Appendix No.1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLAERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of November, one thousand nine hundred and ninety-eight.

PRESENT:

Hon. Wilfred Feinberg,
Hon. Dennis Jacobs,
Hon. Robert D. Sack
Circuit Judges.

H. Richard Austin, 97-9069
Plaintiff-Appellant.

v.

Hanover Insurance Company, et al.,
Defendants-Appellees

APPEARING FOR APPELLANT:
H. Richard Austin, Pro Se
Chesterfield, MO

APPEARING FOR APPELLEES:
Gregory S. Clayton,
Downs Rachlin & Martin PLLC Littleton, NH

Appeal from the United States District Court for the District of Vermont, (Murtha, Ch.J.)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

H. Richard Austin, pro se, appeals from a judgment in the district court entered following a jury verdict in favor of the defendants .

In his complaint, Austin alleged that after the defendants issued him a fire insurance policy, defendants would not pay him the required sums after his house was destroyed by fire. Austin also alleged that defendants acted in bad faith. In

response to Austin's charges, defendants claimed that Austin set fire to his own house.

On appeal, Austin argues, in part, that: 1) he was improperly denied discovery of essential evidence, thus compelling him to go to trial unprepared and without an expert witness; 2) the district court improperly denied requested jury instructions; 3) the district court erred in admitting certain evidence; and 4) the district court never reviewed the magistrate judge's recommendation that partial, summary judgment is granted in favor of the defendants.

Austin's arguments concerning discovery proceedings and evidentiary rulings are meritless because he fails to show that the district court abused its discretion in its rulings on these matters. See Curdin v. Bank of New York, 957 F.2d 961, 972 (2d Cir. 1992) (holding that discovery rulings will be reversed only upon a clear showing of an abuse of discretion); Perry v. Ethan Allen, Inc., 115 F.3d 143, 150 (2d Cir. 1997) (holding that evidentiary rulings are reviewed for an abuse of discretion, and erroneous evidentiary rulings "will not lead to reversal unless affirmance would be inconsistent with substantial justice.")

This Court reviews a claim of error in the district court's jury instructions de novo and will reverse on this basis only if the appellant can show that the error was prejudicial in light of the charge as a whole, Perry, 115 F.3 d at 153. Austin cannot prevail on his jury instruction claims because other language in the charge clarified the proper standard for an

affirmative defense of arson and his proposed instruction on defendant's waiver of certain evidence has no basis in law. Thus, the court did not err in its instructions to the jury on the law. Id. ("A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.") (quotations omitted).

Austin claims that the district court never reviewed his summary judgment motion after he submitted his objections to the magistrate judge's report and recommendations; however, the district court order belies Austin's claim and indicates that de novo review occurred. To the extent that Austin seeks to challenge the district court's denial of summary judgment in his favor and its grant of partial summary judgment in favor of defendants, Austin cannot prevail because there were issues of material fact with respect to the elements of defendants' arson defense. See Westchester Fire Insurance Co. v. Deuso, 146 Vt. 424 427, 505 A.2d. 666, 667-68 (1985). Additionally, in light of evidence indicating that the cause of the fire was incendiary in the instant case, including evidence obtained from the Vermont police, Austin could not have won on his claim of bad faith. Bushey v Allstate Insurance Co., 164 Vt. 199, 670 A.2d 807, 809 (Vt. 1995)

Austin's remaining claims lack merit.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT,
Carolyn Clark Campbell, Clerk
By/LucilleCarr/

Appendix No .2

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

H. RICHARD AUSTIN, 1:99-CV-252
Plaintiff Pro Se

v

HANOVER INSURANCE COMPANY &
MASSACHUSETTS BAY INSURANCE
COMPANY,
Defendants

MOTION TO DISMISS
AND FOR AFFIRMATIVE RELIEF

NOW COME Defendants Hanover Insurance Company and Massachusetts Bay Insurance Company, by and through their counsel, Downs Rachlin & Martin PLLC, and respectfully move pursuant to F.R.C.P. 12(b)(6) to dismiss the Petition and "Petition - Amended" filed in this action as time-barred by F.R.C.P. 60(b) and barred under principles of res judicata.

Defendants also request that the Court rule: 1) that any appeal by Plaintiff from this Court's ruling on this motion will be frivolous as a matter of law within the meaning of F.R.A.P. 38; 2) that Plaintiff is affirmatively ordered to pay defendants all costs ordered in Civil Action No: 2:95-CV-170 by a date certain and prior to filing any additional pleadings with this court or taking any appeals of this Court's ruling; and 3) that Plaintiff is required to post a bond

for costs pursuant to F.R.A.P 7 in the amount of $10,000 prior to taking any appeal.

In support thereof Defendants submit the following memorandum of law.

MEMORANDUM OF LAW

Judgment was entered against Richard Austin on August 1, 1997 in Civil Action No. 2:95-CV-170, following a jury finding that he intentionally burned his Warren residence and made material misrepresentations about his insurance claim. The Second Circuit Court of Appeals summarily affirmed, 165 F.3d 13 (2d.Cir.1998) and the United States Supreme Court denied certiorari, 144 L.Ed.2d 237 (1999). Austin has never made payment of the costs of $5,028.17 taxed on April 13, 1999.

The sole jurisdictional basis for Austin's independent action is FR.C.P. 60(b)(1)&(3), which respectively permit motions for relief from judgment on the basis of "mistake, inadvertence, surprise, or excusable neglect" or for "fraud." Rule 60 specifically states: "The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) *not more than one year after the judgment, order, or proceeding was entered or taken.*" (emphasis added)

The final judgment in Civil Action No. 2:95-CV-170 was entered on August 1, 1997. The instant action was filed over twenty-three months after that judgment was entered. The pendency of an appeal does not toll the one year statute. Nevitt v. United States, 886 F.2d 1187, 1188 (9th Cir. 1989) (citing decisions from four other circuits). The one year statute also imposes an absolute bar to delinquent Rule 60(b) motions. United States v. Berenguer, 821

F.2d 19, 21 (1st Cir. 1987).

Furthermore, the most cursory review of the Amended Petition reveals that Mr. Austin is again continuing to argue - as he unsuccessfully claimed during the trial, in his post trial motions, on appeal to the Second Circuit, and in his certiorari petition to the United States Supreme Court - that the Mercury Research Laboratory test results were fabricated evidence. The jury rejected this claim and that rejection has been affirmed by all reviewing courts. That issue, and all issues determined in Civil Action No: 2:95-CV-170, are now res judicata between these parties and not subject to perpetual litigation.

Given the clear abuse of process employed by Mr. Austin in filing this new action and his failure to obey the taxation of costs in the initial litigation, the affirmative relief sought by defendants is both necessary and appropriate.

Littleton, New Hampshire
October 6, 1999

DOWNS RACHLIN & MARTIN

By _____
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Appendix No. 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

4:16-CV-01491-JAR

H. RICHARD AUSTIN
Plaintiff Pro Se,
v.

HANOVER INSURANCE COMPANY a/k/a
MASSACHUSETTS BAY INSURANCE
COMPANY
Defendants

MEMORANDUM AND ORDER

This matter is before the Court on Defendant's Motion for Sanctions (Doc.14). On April 20, 2017, the Court ordered Plaintiff to show cause why sanctions should not be imposed and set the date for a hearing (Doc.31). On May 4, 2017, Plaintiff filed his response to the Court's show cause order (Doc.32) and on May 15, 2017, Defendant filed its response (Doc.33). The court held a hearing on May 19, 2017 and found under its inherent authority that actions against Plaintiff were appropriate and necessary (Doc.36). The Court directed Defendant to submit its statement of costs in defending this lawsuit, including attorney's fees, and defendant filed a statement of attorneys' fees and costs on May 26, 2017 (Doc.37). For the reasons set forth below Defendant's motion for sanctions will be granted.

I. Background

The procedural history of this case dates back to 1993 and involves several, related actions filed in four federal district courts and three courts of appeal.

Austin I

According to the Amended Complaint (Doc.7) and the exhibits attached therein, pro se Plaintiff Austin's home in Vermont burned down on November 12, 1993. His insurance company, Hanover Insurance company ("Hanover") found the fire to be the result of arson and refused to pay benefits under Plaintiff's policy. Thereafter, Plaintiff initiated an action against Hanover and Massachusetts Bay Insurance Company and sought payment under the policy. Plaintiff also alleged that the defendants acted in bad faith. Hanover asserted that Plaintiff was not able to recover because he set fire to the home. *Austin I* culminated in a jury trial (Doc.13-1). At trial, Plaintiff challenged the finding of arson. The jury returned a verdict in favor of Defendant, and judgment was entered in favor of the defendants. Plaintiff appealed the case to the United States Court of Appeals for the Second Circuit, which affirmed the District Court's judgment. *Austin v. Hanover Ins. Co.*, Case No. 1:95-CV-170 (D.Vt). Aug.1, 1997, *aff'd* No. 97-9069, 1998 WL 801885 (2d Cir. Nov.12, 1998), *cert. denied*, 527 US 1004 ("*Austin I*").

Austin II

On September 28,1999, Plaintiff filed an "independent action" against Defendant in the United States District Court of the District of Vermont, requesting the court's judgment against him in *Austin I* be revoked. Plaintiff further sought entry of default judgment against Defendant and the "reinstatement of his other extra-contractural claims of emotional

suffering and punitive damages." (Doc. 7-2 t 18; 13-5 at 1). Hanover and Massachusetts Bay filed a motion to dismiss, arguing that Plaintiff's claims were barred by the doctrine of *res judicata*. The district court granted the motion to dismiss and denied Plaintiff's motions for relief from the order granting dismissal. *Austin v. Hanover Ins. Co.*, 1:99-CV-252 (D.Vt. Nov.3, 1999). The Second Circuit affirmed. *Austin v. Hanover Ins. Co.*, 14 F.App'x109 (2d Cir. 2001) (collectively, with the district court order, "*Austin II.*")

Austin III

In August 2003, Plaintiff filed a third action, this time against Defendant's attorneys and experts, challenging the validity of scientific evidence Hanover used to prove arson. The district court dismissed Plaintiff's complaint, and the Second Circuit affirmed. *Austin, v. Downs, Rachlin &Martin*, No. 1:03-CV-204, 2003 WL 23273466 (D.Vt. Nov.3, 2003) *aff'd* 114.F.App'x 21 (2d. Cir. 2004).

Austin IV

On May 18, 2005, Plaintiff filed an action in this court ("*Austin IV*"), which the Court found to be "a near replica of his previous suits." *Austin v. Downs, Rachlin & Martin et al.*, No. 4:05CV800 SNL. 2006 WL 355261, at *2 (E.D. Mo. Feb.15, 2006). In granting Defendants motion to transfer to the District of Vermont, the Court noted that "Plaintiff's case clearly has no merit." *Id.* *4. This Court further noted that "if Plaintiff brings this or a related cause of action before this Court again, he will be subject to sanctions." *Id.* After transfer, the District of Vermont granted the defendant's motion to dismiss, stating that "Austin has had his day in court and at this point he is simply wasting judicial resources." *Austin v. Downs, Rachlin & Martin*, No. 1:06-CV-38, 2006 WL 2585102, at *3

(D.Vt. Aug.24, 2006)

Austin V-VIII

After *Austin IV*, Plaintiff initiated four more actions against Hanover's attorneys and experts in federal court, none of which were successful. See *H. Richard Austin v. Douglas G. Peterson & Assoc.*, No. CIV.A. 08-30128-MAP, 2008 WL 5070612 (D.Mass. Nov. 18, 2008); *H. Richard Austin v. Douglas G. Peterson& Assoc, et al.,* No 5:11-CV-373-BR. 2011 WL 8997718 (E.D.N.C.) Dec.1, 2011); *Austin v. Douglas G. Peterson & Assoc., Inc.,* No. 5:13-CV-877-BO), 2014 WL 1891419 (E.D.N.C. May 12, 2014). On September 21, 2016, Plaintiff initiated the instant action purporting to bring it under Fed.R.Civ.P. 60(d)(1) and 60(d)(3). By Plaintiff's own admission, the present action is the ninth time that he has tried to litigate matters relating to the destruction of his home in 1993.

II. Discussion

Courts have a number of implied powers necessary to manage their own affairs and achieve the orderly and expeditious disposition of cases. *Chambers v. NASCO, Inc.* 501 U.S. 32, 43 (1991). These inherent powers include the imposition of sanctions for the willful disobedience of a court order or when a losing party has acted in bad faith, vexatiously, or for oppressive reasons. *Alyeska Pipeline Serv. Co. v. Wilderness Soc,y*, 421 U.S. 240, 258-59 (1975); see also *Young v. U.S. ex rel. Vuitton et. Fils S.A.*, 481 U.S. 787, 796 (1987) ("The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches.") Sanctions may include outright dismissal of a lawsuit and

assessment of attorney's fees. See *Chambers*, 501 U.S. at 45 ("outright dismissal of a lawsuit... is a particularly severe sanction, yet is within the court's discretion.") *Greiner v. City of Champlin*, 152 F.3d 787,790 (8th Cir. 1998) ("The court has inherent power to assess attorney's fees as a sanction for willful disobedience of a court order.") Inherent powers must be exercised with restraint and discretion, and a primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process. *Chambers* 501 U.S. at 44-45.

Here, the Court finds that dismissal of this lawsuit with prejudice and assessment of attorney's fees and costs against Plaintiff are appropriate sanctions for Plaintiff's conduct. Plaintiff has filed numerous, nearly identical actions in federal courts and disregarded the orders of those courts, including this Court. In *Austin IV*, this Court found Plaintiff's lawsuit to be "a near replica of his previous suits" and noted that "if Plaintiff brings this or a related cause of action before this Court again, he will be subject to sanctions." *Austin IV*, 2006 WL 355261, at *4 (discussing Plaintiff's cases against both Hanover Insurance Company and its experts and attorneys). The language contained in that order was an authoritative statement containing an express declaration of the court regarding future conduct. See *United States v. Certain Lands in Jackson Cty. Mo.*, 69 F. Supp. 565, 569 (W.D.Mo. 1947). Plaintiff disregarded this Court's Order and filed the instant action in violation of this Court's directive.

Plaintiff conceded in his response to the Court's show cause order that litigation related to the 1993 destruction of Plaintiff's home has spanned more than

16 years and that the current action constitutes his ninth lawsuit against Defendant or "various participants (expert and attorneys), who executed the fraud on [Defendant's] behalf." (Doc.32 at 5). He argues that Defendant's "voluntary and devious behavior" is the reason for the numerous lawsuits which Plaintiff himself characterizes as a "lengthy and wasteful process." (*Id.*) Although the Court acknowledges that Plaintiff holds a sincere belief in the merits of his legal argument, his conduct became vexatious and in bad faith after his lawsuits were consistently dismissed and the Courts warned Plaintiff against bringing this or a related cause of action. Plaintiff willfully disobeyed a court order, and the court may exercise its inherent authority to sanction Plaintiff for his misconduct.

Having provided Plaintiff with notice and an opportunity for a hearing on the record, the Court finds that Plaintiff acted vexatiously and in bad faith by filing the instant action. See *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 767 (1980). Accordingly, the Court will exercise its inherent authority and dismiss this action with prejudice and award Defendant reasonable attorney's fees and costs. Based on the filings, appearances, and Defendant's statement of attorney's fees and costs, the court will award Defendant $7,500 for its reasonable fees and costs incurred in defending this lawsuit.

For the reasons set forth above,

IT IS HEREBY ORDERED that Defendant's motion for sanctions (14) is **GRANTED.**

IT IS FURTHER ORDERED that this matter is **DISMISSED WITH PREJUDICE** and that attorney's fees totaling $7500.00 are assessed

against Plaintiff for his willful disobedience of a court order.

IT IS FINALLY ORDERED that all pending motions are **DENIED as moot.**

A separate Order of Dismissal will accompany this Memorandum and Order.

/ John A. Ross/

JOHN A. ROSS
UNITED STATES DISTRICT JUDGE

Dated this 24th day of July, 2017

Appendix No. 4

UNITED STATED DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

H. RICHARD AUSTIN,
Plaintiff,
v.
HANOVER INSURANCE COMPANY a/k/a MASSACHUSETTS BAY INSURANCE COMPANY,
Defendant

ORDER OF DISMISSAL

In accordance with the Memorandum and Order entered this day and incorporated herein, **IT IS HEREBY ORERED, ADJUDGED and DECREED that this case is DISMISSED WITH PREJUDICE.**

/John A. Ross/
JOHN A. ROSS
UNITED STATES DISTRICT JUDGE

Dated this 24th day of July, 2017.

Appendix. No. 5

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-2717

H. Richard Austin
Plaintiff – Appellant

v.

Hanover Insurance Company, also known as Massachusetts Bay Insurance Company

Defendant - Appellee

Brown & James

Appeal from U.S. District Court
for the Eastern District of Missouri – St. Louis
(4:16-cv-01491-JAR)

JUDGMENT

Before GRUENDER, MURPHY and BENTON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district

court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

April, 24, 2018

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix No. 6

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-2717

H. Richard Austin
Plaintiff - Appellant

v.

Hanover Insurance Company, also known as
Massachusetts Bay Insurance Company
Defendant - Appellant

Brown & James
Defendant

Appeal from United States District Court
For the Eastern District of Missouri – St. Louis

Submitted: April 20, 2018
Filed: April 24, 2018
[Unpublished]

Before GRUENDER, MURPHY, and BENTON,
Circuit Judges
PER CURIAM

H. Richard Austin appeals the district court's order[1] dismissing his action seeking to set aside several judgments for fraud on the court, and awarding attorney's fees. Having jurisdiction under 28 U.S.C. 1291, this court affirms.

After reviewing the parties' arguments on appeal and the circumstances of the case, the court finds no basis to reverse the dismissal. *See Superior Seafoods, Inc. v. Tyson Foods, Inc.*, 620 F. 3d 873, 878 (8th Cir. 2010) (appeal from action seeking relief from prior judgment under Federal Rule of Civil Procedure 60(d) is reviewed for clear abuse of discretion). This court also finds no abuse of discretion in the district court's award of attorney's fees. *See Goodyear Tire & Rubber Co. v. Haeger,* 137 S. Ct. 1178, 1184 (2017) (holding a federal court's inherent authority to award attorney's fees as a sanction for bad-faith conduct is limited to the fees incurred because of the misconduct); *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 266-67 (8th Cir. 1993) (a court may assess attorney fees where a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons").

This judgment is affirmed. See 8th Cir. R. 47 B.

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[1] The Honorable John A. Ross, United States District Judge for the Eastern District of Missouri.