UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SCOTT TRAUDT, Plaintiff,	:	
v.	:	CA 04-111ML
WOOD HOLLOW TRAWLERS, INC., Defendant.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is the Motion for a Continuance (Document #11) of Plaintiff Scott Traudt ("Plaintiff"). Therein, Plaintiff requests that all proceedings in this matter be continued until January of 2005 or, alternatively, that the case be dismissed without prejudice. Defendant Wood Hollow Trawlers, Inc. ("Defendant"), objects to any continuance and requests that the case be dismissed with prejudice pursuant to Federal Rule of Civil Procedure Rule 41(b). See Defendant's Objection to Plaintiff's Motion for a Continuance and Defendant's Motion for Dismissal Under Rule 41(b) ("Motion for Involuntary Dismissal") (Document #13). Alternatively, in the event the court grants Plaintiff's request for a dismissal without prejudice, Defendant requests that Plaintiff be ordered to "pay Wood Hollow all costs and legal fees incurred by Wood Hollow in the defense of this proceeding." Defendant's Memorandum in Support of Its Objection to Plaintiff's Motion for a Continuance and in Support of Its Motion for Dismissal Under Rule 41(b) ("Defendant's Mem.") at 5.

This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). A conference was conducted on August 9, 2004. As explained more fully below, I recommend that Plaintiff's Motion for a Continuance be granted to the extent it seeks dismissal without prejudice. However, in the event Plaintiff at a later date brings a new action against

Defendant raising the same or similar claims, he should be required to reimburse Defendant for the costs and attorney's fees which it has incurred defending the present action before the new action is allowed to proceed.

Facts

Plaintiff filed this action on March 29, 2004, seeking to recover back pay and damages, maintenance, and attorney's fees related to a hand injury he suffered while working on Defendant's fishing vessel on or about March 24, 1997. See Complaint (Document #1). After Plaintiff's Motion for Judgment on the Pleadings (Document #2) was denied, see Memorandum and Order of 7/20/04 (Document #8), the matter was referred to this Magistrate Judge for a pretrial scheduling conference. On July 21, 2004, the court issued a Notice and Order directing the parties to submit proposed discovery plans by Wednesday, August 4, 2004, and to appear for the conference on Monday, August 9, 2004. See Notice and Order of 7/21/04 (Document #9). Defendant's Proposed Discovery Plan was received by the court on Tuesday, August 3, 2004. On Thursday, August 5, 2004, Plaintiff filed the Motion for a Continuance (Document #11), which was referred to this Magistrate Judge on Friday, August 6, 2004. The stated basis for the requested continuance is that "Defendant is leaving the country immediately under confidential employment terms in support of a Department of Defense contract. He will not return until January of 2005." Motion for a Continuance ¶ 1. Alternatively, Plaintiff stated that he "accepts dismissal without prejudice, and will pursue litigation and/or retain counsel in the near future." Id. ¶ 2. Plaintiff did not submit a proposed discovery plan as required by the court's July 21, 2004, Notice and Order.

On Monday, August 9, 2004, the scheduled conference was held and neither Plaintiff nor any representative of Plaintiff attended. Plaintiff's Motion for a Continuance was read into the

record and Defendant objected to his alternative request for dismissal without prejudice. The court advised Defendant's counsel that if Defendant wished the dismissal to be with prejudice it should file a motion so requesting. In response to the court's suggestion, Defendant subsequently filed its Motion for Involuntary Dismissal (Document #13).

In its accompanying memorandum, Defendant provides additional information regarding other litigation involving the parties. According to Defendant, in December 1997 Plaintiff, in exchange for $18,961, executed a General Release releasing and discharging Defendant "of all claims relating to the March 1997 incident." Defendant's Mem. at 1; see also id., Exhibit ("Ex.") A (General Release dated 12/2/97). In June 2003, Plaintiff filed suit against Defendant in the District of Vermont seeking relief relating to the March 1997 incident. See Defendant's Mem. at 1-2. That action was dismissed without prejudice in October 2003 due to the Vermont court's lack of personal jurisdiction over Defendant. See id., Ex. B (Opinion and Order of 10/3/03); Ex. C (Judgment of 10/6/03).

Plaintiff is party to another action against a different defendant which is pending in the District of Massachusetts. See Defendant's Mem. at 2; id., Ex. D (Docket in Traudt v. Hard Bottom Fisheries, Inc., CA 03-12015-PBS (D. Mass.)). One of Defendant's counsel in this case, Leonard W. Langer, also represents the defendant in the Massachusetts action. See Defendant's Mem. at 2. On July 23, 2004, Plaintiff was deposed in the Massachusetts action. See id. On that date, Mr. Langer provided Plaintiff with a copy of this court's Notice and Order scheduling the pretrial conference and with a copy of Defendant's proposed discovery plan.[1] See id. at 3. At the deposition,

[1] Presumably, Plaintiff also received the copy of the Notice and Order that was sent to him by the court on July 21, 2004.

Plaintiff "indicated that he had accepted a job that could take him out of the country for several months, although [he] refused to provide any specifics about the job, or exactly how long he would be gone." Id. at 2-3. Plaintiff did not object or agree to Defendant's proposed discovery plan at that time. See id. at 3.

On August 5, 2004, Plaintiff's counsel in the Massachusetts action,[2] David J. Berg, notified Mr. Langer that Plaintiff would be unavailable for a medical examination in that matter because he was "currently in the Middle East." Id.; see also id., Ex. E (Letter from Mr. Berg to Mr. Langer of 8/5/04). Plaintiff had not informed Mr. Berg of his exact location or work schedule. See id. Defendant received Plaintiff's Motion for a Continuance the following day, i.e., the Friday before the scheduled Monday hearing. See Defendant's Mem. at 3.

Law

Pursuant to the federal rules, once a defendant's answer has been filed, an action may be voluntarily dismissed by a plaintiff only "upon order of the court and upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). Unless otherwise specified in the order of dismissal, a dismissal pursuant to Rule 41(a) is without prejudice. See id.

Rule 41 also permits a defendant to move for dismissal of an action "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court ...." Fed. R. Civ. P. 41(b). Unless otherwise specified in the order of dismissal, a dismissal pursuant to Rule 41(b) "operates as an adjudication upon the merits." Id.

"The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to

[2] The court notes that Plaintiff is proceeding pro se in the present action.

prosecute cannot seriously be doubted." Pomales v. Celulares Telefónica, Inc., 342 F.3d 44, 48 (1st Cir. 2003)(citing Link v. Wabash R.R., 370 U.S. 626, 629, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)). The power "is a necessary component of the authority and responsibility of the district courts to establish orderly processes and manage their calendars." Id. (citing Young v. Gordon, 330 F.3d 76, 81 (1st Cir. 2003)); see also Cintrón-Lorenzo v. Departamento de Asuntos del Consumidor, 312 F.3d 522, 525-26 (1st Cir. 2002)("A district court, as part of its inherent power to manage its own docket, may dismiss a case sua sponte for any of the reasons prescribed in Fed. R. Civ. P. 41(b)."). Nevertheless, dismissal with prejudice is a drastic sanction, and disposition on the merits is preferred. See Pomales v. Celulares Telefónica, Inc., 342 F.3d at 48.

"No exact rule can be laid down as to when a court is justified in dismissing a case for failure to prosecute. Each case must be looked at with regard to its own particular procedural history and the situation at the time of dismissal." Zaddack v. A.B. Dick Co., 773 F.2d 147, 150 (7th Cir. 1985). Federal Rule of Civil Procedure Rule 16, which governs pretrial conferences, scheduling, and case management, provides in relevant part that:

> If a party ... fails to obey a scheduling or pretrial order, **or if no appearance is made on behalf of a party at a scheduling or pretrial conference** ... 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)**. In lieu of or in addition to any other sanction, the judge shall require the party ... to pay the **reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees**, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 16(f) (bold added). Amongst the orders enumerated in the cited subsections of Rule 37 is one "dismissing the action or proceeding or any part thereof ...." Fed. R. Civ. P. 37(b)(2)(c).

Discussion

Defendant argues that, under the circumstances, Plaintiff's Motion for a Continuance should be denied and this action should be dismissed with prejudice. See Defendant's Mem. at 4-6. Defendant notes the General Release signed by Plaintiff and the previous litigation between the parties, see id. at 4, presumably as evidence of the weakness of Plaintiff's case and/or of the costs it has already incurred in conjunction with Plaintiff's claims. It also points to Plaintiff's failure to appear at the pretrial conference and his failure to inform the court sufficiently in advance of the conference of his inability to attend and the reason therefor. See id. Defendant further takes issue with the fact that Plaintiff did not retain counsel to represent him in this matter, as he has in the Massachusetts litigation. See id.

A party's failure to attend a pretrial conference is a ground which repeatedly has been held to support dismissal of a case with prejudice. See Link v. Wabash R.R. Co., 370 U.S. 626, 633, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962); Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell, a P'Ship v. Medfit Int'l, Inc., 982 F.2d 686, 691 (1st Cir. 1993)(upholding dismissal of counterclaims and cross-claim); Barreto v. Citibank, N.A., 907 F.2d 15, 16 (1st Cir. 1990); Zavala Santiago v. Gonzalez Rivera, 553 F.2d 710, 712 (1st Cir. 1977). However, in each of the cited cases, additional aggravating circumstances were present. See Link v. Wabash R.R. Co., 370 U.S. at 633, 82 S.Ct. at 1390 (history of litigation demonstrated that petitioner had been deliberately proceeding in dilatory fashion); Goldman,

Antonetti, Ferraiuoli, Axtmayer & Hertell, a P'Ship v. Medfit Int'l, Inc., 982 F.2d at 688 (failure to prepare a pretrial order and to otherwise comply with court's orders); Barreto v. Citibank, N.A., 907 F.2d at 16 (failure to answer interrogatories though request for extension of time had been denied); Zavala Santiago v. Gonzalez Rivera, 553 F.2d at 711-12 (failure to take several steps required by court's show cause order prior to hearing date). Plaintiff's behavior here, though sanctionable, is less egregious than that found to warrant dismissal in the above cases.

"Dismissal *with prejudice* is a harsh sanction which should be employed only when a plaintiff's misconduct has been extreme, and only after the district court has determined that none of the lesser sanctions available to it would truly be appropriate." Estate of Solis-Rivera v. United States, 993 F.2d 1, 2 (1st Cir. 1993)(citations and internal quotation marks omitted); see also Figueroa v. Ethicon Corp., 185 F.R.D. 17, 19 (D.P.R. 1999) (finding dismissal with prejudice for failure to prosecute "justified where there is extremely protracted inaction or some other aggravating circumstance, such as prejudice to the defendant, glaring weaknesses in the plaintiff's case, and the wasteful expenditure of a significant amount of the district court's time."); cf. Zavala Santiago v. Gonzalez Rivera, 553 F.2d at 712 (noting outright dismissal not favored where case had been pending only short period of time and had occupied very little of court's time).

Based on the foregoing, the court concludes that, under the circumstances, dismissal of this matter with prejudice would be an inappropriately harsh sanction. Plaintiff's case has been pending for a relatively short period of time – approximately five and a half months – and has yet to necessitate an inordinate amount of court involvement. See Docket in Traudt v. Wood Hollow

Trawlers, Inc., CA 04-111 (D.R.I.). Furthermore, although Plaintiff in requesting continuance or dismissal cannot be said to have complied with the July 21, 2004, Notice and Order, he is yet to amass a lengthy record of dilatory behavior, neglect of the case, or repeated disobedience of this court's orders.

Nevertheless, Plaintiff's failure to attend the pretrial conference and his apparent abandonment of a lawsuit which he chose to institute before accepting work abroad are not matters to be condoned, and the court finds that a lesser sanction still is warranted for the purpose of deterring such conduct in the future. Defendant has been prejudiced insofar as it has incurred expenses in answering the complaint, objecting to Plaintiff's Motion for Judgment on the Pleadings, and preparing for and attending the conference for which Plaintiff was not present.[3] Additionally, although Plaintiff was aware no later than July 23, 2004, that his plans to leave the country would conflict with the conference scheduled for August 9, 2004, he waited until two court days before the conference to submit a motion apprising the court and opposing counsel of his unavailability and requesting a continuance or dismissal. Further, by the time that motion was transmitted, Plaintiff had already departed, apparently assuming

[3] The court is cognizant that these expenses are in addition to those previously incurred by Defendant as a result of Plaintiff's first bringing this action in the District of Vermont, where the court did not have personal jurisdiction over Defendant. Furthermore, Defendant has already paid Plaintiff a significant sum to compensate him for his injury and there is some likelihood that the recovery Plaintiff now seeks will largely be foreclosed by his execution in 1997 of the General Release. Although he is now challenging its validity, see Complaint ¶¶ 16, 23, the precise basis for that challenge is not readily discernible from the Complaint. If the General Release is ultimately found to be effective, Defendant will have been forced to expend substantial resources in defending a frivolous claim.

that it would be granted in his absence.[4] Although he had retained counsel, Mr. Berg, to represent him in another matter and presumably could have arranged for that counsel to appear for him at the scheduled conference in this case, Plaintiff did not.

The court concludes that an appropriate sanction would be to allow Plaintiff to voluntarily dismiss this case without prejudice but with the condition that, if and when he brings the action anew, he be required to reimburse Defendant for the expenses it has incurred in defending this lawsuit thus far before the new action is allowed to proceed. Imposition of this condition is within the court's discretion. See Fed. R. Civ. P. 41(a)(2)(allowing for dismissal with "terms and conditions as the court deems proper"); see also Puerto Rico Mar. Shipping Auth. v. Leith, 668 F.2d 46, 51 (1st Cir. 1981)(holding that, in considering Rule 41(a)(2) dismissal, "[t]he decision of whether or not to impose costs on the plaintiff lies within the sound discretion of the district judge, as does the decision of whether to impose attorney's fees.")(citation omitted). The court's discretion is broad enough to impose a condition concerning future litigation. See Sandstrom v. ChemLawn Corp., 904 F.2d 83, 87 (1st Cir. 1990)(noting that plaintiff could have asked court to condition voluntary dismissal on defendant's not contesting personal jurisdiction in subsequent action); Ryerson & Haynes, Inc. v. Am. Forging & Socket Co., 2 F.R.D. 343 (E.D. Mich. 1942) (conditioning voluntary dismissal of first action on plaintiff paying defendant's costs and expenses of first action prior to instituting second action); cf. Banjo Buddies, Inc. v. Renosky, 182 F.Supp.2d 142, 143 (D. Me. 2002)(noting rule 41(d) and indicating it encompasses attorney's fees); Fed. R. Civ. P. 41(d) (authorizing a court to require a plaintiff who dismisses an

[4] Plaintiff's failure to submit a proposed discovery plan is further evidence of this assumption.

action and subsequently commences a new action "based upon or including the same claim against the same defendant" as in the dismissed action to pay that defendant "costs of the action previously dismissed as [the court] may deem proper ....").

Conclusion

For the reasons stated herein, I recommend that Plaintiff's Motion for a Continuance be granted to the extent that it seeks dismissal without prejudice and that Defendant's Motion for Involuntary Dismissal be granted to the extent it seeks reimbursement of the costs and attorney's fees it has incurred thus far in defending this action. Plaintiff should not be required to reimburse Defendant for these costs and fees, however, unless and until he commences another action against Defendant raising the same or similar claims as those raised in the present action.

Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

David L. Martin
United States Magistrate Judge
September 23, 2004