

HON. JEFFREY H. LANGTON
District Judge, Department No. 1
Twenty-first Judicial District
Ravalli County Courthouse, Suite A
205 Bedford Street
Hamilton, MT 59840-2853
Telephone: (406) 375-6780
Fax: (406) 375-6785

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DEBBIE HARMON, CLERK

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Langton
DEPUTY

MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

JOHN WATSON,)	Department No. 1
)	
Plaintiff,)	Cause No. DV-03-145 / 72
)	
-vs-)	OPINION & ORDER
)	
DEVRA WEST,)	
)	
Defendant.)	

This matter comes before the Court upon a *Motion for Sanctions* filed by Plaintiff John Watson ("Watson"), represented by David M. McLean and Ryan C. Willmore of Browning, Kaleczyc, Berry & Hoven, P.C. On July 1, 2008, the Court heard argument on the motion. Mr. Willmore appeared for Watson, and Defendant Devra West ("West") appeared *pro se*.

FACTUAL BACKGROUND

On April 17, 2003, Watson filed suit in this matter alleging claims of breach of contract, fraud, constructive fraud, unjust enrichment, and constructive termination. All claims arise out of Watson's assertion that he and West had an oral agreement to actively pursue a partnership in a for-profit business called Millennia Mind, Inc. Watson asserts he invested time and expertise

into the forming of Millennia Mind, Inc. with the expectation that he would eventually receive a salary of \$50,000 to \$60,000 per year. Watson seeks actual and punitive damages and attorney's fees and costs incurred in bringing this action.

On June 9, 2003, West filed her answer denying Watson's allegations and raising numerous affirmative defenses.

The Factual Background set forth in the Court's February 16, 2006 *Opinion & Order* denying summary judgment is hereby incorporated in its entirety.

PROCEDURAL BACKGROUND

Trial in this matter was first set to begin on November 13, 2006. Since that first setting, trial has been rescheduled four times. Watson requested continuances and/or vacations of the first four settings, all unopposed by West. The first two trial settings (November 13-17, 2006 and January 8-12, 2007) were continued due to conflicts Watson's counsel had with the trial dates. The third trial setting (July 16-20, 2007) was vacated due to Watson's substitution of counsel. Prior to the fourth trial setting (January 14-18, 2008), West's third attorney in this matter withdrew from representation. Watson sent West the requisite Rule 10 notice pursuant to Rule 10, M.U.D.C.R.; additionally, Watson moved to vacate the trial preparation order on behalf of West, noting that various pre-trial deadlines were scheduled to lapse prior to the date by which West was required to obtain new counsel or appear *pro se*. Accordingly, on November 14, 2007, the Court ordered the fourth trial setting vacated and a telephonic status conference to be held on December 20, 2007 for the purpose of rescheduling trial dates.

On November 26, 2007, West's non-lawyer assistant Geoffrey Reynolds informed Court Administrator Ms. Keri Muir that West was in Mexico and would be unavailable to participate in

the December 20, 2007 status conference. *Aff. Keri Muir* (July 15, 2008), Ex. 1. Mr. Reynolds indicated that a formal request to continue the status conference to January 16, 2008 would be made by letter. *Id.* No such request was received.

On December 13, 2007, Mr. Reynolds communicated to Ms. Muir that West would be unavailable on January 16, 2008 and asked that the December 20, 2007 status conference be rescheduled for February 27, 2008. *Id.* Ms. Muir informed him that a formal written request would be required to vacate the December 20, 2007 conference and reschedule it at a later date. *Id.*

On December 16, 2007, an unsigned request seeking a continuance was faxed to the Court by Mr. Reynolds. *Id.*

On December 18, 2007, the Court Administrator informed Mr. Reynolds that a request for continuance required either West's signature or the signature of her attorney. *Id.*

As of December 20, 2007, no formal request to vacate the conference had been received from West. On that day, the Court Administrator spoke with Mr. Reynolds who indicated that West was going to fax the request from Mexico. *Id.* No request was received.

On January 3, 2008, the Court Administrator and Mr. Reynolds spoke again by telephone regarding the lack of any formal request to vacate and continue the December 20, 2007 conference. *Id.* Later that day, the Court received a faxed letter from West dated December 26, 2007 wherein she requested a continuance until February 27, 2008. See Doc. No. 65. In response to the request, the Court Administrator issued a Minute Entry vacating the December 20, 2007 status conference and rescheduling it for February 27, 2008 at 3:00 p.m. See Minute Entry (Jan. 7, 2008).

On February 26, 2008, Mr. Reynolds informed Watson's counsel and the Court Administrator via telephonic conference that West was unavailable to participate in the February 27, 2008 status hearing and sought a continuance for another 30 days. Counsel for Watson agreed to the request but noted his objection to any further delays. A Minute Entry was issued on February 27, 2008 continuing the status conference to March 27, 2008 at 9:00 a.m. See Minute Entry (Feb. 27, 2008).

On March 26, 2008, Mr. Reynolds called the Court Administrator to confirm the telephone instructions for the status conference scheduled the following day. *Aff. Muir*, Ex. 2.

On March 27, 2008, the status conference came on before the Court at 9:00 a.m. Watson appeared by counsel. West did not appear. See Minute Entry (March 27, 2008). The Court ordered the setting of new pretrial and trial dates. Sanctions were discussed as a possibility should West fail to adhere to the pretrial scheduling order.

At 1:45 p.m. that day, Mr. Reynolds spoke with the Court Administrator by telephone and expressed his surprise and chagrin that he had missed the status conference. Mr. Reynolds gave no indication that West was planning to be present at the telephonic conference. *Aff. Muir*, Ex. 2.

On March 31, 2008, a *Third Amended Jury Trial Preparation Order* was issued setting June 5, 2008 as the deadline for West to submit her proposed Pretrial Order to Watson's counsel; June 19, 2008 as the deadline for submission of the Final Pretrial Order to the Court; July 3, 2008 for the Pretrial Conference; and July 28-August 1, 2008 as trial dates.

On June 18, 2008, Watson filed his motion for Rule 16(f), M.R.Civ.P. sanctions against West for her failure to appear on March 27, 2008 and her failure to submit her proposed Pretrial Order by June 5, 2008 in accordance with the *Third Amended Jury Trial Preparation Order*.

Attached to his motion is a copy of his proposed Pretrial Order and a cover letter to West dated May 22, 2008.

On June 19, 2008, the Court issued an order scheduling a hearing on the motion for sanctions for July 1, 2008.

West filed no response to the motion.

On July 1, 2008, Watson's counsel Mr. Willmore and West, *pro se*, appeared at the hearing and presented argument on the motion. The Court informed the parties it would take the matter under advisement and issue a ruling. The Court also vacated the pretrial conference scheduled for July 3, 2008 and the fifth trial setting scheduled to begin on July 28, 2008.

OPINION

I. LEGAL AUTHORITY

Rule 16 of the Montana Rules of Civil Procedure generally addresses a district court's pretrial case management functions. *Vermeer of Washington v. Jones*, 2004 MT 77, ¶ 9, 320 Mont. 435, ¶ 9, 87 P.3d 516, ¶ 9. Rule 16(a) authorizes a court to direct attorneys and *pro se* parties to appear for pretrial conferences. *Id.* Rule 16(b) addresses scheduling conferences and scheduling orders which follow such conferences. *Id.* Rule 16(f) authorizes a court on its own initiative or upon motion to order sanctions for misconduct relating to Rule 16 processes. *Id.*

Rule 16(f) provides:

If a party or party's attorney 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, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, 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), or (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both 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.

A trial court has discretion to award sanctions since it is in the best position to know whether a party is disregarding the rights of the opposing party in the course of litigation and which sanctions for such conduct are most appropriate. *McKenzie v. Scheeler* (1997), 285 Mont. 500, 506, 949 P.2d 1168, 1172 (citation omitted). Sanctions "are imposed in order to deter unresponsive parties in an action; it is the attitude of unresponsiveness to the judicial process, regardless of the intent behind that attitude, which warrants sanctions." *Id.*, 285 Mont. at 508, 949 P.2d at 1172.

II. IS A SANCTION WARRANTED?

Initially, the Court notes that West failed to timely seek a continuance of the December 20, 2007 status conference which was set for the purpose of rescheduling the vacated fourth trial setting. The Court's November 14, 2007 order setting this conference date of December 20, 2007 is a Rule 16(a) pretrial scheduling order. *Vermeer*, ¶ 10. This conference, as described above, was continued twice upon West's request to dates of her own choosing: the first request was untimely made two weeks after the scheduled conference date, and the second request was made the day before the rescheduled conference. Despite receiving the continuances she sought, West failed to appear at the March 27, 2008 conference.

At the hearing, West testified that she "dutifully" called in at 3:00 p.m. on March 27, 2008 for the telephonic status conference, but because she had been provided the incorrect time by the Court Administrator, she missed the actual conference at 9:00 a.m. West did not specify with whom she spoke when she purportedly called in at 3:00 p.m. The Court Administrator has

never received a telephone call from West. *See Aff. Muir*, ¶ 6. In support of her claim that she was misinformed about the time, West provided the Court with an email Geoffrey Reynolds forwarded her on March 26, 2008 from the Court Administrator dated January 7, 2008 with instructions for the telephonic conference call scheduled for February 27, 2008 at 3:00 p.m. An undated handwritten note at the end of the email states: "Keri told me the procedures and time were the same as the original meeting. I mailed the original email to Dr. West so she could call." The note is signed with illegible initials. This undated, unsworn note presumably written by Mr. Reynolds does not lend credence to West's claim that she was misinformed of the correct time by the Court Administrator.

The record reflects that the Minute Entry rescheduling the status conference to 9:00 a.m. on March 27, 2008 was sent by certified mail to West's post office box in Lakeside, Montana, where it was returned "Unclaimed" to the Clerk of Court after three attempts at delivery on February 29, March 6, and March 15. West testified that the post office box to which the notice was sent was at that time and still is her correct address. She offered no explanation for her failure to claim her certified mail, either personally or via Mr. Reynolds. She did note that she was out of the country during February and March. The Court determines West had proper notice of the 9:00 a.m. March 27, 2008 status conference as required under the Rules of Civil Procedure.

The *Third Amended Jury Trial Preparation Order* filed on March 31, 2008 is a Rule 16(b) scheduling order. *Id.* That order set a deadline of June 5, 2008 for West to submit her proposed Pretrial Order to Watson, pursuant to Rule 5, U.D.C.R. West's failure to prepare and

submit a proposed Pretrial Order to Watson made it impossible for the parties to meet the June 19, 2008 deadline for submission of the Final Pretrial Order to the Court.

The *Third Amended Jury Trial Preparation Order* was sent by certified mail to West's post office box, and the record indicates it was picked up on April 15, 2008 by Geoffrey Reynolds. At the hearing, West attempted to place the blame for her failure to produce a proposed Pretrial Order on John R. Quatman of Quatman & Quatman, P.C., her former counsel, who she said was enlisted to prepare it but will not complete it without payment. The Court notes that Mr. Quatman has been out of this case since October 31, 2007, five months before the *Third Amended Jury Trial Preparation Order* was issued.

West acknowledged she has not retained counsel since Mr. Quatman's withdrawal and stated that she cannot afford to retain counsel. Upon questioning by the Court as to whether she was prepared to represent herself at trial, she indicated her unfamiliarity with the basics of trial practice and the Rules of Civil Procedure. However, she stated her belief that certain monies she expected months ago will arrive imminently and allow her to re-engage Mr. Quatman to represent her at trial.

Mr. Quatman, West's third attorney in this matter, filed his notice of appearance as counsel on July 16, 2007. The next document Mr. Quatman filed was his October 30, 2007 motion to withdraw as counsel on the ground that the attorney/client relationship had deteriorated to the point where it was impossible for him to represent West. West admitted she is in arrears to Mr. Quatman for fees in the amount of \$16,000.00 and he will not proceed as counsel without a retainer of \$20,000.00, neither of which she can pay.

West's cavalier disregard of scheduling orders is not unique to this matter. The Court takes judicial notice of *Essex Ventures, LLP et al. v. West*, a foreclosure action brought against West for her failure to make payments on two promissory notes in the approximate amount of \$1,500,000.00. *Essex Ventures, LLP et al. v. West*, Cause No. DV-06-462, Twenty-first Judicial District Court. Mr. Quatman initially represented West in that matter. On October 30, 2007, the same day he filed his motion to withdraw as counsel in this matter, Mr. Quatman filed a motion to withdraw as counsel in *Essex Ventures, LLP v. West*. The Essex Ventures Plaintiffs objected, pointing out that a settlement conference was scheduled for November 9, 2007 with Mr. Tracy Axelberg, Esq., and noting that rescheduling the conference would result in a several-month delay due to Mr. Axelberg's busy schedule. This Court granted Mr. Quatman's motion to withdraw. West was sent a Rule 10 notice, and the settlement conference was rescheduled for January 15, 2008, a date West participated in selecting.

West failed or refused to attend the January 15, 2008 settlement conference, and the Essex Ventures Plaintiffs subsequently sought Rule 16(f) sanctions for her failure to obey the Court's scheduling and mediation orders. A contempt hearing was scheduled for March 5, 2008. A motion to continue the hearing was filed in West's name and signed by non-lawyer "Geoffrey Reynolds, Financial Manager for the Defendant, Devra West," noting that West was out of the country until the end of March and needed additional time to retain counsel. The Court denied the motion. West did not file a response brief to the Essex Ventures Plaintiffs' motion for sanctions, nor did she appear at the contempt hearing. On March 27, 2008, the Court entered default judgment and a decree of foreclosure against West in *Essex Ventures*.

In this matter, Mr. Quatman was allowed to withdraw as West's counsel eight months ago. In light of the facts that (1) West admits that to secure the services of Mr. Quatman, she must pay her past due fees of \$16,000.00 and a retainer of \$20,000.00, (2) she has no means by which to do either, and (3) she has submitted no verification by Mr. Quatman that he intends to represent her at trial, the Court found West's expectation at the hearing that Mr. Quatman will represent her at trial beginning July 28 dubious at best. In the absence of a Final Pretrial Order, the Court ordered the July 3 pretrial conference and the upcoming trial dates vacated.

It may well be that West can no longer afford the services of an attorney. *Pro se* litigants are accepted and not at all unusual in Montana courts, and some do quite well at presenting or defending their cases. Being *pro se*, however, does not excuse a litigant from meeting scheduling deadlines, appearing for proceedings, and communicating requests by motion or letter to the Court. On or soon after the issuance of the *Third Amended Jury Trial Preparation Order*, West could have moved by motion or letter for a continuance of the order, on the basis of her alleged inadvertent mistake in failing to attend the March 27, 2008 conference, to seek time in which to prepare a *pro se* defense. At the least, West could have communicated a written apology to Watson and the Court for her failure to attend the status conference. West did nothing. For the next three months, West did nothing. West simply ignored scheduling deadlines as they approached and passed, and ignored Watson's motion for sanctions.

On the basis of West's failure to appear at the March 27, 2008 status conference, her failure to prepare and submit her proposed Pretrial Order to Watson, and her failure to prepare for the July 3, 2008 pretrial conference, the Court determines West should be sanctioned.

III. WHAT IS THE APPROPRIATE SANCTION?

Watson suggests an appropriate sanction for West's noncompliance with Court orders would be the striking out the defenses set forth in her answer and rendering a default judgment in favor of Watson.

The sanctions authorized by Rule 16(f) include sanctions provided in Rule 37 which governs failure to make discovery. Rule 37 authorizes a court to sanction a party by making an order: (1) that matters or designated facts shall be taken to be established in accordance with the claim of the party obtaining the order; (2) refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; and (3) striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. Rule 37(b)(2)(B), (C), and (D), M.R.Civ.P.

Rule 16(f) sanctions are cousins to Rule 37(b)(2) sanctions: both are warranted in cases of abuse by a party and/or the party's counsel that restricts the efficiency of judicial administration. Montana law holds that a litigant who abuses discovery procedures should not be dealt with leniently, but "should be punished rather than patiently encouraged to cooperate in the discovery process." *McKenzie v. Scheeler* (1997), 285 Mont. 500, 506, 949 P.2d 1168, 1171. (Citation omitted.) "Concerns related to crowded dockets and the responsibility to maintain fair and efficient judicial administration have shifted the traditional reluctance to impose discovery-related sanctions to a judicial intolerance of discovery abuses." *Id.* (Citation omitted.) The imposition of sanctions for failure to comply with discovery procedures is regarded with favor. *Id.*, 285 Mont. at 506, 949 P.2d at 1172. (Citation omitted.)

In *Eastern Livestock Co., Inc. v. O'Neal*, the Montana Supreme Court affirmed a district court's Rule 16(f) sanction of default judgment in the amount of \$18,000 for O'Neal's repeated failure to participate in court-ordered mediation. *Eastern Livestock Co., Inc. v. O'Neal* (1997), 285 Mont. 90, 99, 945 P.2d 931, 937. The court was unpersuaded by O'Neal's arguments on appeal that he would have entered mediation had all the third-party defendants been required to be present and but for the obligations of his cattle business. *Id.*, 285 Mont. at 98, 945 P.2d at 936. Here, this Court is unpersuaded by West's arguments that she should not be sanctioned because did not receive adequate notice, she was out of the country, and she is unable to retain an attorney at this time. All of these arguments are untimely and/or without merit.

As of the hearing, with the Final Pretrial Conference in two days and trial within the month, Watson was without knowledge of what facts were in dispute, what legal issues West intended to try, what witnesses West intended to call, and what exhibits West intended to introduce. The Court concludes the appropriate sanction for West is the striking of the defenses set forth in her answer. Accordingly, Watson is entitled to default judgment as to liability on his claims. However, the damages Watson seeks are not for a sum certain or for a sum which can by computation be made certain; thus, the issue of damages remains for hearing. *See* Rule 55(b)(2), M.R.Civ.P.

IV. IS WATSON ENTITLED TO HIS FEES?

In addition to sanctions for failure to comply with scheduling orders, Watson seeks his attorney fees incurred in bringing his motion for sanctions and in preparing his proposed Pretrial Order.

Rule 16(f) mandates that the Court require West to pay the reasonable expenses incurred by Watson because of any noncompliance with the rule, including attorney's fees, unless the Court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust. In the absence of anything to substantially justify West's noncompliance with Rule 16, or any other circumstances that would make an award of expenses unjust, the Court determines that West should be ordered to pay Watson's reasonable expenses, including attorney fees, incurred in the filing of his motion for sanctions and in preparing his proposed Pretrial Order. Counsel for Watson is directed to file an itemized statement of his fees within 20 days of the date of this order. A hearing on the reasonableness of the fees claimed will be held in conjunction with the bench trial on damages.

ORDER

IT IS THEREFORE ORDERED that Plaintiff John Watson's *Motion for Sanctions* is hereby **GRANTED** to the extent that West's answer is ordered stricken, and default judgment is entered in favor of Watson on his breach of contract and tort claims.

IT IS FURTHER ORDERED that a bench hearing on the amount of damages to which Watson is entitled is set for the 2nd day of October, 2008, at 9:00 o'clock a. m., as the first setting, for three (3) hours.

IT IS FURTHER ORDERED that Watson is entitled to his reasonable expenses including attorney fees incurred in bringing this motion and in preparing his proposed Pretrial Order. Counsel for Watson is directed to file an itemized statement of his fees within 20 days of the date of this order. A hearing on the reasonableness of the fees claimed will be held in conjunction with the bench trial on the date set forth above.

DATED this 15th day of July, 2008.


HON. JEFFREY H. LANGTON, District Judge

cc: counsel of record
Devra West, Pro-se, via certified mail

I certify, that I furnished copies of
this instrument to counsel of record
& *ref. by certif. mail*
July 17, 2008
Debbie Harmon, Clerk
By: *Gary Sawyer* Deputy