the magistrate judge's June 7, 2006 award of attorney fees; (4) defendant's motion to dismiss; and (5) plaintiff's response to the court's June 9 and June 20 orders to show cause. Plaintiff's motion for a protective order will be denied because he has

not shown any reason that the deposition he was ordered to attend and which was scheduled at his convenience would have been improper in any way. Plaintiff's "Motion for the Court to Issue Its Ruling" will be denied as moot because, as I explained in the court's June 9, 2006 order, the motion for summary judgment was denied on March 31, 2006. Plaintiff's motion for reconsideration of the magistrate judge's award of attorney fees to defendant for plaintiff's first missed deposition will be denied because the fees awarded to defendant were not inappropriate. Finally, defendant's motion to dismiss this case pursuant to Fed. R. Civ. P. 37(b)(2)(C) will be granted as a result of plaintiff's flagrant and repeated discovery violations. Before turning to the substance of each motion, I will provide a brief summary of this lawsuit's tortured procedural history.

A. Procedural History

On February 6, 2006, plaintiff moved for partial summary judgment against defendant. In response to plaintiff's motion, defendant asserted that plaintiff had failed to respond to defendant's interrogatories and requests for document production and had failed to appear at a scheduled March 1, 2006 deposition. In the summary judgment opinion, dated March 31, 2006, I noted that

> [a]ccording to defendant, plaintiff's failure to comply with his discovery obligations has handicapped its efforts to respond to his motion for summary judgment . . . In the court's preliminary pretrial conference order dated Nov. 8,

> 2005, dkt. #18, at 9, the magistrate judge warned the parties that if they "d[id] not bring discovery problems to the court's attention quickly, then they c[ould] not complain that they ran out of time to get information that they needed for summary judgment or for trial." If defendant believed that plaintiff was not forthcoming in producing answers to its discovery requests, its remedy was to file a timely motion to compel or impose sanctions, which could include dismissal of the entire case, if plaintiff failed intentionally to appear for his deposition.

Dkt. #44, at 4. Because defendant had not moved to compel plaintiff to respond to its discovery requests, the court took no action with respect to the alleged discovery violations at that time. Instead, noting that plaintiff had failed to establish standing to bring his lawsuit at all, I denied the motion for summary judgment and directed plaintiff to submit proof of standing. He did so on April 10, 2006.

Meanwhile, discovery problems mounted. On April 26, 2006, defendant filed a motion to compel, asserting formally that plaintiff had refused to appear for deposition and continued to provide incomplete and evasive answers to defendant's interrogatories and requests for document production. In an order dated May 19, 2006, the magistrate judge reviewed plaintiff's objections to defendant's discovery requests and ruled that plaintiff had "no legitimate basis for objecting to providing any of [the requested information]" and ordered plaintiff to "provide all of the requested information forthwith." Moreover, the magistrate judge directed defendant to "notice up plaintiff for a deposition in the near future [at which] plaintiff must appear to be deposed." The magistrate judge directed defendant to submit an

itemized list of the expenses it had incurred in filing the motion to compel by May 26, 2006, and gave plaintiff until June 2, 2006, in which to file any objections he had to the expenses alleged.

On May 25, 2006, defendant filed its itemized expenses, requesting $1,685.00 for the 13.3 hours its attorneys had spent researching plaintiff's objections and moving to compel his response. Moreover, as directed, defendant scheduled a deposition for plaintiff on May 30, 2006 at 9:00 a.m. Upon receiving notice of the deposition, plaintiff faxed the following letter to defendant's counsel:

> I am in receipt of your May 23, 2006 correspondence regarding my verbal deposition for May 30, 2006. Such short notice for deposition on that day is problematic for me. In addition, your request fails to address the main objections raised in my February 22, 2006 letter facsimiled [sic] to your office. These objections, once again, are failure to describe the method of taking deposition, the parties who are in charge of such recording, and the reimbursement of costs incurred by me to fulfill your deposition request. The earliest possible date could be June 8, 2006, but the dates of June 12, 13, 15, 16, 19, 20, and 22 at any time after 10:00 a.m. would be more convenient for obtaining my deposition.

Dkt. #62, Exh. D. The faxed letter was sent at 3:33 p.m. on May 26, 2006, the Friday preceding Memorial Day, and the end of the last business day prior to the scheduled deposition.

When plaintiff did not appear at the May 30 deposition, defendant filed a "supplemental request for attorney's fees," dkt. #55, seeking reimbursement in connection

with plaintiff's failure to appear at this second scheduled deposition. Relying on plaintiff's representation of his availability, defendant sent plaintiff an amended deposition notice, directing him to appear for deposition at 10:00 a.m. on Thursday, June 15, 2006.

On June 7, 2006, the magistrate judge ordered plaintiff to pay the $1,685.00 requested by defendant in connection with the first missed deposition, and in an order dated June 9, 2006, I ordered plaintiff to show cause why he had failed to appear at the second deposition in defiance of the magistrate judge's May 19 order.

On June 12, 2006, several days after the June 9, 2006 order was mailed to the parties, the clerk of court received both a notice from plaintiff that his mailing address had changed and a motion for a "protective order," in which plaintiff sought to be excused from (1) producing discoverable documents for defendant to copy (apparently, plaintiff believed that defendant expected him to photocopy relevant documents rather than make the documents available for defendant to photocopy during plaintiff's deposition) and (2) having court reporter Colleen Reed record plaintiff's deposition because "without actual proof or further information [it] is doubtful that Ms. Reed does not [sic] meet the criteria of Rule 28(c)" because she "may be employee or agent of Defendant or relative of [an] attorney [employed by] Hinshaw & Culbertson, LLP." The motion for a protective order was docketed and placed under advisement.

On June 15, 2006, defendant filed a motion to dismiss plaintiff's case, asserting that

plaintiff had failed to appear for a third time at the June 15, 2006 deposition. (Although the motion was unnecessary in light of the court's order to show cause, it appears that the clerk of court entered a standard briefing schedule for the motion in the court's electronic docketing system.)

On July 16, 2006, after noting that plaintiff had failed to respond to the June 9, 2006 order to show cause, I issued an order expressing concern that plaintiff may not have received the June 9 order because of his recent move. Therefore, I extended his deadline for showing cause for missing both the second and third depositions until June 30, 2006.

Apparently, the court's suspicions were well-founded. According to a letter to the court dated June 23, 2006, plaintiff did not receive a copy of the June 9, 2006 order. However, he became aware of the order because the magistrate judge made reference to it in a scheduling order dated June 20, 2006, dkt. #64, at 1.

On June 22, 2006, plaintiff appeared in person at the clerk of court's office and asked to review a copy of his case file. At that time, plaintiff submitted his response to the court's order to show cause, dkt. #66, along with an objection to the magistrate judge's order awarding defendant attorney fees in relation to the first missed deposition. Dkt. #67. During plaintiff's conversation with the clerk of court, he was informed of the dates that had been entered on the docket (mistakenly) for briefing defendant's motion to dismiss. Upon learning of the briefing schedule, which set the deadline for defendant's reply brief one week before

trial, plaintiff became incensed and spoke with chambers staff members about his frustrations; however, the error regarding the briefing schedule was not discovered until the following day, at which time the docket was amended to reflect that plaintiff had until June 30, 2006 in which to show cause for his failure to attend depositions and respond to defendant's interrogatories and requests for document production.

B. Pending Motions

1. Plaintiff's motion for a protective order

In his motion for a protective order, dkt. #60, plaintiff reiterated challenges to defendant's deposition notice addressed in previous orders from both the magistrate judge and this court. In his motion, plaintiff contends that "defendant's repeated non-compliance with Rule 34 for Requests for Production of documents are annoying and would cause [an] undue burden" on him. Plaintiff appears to have had two key issues with the notice provided to him by defendant regarding his third deposition. First, he believed that by asking him to bring copies of relevant documents to his deposition, defendant was asking him to pay for copies of documents defendant planned to retain. It is not clear whether defendant wanted plaintiff to give its counsel copies to retain (which would be improper) or whether it was merely asking him to bring documents with him that defendant could then photocopy. Regardless, plaintiff's apprehension that defendant might be asking him to bear the cost of making copies was no

excuse for failing to appear at all. Second, plaintiff persists in his unfounded assertion that defendant's notice was deficient because it failed to provide "actual proof" that the "chosen Notary Public-court reporter" was not an "employee or agent of Defendant or relative or employee of Michael P. Malone and/or attorney(s) at Hinshaw & Culbertson, LLP." Plaintiff's concerns in this regard appear to rest on sheer paranoia; they have no grounding in fact. Because plaintiff's motion for a protective order has no legal merit, it will be denied.

2. Plaintiff's motion for decision on his motion for partial summary judgment

> In the court's June 9, 2006 order, dkt. #59, at 4-5, I noted that
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> > [i]n plaintiff's motion for reconsideration of the May 19 order, he makes reference several times to this court's alleged failure to rule on his motion for summary judgment, filed February 6, 2006. It is not clear why plaintiff believes his motion remains unresolved. In an order dated March 31, 2006, I denied his motion after finding that he had failed to plead facts sufficient to permit the court to rule on its merits. Dkt. #44, at 15. It may be that plaintiff believed the court would vacate the denial of his motion after he submitted supplemental information regarding his standing to bring suit, as he was directed to do in the March 31 order. If so, he was mistaken. No motion is pending in this case.

In plaintiff's "Motion for the Court to Issue Its Ruling," which he appears to have filed before he read the January 9, 2006 order, plaintiff contends again that the court has not ruled on his motion for summary judgment. However, in his motion, plaintiff quotes directly from the March 31 order in which his motion was denied. Plaintiff is not entitled to a second shot at summary judgment. The motion has been denied; no further ruling is necessary.

3. Plaintiff's request for review of attorney fees award

Plaintiff objects to the magistrate's June 7 order directing him to pay defendant $1,685.00 in attorney fees in connection with defendant's motion to compel discovery and request for cost-shifting under Fed. R. Civ. P. 37(a)(4). Plaintiff contends that the $125 hourly rate charged by defendant's attorney, Kristofor Hanson, is an unreasonably high rate for a first year associate. It is not.

Plaintiff appears to believe that Hanson receives as salary 100% of the amount he bills. Assuming Hanson bills 2,000 hours per year, plaintiff asserts that Hanson must make $250,000 annually, an amount plaintiff contends is unreasonably high for a first year associate. But as the magistrate judge explained in his June 7 order, "[p]laintiff's theoretical extrapolations do not take into account that associates' hourly rates must cover not only their own salary, but office overhead and a percentage of profits for partners." Dkt. #57, at 1. The amount Hanson billed is within the hourly market rate for junior associates at large Midwestern law firms. Consequently, the magistrate judge's decision to award defendant the full $1,685.00 it incurred in bringing its motion to compel was not erroneous. Plaintiff's request for reconsideration of the July 7, 2006 order will be denied.

4. Defendant's motion to dismiss and plaintiff's response to the order to show cause

Throughout the course of this litigation it has become clear that plaintiff has a tendency

to fixate on minor details of procedural rules to the exclusion of the larger goals of fairness the rules are designed to promote. Hence, he has engaged in failed attempts to strike pleadings because of perceived problems with the commission of notaries, dkt. #44, at 3; obtain default judgment for misperceived untimeliness, dkt. #13; avoid disclosing basic information about his employment history and alleged damages because of unfounded "privileges," dkt. #59, at 4; and avoid attending depositions because of the unsupported allegations of conflicts of interest between the court reporter and defense counsel, see section B.1., above.

Had plaintiff's refusal to comply with his discovery obligations arisen from "innocent misunderstanding or lack of familiarity with the law," Downs v. Westphal, 78 F.3d 1252, 1257 (7th Cir. 1996), it might well be excusable. However, plaintiff's conduct throughout this lawsuit has glorified form over substance in repeated manifestations of bad faith. His response to the court's order to show cause is perhaps the most egregious example. According to plaintiff,

> two previous orders in the case record determine the disposition and status of this case. The October 12, 2005 court notice set forth time and case-specific instructions for Preliminary Pretrial Conference . . . [A]fter the telephonic [preliminary pretrial] conference was held, Magistrate Judge Crocker issued Preliminary Pretrial Conference Order on November 9, 2005, that set forth various deadlines for case management and provided guidelines for pro se proceeding(s). However, in the October 12, 2005 court instructions, it was stated that "*the court is ordering that discovery shall not begin until after the pretrial conference*." There is no pretrial conference order or schedule in the record. The November 9, 2005 Pretrial Conference Order is Preliminary as stated in the title "Preliminary Pretrial Conference Order." According to Random House's

> Webster's Unabridged Dictionary ©2000, the word "*preliminary*" is an adjective that means "*preceding and leading up to the main part, matter, or business; introductory; preparatory.*" Hence a reasonable person can conclude this order precedes or is introductory to a formal pretrial conference order.

Dkt. #66, at 2.

Plaintiff does not contend that *he personally* did not understand the binding nature of the court's deadlines as set out in the preliminary pretrial conference order. Nevertheless, he asserts that despite the court's discovery orders and the monetary sanctions that have been imposed on him for his failure to comply with legitimate discovery requests,

> [t]hus far in the case, any exchange of discoverable information between the parties has been voluntary and informal. Defendant's attempts to obtain discoverable information from Plaintiff has been by shortchanging Federal Rules of Discovery, while compromising Plaintiff's procedural rights to disclose or not disclose . . . Defendant attempts for Plaintiff's deposition and Motion to Compel Discovery have failed to adhere to Rules of Discovery and are premature discovery requests that ignore this Court's October 12, 2005 instructions.

Id. at 2-3.

The only party disregarding this court's instructions is plaintiff. His semantic argument regarding the "preliminary" nature of the pretrial conference order is one he has never raised previously and is a transparent attempt to continue circumventing this court's orders and the Federal Rules of Civil Procedure.[1] As the Court of Appeals for the Seventh Circuit has

[1] The adjective "preliminary" modifies the phase "pretrial conference," not the word "order." In the Western District of Wisconsin, telephonic "preliminary" pretrial

explained:

> [B]eing a pro se litigant does not give a party unbridled license to disregard clearly communicated court orders. It does not give the pro se litigant the discretion to choose which of the court's rules and orders it will follow, and which it will wilfully disregard. "Although civil litigants who represent themselves (pro se) benefit from various procedural protections not otherwise afforded to the attorney-represented litigant . . . pro se litigants are not entitled to a general dispensation from the rules of procedure."

Downs, 78 F.3d at 1257 (citing Jones v. Phipps, 39 F.3d 158, 163 (7th Cir. 1994)). Like the litigants in Downs, who "fail[ed] to respond to interrogatories; fail[ed] to appear for scheduled depositions; fail[ed] to make mandatory initial discovery disclosures; [and] violat[ed] court orders requiring them to comply with discovery requests," Long v. Steepro, 213 F.3d 983, 987-988 (7th Cir. 2000) (summarizing Downs), plaintiff has engaged in "a course of conduct that can only be described as abusive." Downs, 78 F.3d at 1255.

Dismissal of a lawsuit is unquestionably a "draconian sanction" that should be "employed only in extreme situations, where there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailable." Marrocco v. General Motors Corp., 966 F.2d 220, 223-224 (7th Cir. 1992). "In the normal course of events, justice is dispensed by the hearing of cases on their merits; only when the interests of justice

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conferences are held at the outset of litigation to establish the schedule for filing dispositive motions, conducting discovery and disclosing trial witnesses and experts. When necessary, a "final" pretrial conference is held shortly before trial to discuss jury instructions and address motions in limine.

are best served by dismissal can this harsh sanction be consonant with the role of courts." Schilling v. Walworth County Park & Planning Comm'n , 805 F.2d 272, 275 (7th Cir. 1986). Nevertheless, before a case may be resolved justly on its merits, both sides must have equal opportunity to present evidence on their behalf and test the strength and credibility of the opposing party's evidence. That can be done only when the parties engage in fair play.

In this case, plaintiff has evaded defendant's legitimate requests for the most basic discovery and has been unresponsive to lesser reprimands and sanctions. Plaintiff has been warned on several occasions that failure to comply with his discovery obligations would lead to dismissal, yet he has persisted in his recalcitrance. Consequently, I am left with only one viable course of action: to grant defendant's motion to dismiss.

ORDER

IT IS ORDERED that

(1) Plaintiff Craig Amin's motion for a protective order is DENIED;

(2) Plaintiff's "Motion for the Court to Issue Its Ruling" on plaintiff's motion for partial summary judgment is DENIED as moot;

(3) Plaintiff's request for reconsideration of the magistrate judge's June 7, 2006 order is DENIED; and

(2) Defendant Loyola University Chicago's motion to dismiss is GRANTED. The clerk

of court is directed to enter judgment in favor of defendant and close this case.

Entered this 30th day of June, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge