NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-3254, 22-3327 and 23-1187

Appendix B

GREGORY I. EZEANI,
Appellant

v.

BRIDGETT KELLY, Union County College Human Resources Division

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On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 2-22-cv-06164)
District Judge: Honorable Brian R. Martinotti

GREGORY I. EZEANI,
Appellant

v.

JEFFREY S. MCCLAIN

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 2-22-cv-06163)
District Judge: Honorable Brian R. Martinotti

GREGORY I. EZEANI,
Appellant

v.

WILLIAM ANDERSON, Warden, Essex County Corrections;

CFG HEALTH SYSTEMS LLC

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 2-21-cv-06759)
District Judge: Honorable Brian R. Martinotti

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
July 3, 2023
Before: JORDAN, CHUNG, and NYGAARD, Circuit Judges

(Opinion filed: July 3, 2023)

OPINION*

PER CURIAM

In these consolidated cases, pro se litigant Gregory Ezeani appeals from orders entered by the District Court in three different actions: the District Court's dismissal of his action against William Anderson due to his failure to comply with Court orders (the Anderson action); the District Court's dismissal of his complaint raising claims against Bridgett Kelly (the Kelly action); and the District Court's dismissal of his complaint raising claims against Jeffrey McClain (the McClain action). For the reasons that follow, we will affirm.

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

I.

Each of Ezeani's complaints raised claims under 42 U.S.C. § 1983. First, in March 2021, Ezeani filed a complaint against Anderson, the Warden of Essex County Correctional Facility. In that complaint, Ezeani argued that he was inadequately treated for diabetes during his ten-month detention in Immigration and Customs Enforcement (ICE) custody. During protracted discovery proceedings that spanned approximately fourteen months, Ezeani failed to comply with various discovery obligations, discussed in greater detail below. Eventually, the Magistrate Judge recommended dismissing Ezeani's action against Anderson with prejudice for failure to adhere to his discovery obligations in violation of Fed. R. Civ. P. 37(b), and failure to comply with rules and court orders in violation of Fed. R. Civ. P. 41(b). In January 2023, after conducting a thorough Poulis[1] analysis, the District Court adopted the Magistrate Judge's report and recommendation and dismissed Ezeani's action against Anderson with prejudice.

In October 2022, while the Anderson action remained ongoing, Ezeani initiated two more civil actions: one against Kelly, an employee of Union County College's Human Resources Department (where Ezeani was previously employed), and another against McClain, an attorney who represented a defendant in the Anderson action. Ezeani alleged that McClain had improperly subpoenaed his employment records – and Kelly had improperly disclosed them – in the Anderson action without obtaining his consent, which violated his due process rights.

[1] Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 868-70 (3d Cir. 1984).

The District Court sua sponte dismissed the complaints against Kelly and Anderson, explaining that Ezeani had failed to state a claim under § 1983 but that, if he wished, he could raise the claims as discovery issues in the Anderson action. Ezeani timely appealed from each order dismissing his complaint.[2]

II.

We have jurisdiction to consider the dismissal of each complaint under 28 U.S.C. § 1291. We review the District Court's dismissal of the Anderson complaint under Rules 37 and 41 for an abuse of discretion. See Curtis T. Bedwell & Sons, Inc. v. Int'l Fid. Ins. Co., 843 F.2d 683, 691 (3d Cir. 1988) (Rule 37); Briscoe v. Klaus, 538 F.3d 252, 257 (3d Cir. 2008) (Rule 41). We exercise plenary review over the District Court's sua sponte dismissals of the Kelly and McClain complaints under 28 U.S.C. § 1915(e)(2). See Dooley v. Wetzel, 957 F.3d 366, 373 (3d Cir. 2020). Because Ezeani is pro se, we liberally construe his filings. See Erikson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam). We may affirm a District Court's ruling on any basis supported by the record. See Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam).

III.

Beginning with the dismissal of the Anderson action, we discern no abuse of discretion in the District Court's ruling. As the District Court explained, dismissal was warranted because Ezeani had failed to prosecute his case, failed to comply with Court orders, and stated that he would continue to disobey orders in the future. More

[2] As to the McClain action, we treat Ezeani's motion for leave to appeal in forma pauperis as a notice of appeal. See 3d Cir. L.A.R. 3.4.

specifically, Ezeani refused to answer material questions the first two times that the defendants attempted to depose him. The District Court then ordered that Ezeani shall "appear for a third deposition via Zoom on or before December 15, 2022, and shall completely and adequately respond to the questions propounded." ECF No. 146 at 3. Ezeani then "file[d] a motion to inform the court and the defendant that the plaintiff will not honor any third deposition because it is organized crime that violates due process." ECF No. 149 at 1. He also filed a letter "to reject[] Honorable Judge Martinotti opinion that direct[s] the plaintiff to abide by all court orders." ECF No. 151. In addition to these instances of recalcitrance, Ezeani repeatedly refused to attend status conferences. See ECF Nos. 128 & 134.

In addressing the Poulis[3] factors, the Court correctly noted that, because Ezeani was proceeding pro se, he bore primary responsibility for failing to comply with his obligations. The District Court also accurately noted that Ezeani's conduct prevented the defendants from adequately defending themselves from suit and prevented the District Court itself from meaningfully addressing the merits of Ezeani's action. Further, as described above, Ezeani had a history of refusing to comply with court orders.

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[3] In assessing the Rule 37 dismissal, we apply the factors set out in Poulis. Those factors are: (1) the extent of the party's personal responsibility; (2) prejudice to the adversary; (3) a history of dilatoriness; (4) whether the conduct of the party was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal; and (6) the meritoriousness of the claim or defense. 747 F.2d at 868-70. Not all factors need to be satisfied for the District Court to dismiss a complaint. Ware v. Rodale Press, Inc., 322 F.3d 218, 221 (3d Cir. 2003). While we recognize that the sanction of dismissal is extreme and should be reserved for cases where it is "justly merited," our standard of review is deferential. Id. at 221-22 (quotations and citation omitted).

Moreover, Ezeani had been expressly warned that failing to comply with such obligations risked Rule 37 dismissal, see ECF No. 146 at 3, but nevertheless refused to comply. There was thus no reason to believe that a lesser form of sanction would alter his behavior. Under these circumstances, the District Court did not abuse its discretion in dismissing the action under Rule 37 and 41.[4]

We also agree with the District Court's orders dismissing the Kelly and McClain[5] complaints. As to McClain, the District Court correctly noted that McClain – a private attorney – was not a state actor for purposes of a § 1983 action. See Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 277-78 (3d Cir. 1999) ("Attorneys performing their

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[4] In his opening brief, Ezeani argues that he did not consent to the Magistrate Judge's jurisdiction. See C.A. No. 23-1187, ECF No. 13 at 21. The District Court was authorized to refer the matter to the Magistrate Judge for pretrial determinations and proposed recommendations for disposition under 28 U.S.C. § 636(a). For that reason, Ezeani's consent was unnecessary. Ezeani also argues that Magistrate Judge Almonte should have been recused because he previously worked as an Assistant United States Attorney and thus could not preside over a case involving detention in ICE custody. See C.A. No. 23-1187, ECF No. 13 at 27. Given that there is no indication that Magistrate Judge Almonte had any responsibility for Ezeani's case (or any related case), we disagree. See United States v. Di Pasquale, 864 F.2d 271, 279 (3d Cir. 1988) ("[A]bsent a *specific* showing that that judge was previously involved with a case while in the U.S. Attorney's office that he or she is later assigned to preside over as a judge, § 455(b)(3) does not mandate recusal."); Edelstein v. Wilentz, 812 F.2d 128, 130-31 (3d Cir. 1987). Insofar as Ezeani's recusal requests flow from his dissatisfaction with the Magistrate Judge's or District Court's rulings, that is not an adequate basis for recusal. See Liteky v. United States, 510 U.S. 540, 555 (1994).

[5] In the McClain action, the District Court entered a single order dismissing Ezeani's claims on the merits and denying his motion to proceed in forma pauperis. We understand the decision to turn on the former ground, and focus on the merits decision. See generally Brown v. Sage, 941 F.3d 655, 660 (3d Cir. 2019) (en banc) (holding that courts may assess the merits of a case and an application to proceed in forma pauperis in either order).

traditional functions will not be considered state actors solely on the basis of their position as officers of the court."). And, as to Kelly and McClain, we agree with the District Court's ruling that Ezeani failed to state a claim for relief. In his complaints, Ezeani alleged that the disclosure of his employment records without his consent violated his constitutional privacy rights. In support, he attached the at-issue documents, which included his pay stubs, resume and cover letter, academic transcripts, and a form bearing his name and signature authorizing Union County to furnish Ezeani's medical records and "any and all information [Union County] may have regarding . . . Ezeani," to McClain's law firm.[6] See Ezeani v. Kelly, Civ. No. 2-22-cv-06164, ECF No. 1-6. Under these circumstances – where the disclosed information does not appear to be highly personal in nature and, especially, where the aggrieved party has signed a form authorizing the release of all information – we are satisfied that no constitutional violation has occurred. See Pennyfeather v. Tessler, 431 F.3d 54, 56 (2d Cir. 2005) (plaintiff failed to state a claim for a constitutional privacy violation because the disclosed information (employee's name, address, work schedule, and social security number) was not highly personal); see generally United States v. Miller, 425 U.S. 435, 444 (1976) (recognizing "the general rule that the issuance of a subpoena to a third party to obtain the records of that party does not violate the rights of a defendant").

Accordingly, we will affirm the District Court's judgments.[7]

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[6] We may consider the exhibits attached to Ezeani's complaint. See Mayer v. Belichick, 605 F.3d 223, 230 (3d Cir. 2010).

[7] Kelly's motion to supplement the appendix is granted. See C.A. No. 22-3254 at ECF

No. 12. Ezeani's motions for "summary action and summary judgment," summary judgment, and for a second default judgment are denied. See C.A. No. 22-3254 at ECF No. 16; C.A. No. 22-3327 at ECF Nos. 14 & 15.

Appendix C

Ezeani v. Anderson

Decided Jan 9, 2023

2:21-cv-06759 (BRM) (JRA)

01-09-2023

GREGORY I. EZEANI, Plaintiff, v. WILLIAM ANDERSON, Defendant/Third-Party Plaintiff, v. CFG HEALTH SYSTEMS, LLC, Third-Party Defendants.

HON. BRIAN R. MARTINOTTI UNITED STATES DISTRICT JUDGE

ORDER

HON. BRIAN R. MARTINOTTI UNITED STATES DISTRICT JUDGE

THIS MATTER is before the Court on (1) the Report and Recommendation of the Honorable Jose Almonte, U.S.M.J. ("Judge Almonte"), dated December 8, 2022 (ECF No. 153), recommending Plaintiff Gregory I. Ezeani's ("Ezeani") Complaint (ECF No. 1) be dismissed with prejudice; (2) Ezeani's "Express Motion for Final Judgement" (ECF No. 156); and (3) Ezeani's request to respond to Defendant CFG Health Systems, LLC's ("CFG") submission of a deposition transcript (ECF No. 158.) Ezeani has filed a response to the R&R which this court construes as an objection. (ECF No. 154.) Having reviewed the submissions and having declined to hold oral argument pursuant to Federal Rule of Civil Procedure 78(b), for the reasons set forth in the accompanying Opinion and for good cause shown, **IT IS** on this 9th day of January 2023, **ORDERED** that Judge Almonte's Report and Recommendation, dated December 8, 2022 (ECF No. 153), is **ADOPTED** in its entirety; and it is further

ORDERED that this matter is **DISMISSED WITH PREJUDICE**; and it is further *2

ORDERED that Ezeani's "Express Motion for Final Judgement" (ECF No. 156) is **DENIED** as moot; and it is further

ORDERED Ezeani's request to respond to CFG's submission of a deposition transcript (ECF No. 158.) is **DENIED** as moot; and it is finally

ORDERED that this matter shall be marked **CLOSED.**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GREGORY I. EZEANI,

Plaintiff,

v.

WILLIAM ANDERSON, WARDEN OF ESSEX COUNTY CORRECTION,

Defendant/Third Party Plaintiff,

v.

CFG HEALTH SYSTEMS, LLC

Third Party Defendant.

Civil Action No.

21-cv-06759 (BRM) (JRA)

REPORT AND RECOMMENDATION

Appendix D

I. INTRODUCTION

The Court raises this matter *sua sponte* to address *pro se* Plaintiff Gregory I. Ezeani's continued noncompliance with his discovery obligations and refusal to obey court orders. In his own words, he "**will not** abide by any court order for third deposition as ordered by the [M]agistrate Judge Almonte and [a]ffirmed by the Honorable Judge Brian Martinotti." ECF No. 151 at 4 (emphasis added); *see also* ECF No. 149. For the reasons set forth below, the Court respectfully recommends that this action be dismissed with prejudice, pursuant to Rule 37(b) and Rule 41(b) of the Federal Rules of Civil Procedure.[1]

[1] Considering the dispositive nature of the recommended sanction, the Court decides this matter by way of a Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B) and (C).

II. BACKGROUND

On March 9, 2021, Plaintiff initiated the present action alleging that he was "infected" with diabetes while incarcerated at the Essex County Correctional Facility ("ECCF"). *See* Compl., ECF No. 1 ¶ 3. Because Plaintiff is proceeding *pro se*, the Court liberally construes his Complaint to allege that he received inadequate medical care for his diabetes while detained at the ECCF between May 2019 and March 2020, and that, as warden of the ECCF, Defendant William Anderson was responsible for the medical malpractice. *Id.*; *see also* ECF No. 53. On July 21, 2021, Defendant Anderson answered Plaintiff's Complaint and filed a Third-Party Complaint against CFG Health Systems, LLC ("CFG Health"), a contractor that provided medical services at ECCF during Plaintiff's detention. Answer to Compl., ECF No. 6.

On September 23, 2021, the Court entered a Pretrial Scheduling Order, under which fact discovery was to be completed by January 23, 2022. ECF No. 23 ¶ 1. That deadline, however, had to be extended three times so that Defendants could attempt to take Plaintiff's deposition, as well as the depositions of non-parties. *See* ECF Nos. 51, 65, 146.

A. Defendants' First Attempt at Conducting Plaintiff's Deposition

The first attempt to take Plaintiff's deposition occurred on December 14, 2021, when CFG Health served upon Plaintiff a notice of deposition to be conducted via video conference, using Zoom. *See* ECF No. 39–1. Plaintiff refused to appear for the deposition, claiming that he was available only for "paper based [discovery] as [the] court instructed." ECF No. 39–2; *see also* ECF No. 40. Plaintiff insisted that he would

participate by Zoom only if Defendants paid any costs associated with taking his Zoom deposition, including the provision of a laptop, internet, and electricity costs. ECF No. 40. He claimed that he did not have the funds to participate by Zoom, even though he is "a PHD engineering student at [O]ld [D]ominion [U]niversity and a Doctor of Business Administration Student at [U]niversity of the Cumberland." ECF No. 43. Alternatively, Plaintiff offered to be available for a "court deposition . . . within court premises," if the Court scheduled one. ECF No. 40.

On December 21, 2021, the Honorable Leda D. Wettre, U.S.M.J. ("Judge Wettre"), ordered Plaintiff to appear for the scheduled Zoom deposition on or before January 12, 2022, without shifting costs to Defendants. ECF No. 42. The Order also outlined that, "[s]hould plaintiff fail to appear for [the] deposition as ordered, defendant and/or third-party defendant may file a motion to compel plaintiff's deposition." *Id.* at ¶ 4. Plaintiff appealed Judge Wettre's denial of his request to shift the cost of the Zoom deposition to Defendants. *See generally* ECF No. 43.

On January 26, 2022, while the appeal was pending before the Honorable Brian R. Martinotti, U.S.D.J. ("Judge Martinotti"),[2] CFG Health informed the Court that Plaintiff appeared for his deposition via telephone on January 12, 2022, but refused to appear on Zoom because he allegedly did not have the funds. ECF No. 49; *see also* ECF No. 50. During the deposition, Plaintiff also refused to answer questions regarding his employment, symptoms, and injuries. *Id.* Thereafter, Judge Wettre entered an Amended Scheduling Order, extending the fact discovery deadline from

[2] Judge Martinotti considered and denied Plaintiff's appeal on April 1, 2022. ECF No. 61.

January 23, 2022, to March 31, 2022, and directing Plaintiff to appear for a continued deposition via Zoom on March 8, 2022. ECF No. 51 ¶¶ 1-2.

B. Defendants' Second Attempt at Conducting Plaintiff's Deposition

On March 8, 2022, Plaintiff appeared for a deposition via Zoom, but he refused to answer numerous questions related to Defendants' defense, including information about his current diabetic symptoms, efforts to control diabetes, health status, eating habits, and diet. *See* ECF No. 76–4, 68:19-70:12, 74:1-18, 117:2-17, 118:2-23, 120:9-121:17, 140:19-142:8, 164:12-20, 199:8-200:11; ECF No. 76–5, 234:20-24, 236:5-8; ECF No. 76–6, 60:21-61:25, 64:6-65:18, 77:1-25, 84:1-16. For example, when Plaintiff was asked, "what are your current symptoms," he responded, "I don't discuss how I feel to somebody who's not a doctor . . . I have to preserve my medical rights . . . . I'm not answering about my symptoms. Okay? The judge have [sic] to review my answers and review your questions . . . ." ECF No. 76–4, 117:8-121:17.

On April 4, 2022, Defendants sought leave to file a motion to dismiss Plaintiff's Complaint for failure to comply with discovery and/or alternative relief barring testimony. ECF No. 63. To give Plaintiff yet another opportunity to comply with discovery, this Court did not grant Defendants leave to file a motion to dismiss, but, rather, allowed them to file a motion for an order to compel discovery. ECF No. 65. On April 21, 2022, and April 22, 2022, Defendants filed a motion to compel deposition testimony under Rule 37(a) of the Federal Rules of Civil Procedure ("Motion to Compel").[3]

[3] Contrary to the Court's directive on April 8, 2022 (ECF No. 65), Defendants filed a motion seeking dismissal of Plaintiff's Complaint for failure to comply with discovery pursuant to Rules 37(b) and

C. Defendants' Third Attempt at Conducting Plaintiff's Deposition

After Defendants filed their Motion to Compel, Plaintiff filed various motions and applications primarily related to discovery.[4] On September 20, 2022, this Court issued a text order requiring the parties to appear for a conference on November 14, 2022, to resolve all pending motions and applications, including Defendants' Motion to Compel. ECF No. 127. Plaintiff, however, notified the Court that he "permanently refuse[s] to consent to continue with any status conference or schedules by the magistrate court judge because it is unconstitutional, and it violates the plaintiff['s] constitutional due process to further any status conference or amended schedule without plaintiff['s] consent to it." ECF No. 128 at 1.

Thereafter, when this Court confirmed that the conference would proceed as originally planned and would now be conducted in person (ECF No. 133), Plaintiff filed a motion addressed to Judge Martinotti, titled "Motion for Permanent Refusal of Magistrate Judge Court Order." ECF No. 134. In it, Plaintiff dictated to the Court that he "will not participate in any conference" because the Court was acting beyond its authority. *Id.* at 1. On November 4, 2022, Judge Martinotti affirmed this Court's

41(b) of the Federal Rules of Civil Procedure. *See* ECF No. 76–2 at 6-7; ECF No. 77. The Court, however, interpreted Defendants' motion as one seeking to compel deposition testimony under Rule 37(a)—what the Court allowed Defendants to file in the first instance. ECF Nos. 65, 146. Plaintiff filed three oppositions in response to Defendants' Motion to Compel, none of which disputed that he refused to answer numerous questions but only refuted the relevance of the questions asked. *See* ECF No. 78 ¶¶ 11-13; ECF No. 79 at 4-10, 12-13; ECF No. 81 at 1, 3-6, 8.

[4] Following this Court's April 8, 2022 status conference with the parties, Plaintiff filed four motions in the span of approximately one month (ECF Nos. 67, 72, 83, 87). On May 3, 2022, this Court directed the parties to not file additional motions without first seeking leave of court. *See* ECF No. 91. In direct contravention of the May 3, 2022 Order, Plaintiff proceeded to file 12 more motions without permission. *See* ECF Nos. 96, 109, 110, 112, 118, 119, 122, 128, 131, 134, 135, 142.

Order requiring Plaintiff to appear for an in-person conference on November 14, 2022.[5] ECF Nos. 140, 141. Plaintiff was "directed to comply with [the Undersigned's] orders, including appearing in-person on November 14, 2022." ECF No. 140 at 8.

On November 6, 2022, just two days after Judge Martinotti's decision, Plaintiff filed a "Motion for rejection of Judge Martinotti Excessive Use of Force to Compel Plaintiff for in person conference." ECF No. 142. He requested to proceed via Zoom, citing his concern of COVID-19's impact on his health for the first time. *Id.* On November 9, 2022, this Court issued an order accommodating Plaintiff's request to proceed via Zoom, but noted that his concern about proceeding in person was belied by prior representations made to the Court:

> [I]t is worth noting that this Court ordered Mr. Ezeani to appear in person believing that it was accommodating him, but it appears that he is now taking a diametrically opposed position regarding whether to appear in person or via Zoom. On December 16, 2021, he refused to appear for a Zoom deposition scheduled by the Defendants. According to Mr. Ezeani, he did not have the resources to appear by Zoom, but he was "available for [a] court deposition at no cost within court premises," and requested that "deposition [] take place in court premises" (ECF No 40). At no point did he express concerns over COVID-19. Now, he refuses to appear for an in-person conference fearing the impact of COVID-19 on his health. Notwithstanding Mr. Ezeani's conflicting requests for relief, the Court will exercise its discretion and accommodate him, again. The in-person conference scheduled for November 14, 2022, at 3:30 p.m., will now proceed via Zoom.

ECF No. 144.

[5] Judge Martinotti's November 4, 2022 Opinion and Order also denied Plaintiff's (1) Motion for Permanent Non-Consent of the Magistrate Court Text Order for Status Conference (ECF No. 128), (2) Motion for Permanent Refusal of Magistrate Judge Court Order (ECF No. 134), (3) Motion for Reopening of the Plaintiff's Summary Judgment Motion (ECF No. 135), and (4) Motion for Federal Civil Procedure Violation Correction and Request for Final Decision (ECF No. 122).

On November 14, 2022, the Court was able to finally hold a hearing with all parties, including Plaintiff, to address seven pending motions (ECF Nos. 72, 76, 109, 110, 112, 118, 119). After the parties were given a full and fair opportunity to be heard, the Court issued an oral opinion on the record as to these motions, followed by an Order on November 16, 2022. *See* ECF No. 146. Most notably, the Court ordered Plaintiff to appear for a third deposition by December 15, 2022. *Id.* at ¶¶ 7-8. The Court cautioned Plaintiff, both on the record and separately in the November 16, 2022 Order, that "this is his **last opportunity** to comply with his discovery obligations." *Id.* at ¶ 8 (emphasis added).

Not long thereafter, on November 19, 2022, Plaintiff filed a "[m]otion to [n]otify the court that **Plaintiff will not attend any third deposition** because it is an organized crime that violates plaintiff['s] constitutional right." ECF No. 149 (emphasis added). His refusal to comply with the Court's orders appears to be rooted in his belief that the Undersigned cannot act or rule impartially in this case because of the Undersigned's prior government position as an Assistant United States Attorney. Plaintiff's logic seems to be that the Undersigned has a conflict of interest because he was previously employed by the United States Attorney's Office in New Jersey, which is part of the United States Department of Justice, which controls the Department of Homeland Security, which contracted with the ECCF, which is the facility where he was detained when he allegedly received inadequate medical care for his diabetes.[6] *See generally* ECF No. 149. Plaintiff also takes issue with Judge

[6] On November 14, 2022, this Court considered and denied on the record Plaintiff's informal application for recusal (ECF No. 72). In seeking recusal of the Undersigned, Plaintiff did not cite to a

Martinotti's denial of his motion to recuse the Undersigned, arguing that His Honor "violated due process right of the plaintiff to refer a recusal complaint for oversight back to the magistrate judge that committed the crime." *Id.* at ¶ 8. In light of Plaintiff's conduct, this Court considers *sua sponte* whether dismissal of this action is appropriate.

III. LEGAL STANDARD

The Federal Rules of Civil Procedure vest this Court with the inherent authority to recommend dismissal of an action *sua sponte*. *See* Fed. R. Civ. P. 16(f)(1)(C) ("On motion or *on its own*, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party . . . fails to obey a scheduling or other pretrial order."). This Court's recommendation to the District Court is guided by Rule 37(b) and Rule 41(b) of the Federal Rules of Civil Procedure. Rule 37(b) allows the District Court to dismiss an action for failure to obey a court order compelling discovery under Rule 37(a). Fed. R. Civ. P. 37(b)(2)(A)(v); *see also Lee v. Sunrise Sr. Living, Inc.*, 455 F. App'x 199, 201–02 (3d Cir. 2012) (affirming Rule 37 dismissal due to plaintiff's repeated refusal to appear for a court-ordered deposition). Rule 41(b) similarly permits dismissal of a suit *sua sponte* for failure to prosecute or based on failure to comply with a court order. Fed. R. Civ. P. 41(b); *see also Shields v. Comm'r of Soc. Sec.*, 474 F. App'x 857, 858 (3d Cir. 2012). Dismissal pursuant to

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particular statute as a basis for the recusal application and only indicated that there is "clear evidence of conflict of interest, and bias," seemingly because of the Court's rulings, which Plaintiff believes were all in Defendants' favor. *Id.* at 2. This Court found that Plaintiff's motion for recusal had no merit, as mere disagreement with a decision made in a judge's judicial capacity is not a basis for recusal. *Securacomm Consulting, Inc. v. Securacom*, Inc., 224 F.3d 273, 278 (3d Cir. 2000).

Rule 41(b) operates as an adjudication on the merits, unless the court's order specifies otherwise. *Reigle v. Riesh*, 635 F. App'x 8, 10 (3d Cir. 2015). When deciding whether the sanction of dismissal is proper, courts typically engage in a balancing analysis of the following six factors:

> (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.

Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 868 (3d Cir. 1984) (emphasis omitted). "None of the *Poulis* factors is alone dispositive, and . . . not all of the factors need to be satisfied to justify dismissal of a complaint for lack of prosecution." *Hildebrand v. Allegheny Cnty.*, 923 F.3d 128, 131–32 (3d Cir. 2019). Balancing the *Poulis* factors is unnecessary when a litigant's conduct "makes adjudication of [the] case impossible." *Abulkhair v. New Century Fin. Servs., Inc.*, 467 F. App'x 151, 153 (3d Cir. 2012) (citing *Spain v. Gallegos*, 26 F.3d 439, 454–55 (3d Cir.1994)).

IV. DISCUSSION

Plaintiff has circumvented his obligation to meaningfully sit for a deposition and has failed to abide by several court orders. Most notably, on November 16, 2022, this Court entered an Order, pursuant to Rule 37(a), ordering Plaintiff to sit for a third deposition (ECF No. 146). *See* ECF Nos. 149, 151. Despite guidance from this Court, Plaintiff has made it abundantly clear that he will not comply with any future orders (ECF Nos. 149, 150), thereby making it impossible to adjudicate his case. The

Court can end its analysis here without analyzing the *Poulis* factors. *See Abulkhair*, 467 F. App'x at 153. But, because the Court recognizes that "dismissal is a drastic sanction," it considers each of the *Poulis* factors. 747 F.2d at 866.

1. The Extent of Plaintiff's Personal Responsibility

This Court first considers the extent of Plaintiff's personal responsibility in refusing to comply with discovery and this Court's orders. *Id.* at 868. "[I]t is logical to hold a *pro se* plaintiff personally responsible for delays in his case because a *pro se* plaintiff is solely responsible for the progress of his case, whereas a plaintiff represented by counsel relies, at least in part, on his or her attorney." *Vittas v. Brooks Bros, Inc., Grp.*, No. 14-cv-3617, 2017 WL 6316633, at *2 (D.N.J. Dec. 11, 2017) (*citing Briscoe v. Klaus*, 538 F.3d 252, 258–59 (3d Cir. 2008)).

Plaintiff is appearing *pro se*. The record reflects that he has been on notice of his obligations but has nonetheless refused to comply with them; therefore, he is solely responsible for such noncompliance. Defendants attempted to conduct Plaintiff's deposition twice—first on January 12, 2022, and then again on March 8, 2022—both of which had to be Court ordered. *See* ECF Nos. 42, 49, 50, 76. And this Court has ordered Plaintiff to attend his deposition for a third time—an order which he has made clear he is going to ignore. *See generally* ECF Nos. 149, 151.

With respect to the first deposition, although Judge Wettre's Order specifically directed Plaintiff to appear via Zoom (ECF No. 42), he refused to do so. Plaintiff appeared by telephone and refused to answer questions regarding his employment, symptoms, and injuries. ECF Nos. 49, 50. Thereafter, Plaintiff was given another

opportunity to comply with his discovery obligations and was ordered, again, to sit for a second deposition on March 8, 2022, via Zoom, not telephone. ECF No. 51 ¶ 2.

As recited above, although Plaintiff appeared for a Zoom deposition on March 8, 2022, he refused to answer questions regarding his current diabetic symptoms, efforts to control diabetes, health status, eating habits, and diet. *See* ECF No. 76–4, 68:19-70:12, 74:1-18, 117:2-17, 118:2-23, 120:9-121:17, 140:19-142:8, 164:12-20, 199:8-200:11; ECF No. 76–5, 234:20-24, 236:5-8; ECF No. 76–6, 60:21-61:25, 64:6-65:18, 77:1-25, 84:1-16. Based on the submissions of the parties and the deposition excerpts provided, Plaintiff's answers were evasive and nonresponsive. For example, when asked, "what are your current symptoms," Plaintiff responded, "I don't discuss how I feel to somebody who's not a doctor . . . I have to preserve my medical rights . . . . I'm not answering about my symptoms. Okay? The judge have to review my answers and review your questions . . . ." ECF No. 76–4, 117:8-121:17. As another example, when he was asked about employment and whether he was currently teaching at Essex County College, Plaintiff stated, "I don't discuss that. That's irrelevant." ECF No. 76–4, 149:14-23.

Plaintiff argues that much of the Defendants' questions about his employment status, health condition, and diet were "irrelevant," notwithstanding that the gravamen of his Complaint is that Defendants' alleged negligence caused his diabetes and that he has suffered an economic harm as a result. *See generally* Compl., ECF No. 1; *see also* ECF No. 78 ¶¶ 11-13, ECF No. 79 at 4-10, 12-13, ECF No. 81 at 1, 3-6, 8. Yet, Plaintiff's own deposition testimony evinces that he was aware of the

relevance of the questioning at issue. For instance, he acknowledges that the questions aimed at his health conditions are designed to bolster the defense in this case. ECF No. 76–6, 60:21-61:25 ("[Y]ou want to know my health situation for you to build your case. It can't happen.").

After Defendants' second attempt at conducting Plaintiff's deposition, this Court held a hearing to determine whether to compel Plaintiff's deposition, pursuant to Rule 37(a). ECF No. 146. During the hearing, this Court explained to Plaintiff that the questions he refused to answer are relevant and central to his claim that he received inadequate medical treatment for his diabetes. This Court ordered Plaintiff to sit for a third deposition and put him on notice, on the record and in a subsequent Order, "that this is his **last opportunity** to comply with his discovery obligations."[7] ECF No. 146 (emphasis added). Plaintiff has squandered that opportunity and has made his intentions unequivocal—he "will not honor any third deposition." ECF No. 149. According to Plaintiff, "any attempt of the court to compel the plaintiff will be dishonored," and he "will not honor anything that the [Undersigned orders] so [the] court should feel free to make their final decision based on my refusal to abide by any unlawful order that violate the plaintiff['s] constitutional right." ECF No. 151 at 4.

Although *pro se* litigants are entitled to a certain degree of leniency,[8] they are

[7] The focus of this Report and Recommendation centers around Plaintiff's refusal to comply with his discovery obligations. But that is not his only intransigence. This Court has directed the litigants to not file motions without first seeking leave of Court. *See* ECF No. 91. Plaintiff has violated that Court Order approximately 12 times. *See* ECF Nos. 96, 109, 110, 112, 118, 119, 122, 128, 131, 134, 135, 142. Although those violations are not the central basis for this Report and Recommendation, they are worth noting as part of Plaintiff's unwillingness to comply with court orders.

[8] *Bey v. Daimler Chrysler Services of North America, LLC,* No. 04-cv-6186, 2006 WL 1344080 at *5 (D.N.J. May 15, 2006).

not entitled to blatantly disregard court orders or circumvent their obligations under the Federal Rules of Civil Procedure. That is precisely what Plaintiff has done and continues to do. He is personally responsible for such noncompliance and failure to prosecute his case. Accordingly, the first *Poulis* factor weighs in favor of dismissal.

2. Prejudice to Plaintiff's Adversaries

The second *Poulis* factor requires this Court to consider the prejudice to Plaintiff's adversaries, including assessing whether the party's conduct has resulted in "deprivation of information through noncooperation with discovery, and costs expended obtaining court orders to force compliance with discovery." *W. Coast Quartz Corp. v. M.E.C. Tech, Inc.*, No. 16-cv-2280, 2017 WL 1944197, at *2 (D.N.J. May 9, 2017) (citing *Adams v. Tr. of New Jersey Brewery Emps.' Pension Tr. Fund*, 29 F.3d 863, 874 (3d Cir. 1994)). Further, a party may be prejudiced if the adversary's conduct hinders "its 'ability to prepare effectively a full and complete trial strategy[.]'" *Chiarulli v. Taylor*, No. 08-cv-4400, 2010 WL 1371944, at *3 (D.N.J. Mar. 31, 2010), *report and recommendation adopted*, No. 08-cv-4400, 2010 WL 1566316 (D.N.J. Apr. 16, 2010) (citing *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 222 (3d Cir. 2003)).

Here, the prejudice is obvious. Defendants have been prejudiced not only because of the unnecessary costs they incurred in connection with two depositions and various motions, but also because they cannot evaluate the strengths and weaknesses of their case. Plaintiff's non-responsiveness on issues critical to this case have stalled the Defendants' ability to defend themselves, effectively bringing this case to a halt. Meanwhile, Defendants run the risk that their witnesses' memories

fade or that witnesses become unavailable. Therefore, the second *Poulis* factor also weighs in favor of dismissal.

3. History of Plaintiff's Dilatoriness

As for the third *Poulis* factor, this Court finds that Plaintiff has demonstrated a clear history of dilatoriness. Plaintiff's conduct illustrates a pattern of dilatory behavior that can be traced back to January 21, 2022, when he failed to comply with Judge Wettre's December 21, 2021 Order requiring him to appear for a deposition via Zoom. ECF No. 39–1; *see also* ECF Nos. 49, 50. Because of Plaintiff's evasiveness, Defendants have not been able to take his deposition almost a year later, and he has foreclosed the possibility that a deposition will ever take place. This case cannot linger in perpetuity with the hope that one day Plaintiff might change his mind and agree to provide full answers to deposition questions. Despite the Court's efforts to provide guidance, Plaintiff's persistent refusal to answer questions and now his rejection of this Court's orders demonstrates a history of dilatoriness. The third *Poulis* factor, too, militates in favor of dismissal. *See, e.g.*, *Huertas v. Philadelphia*, 139 F. App'x 444, 446 (3d Cir. 2005) (citing *Adams*, 29 F.3d at 874–75 (finding that dilatory conduct was established when plaintiff failed to appear for depositions after receiving adequate notice and did not pursue any protection from the court)).

4. Whether Plaintiff's Conduct was Willful or in Bad Faith

In considering the fourth *Poulis* factor, this Court finds that Plaintiff's conduct is not just willful but also in bad faith for the same reasons that the Court finds that he is personally responsible for his dilatoriness. "Willfulness involves intentional or

self-serving behavior." *Adams*, 29 F.3d at 874. "A consistent failure to obey orders of the court, 'at the very least, renders [a party's] actions willful for the purposes of the fourth *Poulis* factor.'" *Hunt-Ruble v. Lord, Worrell & Richter, Inc.*, No. 10-cv-4520, 2012 WL 2340418, at *5 (D.N.J. June 19, 2012). Plaintiff's history of continued noncompliance with this Court's orders is well documented above, culminating with his own declaration that he "will not honor any third deposition" (ECF No. 149 at 1) and that he "is not abiding and will not abide by any court order for third deposition as ordered by the [Undersigned] and Affirmed by the Honorable Judge Brian Martinotti." ECF No. 151 at 4. Plaintiff "does not agree with any action of the magistrate judge and . . . make[s] it clear that any court decision from the magistrate judge is irrelevant." ECF No. 149 ¶ 10.

Plaintiff is aware of the Court's orders, and he is similarly aware of his discovery obligations, but he still refuses to comply, preventing the case from moving forward. Plaintiff's own conduct and words leave this Court with no choice but to conclude that he has acted both willfully and in bad faith. Therefore, the fourth *Poulis* factor also calls for dismissal.

5. *Alternative Sanctions*

Next, this Court considers whether there are alternative sanctions to dismissal. *Poulis*, 747 F.2d at 868. It finds that there are none. "The Third Circuit has identified a number of alternative sanctions available to a court [other than dismissal], including a warning, a formal reprimand, placing the case at the bottom of the calendar, a fine, the imposition of costs or attorney fees or the preclusion of

claims or defenses." *Hayes v. Nestor*, No. 09-cv-6092, 2013 WL 5176703, at *5 (D.N.J. Sept. 12, 2013) (internal quotation marks and citation omitted). "Where, as here, a plaintiff is appearing *pro se*, monetary sanctions, such as fees and costs, are often inappropriate." *Gonzalez v. Town of W. New York*, No. 20-cv-1849, 2022 WL 4586479, at *6 (D.N.J. Sept. 29, 2022) (citing *Briscoe*, 538 F.3d at 263); *Emerson v. Thiel College*, 269 F.3d 184, 191 (3d Cir. 2002)). Although Plaintiff does not proceed in *forma pauperis,* he has represented to the Court that he did not have sufficient financial resources to participate by Zoom in the first deposition on January 12, 2022. ECF No. 43 ("I have financial difficulty because I am a PHD engineering student at [O]ld [D]ominion [U]niversity and a Doctor of Business Administration Student at [U]niversity of the Cumberland . . . I have invested my funds in paying for tuition, so I have financial challenges at this time . . . . The decision of [C]ourt not to consider the plaintiff['s] financial burden does not seem rational because it does not protect the plaintiff['s] financial wellbeing."). Given his representations, monetary fines are unlikely to be an effective alternative sanction.

No other form of sanction—other than dismissal—will alter the course of this case. Despite being on notice that this was Plaintiff's last opportunity to comply with his discovery obligations, he has been unequivocal that "any attempt of the court to compel the plaintiff will be dishonored," and he "will not honor anything that the [Undersigned orders] so [the] court should feel free to make their final decision based on my refusal to abide by any unlawful order that violate the plaintiff['s] constitutional right." ECF No. 151 at 4. Given Plaintiff's continued disregard for the

discovery process and this Court's prior orders, it would be futile, and prejudicial to Defendants, to order Plaintiff to comply with basic discovery obligations a fourth time. Thus, the fifth *Poulis* factor favors dismissal.

6. Meritoriousness of the Claims

The sixth *Poulis* factor calls for an analysis of the merits of the claims. "A claim, or defense will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense." *Poulis*, 747 F.2d at 869–70. At this juncture, the Court lacks sufficient information to evaluate the evidence in this case and, therefore, cannot adequately assess the sixth *Poulis* factor. This, however, is not fatal to the dispositive nature of the Court's recommendation as it is not necessary to find that all factors weigh in favor of dismissal. *Emerson*, 296 F.3d at 190. As such, the Court will consider this factor neutral. *See Hayes*, 2013 WL 5176703 at *6 (finding that the sixth *Poulis* factor was neutral where "the Court [did] not have a sufficient basis upon which to evaluate the meritoriousness of plaintiff's claims" and that no greater analysis of the sixth factor was necessary to dismiss plaintiff's complaint).

After considering and balancing the *Poulis* factors, this Court finds that dismissal of this case with prejudice is appropriate. *See* Fed. R. Civ. P. 37(b) and 41(b). The Court acknowledges that dismissal of an action as a sanction is undoubtedly a measure of last resort, one that should not be made lightly. Where, as here, a plaintiff, even one proceeding *pro se*, blatantly shirks his responsibility to comply with discovery and this Court's orders, he leaves the Court with no other

choice but to recommend dismissal of the action. To hold otherwise would undermine the purpose of the Federal Rules of Civil Procedure—"to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

V. CONCLUSION

For the reasons set forth above, this Court respectfully recommends that the District Court dismiss the Complaint against all Defendants in this action with prejudice, pursuant to Rule 37(b) and Rule 41(b) of the Federal Rules of Civil Procedure. The parties have fourteen days to file and serve objections to this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1)(C); L. Civ. R. 72.1(c)(2).

Respectfully submitted,

s/ José R. Almonte
HON. JOSÉ R. ALMONTE
UNITED STATES MAGISTRATE JUDGE

Dated: December 8, 2022

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1187

Appendix A

GREGORY I. EZEANI,
Appellant

v.

WILLIAM ANDERSON, Warden, Essex County Corrections;
CFG HEALTH SYSTEMS LLC

(D. N.J. No. 2-21-cv-06759)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, and NYGAARD,* Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

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* Pursuant to Third Circuit I.O.P. 9.5.3, Judge Richard L. Nygaard's vote is limited to panel rehearing.

concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Richard L. Nygaard
Circuit Judge

Dated: July 24, 2023
Amr/Cc: All counsel of record