

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON
CASE NO. 5:18-CV-00351-KKC**

NICHOLAS BREINER

PLAINTIFF

v.

**BOARD OF EDUCATION OF
MONTGOMERY COUNTY, KENTUCKY**

DEFENDANT

**MOTION FOR SANCTIONS FOR FAILURE TO
COMPLY WITH COURT'S DISCOVERY ORDERS**

Comes now the Plaintiff, by and through Counsel, and moves the Court for an Order of Sanctions against the Defendant for failure to comply with the Court's Discovery Order entered on January 12, 2021 and modified on April 12, 2023 (D.E. 24 and D.E. 42). In support of said motion, the Plaintiff states:

On May 3, 2018, the Plaintiff filed his Complaint with the Court (D.E. 1). The Court entered a Scheduling Order which included discovery timelines. The initial Order stated that all discovery must be completed by May 28, 2021 (D.E. 24).

On September 15, 2021, the Plaintiff propounded his First Set of Interrogatories, Requests for Production of Documents, and Request for Admissions. The Plaintiff's initial discovery has not been answered by the Defendant.

On July 6, 2022, a Modified Scheduling Order was entered stating that Fact Discovery would be due no later than August 30, 2022.

On January 11, 2023, the Plaintiff filed a Motion for a Status Conference and a Motion to Compel Discovery (D.E. 38). On January 25, 2023, an Order was entered denying the Plaintiff's motion due to it lacking clarity as to whether there had been adequate notice of the discovery dispute to the Defendant pursuant to CR 37(a)(1) and LR 37.1 (D.E. 39).

On March 30, 2023, the Plaintiff renewed his motion with a chronology of attempts the Plaintiff had made requesting that the Defendant provide the discovery answers (D.E. 40). The Court scheduled a Status Conference on April 12, 2023 (D.E. 41).

On April 12, 2023, the Court called the case, and all counsel were present. After discussing the discovery issues and pending Trial date, the Court found that a new Scheduling Order was appropriate. The Court entered the new Scheduling Order via Minute Entry on April 12, 2023 (D.E. 42).

Also, on April 12, 2023, the Court ordered the Defendant to provide the Plaintiff with answers to the late discovery by April 21, 2023. The Defendant has not complied with the Court's Order by providing the discovery answers.

On April 21, 2023, the Plaintiff inquired about scheduling depositions with the Defendant. The Plaintiff again inquired about scheduling depositions on May 15, 2023; no depositions were scheduled (*See attached* Emails.)

On June 19, 2023, the Plaintiff sent an e-mail to the Defendant requesting a date that, with certainty, the discovery responses would be expected to arrive by. The Plaintiff, as of the date of this motion, still has not received the discovery answers.

On May 9, 2023, the Defendant filed a Proposed Agreed Order (D.E. 45). The Agreed Order was entered on May 10, 2023 stating that Fact Discovery was due by August 30, 2023 (D.E. 46). At this point, the window in which the Plaintiff may properly review the awaited discovery answers and schedule the appropriate depositions is narrowing.

The Defendant is in contempt of the Court's April 12, 2023 Order and Sanctions are appropriate.

ARGUMENT

FRCP 37(b)(2) permits a Court to enter such Orders with regard to a party's failure to obey an Order to provide discovery. Examples of Orders that may be dependent upon the circumstances are:

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

- (i) 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;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

FRCP 37(b)(2)(A).

In determining the appropriate Sanction under Rule 37, “a Court may properly consider both punishment and deterrence.” JP Morgan Chase Bank N.A. v. Neon Inc. No. 2, 2:06-CV-0095, 2007 U.S. Dist. Lexis 49458 2007 WL 1989752 (S.D. Ohio July 7, 2007).

The Sixth Circuit has adopted a five-factor test to determine whether an omitted or late disclosure is harmful: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence.

Howe v. City of Akron, 801 F.3d 718, 747-48 (6th Cir. 2015) *quoting* Russell v. Absolute Collection Servs., Inc., 763 F.3d 385, 396-97 (4th Cir. 2014)¹.

¹ Terra II, LLC v. Rice Drilling D, LLC, 2:19-cv-2221 (S.D. Ohio Mar. 28, 2023) *at* 5.

The Terra decision addressed the Plaintiff's failure to comply with discovery, not the Defendant, and denied imposing Sanctions for failure to comply with the Court's discovery Orders. However, this is the Defendant who has repeatedly failed to comply with the Court's scheduling Order denying the Plaintiff an opportunity to move his case forward.

In Adkins v. United States, 816 F.2d 1580, 1582 (Fed. Cir. 1987), the Court expressly held that the burden of proof is on the sanctioned party to establish "that the failure to comply was due to inability and not to willfulness, bad faith, or any fault of the party." *Cited in* Regional Refuse Systems Inc. v. Inland Reclamation Co., 842 F.2d 150 (6th Cir. 1987).

The Plaintiff understands that the Defendant has stated exceptional circumstances for the several month delay in answering the Plaintiff's discovery. However, the Defendant was a party to the April 12, 2023 Conference with the Court and did not express an objection to providing discovery by April 21, 2023. Therefore, pursuant to the rationale of the cases cited, sanctions are appropriate.

The imposition of sanctions is within the inherent powers of the Court. First Bank of Marietta v. Hartford Underwriters Ins. Co., 307 F.3d 501, 512 (6th Cir. 2002). The Plaintiff respectfully requests the Court fashion an appropriate sanction for the Defendant's failure to comply with the Court's Discovery Order. The Plaintiff realizes that striking the Defendant's answer may be the harshest of remedies but as the Supreme Court held in National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642-643 (1976):

But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642-43 (1976) at 154 quoting Regional Refuse Sys. v. Inland Reclamation Co., 842 F.2d 150, 154 (6th Cir. 1988).

Therefore, the Plaintiff respectfully requests the Court enter an Order striking the Defendant's Answer to the Plaintiff's Complaint and award the Plaintiff's counsel fees for time spent filing the Motion to Compel.

Respectfully Submitted,

/s/ Edward E Dove

Edward E. Dove
300 Lexington Building
201 West Short Street
Lexington, Kentucky 40507
(859) 252-0020 – Phone
(859) 258-9288 – Fax
eddove@windstream.net

/s/ Mark A Mantooth

Mark A. Mantooth
1800 Eagle Drive
Morehead, KY 40351
P – 606-356-9964
Mark.a.mantooth@gmail.com

CERTIFICATE OF SERVICE

This certifies that a true copy of the foregoing has been served upon the following on this the 13th day of July 2023:

Hon. John G. McNeill
Landrum & Shouse LLP
106 West Vine Street
PO Box 951
Lexington, KY 40588
jmcneill@landrumshouse.com

/s/ Edward E Dove
EDWARD E. DOVE

ed.dove.law@live.com

From: John G. McNeill <jmcneill@landrumshouse.com>
Sent: Wednesday, June 21, 2023 4:32 PM
To: Edward Dove
Subject: RE: Breiner

Ed,

Now that Parks is behind us, I will get cracking on Breiner.

John



JOHN G. MCNEILL
PARTNER ATTORNEY

o. 859.255.2424 d. 859.514.7241
f. 859.233.0308
a. 106 West Vine Street, Suite 800, Lexington, KY 40507



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From: Edward Dove <ed.dove.law@live.com>
Sent: Monday, June 19, 2023 2:37 PM
To: John G. McNeill <jmcneill@landrumshouse.com>
Subject: FW: Breiner

John: I am still waiting not so patiently for the Breiner discovery please let me know by Friday when I may receive the answers If I do not hear from you by Friday I will be forced to file another motion with the Court .

Ed

Edward E. Dove

201 W. Short Street
Suite 300
Lexington, KY 40507
Phone: (859)252-0020
Fax: (859)258-9288

From: Edward Dove
Sent: Monday, May 15, 2023 9:22 AM
To: ed.dove.law@live.com
Subject: RE: Breiner

John: Any update on when I may receive the Breiner discovery I would like to schedule depo in June but I really need the discovery let me know please

From: Edward Dove
Sent: Monday, May 1, 2023 9:10 AM
To: John G. McNeill <jmcneill@landrumshouse.com>
Subject: RE: Breiner

John: sorry about the delayed response I was in Prestonsburg most of last week I think if we extend fact discovery out an additional thirty days we can work our the schedule an d submit the plan to the Court if that is ok with you

From: John G. McNeill <jmcneill@landrumshouse.com>
Sent: Thursday, April 27, 2023 5:40 PM
To: Edward Dove <ed.dove.law@live.com>; Edward Dove <eddove@windstream.net>
Cc: kclaggett@windstream.net
Subject: FW: Breiner

Ed,

Any suggestion on when you want fact witness discovery deadline set? That way I can adjust everything else for the agreed modified scheduling order.

Let me know so I can get a revised draft to you.

John



JOHN G. MCNEILL
PARTNER ATTORNEY

o. 859.255.2424 d. 859.514.7241
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From: John G. McNeill
Sent: Friday, April 21, 2023 3:02 PM

To: Edward Dove <eddove@windstream.net>
Subject: RE: Brained

Ed,

Okay. Just tell me what you recommend as a date and I will plug it in and adjust the other dates to fit.

John



JOHN G. MCNEILL
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From: Edward Dove <ed.dove.law@live.com> **On Behalf Of** Edward Dove
Sent: Friday, April 21, 2023 2:40 PM
To: John G. McNeill <jmcneill@landrumshouse.com>
Subject: RE: Brained

John: I have reviewed the draft of the Breiner scheduling order my only comment is that do you think we can complete fact discovery by July 15? I do not know how many depositions you will want to take but July 15 will be here before you know it and with our schedules I am not sure we will be able to complete fact discovery by that date and I certainly do not want to go back to Judge Stinnett for an extension what do you think? Have a good weekend

From: John G. McNeill <jmcneill@landrumshouse.com>
Sent: Wednesday, April 12, 2023 4:25 PM
To: Edward Dove <eddove@windstream.net>
Subject: Re: Brained

Will do.

John

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From: Edward Dove <ed.dove.law@live.com> on behalf of Edward Dove <eddove@windstream.net>
Sent: Wednesday, April 12, 2023 3:24:10 PM
To: John G. McNeill <jmcneill@landrumshouse.com>
Subject: RE: Brained

John: that would be great thanks for offering

From: John G. McNeill <jmcneill@landrumshouse.com>
Sent: Wednesday, April 12, 2023 1:15 PM
To: Ed Dove (eddove@windstream.net) <eddove@windstream.net>
Subject: Brained

Ed,

Do you want me to craft a proposed scheduling order for your review?

John

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DEFENDANT

ORDER

This matter comes before the Court on the Plaintiff's Motion for Sanctions for Failure to Comply with the Court's Discovery Order. The Court having reviewed the Plaintiff's motion, finds that the Defendant has failed to comply with the Court's Order of April 12, 2023, and the Plaintiff having given notice to the Defendant according to LR 37.1, now finds the Defendant in contempt for failure to comply with the Court's discovery Order.

The Court will schedule a status conference to discuss the progress of the case and an appropriate sanction.

SO ORDERED THIS THE ____ DAY OF _____ 2023.

Magistrate Judge Matthew Stinnett
U.S. District Court