UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Copy

CHAMBERS OF
RICHARD L. WILLIAMS
U.S. DISTRICT JUDGE
P.O. BOX 2-AD
RICHMOND, VIRGINIA 23205

November 29, 1988

Mrs. Doris Casey, Clerk
U.S. District Court
P.O. Box 21449
Alexandria, VA 22320-2449

Re: Elizabeth Morgan v. Eric A. Foretich / CA 86-0944-A
and
Hilary Foretich v. Eric A. Foretich / CA 86-0945-A

Dear Doris:

Enclosed is a Final Order and Memorandum Opinion in the above two cases. Please process these in the usual manner. By copy of this letter to Magistrate Brinkema, I am informing her of the action taken.

Very truly yours,

Richard L. Williams

Richard L. Williams

RLW/mce

cc: Hon. Leonie M. Brinkema

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ELIZABETH MORGAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 86-0944-A
	)	
ERIC A. FORETICH, et al.,	)	
	)	
Defendants.	)	
	)	
HILARY FORETICH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 86-0945-A
	)	
ERIC A. FORETICH, et al.,	)	
	)	
Defendants.	)	

FINAL ORDER

This case is before the Court for review of the Magistrate's Report and Recommendations and the exceptions taken thereto. For the reasons stated in the accompanying Memorandum Opinion, the Court DISMISSES WITH PREJUDICE Dr. Morgan's case, No. 86-0944-A, and DISMISSES WITHOUT PREJUDICE Hilary Foretich's case, No. 86-0945-A.

Let the Clerk send a copy of this Final Order to all counsel of record.

11/29/88
DATE

Richard L. Williams
UNITED STATES DISTRICT JUDGE

Mark

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ELIZABETH MORGAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 86-0944-A
	)	
ERIC A. FORETICH, et al.,	)	
	)	
Defendants.	)	
	)	
HILARY FORETICH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 86-0945-A
	)	
ERIC A. FORETICH, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This case is before the Court for review of the Magistrate's Report and Recommendations and the exceptions taken thereto. The report recommends dismissal with prejudice of Dr. Morgan's case and dismissal without prejudice of Hilary Foretich's case for failure to comply with the Magistrate's previous order reopening discovery and requiring Dr. Morgan to make Hilary available for deposition. The merits of the discovery order are not before the Court; the Court must decide only whether dismissal is the appropriate sanction.

FACTS

This case began not as a tort suit in federal court, but as a custody dispute in the Superior Court for the District of Columbia. It became a federal case when Dr. Morgan alleged that

her former husband, Dr. Foretich, was abusing Hilary during visitation. After the Superior Court granted Dr. Foretich visitation rights, Dr. Morgan apparently hid Hilary and refused to produce her for visitation. Dr. Morgan was held in contempt of the Superior Court order and is currently incarcerated.

After the first federal trial, which resulted in a jury verdict for Dr. Foretich, the Fourth Circuit ordered a new trial. On October 14, 1988, Magistrate Brinkema granted the defendants' motion to reopen discovery, and in particular to take Hilary Foretich's deposition. Hilary is now six years old and may be better able to testify. One week after the Magistrate's order, plaintiff's counsel advised the Court that Dr. Morgan refused to comply with the order and would not produce Hilary. Dr. Morgan feared that if she produced Hilary for deposition, the D.C. Superior Court's order would be enforced and Dr. Foretich would be permitted visitation with his daughter. The Magistrate recommended dismissal with prejudice of Dr. Morgan's case and dismissal without prejudice of Hilary Foretich's case.

DISCUSSION

Federal Rule 37(b)(2)(C) authorizes courts to dismiss cases as a sanction for failure to comply with discovery requests. Although the Rule does not literally require it, most courts have dismissed cases under Rule 37 only for willful defiance of a discovery order. See, e.g., Founding Church of Scientology v. Webster, 802 F.2d 1448 (D.C. Cir. 1986); Hashemi v. Campaigner Publications, 572 F. Supp. 331 (N.D. Ga. 1983). Dr. Morgan argues that bad faith is required before a case may be dismissed

under Rule 37, citing Societe International, S.A. v. Rogers, 357 U.S. 197, 212 (1958). There the Supreme Court refused to dismiss a case as a sanction for failure to produce documents where the party was unable to produce them. The case is inapposite because Dr. Morgan is able to produce Hilary but refuses to do so.

Whether bad faith is required or not, Dr. Morgan's willful refusal to produce Hilary justifies dismissal. Instead of making a good faith objection to the discovery order (by, for example, appealing it), Dr. Morgan chose to respond the same defiant way she responded to the Superior Court: by simply refusing to comply. The Magistrate even warned Dr. Morgan that the case might be dismissed, see Magistrate's Report at 2, and Dr. Morgan nonetheless informed the Court that she would ignore its order.

Dr. Morgan points out that if she produces Hilary for deposition, the Superior Court would enforce its order to permit visitation with Dr. Foretich. She attempts to justify her obstinance by claiming that Dr. Foretich will abuse Hilary. The defense fails for several reasons. Most importantly, it begs the fundamental question: it essentially claims that Dr. Foretich is not entitled to defend against the charge of abuse because he is guilty of it. Deciding that issue is the very purpose of discovery and trial, and Dr. Morgan cannot simply assume that which she has not proven.

Despite several bites at this apple, incidentally, Dr. Morgan has failed to convince any jury that her assumption is correct. The Superior Court, with a special expertise in child

custody issues, already determined that Dr. Morgan has not proven her case and granted visitation to Dr. Foretich. Despite that result, Dr. Morgan brought the same claim in federal court, and the federal jury also returned a verdict for Dr. Foretich. Although the Fourth Circuit reversed that judgment because certain evidence was not admitted, some of the most crucial evidence concerned abuse of Hilary's sister, Heather. A Virginia state court found that Dr. Foretich has not abused Heather. Commonwealth v. Sharon Foretich. No. J2089 (Circuit Court of Fairfax County, Va. 1987). If Dr. Morgan seeks another bite at the apple by asking the federal courts to review a Superior Court decision, and that is the essence of the case, she should at least be required to follow the rules. "Dr. Morgan consciously chose to continue litigation in this court . . . . By choosing to litigate in this court, Dr. Morgan has obligated herself to follow its rules and orders." Magistrate's Report at 3. Her unproved assumption about Dr. Foretich cannot justify her flagrant disregard for orders of this Court. This is simply not a case where a party has innocently and in good faith attempted to comply with a discovery order and failed. It is a case of willful defiance, in which Dr. Morgan fully expects both to maintain a suit in federal court and to defy the court's orders.

That same refusal to accept a court's judgment incarcerated her for contempt of the Superior Court, which has ruled on the merits. This Court has some obligation to recognize the Superior Court order, and not to participate in Dr. Morgan's defiance of it. To approve of Dr. Morgan's refusal to produce Hilary would

be to commend her continuing defiance of the Superior Court order. the Court declines to aid her in that effort.

The Court is well aware that the Fourth Circuit remanded the case for a new trial, and that "Once an issue is decided on appeal . . . the lower court may not 'vary it . . . or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.'" Stamper v. Baskerville, 724 F.2d 1106, 1107 (4th Cir. 1984)(quoting In re Stanford Fork & Tool Co., 160 U.S. 247, 255-56 (1895)). However, the Fourth Circuit's mandate of a new trial does not suspend the Federal Rules, and the issue now before the Court was not decided on appeal. See Taylor v. U.S., 815 F.2d 249 (3rd Cir. 1987); Panama Processes, S.A. v. Cities Service Co., 789 F.2d 991 (2d Cir. 1986).

Dismissing Dr. Morgan's case without prejudice, as she suggests, would be no sanction at all; Dr. Morgan could simply refile and hope that the issue would not resurface. For these reasons, Dr. Morgan's case will be dismissed with prejudice.

Unlike Dr. Morgan but like the respondent in Rogers, 357 U.S. 197 (1958), Hilary is simply unable to comply with the Court's order. Therefore, the Magistrate recommended that Hilary's case be dismissed without prejudice, and neither party contests this recommendation. The Magistrate also recommended that should Hilary refile her case a guardian ad litem be appointed to bring the case on her behalf. However, Dr. Morgan may not always be hostile to court orders, and the Court is unprepared to bar her from suing as Hilary's next friend.

Therefore, if Dr. Morgan brings a new case on Hilary's behalf, the defendant may then make a motion challenging Dr. Morgan's fitness to serve as next friend. The Court can then hold an evidentiary hearing to resolve the issue when it is more directly before the Court. The Court also notes that the fundamental claim at issue is abuse of Hilary, and that Dr. Morgan's claim is to some extent derivative of that allegation. Hilary is therefore the one primarily injured, allegedly, and her remedy remains intact.

For the foregoing reasons, Dr. Morgan's case, Civil Action 86-0944-A, is dismissed with prejudice, and Hilary Foretich's case, Civil Action 86-0945-A, is dismissed without prejudice.

11/29/88
DATE

Richard L. Williams
UNITED STATES DISTRICT JUDGE