IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RICHARD SNYDER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 02-29-KAJ
	)	
HI TECH ELECTRONIC DISPLAYS INC.,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

Introduction

This case springs from a basic contract dispute and a franchise relationship gone sour, in which $250 separated the parties in their efforts to settle for a sum of approximately $3,000. *See infra* at 6. The pro se plaintiff "alleges breach of contract, unfair and deceptive trade practices, fraudulent conduct, misrepresentation, and violations of Federal Franchise Law, and the RICO Statutes." (Docket Item ["D.I."] 1 at ¶ 7.) Unfortunately, the plaintiff has pursued his claims with only sporadic attention, which is in sharp contrast to his apparently constant anger at the defendant and its counsel. The matter is set for a two-day jury trial beginning in less than two weeks, on December 6, 2004. Because the plaintiff has failed to participate in the preparation of this case for trial, after a direct and unmistakable warning that he must do so and after being given an additional month in which to do so, I am ordering that the case be dismissed with prejudice.

Background

The Complaint in this case was filed on January 11, 2002, seeking in exces of $100,000 in damages. (D.I. 1) Following denial of the defendant's motion to dismiss (D.I. 20), an Amended Complaint was filed on February 23, 2003 (D.I. 24). An amended scheduling order was entered (D.I. 43), requiring the parties to file their pretrial order by September 8, 2004, in preparation for trial to begin on October 6, 2004.[1] The Magistrate Judge then undertook to assist the parties by mediating their dispute. (D.I. 36.)

The efforts of the Magistrate Judge appeared to be successful. The parties advised that they had settled the case and I, in turn, requested on July 29, 2004, that a stipulation of dismissal be filed by August 16, 2004. (*See* D.I. 46.) Unfortunately, on August 16, 2004, I did not receive a stipulation of dismissal. I received instead a copy of the July 29th letter I had sent to the parties with a note from the plaintiff handwritten across the bottom, saying, "Please advise Judge Jordan that Counsel has Renged [sic] on an offer to settle. Plaintiff is filing Rule 11 Sanctions." (D.I. 47; original emphasis.) I then held a conference call with the parties on September 2, 2004, in an effort to put the case back on track for trial, so that the matter could be finally resolved. (*See* D.I. 51.)[2]

[1]The original scheduling order had been entered on October 16, 2003. (D.I. 33.) The First Amended Scheduling Order was entered on April 22, 2004 (D.I. 43), following an April 21, 2004 teleconference with the court in which the plaintiff and the defendant both requested, after the original discovery cutoff had passed, for additional time to take discovery. (See D.I. 42 at 4.)

[2]Docket Item 51 is the transcript of the September 2, 2004 teleconference.

During the teleconference, I told the plaintiff that a motion for sanctions was not in order and that it was important to focus on the merits of the dispute so that the parties could resolve it once and for all. (*See id.* at 2-4.) I then asked the parties about their preparations for trial. The defendant, through counsel, stated its readiness to proceed to trial. (*Id.* at 5.) The plaintiff asked for an additional thirty days for discovery (*id.*), even though the already extended discovery cutoff, that had been set with the parties' input, had passed more than three months before.[3] (*See* D.I. 33.) I granted the plaintiff's request to extend the discovery cutoff and to continue the trial from October 6, 2004 to December 6, 2004, and set the pretrial conference for October 14, 2004.[4] The plaintiff expressed a desire to forego the pretrial conference, but I explained to him that a pretrial conference was necessary and that he would be required to submit proposed jury instructions and voir dire in preparation for the conference. (D.I. 51 at 8-9.)

The October 14th pretrial conference did not turn out as planned. Rather than preparing for the conference, as I had instructed him and as is required by Federal Rule of Civil Procedure 16 and Local Rule 16.1, the plaintiff decided to send an acrimonious e-mail to defense counsel.[5] Among other things, the e-mails exchanged between the parties included an August 31 offer from defense counsel that stated: "You may wish to call me for assistance in preparing your side fo the pre-trial – I have indicated to the

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[3]This was the second time the plaintiff asked that an expired discovery deadline be extended for his benefit. *See supra* n.1.

[4]The pretrial conference had to be set several weeks ahead of the trial date to accommodate the plaintiff's personal schedule. (*See* D.I. 51 at 7-8, 10.)

[5]Defense counsel attached the e-mails to an October 8, 2004 letter (D.I. 53) explaining the delay in filing an incomplete form of pretrial order.

court that I will assist." There is also an October 6, 2004 e-mail from defense counsel to plaintiff stating, *inter alia*, "you were supposed to get back to me with your contributions to the pre-trial. ... If I do not receive your input on the pret-tiral, I will file it as it is, that is as I sent it to you. *If you do not identify witnesses and documents, I assume the court will not be able to try your case, and it will be dismissed.* Please let me hear from you." (Emphasis added.) The plaintiff's response to that e-mail, in its entirety, was, "as indicated, we are sending in a Rule 11 motion for sanctions. There is no excuse for your behavior .... No wonder the world hates lawyers." Declining to respond in kind, defense counsel sent a later e-mail to the plaintiff saying simply, "I have to file the pre-trial with the court in one hour. If you have any input, please send it to me." The plaintiff did not send anything to defense counsel for inclusion in the pretrial order (*see* D.I. 55) and instead filed a "Motion for Sanctions. Request for Continuance". (D.I. 56.)

During the pretrial conference on October 14th, I asked the plaintiff why he thought he needed a continuance. (Tr. at 3.)[6] He responded, "I think this whole procedure has led to a new low between the actions of counsel. I think he has got a perverse attitude towards myself. And although I have repeatedly offered to settle with him and actually made, and virtually signed my life away in his office at the conclusion of a deposition, he refused to pay the money on the terms that we agreed to." (*Id.*) I then advised the plaintiff that we would get to his sanctions motion later but that I was trying to focus on his need for a continuance. (*Id.* at 4.) Undeterred, the plaintiff said that he "would like to make one final offer to [defense counsel]. That is, if he would pay

[6]References to "Tr." are to the transcript of the October 14, 2004 pretrial conference.

me a cashier's check for the amount of money which he purportedly was going to pay me ..., and if he would make a contribution of $250 to any charity that the Judge might suggest, I will consider the matter closed." (*Id.*) I indicated that the parties were free to continue settlement discussions, if they wished (*Id.* at 4-5), and again asked about the continuance. The plaintiff responded that he wanted an additional thirty days for discovery, "[a]nd the other dates are fine." (*Id.* at 5.) Counsel for the defendant did not object and I granted the additional time for discovery. (*Id.* at 6; D.I. 57.) I denied the motion for sanctions as not well-founded in fact or law. (Tr. at 10-11; D.I. 57.)

Most importantly, I explicitly and emphatically reiterated to the plaintiff his responsibility to participate in the pretrial process so that the matter could be properly tried. I stated:

> [T]his is important, Mr. Snyder, because if I understood correctly the pretrial order information sent to me by [defense counsel], you did not submit any part of that pretrial submission. You need to do that, because under the rules of this Court, if you don't particpate in that process, you can be held to have waived positions that you may want to take at trial.
>
> In fairness – see, I have to give you some leeway because you are here representing yourself, and I will do that. But in fairness to the defense, I can't just throw the rule book out the window. So if you don't submit anything in the pretrial order, and then you come in and say, wait a second, I wanted to talk about that here, and the defense gets up and says, they didn't say that, we are getting sandbagged, I have to say to them, you are right, and you [the plaintiff] don't get to talk about that, Mr. Snyder. I am sure you don't want that to happen.
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> So I will give this the extra 30 days. Then I will give you a week, one week past that to talk to each other and exchange whatever information is necessary so that I get what the rules require, which is a joint pretrial submission that both parties have participated in the preparation of.
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> So that will fall due on the 13th of November.
>
> I will expect that to be filed. And since this is a jury trial, I am going to expect agreed-upon jury instructions, and voir dire questions, that is questions that you want to have asked to the ... potential jurors, when they come in before they are selected. ... In short, I'm giving you another crack at this pretrial order and the jury instructions and the special voir dire.

(Tr. at 6-8.)

The 13th of November came and went without the parties filing the submissions required. On November 22, 2004, I received a letter from defense counsel, stating:

> I am filing this letter with the pre-trial order, jury instructions, jury interrogatories and voir dire, in order to explain the circumstances since our meeting with the court, and to, once again, document my efforts at obtaining Mr. Snyder's side of the pre-trial. Mr. Snyder has still provided no information to date. After the last attempted pre-trial conference, I wrote to Mr. Snyder, to continue to obtain Mr. Snyder's assistance in completing the pre-trial, notify him that he had not yet filed discovery and that I would answer it if he sent it (even at this late date), and to renew contact on the issue of settlement. The only response I have received is Mr. Snyder's faxed note, on the bottom of my letter, which was sent at 6:25 p.m. Friday, November 19.

(D.I. 59.) Attached to the letter from defense counsel is a letter dated October 23, 2004, that he had sent to the plaintiff, offering to settle the matter for $2,750. Which, apparently, is exactly or approximately the amount that had been negotiated last Summer as sufficient to settle the case. (*See* D.I. 59.) The plaintiff's handwritten note across the bottom of the October 23rd letter reads in its entirety: "You send me $3,000 and I will quit."

Discussion

Rule 16 of the Federal Rules of Civil Procedure requires the court to hold a final pretrial conference "as close to the time of trial as reasonable under the circumstances." Fed.R.Civ.P. 16(d). The Rule further provides that the conference be memorialized by a final pretrial order that "shall control the subsequent course of the action" and which is only to be modified "to prevent manifest injustice." Fed.R.Civ.P. 16(e). Under this court's local rules, the parties are required to cooperate with one another in the preparation of a proposed pretrial order which must cover a number of specified topics,

including, among other things, “[a] statement of facts that are admitted and require no proof”; “[a] statement of issues of fact that remain to be litigated”; “[a] statement of issues of law which any party contends remain to be litigated, and a citation of authorities relied upon by each party”; “[a] list of pre-marked exhibits”; and “[t]he names and addresses of all witnesses a party intends to call to testify either in person, or by deposition”. Local Rule 16.1(d).

Proper functioning of the court requires adherence to the rules pertaining to final pretrial preparations. The seriousness of the parties’ obligations in that regard are highlighted by Rule 16(f), which reads:

> 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), (D).

The sanctions cross-referenced in Rule 37(b)(2) include an order denying a party the opportunity to support its claims. *See* Fed.R.Civ.P. 37(b)(2)(B). As the Advisory Committee Notes to Rule 16 observe, “courts have not hesitated to enforce [the Rule] by appropriate measures.” Adv. Comm. Notes to 1983 amendment (discussing addition of subsection (f) and citing *Link v. Wabash R. Co.,* 370 U.S. 628 (1962) as follows: “district court's dismissal under Rule 41(b) after plaintiff's attorney failed to appear at a pretrial conference upheld”). Under the circumstances of this case, dismissal is the appropriate sanction.

The United States Court of Appeals for the Third Circuit has adopted a six-factor test for determining the appropriateness of a sanction that dismisses a litigant’s claims.

The Court stated in *Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863 (3d Cir. 1984):

> [W]e will be guided by the manner in which the trial court balanced the following factors, ... and whether the record supports its findings: (1) the extent of the *party* 's personal *responsibility;* (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith;* (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions;* and (6) the *meritoriousness* of the claim or defense.

Id. at 868 (original emphasis).

In this case, the plaintiff is representing himself and is entirely responsible for his actions and inaction. The prejudice to his adversary is manifest. Defense counsel has had to expend time and resources in the unavailing effort to communicate with and obtain cooperation from the plaintiff. If the matter were permitted to go forward without dismissal, it would only mean further delay in resolving a matter that has been repeatedly delayed. The dilatoriness of the plaintiff is likewise clear. Despite the repeated warnings from defense counsel and from me about the consequences of failing to participate in the pretrial process, the plaintiff has simply refused to cooperate. He obviously feels himself aggrieved. He obviously dislikes the defendant and its attorney, intensely. He obviously believes he is owed money. But whether or not he has any basis in fact for his feelings is now irrelevant. He cannot be permitted to turn even a legitimate dispute into a petulant vendetta that wastes everyone else's time. The tone of his communications evidences the willfulness of his refusal to comply with the rules and instructions of this court. I do not believe any other sanction would be sufficient under these circumstances. As noted, I have explained to the plaintiff more than once already, and defense counsel has endeavored to do the same, that a failure

to participate in the pretrial process can eliminate one's rights. The plaintiff appears to simply not care, and now he must face the consequences. Finally, I have serious doubts about the meritoriousness of some of the plaintiff's allegations, including those relating to the federal claims he has asserted.

That last point raises an unusual problem. Given that the sum of approximately $3,000 appears to be what is at stake now, and given that the parties have not discussed RICO or federal franchise laws in the pretrial order, there is a real doubt that subject matter jurisdiction could be sustained in this case. That doubt raises the conundrum of whether it is more suitable to hold that there is no subject matter jurisdiction, because the plaintiff failed to sustain it with any proffered proof or argument, and therefor dismiss the case without prejudice, or, on the other hand, to assume that the pleaded basis for subject matter jurisdiction does exist and dismiss the case with prejudice as a sanction for failure to cooperate in preparing the case for trial. I believe dismissal with prejudice is the more proper result.

The plaintiff alleged violations of state contract law in terms that appeared to be aimed at meeting the prerequisites of diversity jurisdiction. He also invoked, in a general way, federal RICO and franchise statutes. However, because the plaintiff refused to properly participate in the pretrial process and, it seems, did not even take the discovery that he twice sought extensions to obtain, and because the defendant did not challenge subject matter jurisdiction in any meaningful way,[7] it would have been left

[7]The defendant stated in the form of pretrial order it submitted only that jurisdiction is contested, but provided no reasons or authorities in support of that generalized statement.

to the court to figure out whether either federal question or diversity jurisdiction could have been sustained, based upon the evidence proffered and the authorities cited in the proposed pretrial order. The Third Circuit has noted that a court lacking subject matter jurisdiction cannot enter a dismissal on the merits. *In re Orthopedic "Bone Screw" Products Liability Litigation*, 132 F.3d 152, 156 (3d Cir. 1997) ("The question we face here is whether the inherent power to sanction extends in a case, over which the court lacks subject matter jurisdiction, to permit the court to impose a sanction which will be dispositive of the merits of the case. We think not.") However, taking the approach of determining that the plaintiff's jurisdictional allegations cannot be sustained at this point because of his failure to provide evidence or argument in a submission for the pretrial order would have the perverse effect of rewarding the plaintiff for his recalcitrance. A more cooperative plaintiff, one who provided some proof to sustain jurisdictional allegations but was nevertheless derelict in other respects and thereby subject to dismissal as a sanction, would be in a worse position than a plaintiff who, like the one at bar, simply refused to cooperate at all.

Consequently, I will continue to liberally construe the plaintiff's pro se pleading and to accept the plaintiff's own jurisdictional allegations, despite his lack of cooperation in providing any evidentiary or legal support for them in the course of pretrial proceedings, and will dismiss his claims with prejudice. *Cf. Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 300 n.4 (3d Cir. 2002) (facial attack to subject matter jurisdiction requires court to accept complaints allegations as true). No other court should be required to go through the colossal waste of time that has been foisted on this one, both in the many hours that the magistrate judge spent trying to assist the parties

to achieve a settlement and in the several conferences I have held with the parties in person and on the telephone in an effort to bring this matter to trial, not to mention in preparing this Order.

Accordingly, for the reasons set forth, it is hereby ORDERED that the Amended Complaint (D.I. 24) is DISMISSED with prejudice.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

November 24, 2004
Wilmington, Delaware