UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

NICHOLAS CHARLES BREINER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**NO. 5:18-cv-00351-KKC-MAS**
	)	
MONTGOMERY COUNTY BOARD OF EDUCATION,	)	
	)	
Defendant.	)	

ORDER

Plaintiff Nicholas Breiner ("Breiner") has filed a Motion for Sanctions for Failure to Comply with Court's Discovery Orders against Defendant Board of Education of Montgomery County, Kentucky ("Board of Education"). [DE 47]. In summary, Breiner complains that the Board of Education has been dilatory in responding to Breiner's discovery requests. The Board of Education concedes that point but counters that it has now fully responded to discovery and believes sanctions are unnecessary. The Court, having fully reviewed the record, denies Breiner's motion.

I. ANALYSIS

There is no dispute that the Board of Education has been plagued with an inability to timely respond to discovery requests in this matter. The Court previously addressed such an issue in early April and ordered the Board of Education to provide

discovery responses to Breiner by April 21, 2023. [DE 42]. Unfortunately, that date came and went without the Board of Education providing the discovery information.

Thus, on July 13, 2023, Breiner filed the current motion. [DE 47]. In response, the Board of Education acknowledged its dilatory behavior but noted it had since produced the discovery. [DE 50]. At a hearing on Breiner's motion, Breiner acknowledged he was now in receipt of all outstanding discovery information from the Board of Education. Consequently, the only remaining issue is whether the Board of Education's tardy responses mandate sanctions.

FED. R. CIV. P. 37(b) authorizes the imposition of sanctions for a party's failure to obey an order requiring discovery. Rule 37(b) sanctions are discretionary and are reviewed by the Sixth Circuit under an abuse of discretion standard. *See Freeland v. Amigo*, 103 F.3d 1271, 1276 (6th Cir. 1997). In determining the appropriate sanction, the Sixth Circuit has directed trial courts to consider four factors: (1) whether the party's failure to cooperate in discovery is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the party's failure to cooperate in discovery; (3) whether the party was warned that failure to cooperate could lead to the sanction; and (4) whether less drastic sanctions were first imposed or considered. *Id.* at 1277.[1] Carefully considering these factors, the Court finds that sanctions are not called for at this time.

[1] The parties both cite to five factors a Court considers for a sanction for evidence that is disclosed after discovery has closed and a party's supplementation obligations under FED. R. CIV. P. 26(e) has passed. Although the factors often overlap, the surprise discussion for post-discovery evidence is slightly different than simply tardy responses to discovery.

First, Breiner cannot cite nor is there any evidence in the record that the Board of Education's tardy responses are due to willfulness. In fact, as discussed at the April 2023 hearing concerning Breiner's motion to compel, one of the driving problems in discovery was counsel's health for the Board of Education. In addition, Breiner does not contest that the associate working on this matter for the Board of Education left the firm causing disruption in representation. None of this is the fault of Breiner but it is also not the willful fault of the Board of Education.

Second, other than the delay itself, Breiner is not prejudiced by the delay. Discovery remains ongoing, and Breiner will have every opportunity to pursue additional discovery and/or depositions in reactions to the Board of Education's tardy discovery responses. Like the first factor, the second factor does not favor sanctions.

Third, Breiner is right to express frustration with the Board of Education as the parties have already met with the Court previously about these discovery responses. And back in April, the Board of Education promised discovery responses by the end of April, not the end of July. The Board of Education was warned that the Court would not tolerate such further delays. The third factor would certainly favor sanctions.

Fourth, Breiner seeks the sanction that the Board of Education's Answer be stricken that would result in a default judgment against the Board of Education. Among the variety of discovery sanctions available in a district court's "arsenal," the entry of a default judgment against a defendant or an order of dismissal against a plaintiff are the court's "strongest weapon[s]." *Grange Mut. Cas. Co. v. Mack*, 270 F.

App'x 372, 376 (6th Cir. 2008) ("A district judge holds a variety of sanctions in his arsenal, the most severe of which is the power to issue a default judgment."). "Although no one factor is dispositive, dismissal is proper if the record demonstrates delay or contumacious conduct," *United States v. Reyes*, 307 F.3d 451, 458 (6th Cir.2002), *i.e.*, conduct that is "'perverse in resisting authority' and 'stubbornly disobedient,'" *Schafer v. City of Defiance Police Dept.*, 529 F.3d 731, 737 (6th Cir.2008) (quoting Webster's Third New International Dictionary 497 (1986)). While the Court is troubled by the Board of Education's conduct, the record does not yet warrant the harsh sanction of an entry of a default judgment or striking the Answer (which would lead to the entry of a default judgment).

In conclusion, the Court cannot caution the Board of Education enough that it has certainly exhausted both Breiner and the Court's patience in responding to discovery. Yet, the Court does not find, under the current circumstances considering the factors considered above, that sanctions are currently necessary. If the Board of Education repeats this behavior and frustrates the progress further, however, the Court will have to take remedial actions if requested by Breiner.

II. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED** that Breiner's Motion for Sanctions for Failure to Comply with Court's Discovery Orders [DE 47] is **DENIED**. The undersigned enters this Memorandum Opinion & Order pursuant to 28 U.S.C. § 636(b)(1)(A). Within fourteen (14) days from entry of this Memorandum Opinion & Order, either party may appeal this decision to Judge Caldwell pursuant § 636(b)(1)(A) and FED. R. CIV. P. 72(a).

Entered this 2nd day of August, 2023.

MATTHEW A. STINNETT
UNITED STATES MAGISTRATE JUDGE
EASTERN DISTRICT OF KENTUCKY