IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

D. STEPHAN SCHNEIDER and DONNA L. SCHNEIDER, as parents and next friends of ASHTON L. SCHNEIDER, a minor child,	)	
Plaintiffs,	)	Civil Action No. 11-EV-013818-C
v.	)	
USA POOLS OF GEORGIA, INC., et al,	)	
Defendants.	)	

ORDER STRIKING DEFENDANTS' ANSWER AS SANCTION FOR WILLFUL CONTEMPT OF COURT AND ORDER FOR HEARING TO ASSESS DAMAGES

A motion having been duly made by Plaintiffs to strike the answer and enter default judgment against Defendants Troy Legg now Troy Avery (hereinafter "Avery"), Robert Legg (hereinafter "Legg") and USA Pools of Georgia, Inc. and all of its alter-ego/related entities (hereinafter collectively "USA Pools") pursuant to O.C.G.A. § 9-11-37 for their willful refusal to participate in this litigation and willful contempt of this Court's Order to Compel entered January 25, 2018; and upon considering the entire record in this case, the Court hereby **grants** Plaintiff's Motion; and finds as follows:

FINDINGS OF FACT

This case arises out of a near drowning incident that occurred on June 27, 2007. Plaintiffs allege Defendants failed to provide properly trained and certified lifeguards at the pool in which this incident occurred. As a result, Plaintiffs allege that their minor child nearly drowned to death

and suffered serious injuries because Defendants' lifeguard on duty was inadequately trained and negligent in her duties. (*See* Plaintiffs' Amended Complaint).

Plaintiffs filed their Complaint against Defendants on November 14, 2011 seeking money damages. (*See* Plaintiffs' Complaint). Defendant Legg filed his answer on December 15, 2011. (*see* Legg's Answer). Defendant Avery and Defendant USA Pools filed their special answer on December 21, 2011. (*See* Avery and USA Pools Special Answer). Defendant Legg and Avery have been served by personal and notorious service, respectively, and the USA Pools Defendants have been served in accordance with O.C.G.A. § 9-11-4(e)(1) and O.C.G.A. § 14-2-504. (*See* Filed Entries of Service). The parties engaged in discovery and this legal action was stayed on or about September 4, 2014 pending the resolution of the issues raised in a declaratory action filed in the Superior Court of Fulton County, Civil Action File No. 2012-CV-221884. (*See* Order of Stay). Summary judgment was granted to the insurer of USA Pools and all obligations under the insurance contract were obviated. (*See* Final Judgment for CAFN 2012-CV-221884).

The stay was lifted on or about May 11, 2016. (*See* Order Lifting Stay). Plaintiffs then moved for discovery to be re-opened to update prior discovery and to complete incomplete answers to previous discovery withheld until the resolution of the declaratory action. (*See* Plaintiffs' Motion to Re-open and Extend Discovery). Plaintiffs' request to re-open and extend discovery was granted by October 12, 2017. (*See* Order Reopening and Extending Discovery). Defendants refused to participate in discovery during the reopened discovery period, and therefore, Plaintiffs filed a motion to compel on November 13, 2017. (*See* Plaintiffs' Motion to Compel). Defendants did not respond to the motion. On January 25, 2018, this Court ordered to compel Defendants to respond and participate in the limited discovery necessary to bring this case to trial. (*See* Order

Compelling Discovery). Defendants had twenty (20) days to comply, which was February 14, 2018. Defendants have made no efforts to comply with this Court's order despite being served with the motion. Plaintiffs then filed the instant motion for sanctions on March 23, 2018, and this Court finds that sanctions are appropriate under the circumstances. (*See* Plaintiffs' Motion for Sanctions).

CONCLUSIONS OF LAW

Failure to comply with a discovery order subjects a party to sanctions under O.C.G.A. § 9-11-37. Under O.C.G.A. 9-11-37(b)(2)(C), the most severe sanction is striking the pleadings and entering default judgment. This portion of the statute provides litigants with a two-step procedure to follow when an opponent refuses to submit to discovery. *See Tenet Healthcare Corp. v. Louisiana Forum Corp.*, 273 Ga. 206, 210–12, (2000). First is a motion to compel that results in an order, and then a motion for sanctions where the court orders the appropriate remedy. *See* O.C.G.A. § 9-11-37(b)(2).

Based on the history of this case, the most severe sanction is warranted. The first prong was met when this Court entered its order compelling the sought discovery. Defendants ignored this Court's opportunity to provide discovery without sanction despite being served with notice of the motion and order. This Court finds that Defendants willfully failed to do so and have made no indication of any desire to do so. Accordingly, this Court finds the most severe sanction of striking the Defendants' pleadings under O.C.G.A. § 9-11-37(b)(2)(C) is warranted. *See Tenet Healthcare Corp.* 273 Ga. at 210; *see also Savannah Surety Assoc. v. Master*, 240 Ga. 438, 440, 241 S.E.2d 192 (1978).

The court has provided Defendants lengthy rope to participate in this litigation before concluding that imposing the ultimate sanction of striking their pleadings is appropriate for their willful failure to comply with this Court's discovery orders. *See Tenet Healthcare Corp.* 273 Ga. at 211; *Hernandez v. State of Ga.*, 200 Ga. App. 368, 370, (1991); *Steele v. Colbert*, 182 Ga. App. 680 (1987). The court has given the offending Defendants an opportunity to establish that its failure to comply with this Court's orders were not willful. *Tenet* at 211; *Gilbert v. E & W Constr. Co.*, 181 Ga. App. 281(2) (1986); *see also Loftin v. Gulf Contracting Co.*, 224 Ga. App. 210(3) (1997) (Before imposing the ultimate sanction, the trial court must afford the party against whom sanctions are sought an opportunity to explain the relevant circumstances.). However, the Defendants have ignored this Court and Plaintiffs efforts to get this case ready for a trial on its merits; and therefore, the court need not conduct an evidentiary hearing on the issue of willfulness because "the trial court can otherwise determine willfulness on the part of the party against whom the sanctions are sought." *Schrembs v. Atlanta Classic Cars*, 261 Ga. 182 (1991). The complete failure to participate since the lift of the stay despite prior participation in the suit prior to the stay and definitive notice of this Court's orders since lifting the staty convinces the court that Defendants actions are willful and worthy of the most severe sanction under the circumstances.

To wit, since this Court's order lifting the stay, the only thing Defendants have done to participate in this case was to hire a temporary counsel to oppose the motion to reopen discovery. Said counsel immediately withdrew from representation once this Court entered an order opening discovery. (*See* Response in Opposition to Motion to Reopen Discovery and Motion to Withdraw as Counsel and Order Granting Withdrawal of Counsel). Based on the record before this Court, Plaintiffs have served appropriate discovery and have sent multiple 6.4 letters seeking

communication and efforts to confer. Despite all good faith efforts, Plaintiffs have been met by silence. The court has given Defendants an opportunity to be heard on this motion before ruling pursuant to O.C.G.A. § 9-11-37, but Defendants have not exercised that right to be heard in willful contempt of this Court's order.

Further, it is well settled under Georgia law that O.C.G.A. § 9-11-37(d) also allows this Court to strike Defendants' answers for its willful disobedience and contempt of court. *See Cannon Air Transport Services, Inc. v. Stevens Aviation, Inc.*, 249 Ga. App. 514, 548 S.E.2d 485 (2001). When a "party or his agent fails to serve answers or objections to interrogatories or requests to produce, the presiding judge 'may take any action authorized under [O.C.G.A. § 9-11-37](b)(2)(A) through (b)(2)(C)....'" and therefore the plaintiff's "complete failure to answer or object to [the defendant's] interrogatories and requests to produce…authorized [the trial court] to strike pleadings, to dismiss the action, or to render default judgment against the disobedient party". *Id.* at 517-518 (quoting O.C.G.A. § 9-11-37(d)(1)). O.C.G.A. § 9-11-37(d) also requires that this Court find that Defendants acted willfully. *Id.* at 517 (quoting *Dyer v. Spectrum Engineering*, 245 Ga. App. 30, 33, 537 S.E.2d 175 (2000)). For the reasons set forth above, this Court finds Defendants have displayed clear indifference and willful refusal to comply with discovery. Accordingly, the facts in this case are sufficiently analogous to those in *Cannon* such that the standard to strike all of Defendants' answers and enter default judgment pursuant to O.C.G.A. § 9-11-37 is warranted.

WHEREFORE IT IS ORDERED AND ADJUDGED:

1. Judgment as to liability is entered in favor of the Plaintiffs and against the Defendants in all respects and to the extent alleged by Plaintiffs in the Amended Complaint.

2. Plaintiffs shall recover from Defendants the damages sustained by them on account of the claims alleged in the Amended Complaint.

3. The damages to be awarded to Plaintiffs shall be assessed by this Court as a fact-finder unless Defendants appear at the hearing and demand trial by jury as to damages.[1]

4. To accomplish such assessment of damages, said case is directed to be called for hearing before this Court on _____, 2018.

SO ORDERED, this _____ day of _____, 2018.

_____
Hon. Judge Myra H. Dixon
State Court of Fulton County

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[1] Plaintiffs filed a withdrawal of their jury trial demand and seek this Court to serve as fact finder in the Default Hearing if Defendants do not appear or do not object to this Court being the fact finder.