

APPENDIX

United States Court of Appeals
For the Eighth Circuit

No. 17-1916

Charles L. Burgett

Plaintiff - Appellant,

v.

The General Store No Two Inc., doing business as Marsh's Sunfresh Market; W.S.C. Services, Inc.; Andrei Florea, in his official capacity as an employee of W.S.C. Services, Inc., and agent of Marsh's Sunfresh Market, and in his individual capacity; Thomas Bethel, in his official capacity as a police officer, and in his individual capacity; Terry Grimmett, in his official capacity as a police officer, and in his individual capacity; Matthew Payne, in his official capacity as a police officer, and in his individual capacity

Defendants - Appellees.

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: March 8, 2018

Filed: March 23, 2018

[Unpublished]

Before WOLLMAN, LOKEN, and COLLOTON, Circuit Judges.

PER CURIAM.

Charles Burgett appeals a judgment of the district court¹ dismissing his civil rights action as a sanction under Federal Rules of Civil Procedure 37(b)(2) and 41(b) for violating court orders. We affirm.

Burgett brought this action under 42 U.S.C. § 1983, raising claims relating to his arrest following an altercation with a security guard at a grocery store. He sued six defendants: three police officers; the security guard and his employer, W.S.C. Services, Inc. (collectively referred to as WSC); and the grocery store where the incident occurred, The General Store No. Two, Inc., d/b/a Marsh's Sunfresh Market (Sunfresh). After months of contentious discovery, WSC and Sunfresh moved to dismiss the action with prejudice under Rules 37(b)(2) and 41(b), arguing that Burgett had willfully violated discovery orders. The police officers moved to dismiss the action with prejudice under Rule 41(b).

The district court granted the motions to dismiss, finding that Burgett had disobeyed the following orders: an October 4, 2016 order requiring Burgett to attend a discovery-dispute hearing; an October 25 order requiring Burgett to answer WSC's and Sunfresh's interrogatories and to provide authorizations they had requested; an oral order of October 26 that directed the parties to confer as to the date and time of the continued deposition of Burgett; and orders entered on November 2 and November 8 requiring Burgett to appear at the continued deposition. The court concluded that Burgett "willfully and in bad faith" disobeyed these orders despite repeated warnings that failure to comply could result in dismissal; that he showed no indication he was willing to comply with discovery orders; that all defendants were prejudiced; and that lesser sanctions would not be effective in compelling his

¹The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri.

compliance with the court's orders. The court later denied Burgett's motion for reconsideration under Rule 59(e). We review the district court's ultimate rulings for abuse of discretion, and we review underlying factual findings on willfulness and prejudice for clear error. *See Comstock v. UPS Ground Freight, Inc.*, 775 F.3d 990, 992 (8th Cir. 2014); *Smith v. Gold Dust Casino*, 526 F.3d 402, 404 (8th Cir. 2008).

We conclude that the district court did not abuse its discretion in dismissing the action against WSC and Sunfresh under Rule 37(b)(2) and Rule 41(b). Dismissal under Rule 37 is permitted only where there is an order compelling discovery, a willful violation of the order, and prejudice. *Comstock*, 775 F.3d at 992. If the violation is willful and in bad faith, then the appropriateness of dismissal as a sanction is "entrusted to the sound discretion of the district court." *Avionic Co. v. Gen. Dynamics Corp.*, 957 F.2d 555, 558 (8th Cir. 1992). Under Rule 41(b), the focus is foremost on the egregiousness of the plaintiff's conduct, and only to a lesser extent on the prejudice to the defendant or the administration of justice in the district court. *See Doe v. Cassel*, 403 F.3d 986, 990 (8th Cir. 2005) (per curiam). "An action may be dismissed pursuant to Rule 41(b) if a plaintiff has failed to comply with any order of the court." *Aziz v. Wright*, 34 F.3d 587, 589 (8th Cir. 1994).

We see no clear error in the findings Burgett violated the several orders willfully and in bad faith, and that WSC and Sunfresh were prejudiced by the denial of information and process to which they were entitled. As to one of the orders cited by the district court, Burgett observes that neither the docket nor his deposition transcript reflects an order entered on October 26. It appears, however, that the court was referring to its statement on October 26 that the parties "are all free to get together like a discovery dispute" if they needed more time to complete Burgett's deposition. Given that the parties followed that direction by arranging a date and time for the continued deposition, and that Burgett then failed to appear on the specified date, it was not an abuse of discretion for the court to consider that circumstance when imposing the sanction. In any event, the court also cited Burgett's

noncompliance with four other discovery orders as to these defendants, and that conduct was sufficient to justify the sanction.

We reject the various justifications Burgett advances for his noncompliance. Burgett offers three reasons for failing to comply with the district court's October 4 order requiring him to attend the discovery-dispute hearing: the court entered the order at the request of WSC counsel Brooke Blake before Blake had entered an appearance in the case; Burgett received notice of the hearing only on the day the hearing was held; and the court reporter did not upload a copy of the hearing transcript to the docket until May 26, 2017. Only Burgett's assertion that he did not receive adequate notice might excuse his failure to attend the hearing, but Burgett did receive notice. The district court entered the order on the docket on October 4, a week before the hearing on October 11, and sent the order to Burgett by postal mail. R. 55. Defense counsel also e-mailed, called, and left messages for Burgett on October 3 and October 4. R. Doc. 91-4, 91-5, 91-6, 91-7. Burgett had agreed at the August 30 scheduling conference to communicate with defense counsel via e-mail, R. Doc. 53, at 28, and later agreed on the record at the October 24 discovery-dispute hearing that "email is fine" as a means of communication. R. Doc. 137, at 48. In light of these communications, Burgett had no valid excuse for failing to comply with the district court's October 4 order.

As to the district court's October 25 order regarding WSC's and Sunfresh's interrogatories and requests for authorizations, Burgett contends that the district court abused its discretion by ordering Burgett to provide irrelevant or overly burdensome information, and that he was therefore excused from following the order. The order, however, did not compel Burgett to provide information beyond the scope of discovery permitted by the 2015 amendments to Federal Rule of Civil Procedure 26(b)(1). The discovery sought nonprivileged information "relevant to any party's . . . defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1).

Defendants' interrogatories seeking Burgett's residential addresses and list of employers, along with a request for authorization to view his employment records, are relevant as general background information allowing defendants to fully investigate their defense. Burgett concedes that the request for authorization to view the Missouri Circuit Court records regarding the arrest at issue is relevant to his claim, and it is not overly burdensome. Burgett does not dispute that Defendants' request for authorization to review his Medicare and Medicaid records is relevant; he complains only that he never received government benefits and that he is therefore unable to sign the authorization. Even assuming that Burgett did not receive benefits, however, it was not unduly burdensome to require a simple authorization so that defendants could verify his claim. Defendants' request for authorization to obtain Burgett's medical records from after his arrest is relevant to Burgett's claim of physical injury and is not overly burdensome. Burgett contends that he was unable to sign the authorization because he received no medical treatment following his arrest. But even if Burgett received no treatment, it was again not overly burdensome to require Burgett to sign the authorization form in blank, so that his claim could be verified. Especially where the district court's order was justified under Rule 26(b)(1), Burgett was not free to disregard the order simply because he disagreed with it.

Burgett also proffers a series of justifications for his failure to attend the continued deposition in violation of the district court's orders of November 2 and November 8. He asserts that the defendants did not obtain leave from the court to notice a continued deposition, but the district court did grant leave at the original deposition on October 26 and in its November 2 and November 8 orders. Burgett then alleges several facts that do not excuse him from attending the continued deposition, including that he was not at fault for any delay in his original deposition, that the district court improperly rescheduled the continued deposition *ex parte*, that he was unavailable on the new date of November 10, and that he thought there was pending a motion to quash the continued deposition. The district court's orders of November 2 and November 8 put Burgett on notice that he was required to attend the

continued deposition unless and until the district court ordered otherwise. Any objections that Burgett had to those orders did not excuse his failure to comply.

We further conclude that the district court did not abuse its discretion by dismissing the action against the police officers. Burgett argues that the officers were not prejudiced by his failure to appear at the continued deposition, because they had completed their examination at the first deposition, and they had no interest in whether Burgett answered discovery requests from WSC and Sunfresh. Under Rule 41(b), however, the district court properly could focus primarily on the egregiousness of the plaintiff's conduct. *See Doe*, 403 F.3d at 990. The district court, moreover, did find that *all* defendants were prejudiced by Burgett's noncompliance, presumably because the police officers could benefit from discovery provided to the other defendants without making duplicate requests of Burgett. This finding was not clearly erroneous, and the dismissal was not an abuse of discretion under the rules.

Finally, we conclude the district court did not abuse its discretion in denying Burgett's post-judgment motion because he failed to identify any ground for relief under Rule 59(e). *See generally United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006).

The judgment of the district court is affirmed.

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

CHARLES BURGETT,)
Plaintiff,)
v.)
THE GENERAL STORE NO TWO INC, et al.,)
Defendants.)
Case No. 4:16-cv-00455-SRB

ORDER

Before the Court are the following motions: (1) Defendants W.S.C. Services, Inc. and Andrei Florea's Motion to Dismiss and for Sanctions, (Doc. #83); (2) Defendants Thomas Bethel, Terry Grimmett, and Matthew Payne's Motion to Dismiss for Failure to Comply with a Court Order, (Doc. #84); (3) Defendant The General Store No. Two, Inc., D/B/A Marsh's Sun Fresh Market's Second Motion for Sanctions and for Dismissal with Prejudice, (Doc. #86); (4) Defendants W.S.C. Services, Inc.'s and Andrei Florea's Third Motion to Amend Scheduling and Trial Order, (Doc. #108); (5) Plaintiff Charles Burgett's Memorandum in Support of Motion for Protective Order, (Doc. #78); and (6) Plaintiff Charles Burgett's Motion to Vacate Orders, (Doc. #79). For the following reasons, the first three motions are GRANTED, and the remaining motions are DENIED.

I. Background

Plaintiff Charles Burgett brings this suit *pro se*, alleging assault and battery, false arrest and imprisonment, malicious prosecution, excessive force, and racial discrimination. All allegations center around an incident that occurred at The General Store No. Two, Inc., D/B/A Marsh's Sun Fresh Market ("Sun Fresh"), where Burgett alleges he was erroneously accused of

shoplifting. All Defendants move to dismiss Burgett's claims in their entirety on the basis that Burgett has willfully defied discovery rules and this Court's orders. Though lengthy, the Court finds it necessary to detail the chronological history of the case's progression.

On May 20, 2016, the Court set an in-person Scheduling Conference for July 21, 2017, at 11:00 a.m. (Doc. #10). When attorneys representing W.S.C. Services, Inc. and Andrei Florea (collectively "WSC") suspected that the Court made a clerical error and that Plaintiff was confused about the date for the Scheduling Conference, they sent a letter to Burgett via U.S. Mail and email on July 5, 2016. Both the letter and the email clarified that the Scheduling Conference was set for July 21, 2016, and that the 2017 date the Court had previously set was a clerical error. (Doc. #85, Ex. 1). Plaintiff failed to appear at the July 21, 2016, Scheduling Conference. The Court realized its error, gave Burgett the benefit of the doubt, and set a new hearing for August 30, 2016, at 10:00 a.m. The Court warned Burgett that "[f]ailure to attend [future] hearings may result in the dismissal of the case." (Doc. #27).

On June 24, 2016, WSC served its first set of discovery requests on Burgett, including several interrogatories and requests for production. (Doc. #18). On August 11, 2016, Sun Fresh sent Burgett interrogatories and requests for production, which were similar to the interrogatories and requests for production sent to Burgett by WSC. Burgett provided responses to WSC's interrogatories that WSC deemed to include inappropriate objections. Similarly, Sun Fresh deemed Burgett's responses insufficient because of inappropriate objections. WSC complied with Local Rule 37.1 by sending correspondence to Burgett and attempting to contact Burgett on the telephone. Burgett's written response to WSC simply reasserted his objections, and he did not respond to WSC's telephone messages.

On August 10, 2016, Burgett was served notice that all Defendants scheduled his deposition on September 20, 2016. On August 30, 2016, the Court held a scheduling conference. At the scheduling conference, Burgett informed the parties and the Court that he had not received notice of his scheduled deposition and would be “out of town for probably about three weeks in September. So [the deposition date] probably won’t work.” (Doc. #53, pp. 27-28). The Court instructed Burgett to provide dates he would be available in October for his deposition to Defendants’ counsel via email. *Id.* The Court informed Plaintiff that “the law views what’s relevant a lot broader than any plaintiff has ever viewed relevance. And so what I don’t want to have to happen is that your deposition take place again because of any issues about what’s relevant.” *Id.* at 30. Burgett emailed counsel, and his deposition was scheduled for October 26, 2016, at the offices of Sun Fresh’s counsel. Burgett was served notice of his deposition on September 6, 2016. (Doc. #47). In light of the discovery disputes up to that point, the Court ordered the deposition to be held in Courtroom 7B in the United States District Courthouse in Kansas City, Missouri (“Courtroom”), on October 26, 2016. Defendants were required to seek an extension of Scheduling Order deadlines as a result of moving Burgett’s deposition to October. (Doc. #51).

On October 4, 2016, WSC informed the Court of the parties’ ongoing discovery dispute involving Burgett’s answers to all Defendants’ interrogatories. The Court set an in-person hearing for October 11, 2016, with Burgett and all Defendants’ counsel required to attend. (Doc. #55). At the in-person hearing on October 11, 2016, counsel for all Defendants appeared. However, Burgett failed to appear, and the Court could not reach Burgett by telephone. (Doc. #58). Subsequently, in a written order, the Court overruled Burgett’s objections and required him to provide responses to several of Defendants’ interrogatories. The Court also ordered that

Burgett comply with Defendants' requests for production that included signed authorizations for release of employment, medical, and arrest records. (Doc. #59). The Court warned Burgett that "[i]f [Burgett] fails to comply with this Order, the Court may take corrective action, up to and including dismissal of [his] Complaint." *Id.* at 5.

Burgett provided supplemental responses to the interrogatories and requests for production ordered by the Court. However, Burgett deliberately provided incomplete answers to the interrogatories and refused to sign the ordered authorizations. His supplemental responses reasserted objections that had already been overruled by the Court's October 11, 2016, Order and raised the objection that he had not received notice of the October 11, 2016, hearing. On October 19, 2016, WSC filed a Motion for Sanctions seeking dismissal of Burgett's Complaint, in part predicated on Burgett's refusal to comply with the Court's discovery orders. An in-person hearing was scheduled for October 24, 2016, to resolve these issues. Burgett and all Defendants' counsel were ordered to appear. (Doc. #65). Burgett was aware of the hearing because he emailed his objections to the hearing to Court staff on October 20, 2016. The Court overruled Burgett's objections and reminded Burgett to remain civil with the Court staff and with all parties. (Doc. #66). On October 24, 2016, Sun Fresh also filed a motion for sanctions, seeking dismissal of Burgett's Complaint for the same reasons as WSC.

Burgett did not appear in-person for the October 24, 2016, hearing, but the Court was able to reach him by telephone. In the hearing, Burgett reasserted his already overruled objections to WSC's discovery requests, including an objection that he should not have to provide addresses of family members. Burgett also objected to his pending deposition, claiming that he was "sending something in because one party is going to be there when it's not convenient." (Transcript from the October 24, 2016, Hearing, p. 4). The Court heard these

arguments, overruled them, and ordered Burgett to respond to WSC's discovery requests by November 8, 2016. The Court asked Burgett, “[j]ust so we're all clear, I have ordered you to answer this discovery question listing your addresses, and you're refusing to follow that order; is that right, Mr. Burgett?” *Id.* at 10. Burgett responded “I'm going to—because of a different situation on what you explained in the protective order, I guess I will consider that.” *Id.* at 13. The Court denied WSC's and Sun Fresh's motions for sanctions as premature. The Court memorialized its oral orders from the in-person hearing in a written order for clarity. (Doc. #70). “Plaintiff [was] reminded of the Court's statement to him on the record during the October 24, 2016, hearing that continued failure to abide by the Court's orders may result in dismissal of this case.” *Id.* at 2. Also on October 24, 2016, Burgett or someone on his behalf filed a motion in-person with the Court Clerk which reasserted his previously overruled objections to the discovery requests.

Burgett appeared at the scheduled October 26, 2016, deposition. The Court was asked to intervene at points to make discovery rulings because Burgett asserted a number of relevancy objections. Due to these interventions, the deposition was delayed multiple times, and Sun Fresh had inadequate time—twenty minutes—to conduct its questioning. Therefore, with all parties present, the Court ordered a continued deposition and ordered the parties to confer as to the date and time of the continued deposition. Burgett advised the Court that he needed time to think about the location and date to reschedule and agreed to confer with all Defendants via email. On October 27, 2016, Burgett sent an email to Defendants, stating his availability, and Defendants selected a time and location that worked for them. Notice for the continued deposition was filed on October 28, 2016, selecting November 1, 2016, as the deposition date. The agreed-upon location was unavailable, and Defendants noticed the deposition for the next closest office of

Defendants' counsel—three miles from the original location. On October 31, 2016, Burgett filed a motion to quash the deposition notice, objecting to the different location. Burgett then failed to respond to Defendants' counsels' additional emails. A conference room opened up at the site originally scheduled for Burgett's continued deposition, and Sun Fresh sent an email to Burgett, notifying him that the continued deposition could proceed at the originally-scheduled location. The deposition notice was amended to reflect this change. (Doc. #75).

The Court contacted all parties the morning of November 1, 2016, to schedule a telephone conference on the issue of Burgett's deposition. All Defendants responded with their availability for the telephone conference, but Burgett did not. Defendants' counsel appeared for Burgett's deposition, as noticed, on November 1, 2016. However, Burgett failed to appear. Afterwards, WSC emailed the Court, all other Defendants, and Burgett to resolve the discovery dispute and reschedule Burgett's continued deposition. On November 2, 2016, the Court ordered Burgett's continued deposition to resume on November 10, 2016, at 9:30 a.m. in Courtroom 7B. (Doc. #77).

On November 3, 2016, Burgett filed a Motion for Protective Order, (Doc. #78), and a Motion to Vacate Orders, (Doc. #79), both requesting that the Court vacate its discovery orders. On November 9, 2016, the day after the Court's deadline to respond to WSC's discovery requests, Burgett responded to WSC's interrogatories, but many of the responses were reassessments of previously-overruled objections. Burgett also failed to sign authorizations as ordered by the Court. As justification for his refusals, Burgett claimed that his pending motions excused his discovery obligations.

On, November 8, 2016, Burgett filed another motion objecting to the Court's discovery orders. This time, Burgett objected to the Court's Order scheduling his continued deposition.

Later that same day, the Court denied Burgett's motion, noting that "continuation of Plaintiff Burgett's deposition is necessary to allow a fair examination to occur, particularly given that Plaintiff Burgett by his actions has delayed the examination." (Doc. #81, p. 2). Defendants' counsel appeared in the Courtroom on November 10, 2016, but Burgett again failed to appear. All Defendants move for dismissal of this case as a sanction for Burgett's repeated willful violations of the Court's orders and Burgett's repeated willful violations of the rules of discovery.

II. Legal Standard

"If a party . . . fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may dismiss[] the action or proceeding in whole or in part[.]" Fed. R. Civ. P. 37(b)(2)(A)(v). "Under Rule 37, dismissal as a discovery sanction is available only if there is (1) an order compelling discovery, (2) a willful violation of the order, and (3) prejudice." *Comstock v. UPS Ground Freight, Inc.*, 775 F.3d 990, 992 (8th Cir. 2014) (alterations and internal quotation marks omitted) (quoting *Bergstrom v. Frascone*, 744 F.3d 571, 576 (8th Cir. 2014)). Prejudice occurs when the willful violation of the Court's orders prevents opposing parties from adequately preparing their case for trial because of the absence of crucial, factual information. *Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 236, 241 (8th Cir. 1977). "[B]efore dismissing a case under Rule 37(b)(2) the court must investigate whether a sanction less extreme than dismissal would suffice, *unless* the party's failure was deliberate or in bad faith." *Comstock*, 775 F.3d at 992 (emphasis in original) (citations and internal quotation marks omitted). Likewise, "[i]f the plaintiff fails to . . . comply with [the Federal Rules of Civil Procedure] or a court order, a defendant may move to dismiss the action or any claim against it." Fed. R. Civ. P. 41(b).

III. Analysis

A. Defendants' Motions for Sanctions

Defendants argue that “[g]iven Plaintiff’s record of failing to cooperate in discovery, disregarding the Court Orders, and failure to appear for his Court Ordered deposition, Plaintiff’s conduct must be construed as a willful disregard of the Court’s Orders [and] [d]ismissal is proper pursuant to Fed. R. Civ. P. 41(b) and 37(b)(2)[.]” (Doc. #85, pp. 15-16). Plaintiff responds he did not receive notice of the October 11, 2016, discovery hearing or the October 24, 2016, hearing. Plaintiff also claims he had good cause to violate the Court’s November 8, 2016, Order, (Doc. #81), because he did not receive notice of the Order. Defendants reply that Plaintiff received legally adequate notice of all of the Court’s orders, and all of Plaintiff’s claims should be dismissed for his repeated willful and bad faith disregard of the Court’s orders.

Clearly, “[p]ro se litigants are not excused from complying with court orders or substantive and procedural law.” *Farnsworth v. City of Kansas City, Mo.*, 863 F.2d 33, 34 (8th Cir. 1988) (per curiam) (citing *Burgs v. Sissel*, 745 F.2d 526, 528 (8th Cir. 1984) (per curiam)). A pro se “litigant who invokes the processes of the federal courts is responsible for maintaining communication with the court during the pendency of his lawsuit.” *Soliman v. Johanns*, 412 F.3d 920, 922 (8th Cir. 2005) (citing *Carey v. King*, 856 F.2d 1439, 1441 (9th Cir. 1988)). Generally, the Court should give parties reasonable notice of the Court’s discovery expectations and warn parties that “failure to comply with subsequent court orders would result in dismissal of their action.” *Farnsworth*, 863 F.2d at 34.

The following analysis applies to all Defendants collectively because all Defendants were affected by the Court’s orders and Plaintiff’s willful, bad-faith violations of these orders. *Comstock*, 775 F.3d at 992. At the outset, it is clear that there were at least four Court orders that

Plaintiff willfully and in bad faith, defied: (1) on October 4, 2016, the Court ordered Plaintiff to appear for a discovery dispute conference on October 11, 2016, and Plaintiff did not appear; (2) on October 25, 2016, the Court ordered Plaintiff to fully answer several interrogatories and sign four authorizations by November 8, 2016, and Plaintiff failed to provide complete responses to the interrogatories and failed to sign the authorizations; (3) on October 26, 2016, the Court ordered Plaintiff to cooperate with all Defendants to schedule his continued deposition, and Plaintiff refused to schedule and appear at any continued deposition; and (4) on November 2, 2016, and again on November 8, 2016, the Court ordered Plaintiff to appear in the Courtroom for a continued deposition on November 10, 2016, and Plaintiff did not appear. Plaintiff's argument that he received inadequate notice has no merit because WSC's attorneys, Sun Fresh's attorneys, and the Court emailed Plaintiff numerous times. The Court issued its orders on a docket accessible to Plaintiff, and it is Plaintiff's responsibility to keep up with his case's schedule. *Soliman*, 412 F.3d at 922. The Court also directly communicated with Plaintiff at in-person hearings and provided written orders memorializing the Court's orders to minimize confusion.

There were numerous times during Plaintiff's interactions with the Court and Defendants where Plaintiff showed bad faith in scheduling depositions and refusing to appear for depositions. *Comstock*, 775 F.3d at 992. Plaintiff showed particularly bad faith by refusing to appear for a deposition simply because the location of the deposition was changed to another location just three miles away. The Court also ordered Plaintiff to respond fully to several interrogatories submitted by all Defendants, and Plaintiff consistently refused to abide by the Court's orders. Similarly, Plaintiff was ordered to comply with all Defendants' requests for production; namely the Court ordered Plaintiff to sign releases for access to employment, medical, and arrest records. Plaintiff repeatedly refused to sign such authorizations. The Court

repeatedly warned Plaintiff that failure to comply with the Court's discovery orders could lead to dismissal of Plaintiff's claims. *Farnsworth*, 863 F.2d at 34. As of the date of this Order, Plaintiff has shown no indication that he is willing to comply with these discovery orders.

All Defendants were prejudiced by Plaintiff's conduct. *Comstock*, 775 F.3d at 992. Plaintiff's repeated violations of the Court's orders have forced Defendants to engage in unusually protracted discovery battles over standard discovery requests and have greatly hindered Defendants' ability to mount a proper defense to Plaintiff's claims. *See Denton*, 564 F.2d at 241 ("The record discloses numerous warnings to appellants and their counsel of the potentially serious consequences of their continued noncompliance. Moreover, appellees were clearly prejudiced by appellants' noncompliance since, without information concerning appellants' alleged injury and damages, they could not be expected to adequately prepare their case for trial."). Plaintiff's refusals to provide complete answers to interrogatory questions—such as his residential address and employment history—has undermined all Defendants' ability to craft defenses through basic fact finding. Plaintiff's refusals to sign any of the authorizations allowing Defendants to review his employment and arrest records also harm the ability of all Defendants to craft their cases' defenses. Plaintiff claims emotional and physical harms but refuses to release any medical records, severely impeding all Defendants' ability to craft defenses to the issue of medical and psychological damages.

Lesser sanctions would not be effective in gaining Plaintiff's compliance because if the designated facts are taken as established or the Court strikes the portions of the pleadings that are affected by Plaintiff's noncompliance, Plaintiff could not establish any element of his claims. Fed. R. Civ. P. 37(b)(2)(A). Likewise, if the Court prohibited Plaintiff from supporting all claims that were affected by his noncompliance, Plaintiff could not establish any element of his

claims. *Id.* Though the Court need not consider lesser sanctions given Plaintiff's bad faith, the Court finds lesser sanctions would not be effective in compelling Plaintiff's compliance with the Court's orders. *See Comstock*, 775 F.3d at 993 ("[A] court dismissing under Rule 37 does not abuse its discretion simply by not investigating lesser sanctions."); *see also Avionic Co. v. General Dynamics Corp.*, 957 F.2d 555, 558 (8th Cir. 1992) ("[B]efore dismissing a case under Rule 37(b)(2) the court must investigate whether a sanction less extreme than dismissal would suffice, *unless* the party's failure was deliberate or in bad faith." (emphasis in original))). In sum, Plaintiff violated several Court orders, all Defendants were prejudiced by Plaintiff's willful, bad-faith conduct, and lesser sanctions are not adequate to ensure compliance with the Court's orders. *Id.* at 992. Therefore, all Defendants' motions are granted, and all of Plaintiff's claims are dismissed.

B. WSC's Motion to Amend the Scheduling Order

Defendant WSC "request[s] that the Court enter an Order amending the Scheduling and Trial Order for Jury Trial in this matter" because WSC has been unable to complete discovery due to Plaintiff's delays and refusals to abide by Court orders. (Doc. #108, p. 3). As Plaintiff's claims are dismissed, WSC's motion to amend the Scheduling and Trial Order is now moot, and the motion is denied.

C. Plaintiff's Discovery Motions

"Plaintiff . . . asks the court to protect him from disclosing and producing the following private, personal and confidential information: Burgett's date of birth, addresses, social security number, and phone number; and, the names, dates of birth, addresses, social security numbers, personal phone numbers or other personal information of a family member of Charles Burgett." (Doc. #78). Next, Plaintiff asks the Court to vacate its October 11, 2016, discovery Order and

partially vacate its October 25, 2016, discovery Order. Because Plaintiff's claims are dismissed for failure to comply with Court orders, Plaintiff's motions regarding discovery are now moot. Therefore, both of Plaintiff's motions are denied.

IV. Conclusion

Accordingly, based upon the parties' filings, the record, and for the reasons stated above, it is hereby **ORDERED** that

- (1) Defendants W.S.C. Services, Inc. and Andrei Florea's Motion to Dismiss and for Sanctions (Doc. #83) is **GRANTED**;
- (2) Defendants Thomas Bethel, Terry Grimmett, and Matthew Payne's Motion to Dismiss for Failure to Comply with a Court Order (Doc. #84) is **GRANTED**;
- (3) Defendant The General Store No. Two, Inc., D/B/A Marsh's Sun Fresh Market's Second Motion for Sanctions and for Dismissal with Prejudice (Doc. #86) is **GRANTED**;
- (4) Defendants W.S.C. Services, Inc.'s and Andrei Florea's Third Motion to Amend Scheduling and Trial Order (Doc. #108) is **DENIED** as moot;
- (5) Plaintiff Charles Burgett's Memorandum in Support of Motion for Protective Order (Doc. #78) is **DENIED** as moot; and
- (6) Plaintiff Charles Burgett's Motion to Vacate Orders (Doc. #79) is **DENIED** as moot.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: December 28, 2016

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-1916

Charles L. Burgett

Appellant

v.

The General Store No Two Inc., doing business as Marsh's Sunfresh Market, et al.

Appellees

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:16-cv-00455-SRB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 17, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**Additional material
from this filing is
available in the
Clerk's Office.**