

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MIGUEL CUESTA and NANCY)
CUESTA,)
)
Plaintiffs,)
)
vs.)
) 02 CV 2921 P
EXPRESS AIRLINES I, INC. and)
NORTHWEST AIRLINES, INC.,)
)
Defendants.)
)

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND
GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR
EXTENSION OF TIME TO COMPLY WITH THE 6/25/03 COURT ORDER AND
PLAINTIFFS' MOTION TO QUASH NOTICE OF DEPOSITIONS

Presently before the court are several motions filed by the plaintiffs and defendant. The defendant, Express Airlines I, Inc., filed a Motion to Dismiss for Plaintiffs' Failure to Comply with a Court Order, on July 15, 2003. The plaintiffs filed a timely response to the defendant's motion on July 21, 2003. Plaintiffs also filed a Rule 60 Motion to Seek Relief from the Court's 6/25/03 Order and to Extend Said Order's Deadlines for Responding to Written Discovery and Arranging Plaintiffs' Depositions by August 31, 2003, as well as a Motion to Quash Notice to Take Depositions and to Allow Re-Setting of Plaintiffs' Depositions No Later than 8/31/03.

With respect to defendant's motion to dismiss, the defendant alleges that the plaintiffs failed to comply with this court's order granting the defendants' Motion to Compel Written Discovery, entered on June 25, 2003. In that order, the court instructed the plaintiffs to comply with the defendants' discovery requests by specific dates set forth therein.¹ In addition to granting the defendants' motion to compel, the court also issued an order allowing the plaintiffs' counsel to withdraw from the case.² In that order, the court instructed the plaintiffs that they must retain new counsel by July 8, 2003; otherwise, the court would assume that the plaintiffs were proceeding *pro se*. On June 26, 2003, after attorney J. Mark Patey spoke with former counsel of record Rebecca Adelman and non-admitted counsel Marni Reagan, Mr. Patey verbally agreed to represent the plaintiffs in this lawsuit. However, neither Ms. Adelman nor Ms. Reagan informed Mr. Patey of the court's June 25 order granting defendant's motion to compel discovery.³

¹Order Granting Defendants' Motion to Compel Written Discovery, Cuesta v. Express Airlines I, Inc., et al., 2:02cv02921 P (W.D. Tenn. June 25, 2003).

²Order Granting Plaintiffs Counsel's Motion to Withdraw, Cuesta v. Express Airlines I, Inc., et al., 2:02cv02921 P (W.D. Tenn. June 25, 2003).

³Although the court does not doubt the sincerity of Mr. Patey's stated reasons for being unaware of the court's June 25 order, the court believes that the most prudent course of action for Mr. Patey after agreeing to take the case would have been to immediately check the court docket to determine the status of the

The defendant relies on Fed. R. Civ. P. 37(b)(2) and 41(b) in support of its request for dismissal. Fed. R. Civ. P. 37(b)(2) provides that:

If a party . . . fails to obey an order to provide or permit discovery, including [an order granting a motion to compel discovery], the court in which the action is pending may make such orders in regard to the failure as are just.

Under Fed. R. Civ. P. 37(b)(2)(A) through (E), a court has several options when handing down sanctions, one of which is dismissal of the case. Fed. R. Civ. P. 41(b) permits a court to enter an involuntary dismissal of the case "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court." Link v. Wabash R.R. Co., 370 U.S. 626, 630 (1962) (holding that Rule 41(b) allows the court to enter an involuntary dismissal without a motion by the defendant). Dismissal of a case, "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." Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976).

The Sixth Circuit encourages restraint on the utilization of dismissal of a lawsuit as a sanction for defiance of a court order.

case. Moreover, given the time restrictions set forth in the court's order, Ms. Adelman and Ms. Reagan should have expeditiously informed Mr. Patey of the order.

Harmon v. CSX Transp., Inc., 110 F.3d 364, 367 (6th Cir. 1997) (stating that dismissal should be cautiously used when defiance of an order is due to the attorney's neglect); Beil v. Lakewood Eng'g and Manuf. Co., 15 F.3d 546, 552 (6th Cir. 1994) ("Dismissal is the sanction of last resort."); Carter v. City of Memphis, Tenn., 636 F.2d 159, 161 (6th Cir. 1980) ("Dismissal [under Fed. R. Civ. P. 41(b)] is usually inappropriate where the neglect is solely the fault of the attorney.").

In determining whether to dismiss an action for failure to comply with a discovery order, the court should consider: (1) whether the failure to cooperate with the discovery order was willful, in bad faith, or based on fault; (2) the extent of any prejudice to the opposing party by the failure to comply with the discovery order; (3) whether the party was warned that a failure to comply could result in dismissal; and (4) whether less drastic sanctions than dismissal were considered or utilized first. Knoll v. Am. Tel. & Tel. Co., 176 F.3d 359, 363 (6th Cir. 1999) (applying these factors to a decision to dismiss under Fed. R. Civ. P. 41(b)); Harmon, 110 F.3d at 366-67 (applying these factors to a decision to dismiss under Fed. R. Civ. P. 37(b)(2)).

Although the plaintiffs' failure to comply with the court's June 25 order could have and should have been avoided, dismissal of the lawsuit under these circumstances would not be appropriate. Any prejudice to the defendant by extending the deadlines set forth

in the court's June 25 order would be minimal, in contrast to denying the plaintiffs their day in court. In addition, the court's order granting the defendants' Motion to Compel Written Discovery did not warn the plaintiffs that failure to comply with the court's order would result in dismissal.

Accordingly, the defendant's motion seeking dismissal of the plaintiffs' lawsuit is DENIED. The court has decided not to award attorney's fees to the defendant in pursuing this motion at this time.

The plaintiffs' motion for an extension of time to comply with the June 25 order and motion to quash the notice to take depositions is GRANTED IN PART AND DENIED IN PART. The plaintiffs have until August 15, 2003, to comply with discovery items 1, 2, 3, and 4 as set forth in the court's June 25, 2003 Order Granting Defendants' Motion to Compel Written Discovery. With respect to item 5, the defendants shall have the right to take the depositions of plaintiffs Miguel Cuesta and Nancy Cuesta, on or before August 20, 2003.

The parties are reminded that, in accordance with the Amended Scheduling Order entered on June 25, 2003, the plaintiffs have until August 23, 2003, to respond to defendant Northwest Airlines' Motion for Summary Judgment. Plaintiffs' response to the Motion for Summary Judgment was originally due on June 23, 2003, and no further extensions will be granted. Furthermore, the plaintiffs

are warned that any future failure to comply with the court's orders will result in a dismissal of the plaintiff's lawsuit with prejudice.

IT IS SO ORDERED. Entered this ____ day of July, 2003.

TU M. PHAM
U.S. MAGISTRATE JUDGE