

IN THE COURT OF COMMON PLEAS OF
PIKE COUNTY, PENNSYLVANIA
CIVIL DIVISION

AMANDA MIDDAUGH,

Plaintiff.

v.

KATLYN HORACEK AND STATE
FARM INSURANCE COMPANY,

Defendants.

691-2011 CIVIL

2010 APR--2 PM 3:23
PIKE COUNTY PA

SARINA MIDDAUGH,

Plaintiff.

v.

KATLYN HORACEK AND STATE
FARM INSURANCE COMPANY,

Defendants.

692-2011 CIVIL

RAYMOND MIDDAUGH,

Plaintiff.

v.

KATLYN HORACEK AND STATE
FARM INSURANCE COMPANY,

Defendants.

693-2011 CIVIL

ORDER

AND NOW, this 16th day of March, 2017, on consideration of Defendant
Katlyn Horacek's Motion for Sanctions for Plaintiffs' Failure to Appear for Court
Mandated Deposition, Plaintiffs' Answer and Brief in Opposition thereto, and following

oral argument held thereon, it is hereby **ORDERED** that Defendant Katlyn Horacek's Motion is **GRANTED**, and Plaintiffs are hereby prohibited from providing any evidence in support of claims for damages.

IT IS FURTHER ORDERED that each named Plaintiff in the above-captioned matter is hereby sanctioned in the amount of \$1,000.00, payable to counsel for Defendant Horacek, within twenty (20) days of the date of this Order.

BACKGROUND

This matter comes before the Court because the parties are still unable to schedule an hold depositions. The case arises from an auto accident which occurred in August of 2008. Six (6) years later, Katlyn Horacek ("Defendant") has been unable to depose Amanda Middaugh, Sarina Middaugh, or Raymond Middaugh ("Plaintiffs").

Defendant filed her first Motion to Compel Deposition of Plaintiffs on or about September 20, 2013. On March 9, 2015, following a series of continuances, the Honorable Joseph F. Kameen, President Judge, issued an Order granting Defendant's Motion to Compel and Plaintiffs' Counter-Motion to Compel, mandating that all depositions be conducted within forty-five (45) days. Depositions were neither scheduled nor conducted.

On or about March 20, 2017, Defendant filed a second Motion to Compel Plaintiffs' Depositions, to which Plaintiffs filed a counter motion. On June 6, 2017, pursuant to *agreement of the parties*, the Honorable Linda Wallach-Miller, Specially Presiding Senior Judge, issued an Order that all depositions "take place within sixty (60) days of this Order." Presumably, no depositions took place, as Defendant filed a Motion

for Sanctions for Plaintiff's Failure to Appear for Court Mandated Depositions ("Motion for Sanctions") on August 14, 2017. Plaintiffs filed an Answer and Brief in Opposition to the Motion for Sanctions on September 6, 2017. Argument on the Motion for Sanctions was held on September 7, 2017, and this opinion follows.

DISCUSSION

The question presented by the instant matter is whether Plaintiffs should be sanctioned by the Court when Plaintiffs have failed to appear for deposition in defiance of two (2) previous Orders of this Court requiring same and the case has been pending for six (6) years. We believe that sanctions are warranted.

On motion, a court may make an appropriate order when, following proper notice, a party fails to appear for deposition. Pa. R.C.P. 4019(a)(1)(iv). "Generally, courts are afforded great discretion in fashioning remedies or sanctions for violations of discovery rules and orders." City of Philadelphia v. Fraternal Order of Police, 985 A.2d 1259, 1269 (Pa. 2009). In considering sanctions for non-compliance with procedural rules, the Supreme Court of Pennsylvania notes that enforcement of the rules is governed by the facts and circumstances of each particular case. Miller v. Brass Rail Tavern, Inc., 664 A.2d 525 (Pa. 1995). Four factors should be considered when evaluating the severity of a discovery sanction. City of Philadelphia, at 1271. The four factors are (1) the prejudice endured by the non-offending party and ability of the opposing party to cure, (2) willfulness or bad faith of the non-complying party, (3) importance of the excluded evidence, and (4) the number of violations by the offending party. City of Philadelphia, at 1270; See e.g. Pioneer Commercial Funding Corp. v. Amer. Financial Mortg. Corp.

797 A.2d 269 (Pa. Super. 2002); Steinfurth v. LaManna, 590 A.2d 1286 (Pa. Super. 1991). The Pennsylvania Superior Court consistently emphasizes the first two (2) of those factors. City of Philadelphia, at 1271; See e.g. Stewart v. Rossi, 681 A.2d 214, 217 (Pa. Super. 1996).

The record in this matter clearly shows that sanctions against the Plaintiffs are warranted because Defendant has been prejudiced by the age of the case and lack of important information and subjected to Plaintiffs' willful non-compliance and/or bad faith.

Defendant has been prejudiced by the Plaintiffs' repeated failures and/or refusals to participate in deposition. Defendant claims that attempts to take the depositions of the Plaintiffs has been ongoing and unsuccessful for several years at the time of the filing of the Motion for Sanctions. Def.'s Motion, ¶3. The fact that this case was initiated in 2011 and depositions of the parties have not yet taken place is a testament to that claim supported by the record. Defendant also claims that deposition of the Plaintiffs is necessary to evaluate the damages they allege. Def.'s Motion, ¶18. This Court agrees, as memory fades and wounds heal with the passage of time, Defendant is increasingly hindered in her ability to prepare a defense. Therefore, we find that Defendant has been prejudiced by Plaintiffs' ongoing refusal to be deposed.

Defendant has also been subjected to Plaintiffs' willful non-compliance and/or bad faith. In response to this Court's Order of June 6, 2017, Defendant's counsel proposed a number of dates for deposition. Counsel for Plaintiffs indicated that he or his clients would not be available on any of the dates proposed by Defendant and failed to offer any dates of his own. Def.'s Motion, ¶7-8. Defendant's counsel proposed

additional dates on July 19, 2017, but received no response from Plaintiffs' counsel. Def.'s Motion, ¶9-10. On August 4, 2017, facing the deadline indicated in the June 6, 2017 Order, Defendant's counsel noticed for depositions. Plaintiffs' counsel then indicated his clients would not appear. Def.'s Motion, ¶10-11. The record indicates that depositions did not take place and Plaintiffs failed to request protective orders. Faced with the age of this case, the prior Court Orders which have thus far been disregarded, and the consistent course of evasive conduct espoused by the Plaintiffs and their counsel, we have no choice but to find that Plaintiffs' repeated failures to schedule and participate in depositions are willful and/or undertaken in bad faith.

Plaintiffs' Answer and Brief in Opposition to the Motion for Sanctions make many assertions as to why the Orders of Court could not, should not, or would not be followed, including short notice, counsel's busy trial schedule, and the unavailability of counsel for the third party Defendant (State Farm Mutual Automobile Insurance Co.). In an attempt to circumvent the June 6, 2017, Order of Court, Plaintiffs even circulated a proposed stipulation purporting to extend the sixty (60) day mandate. We acknowledge that each explanation offered by the Plaintiffs may be sufficient to overcome a request for sanctions under normal circumstances; this Court can appreciate a busy trial schedule, a desire to protect the interests of other parties to an action, and attempts to resolve issues without Court intervention, even when those attempts bear no fruit. However, each of Plaintiffs' explanations as to why they failed to conform to two (2) separate Orders of Court are belied by the age of the case and multiple attempts to hold depositions in the past. Plaintiffs' blatant and ongoing non-compliance is only exacerbated by the fact that the June 6, 2017, Order of Court, directing all depositions to take place within sixty (60)

days was made *by agreement of the parties*.

Therefore, this Court finds that sanctions against the Plaintiffs are warranted because Defendant has been prejudiced by the Plaintiffs' repeated failures and/or refusals to schedule and hold depositions and Plaintiffs' ongoing non-compliance with previous Orders of Court is willful and/or done in bad faith.

After drafting and redrafting this Opinion, we have deliberated long and hard in the hope that Plaintiffs' attorney would comply with the previous two Court Orders to appear with his clients for depositions. By virtue of a Motion filed by Plaintiffs' attorney with another Judge of this Court, we learned that he did appear with his clients and asked that we find Defendants' Motion moot. However, as we have seen in many other cases involving Plaintiffs' attorney, while appearing he directed his clients to answer no relevant questions. Thus, making the depositions fruitless. If this were the only motion of this type involving Plaintiffs' attorney our decision might be different. During our three-month assignment as Senior Judge in this county, Plaintiffs' attorney appeared numerous times on motions similar to this one. We heard, time and time again, from opposing counsel of time spent attempting to schedule matters and we handled numerous cases where Plaintiffs' attorney failed to comply with court orders. No defendant should have a case hanging over her head for over seven (7) years.

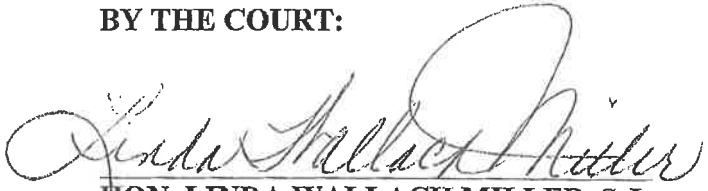
CONCLUSION

Accordingly, Defendant Katlyn Horacek's Motion for Sanctions for Plaintiffs' Failure to Appear for Court Mandated Depositions is hereby **GRANTED**, and Plaintiffs are hereby prohibited from providing any evidence in support of claims for damages.

IT IS FURTHER ORDERED that each named Plaintiff in the above-captioned

matter is hereby sanctioned in the amount of \$1,000.00, payable to counsel for the Defendant Horacek, within twenty (20) days of the date of this Order.

BY THE COURT:


HON. LINDA WALLACH MILLER, S.J.
SPECIALLY PRESIDING

OFFICE OF
PROthonary
CLERK OF COURT
2010 APR -2 PM 3:23
STATE COURT 7:22A

cc: Kevin C. Hayes, Esq., *Scanlon, Howley & Doherty, P.C.*
James A. Doherty, Esq., *Scanlon, Howley & Doherty, P.C.*
Charles Kannebecker, Esq., *Law Office of Charles Kannebecker*
Thomas P. Comerford, Esq., *State Farm Insurance*
Court Administration

JC