FILED
United States Court of Appeals
Tenth Circuit

October 15, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AUSTIN ROGER CARTER,

Plaintiff - Appellant,

v.

GENESIS ALKALI LLC; GENESIS ENERGY LP; CODY J. PARKER; KRISTEN O. JESULAITUS; TERRY HARDING,

Defendants - Appellees.

No. 23-8079
(D.C. No. 2:20-CV-00216-SWS)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **HARTZ**, and **ROSSMAN**, Circuit Judges.

Plaintiff Austin Roger Carter filed a pro se lawsuit asserting various whistleblower and employment-related claims against Genesis Alkali LLC, Genesis Energy LP, and three individual defendants (collectively, "Defendants"). Under Rule 41(b) of the Federal Rules of Civil Procedure, the district court dismissed Mr. Carter's lawsuit as a sanction for his failure to prosecute the case or comply with

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

A

the court's orders. Mr. Carter timely appealed. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

Mr. Carter sued in November 2020. Defendants filed motions to dismiss which the district court granted in part, leaving only a claim under the Sarbanes-Oxley Act. Mr. Carter then moved to disqualify defense counsel. After the district court denied his motion and his later motion to reconsider, Mr. Carter appealed. This court dismissed for lack of appellate jurisdiction,[1] and Mr. Carter filed a petition for writ of certiorari with the Supreme Court.

After an initial conference on February 9, 2022, the magistrate judge issued a scheduling order. Mr. Carter did not abide by that order, however. He did not serve initial disclosures by the required deadline and failed to respond to discovery requests Defendants had served on him. He also did not respond to Defendants' repeated requests to address discovery issues.

In July 2022, the magistrate judge set an informal discovery conference to address Mr. Carter's failure to engage in the discovery process. Mr. Carter did not appear for the conference and instead moved to vacate the hearing and stay proceedings pending his petition for certiorari. The magistrate judge reset the

[1] Mr. Carter filed two other interlocutory appeals and an original proceeding with this court during the litigation, all of which were dismissed or denied. He attempts to challenge those rulings by way of his current appeal, but he can only appeal from orders of the district court. *See* 8 U.S.C. § 1291. Although he could have petitioned for rehearing on any of our previous rulings, *see* Fed. R. App. P. 40, he did not do so.

conference for August 1, 2022, but Mr. Carter again failed to appear. The magistrate judge yet again reset the conference to August 22, 2022, and denied Mr. Carter's motion for stay. Mr. Carter failed to appear at the August 22 conference and then moved to disqualify the magistrate judge and district court judge. That motion was denied.

Defendants then moved for an order to show cause why the case should not be dismissed for failure to prosecute. The magistrate judge held a hearing on the motion on February 23, 2023, and subsequently issued an order granting the motion in part by imposing sanctions in the form of Defendants' reasonable costs and fees. The order warned Mr. Carter "that any future delays, failures to participate in the litigation of this action, failures to participate in discovery, or meet a Court imposed deadline will likely result in the dismissal of the action." Supp. App. vol.3 at 125-26. The order also set a status conference to address a new scheduling order.

At the status conference, the magistrate judge entered a new scheduling order with a discovery deadline of October 20, 2023. The order required Defendants to serve Mr. Carter with their written discovery responses and document production by June 5, 2023. Defendants complied, and Mr. Carter responded by requesting permission from the court to file motions to compel and for sanctions. He identified no objectionable discovery responses but accused Defendants and their counsel of hacking his personal email account. Defendants' counsel attempted to confer with Mr. Carter about the allegations, but he did not respond. Instead, he filed motions for injunctive relief and sanctions. Defendants responded by renewing their motion for

sanctions in the form of dismissal, arguing Mr. Carter's motions attempted to delay the litigation.

While the parties briefed their competing motions, Defendants contacted Mr. Carter about setting his deposition, given the approaching discovery deadline. He declined to confer. To preserve their right to depose Mr. Carter before the discovery deadline, Defendants noticed his deposition for October 18, 2023. In response, Mr. Carter filed a "Notice of Falsification," in which he called Defendants' counsel "dolts," "liars and cheats." Supp. App. vol. 3 at 142. He further indicated he would not attend his deposition, but he did not seek a protective order excusing his attendance.

On November 1, 2023, the district court granted Defendants' renewed motion and dismissed Mr. Carter's lawsuit "as a sanction for Plaintiff's many and continued failures and refusals to prosecute this case and comply with the rules of procedure and court orders." R. at 476. The court also denied as moot Mr. Carter's competing motions for injunctive relief and sanctions.

II. Discussion

A. Dismissal Under Rule 41(b)

Mr. Carter argues the district court erred in dismissing his lawsuit.[2] He focuses on Defendants' alleged litigation misconduct and contends the dismissal of his case

[2] We liberally construe Mr. Carter's pro se filings, but we do not act as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

violates his constitutional rights. He does not, however, identify the case law governing dismissal as a sanction, nor does he acknowledge that we review the dismissal for an abuse of discretion, *see Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1161 (10th Cir. 2007). Our review indicates that no abuse of discretion occurred here.

Rule 41(b) provides that "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." A district court should ordinarily consider the following non-exhaustive list of factors in determining whether to dismiss an action under Rule 41(b):

> (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.

Ehrenhaus v. Reynolds, 965 F.2d 916, 921 (10th Cir. 1992) (ellipses, citations, and internal quotation marks omitted).

Here, the district court carefully considered these factors and concluded each supported dismissal. First, Mr. Carter's failure to participate in discovery and to attend hearings caused both the court and Defendants the needless expenditure of time and, in the case of Defendants, money. Second, Mr. Carter interfered with the judicial process by failing to attend multiple hearings, failing to engage with defense counsel's efforts to confer on discovery matters, and refusing to make himself available for a deposition. Third, the record reveals no justifiable excuse for Mr. Carter's litigation conduct. Fourth, the magistrate judge had imposed sanctions in

the form of an award of fees and costs and warned Mr. Carter that future delays and failures to participate in the litigation would likely result in the dismissal of the action. Although Mr. Carter asserts the judges "grossly misrepresented the history of the case," Opening Br. at 29, we disagree. The district court acted within its discretion in dismissing Mr. Carter's claims as a sanction for his litigation misconduct.

B. Motion to Disqualify Judges

Mr. Carter argues the district court erred in denying his motion to disqualify the district court judge and magistrate judge. The denial of such a motion is reviewed for an abuse of discretion. *Hinman v. Rogers*, 831 F.2d 937, 938 (10th Cir. 1987) (per curiam). Mr. Carter points to adverse rulings and alleged *ex parte* communications between the judges and defense counsel. But as the district court correctly observed, "'judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.'" Supp. App. vol. 2 at 177 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). And the alleged *ex parte* communications resulted from Mr. Carter's refusal to attend court proceedings, which were conducted on the record and in the presence of a court reporter.

Mr. Carter also says the judges should have recused because former Governor Dave Freudenthal is legal counsel to a Genesis Alkali entity, and both judges have past professional connections to him. Mr. Carter also noted the three of them attended the same bar conference in 2017. But Governor Freudenthal is not counsel

of record in this case, so we need not engage with this argument further. In short, the district court did not abuse its discretion in denying the motion to disqualify.

C. Denial of Mr. Carter's Motions for Injunctive Relief and Sanctions

Mr. Carter argues the district court erred in denying as moot his motions for injunctive relief and sanctions.[3] Essentially, he insists the district court should have ruled on his motions *before* granting Defendants' motion for sanctions and dismissing the case. "[D]istrict courts generally have broad discretion to manage their dockets." *See Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1140 (10th Cir. 2009) (internal quotation marks omitted)). We discern no error in the district court's management of its docket.

D. Denial of Motion for Stay

Mr. Carter argues the district court erred in declining to stay the proceedings until resolving his interlocutory appeal of the denial of his motion to disqualify opposing counsel. We review this issue for abuse of discretion. *See Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 987 (10th Cir. 2000). A stay is not a matter of right. *Nken v. Holder*, 556 U.S. 418, 433 (2009). Instead, the movant must establish, among other things, that he "has made a strong showing that he is likely to succeed on the merits." *Id.* at 434 (internal quotation marks omitted). Mr. Carter does not address the legal standard for obtaining a stay, and we discern no

[3] Notably, the district court also mooted the imposition of fees and costs in light of the ultimate sanction of dismissal.

error in the district court's conclusion that he had not carried his burden of establishing a likelihood of success on the merits.

Mr. Carter also seems to contend that his interlocutory appeal should have automatically stayed all proceedings in the district court. To the extent he is invoking the principle that filing a notice of appeal divests the district court of jurisdiction, *see Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982), that principle has no application here because the Tenth Circuit dismissed his appeal for lack of jurisdiction. *See Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563, 567 (10th Cir. 1979) ("An attempt to appeal a non-final decision remains just that, an attempt. It is a nullity and does not divest the trial court of its jurisdiction.").

III. Conclusion

We affirm the judgment of the district court.

Entered for the Court

Veronica S. Rossman
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

October 15, 2024

Austin Roger Carter
96 MT Highway 2E
Whitehall, MT 59759

RE: 23-8079, Carter v. Genesis Alkali, et al
Dist/Ag docket: 2:20-CV-00216-SWS

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Amanda F. Esch
Kevin E. Griffith
Nicole LeFave

CMW/sds

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

AUSTIN ROGER CARTER,

Plaintiff,

v.

GENESIS ALKALI, LLC; GENESIS ENERGY LP; CODY J. PARKER; KRISTEN O. JESULAITIS; and TERRY HARDING,

Defendants.

Case No. 20-CV-216-SWS

ORDER OF DISMISSAL AS SANCTION

This lawsuit was originally filed in November 2020. (ECF 1.) After a ruling of partial dismissal in March 2021 (ECF 36), Plaintiff's sole remaining claim concerns an alleged violation of the Sarbanes-Oxley Act of 2002 ("SOX Act"), 18 U.S.C. §1514A. Plaintiff has proceeded pro se without the assistance of an attorney, and therefore the magistrate judge and this Court have construed his filings liberally and been as forgiving of his erroneous practices as possible. Nonetheless, the magistrate judge previously granted sanctions against Plaintiff for his "repeated pattern of refusing to participate [in the litigation process] with defense counsel and ignoring Court hearings and deadlines." (ECF 31 p. 9.) The magistrate judge ordered the payment of Defendants' attorney fees and costs as the sanction for Plaintiff's intentional litigation misconduct, but declined to recommend dismissal as a sanction in the hope that Plaintiff would prosecute his case in a more appropriate manner.[1] (*Id.* pp.10-13.) That hope has borne no fruit.

[1] Plaintiff filed an opposition to the amount of fees and costs requested by Defendants (ECF 138) but did not seek review of the magistrate judge's order of sanctions. *See* Local Civil Rule 74.1(a) (allowing a party to ask the district judge to review a magistrate judge's non-dispositive order within 14 days).

B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

AUSTIN ROGER CARTER,

Plaintiff,

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[1] Plaintiff filed an opposition to the amount of fees and costs requested by Defendants (ECF 138) but did not seek review of the magistrate judge's order of sanctions. *See* Local Civil Rule 74.1(a) (allowing a party to ask the district judge to review a magistrate judge's non-dispositive order within 14 days).

The matter is now before the undersigned trial judge on the Defendants' renewed motion to dismiss as a sanction for Plaintiff's continued malicious and abusive litigation conduct. (ECF 142.) The Court has also considered Plaintiff's opposition (ECF 146), Defendants' reply (ECF 147), Defendants' supplement (ECF 153), and Plaintiff's response to the supplement (ECF 154), as well as the lengthy record herein. Finding Plaintiff's behavior has continued to violate several rules, and measuring that misbehavior against the *Ehrenhaus* factors, the Court concludes dismissing Plaintiff's lawsuit is the most appropriate sanction at this point because previous lesser warnings and sanctions failed to convince Plaintiff to remedy his litigation misconduct.

BACKGROUND

In the prior order granting sanctions, the magistrate judge accurately summarized the tortured timeline of events to that point:

> Plaintiff's Complaint was filed on November 25, 2020. On October 7, 2021, Plaintiff filed a Motion to Disqualify defense counsel. [ECF No. 53]. On January 4, 2022, this Court entered an Order Denying Plaintiff's Motion to Disqualify Counsel finding the Motion untimely and finding Plaintiff failed to establish the existence of an attorney-client relationship. [ECF No. 64]. Plaintiff filed a Motion to Reconsider the Order Denying Plaintiff's Motion to Disqualify Counsel. [ECF No. 65]. On February 8, 2022, the trial Court upheld this Court's ruling denying Plaintiff's request to disqualify counsel. [ECF No. 71]. Plaintiff immediately appealed the trial Court's ruling to the Tenth Circuit Court of Appeals. [ECF No. 72]. Plaintiff's appeal to the Tenth Circuit was denied on March 17, 2022. [ECF No. 80]. On June 13, 2022, Plaintiff filed a Petition for Writ of Certiorari with the United States Supreme Court to appeal the denial of his Motion to Disqualify. [ECF No. 81].
>
> On July 11, 2022, defense counsel contacted the Court via email, including Plaintiff in the email, requesting an informal discovery conference pursuant to the Local Rules to address Plaintiff's failure to engage in the discovery process. Defendants alleged Plaintiff did not serve his initial disclosures by the March 4, 2022, deadline and did not respond to Defendants' April 12, 2022, discovery requests. Defendants also asserted that Plaintiff ignored repeated requests from defense counsel to address discovery issues. Without responding to the email, the Court set an informal discovery conference for July 22, 2022, to address Plaintiff's alleged discovery deficiencies. [ECF No. 82]. Plaintiff did not appear for the July 22, 2022, telephonic discovery conference and instead filed a Motion to Vacate the Hearing and Stay the

Case. [ECF No. 83]. In the Motion, Plaintiff requested that the Court vacate the July 22, 2022, discovery conference and stay the case pending resolution of his Petition of Writ of Certiorari filed with the United States Supreme Court. The Court reset the telephonic discovery conference to August 1, 2022. Again, Plaintiff, without justification, failed to appear at the August 1, 2022, discovery hearing and the conference was reset to August 22, 2022. Defendants filed a Response to Plaintiff's Motion to Vacate and Stay on July 29, 2022, and Plaintiff filed a Reply on August 5, 2022. [ECF Nos. 87 and 93]. The Court denied Plaintiff's Motion to Vacate and Stay on August 18, 2022. [ECF No. 100]. In the Order Denying the Motion to Vacate and Stay, the Court found Plaintiff had not shown a strong likelihood of a successful appeal on the merits or that he would be irreparably injured absent a stay. The Court also found a stay would prejudice Defendants and that the public interest would be best served by a speedy resolution of the case avoiding unnecessary expenditure of judicial resources. [ECF No. 94]. Despite the Court's denial of his Motion to Stay, Plaintiff again failed to appear for the August 22, 2022, telephonic discovery conference. Plaintiff's Writ of Certiorari was denied by the Supreme Court on October 3, 2022. [ECF No. 103].

On September 28, 2022, Defendants filed a Motion for Order to Show Cause [ECF No. 100] requesting the Court require Plaintiff to show cause why his case should not be dismissed for failure to prosecute. Defendants also filed a Motion for Sanctions requesting the Court impose monetary sanctions against Plaintiff for his refusal to participate in discovery and to prosecute his case. [ECF No. 101]. Plaintiff's responses in opposition to Defendants' Motion to Show Cause and for Sanctions did not address the merits of the issue or his failure to comply with discovery obligations or attend hearings. Rather, Plaintiff seemingly wanted to relitigate issues previously addressed and attack the credibility of the Court. The Court found Plaintiff has shown a continued and consistent pattern of failing to confer with defense counsel, failing to respond to discovery requests, and has repeatedly ignored Court orders.

Consequently, the Court granted Defendants' Motion for Order to Show Cause and set a hearing for November 22, 2022. The Court also ordered Plaintiff to fully and completely respond to all of Defendants' outstanding discovery requests by November 10, 2022. [ECF No. 111]. However, the Court vacated the November [22], 2022, hearing after Plaintiff appealed the Court's Order Granting Defendants' Motion to Show Cause to the United States Court of Appeals for the Tenth Circuit. [ECF No. 113]. On January 26, 2023, The Tenth Circuit Court of Appeals dismissed Plaintiff's appeal. [ECF No. 123]. The Court reset the show cause hearing for February 23, 2023, at 10:00 a.m. in Cheyenne, Wyoming, ordering Plaintiff and defense counsel to appear in person, without exception. Plaintiff was ordered to appear and to show cause why this case should not be dismissed for failure to prosecute and for failure to obey Court orders.

Both Plaintiff and defense counsel appeared in person for the February 23, 2023, show cause hearing. After hearing argument, the Court found Plaintiff was again

> attempting to relitigate previously addressed issues. The Court also found that Plaintiff's persistent and continued pattern of delay, refusal to communicate with defense counsel, and failure to participate in the discovery process caused substantial delay and prejudice to Defendants. The Court took the pending Motion to Dismiss and for Sanctions [ECF. Nos. 100 and 101] under advisement and ordered Plaintiff to produce his initial disclosures and respond to all outstanding discovery requests by March 9, 2023. On March 13, 2023, defense counsel sent the Court and Plaintiff an email stating that Plaintiff had informed defense counsel that he had mailed his responses on March 9, 2023.

(ECF 131 pp. 2-5 (bracketed record citations in original).)

Importantly, the magistrate judge determined "Plaintiff failed to comply with any discovery obligations and refused to serve his initial disclosures despite repeated efforts from defense counsel and this Court" and "failed to prosecute this case." (ECF 131 p. 7.) The magistrate judge then recounted Plaintiff's several specific failures:

> Plaintiff failed to exchange initial disclosures by the Court imposed March 4, 2022, deadline; Plaintiff failed to comply with, or otherwise respond to, Defendants' April 12, 2022, written discovery requests; Plaintiff failed to respond to Defendants' June 2, 2022, deficiency letter asking Plaintiff to serve initial disclosures and comply with written discovery request by June 15, 2022; Plaintiff failed to respond to Defendants' request for an August 2022 date to conduct his deposition; Plaintiff failed to appear for the July 22, 2022, telephonic discovery conference and instead filed a Motion to Vacate and Stay the Case, that was subsequently denied; Plaintiff failed to appear for the August 1, 2022, telephonic conference; and Plaintiff failed to appear for the August 22, 2023, telephonic discovery conference.

(*Id.* pp. 7-8.) The magistrate judge also found "Plaintiff's actions and inactions have also severely interfered with the judicial process," noting the Court had "set, and attempted to hold, three separate telephonic discovery conferences that Plaintiff failed to attend." (*Id.* p. 8.) The magistrate judge accurately continued, "Plaintiff has shown a repeated pattern of refusing to participate with defense counsel and ignoring Court hearings and deadlines. Plaintiff is culpable for the status of this case." (*Id.* p. 9.) At the time of the magistrate judge's order, this lawsuit had been languishing for 2 ½ years, and is now almost three years old. "Defendants have engaged Plaintiff in an attempt

to conduct discovery and move this case forward. Yet Plaintiff, without offering any justifiable explanation, refused to do so." (*Id.* p. 9.)

Despite Plaintiff's repeated deficiencies and failures, in a very patient and forgiving fashion, the magistrate judge analyzed the five *Ehrenhaus* factors from *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992), and determined a monetary penalty rather than dismissal was the more appropriate sanction. (ECF 131 pp. 7-13.) So the magistrate judge ordered Plaintiff to pay the reasonable costs and fees incurred by Defendants in addressing Plaintiff's several discovery deficiencies and instructed Defendants to submit a bill of costs setting forth those amounts. (ECF 131 p. 13.) Defendants submitted their bill of costs (ECF 134), and Plaintiff submitted an objection to it (ECF 138).

Since then, Plaintiff filed two more motions, one seeking an injunction and one seeking sanctions in the form of summary judgment in the amount of $2.8 million, both surrounding his belief that Defendants' attorneys and/or other agents have been "hacking" his personal data through digital means. (ECF 140, 141.) Defendants deny Plaintiff's accusations. (ECF 143.) Defendants also filed the instant renewed motion to dismiss as a sanction after Plaintiff's motions. (ECF 142.)

More significant to the Court, Plaintiff has continued to refuse to engage in the discovery process with Defense Counsel. Specifically, Defense Counsel contacted Plaintiff via email in an attempt to schedule a phone call with him so they could set up his deposition before the discovery cut-off. (ECF 149 p. 6.) In his email response, Plaintiff said he would not participate in a phone call with Plaintiff until the Court had issued orders on the motions that were pending (Plaintiff's motion for injunction, Plaintiff's motion for summary judgment as sanctions, and Defendants' renewed motion to dismiss as sanction). (ECF 149 p. 6.) Plaintiff's conduct effectively precluded

Defendants from working with him to schedule his deposition. Consequently, on September 29, 2023, and in conformity with Federal Rule of Civil Procedure 30, Defendants filed a formal notice to take Plaintiff's deposition. (ECF 148.) The deposition was scheduled for October 18, 2023, giving the parties nearly three weeks' advance notice to arrange their schedules. Plaintiff, however, refused to appear for the deposition as scheduled and did not offer any alternative time for his deposition to be taken. (ECF 153-1 p. 2.) Moreover, he filed a response to the deposition notice, which baldly averred that Defendants had noticed the deposition for the nefarious reason of trying to influence the Court's decisions on the pending motions. (ECF 149.[2])

STANDARD FOR DISMISSAL AS SANCTION FOR LITIGATION MISCONDUCT

Federal Rule of Civil Procedure 41(b) permits a court to dismiss an action where a plaintiff fails to prosecute or to comply with the rules or a court order. That provision states:

> If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

Fed. R. Civ. P. 41(b). Before dismissing a pro se litigant's case, however, the court should "carefully assess whether it might appropriately impose some sanction other than dismissal, so that the party does not unknowingly lose its right of access to the courts because of a technical violation." *Villecco v. Vail Resorts, Inc.*, No. 1:16-CV-0009, 2016 WL 10537555, at *2 (D. Wyo. Dec. 2, 2016) (quoting *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 2012)). Nevertheless, pro se litigants "have no license to flout a court's authority willfully. Although pro se litigants get the benefit of more generous treatment in some respects, they must nonetheless follow the same rules of procedure that govern other litigants." *Id.* (quoting *Creative Gifts, Inc. v. UFO*, 235 F.3d

[2] Notably, Plaintiff did not explain how a deposition notice might influence the Court's decisions on pending motions (*see* ECF 149), and the Court finds that it would not and did not.

540, 549 (10th Cir. 2000)). The Tenth Circuit has identified five factors that can inform the trial court when considering whether dismissal is an appropriate sanction under Rule 41(b)[3]:

> (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.

Ehrenhaus 965 F.2d at 921 (internal citations and quotation marks omitted). The discretion to dismiss as a sanction "must be exercised with restraint" because of its harshness. *Chavez v. City of Albuquerque*, 402 F.3d 1039, 1044 (10th Cir. 2005). Consequently, "it is appropriate only in cases of 'willfulness, bad faith, or [some] fault of petitioner.'" *Id.* (quoting *Archibeque v. Atchison, Topeka, and Santa Fe Railway Co.*, 70 F.3d 1172, 1174 (10th Cir. 19995)).

DISCUSSION

Consistent with the magistrate judge's prior order of sanctions (*see* ECF 131 pp. 7-10), the Court finds the first four factors demonstrate Plaintiff's ongoing obstruction and weigh in favor of a serious sanction.

1. Degree of Actual Prejudice to Defendants

Since Plaintiff filed this lawsuit, he has willfully obstructed the discovery and litigation process. His many failures to prosecute the action, outright refusals to participate in the exchange of discovery, and multiple missed hearings with the magistrate judge have caused substantial actual prejudice to Defendants. (*See* ECF 131 pp. 8-9.) His actions have severely hindered Defendants in their own investigations and preparations, and have caused Defendants and the Court to incur the needless expenditure of time, money, and other resources.[4]

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[3] *See King v. Fleming*, 899 F.3d 1140, 1150 (10th Cir. 2018) (noting the Tenth Circuit has used the five *Ehrenhaus* factors in determining the propriety of dismissal as a sanction in a variety of circumstances, including under Rule 41(b)).

[4] For example, Plaintiff attempted to take three interlocutory appeals to the Tenth Circuit during this lawsuit, all of which were dismissed by the Tenth Circuit as premature and unripe. (*See* ECF 37, 80, 123.)

His latest obstructive tactic—refusing to sit for a properly noticed deposition or to coordinate with Defense Counsel to schedule his deposition for an agreed-upon time—is simply another improper and prejudicial action. Plaintiff sued Defendants, and with that lawsuit comes the legally-recognized obligation to make himself available for a deposition. *See Paul v. Wyoming Auto Invs.*, LLC, No. 19-CV-251-J, 2021 WL 7208907, at *2 (D. Wyo. Apr. 30, 2021) ("It is the general rule that a plaintiff must make themselves available for deposition in the district where they brought suit."); *Yomi v. Becerra*, No. 21-2224-DDC, 2022 WL 579264, at *1 (D. Kan. Feb. 25, 2022) (same), *review denied*, No. 21-2224-DDC-ADM, 2022 WL 1102657 (D. Kan. Apr. 13, 2022). Plaintiff's refusal to submit to a deposition before the discovery deadline is just the latest example of him incorrectly believing he is not bound by the law and rules of procedure. And it has continued to cause actual prejudice to Defendants because they were unable to depose him prior to the discovery deadline.

2. **Amount of Interference with Judicial Process**

As the magistrate court already determined before Plaintiff refused to attend his own deposition, "Plaintiff's actions and inactions have also severely interfered with the judicial process." (ECF 131 p. 8.) His recent refusal to make himself available for a deposition has continued his multi-year pattern of interfering with the judicial process without justification.

3. **Culpability of the Defendant**

Plaintiff's various failures and refusals are his own doing. The magistrate judge accurately found that "Plaintiff has shown a repeated pattern of refusing to participate with defense counsel and ignoring Court hearings and deadlines." (ECF 131 p. 9.) Plaintiff's recent refusal to participate in a telephone call with Defense Counsel to schedule a deposition convenient for all parties and then his refusal to attend his properly noticed deposition are just his latest willful and

wrongful actions. Plaintiff is culpable for the delay in this case and for failing to appropriately engage in the litigation process.

4. **Prior Warning that Dismissal Would Be Likely Sanction For Future Misconduct**

In the prior sanctions order, the magistrate judge noted that "Plaintiff has been warned on multiple occasions that failure to participate in discovery and comply with Court orders would result in the dismissal of his case" and recounted those earlier warnings. (ECF 131 pp. 9-10.) And after deciding not to impose dismissal as a sanction, the magistrate judge again warned Plaintiff that continued deficiencies and refusals would not be tolerated: "Plaintiff is again cautioned that any future delays, failures to participate in the litigation of this action, failures to participate in discovery, or meet a Court imposed deadline will likely result in the dismissal of the action." (ECF 131 pp. 12-13.) And only a few months later, Plaintiff declined to participate in a telephone call with Defense Counsel to schedule a deposition and then refused to attend his properly noticed deposition. That is, he willfully refused to participate in the litigation of this action and willfully refused to participate in discovery. His latest failures further prejudiced Defendants by precluding them from completing discovery, including taking his deposition, before the court-imposed discovery deadline expired.

5. **Efficacy of Sanction Short of Dismissal**

This is the point where the undersigned trial judge deviates from the magistrate judge's prior order of sanctions. The magistrate judge found that "Plaintiff has ignored multiple communications from defense counsel, has refused to cooperate in the discovery process, has ignored this Court's imposed discovery deadlines, and failed to appear for multiple court hearings without cause." (ECF 131 p. 11.) Nevertheless, the magistrate judge exercised his discretion and generously determined a sanction short of dismissal would likely serve to remedy Plaintiff's

failures and correct his future conduct. It didn't. Instead, Plaintiff continued to behave by his own rules and unilaterally decided he would not allow Defendants to depose him, despite their legal right to do so and his legal obligation to submit to a deposition. The Court finds Plaintiff has proven that a sanction short of dismissal will not correct his abusive misconduct or convince him to comply with his legal obligations.[5]

Plaintiff's willful refusals and non-compliance outweigh the judicial system's strong predisposition to resolve cases on their merits. *See Murray v. Archambo*, 132 F.3d 609, 611 (10th Cir. 1998). Indeed, Plaintiff's own actions demonstrate he is not interested in resolving his claims on their merits, and the Court will not abide Plaintiff's use of the judicial system as a tool of harassment. The Court finds dismissal of this lawsuit is the only reasonable sanction remaining for Plaintiff's failures and refusals to participate in the proper litigation of his case.

IT IS THEREFORE ORDERED that Defendants' Renewed Motion to Dismiss (ECF 142) is **GRANTED**. Plaintiff's lawsuit is hereby **DISMISSED WITH PREJUDICE** under Fed. R. Civ. P. 41(b) as a sanction for Plaintiff's many and continued failures and refusals to prosecute this case and comply with the rules of procedure and court orders.

IT IS FURTHER ORDERED that Plaintiff's pending motions (ECF 140, 141) are **DENIED AS MOOT**.

The Clerk of Court will please enter a general judgment in Defendants' favor and close the merits proceedings of this case.

DATED: November 1st, 2023.

Scott W. Skavdahl
United States District Judge

[5] The Court finds this without factoring in Plaintiff's utterly improper ad hominem attacks against Defendants and Defense Counsel, such as calling them "dolts," "liars," and "cheats." (*See* ECF 149 p. 3.)

United States District Court

For The District of Wyoming

AUSTIN R. CARTER, Plaintiff, vs. GENESIS ALKALI, LLC, GENESIS ENERGY L.P., CODY J. PARKER, KRISTEN O. JESULAITIS, AND TERRY HARDING, Defendants.	Civil No. 20-CV-216-S

ORDER MOOTING THE IMPOSITION OF COSTS AND FEES

This matter came before the Court on Defendants' Motion to Show Cause why Plaintiff's case should not be dismissed for failure to prosecute [ECF No. 100], Defendants' Motion for Sanctions [ECF No. 101], and Defendants' Renewed Motion to Dismiss and for Sanctions [ECF No. 128]. The Court granted Defendants' Motion to Show Cause and ordered Plaintiff to appear to show cause why his case should not be dismissed for failure to prosecute and for failure to obey Court orders. On February 23, 2023, the Court conducted an in-person hearing on Defendants' Motions for Sanctions. After careful consideration of the briefing and arguments made during the hearing, the Court found Plaintiff failed to show good cause or offer any real justification for his failure to participate in discovery, failure to confer with defense counsel, failure to obey Court orders, and failure to appear for hearings. [ECF No. 131].

C

The Court declined to impose the ultimate sanction of dismissal of Plaintiff's action but did find the imposition of lessor sanctions appropriate. The Court ordered Plaintiff to pay Defendants reasonable costs and fees incurred in addressing Plaintiff's discovery deficiencies. Defendants submitted a Bill of Costs on April 28, 2023, [ECF No. 134], and Plaintiff filed a response in opposition on May 18, 2023 [ECF No. 138]. Defendants provided a detailed and extensive Bill of Costs that includes the time and resources expended by Defendants in litigating this action from July 11, 2022, to March 31, 2023. In total, Defendants seek fees and costs in the amount of $41, 852.11.

On August 10, 2023, Defendants filed a Renewed Motion to Dismiss. [ECF No. 142]. On November 1, 2023, the Court granted the Renewed Motion to Dismiss finding dismissal of Plaintiff's action is the only reasonable sanction remaining for Plaintiff's continued willful refusal to participate in the litigation. [ECF No. 155]. Defendants' first Motion for Sanctions [ECF No. 101] filed on September 28, 2022, sought $6,500 in costs and fees for the resources expended in addressing Plaintiff's discovery failures. Since that time, this case has proceeded along varies avenues that include numerous appeals to the trial Court, the Tenth Circuit, and even the United States Supreme Court. While most of the costs incurred and included in Defendants' Bill of Cost are at least arguably related to discovery issues, the Court will not require Plaintiff to cover the proffered fees after the imposition of the ultimate sanction. The issues in this case have expanded exponentially and given the factors at play it is not reasonable to hold Plaintiff responsible to pay costs and fees.

Consequently, the previous sanction of attorney's fees and costs is mooted by the imposition of the ultimate sanction of dismissal of Plaintiff's action.

NOW, THEREFORE, IT IS ORDERED the Court's previous imposition of fees and costs is denied as moot.

Dated this 14th day of November, 2023.

Kelly H. Rankin
U.S. Magistrate Judge

FILED
United States Court of Appeal
Tenth Circuit

December 23, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AUSTIN ROGER CARTER,

Plaintiff - Appellant,

v.

GENESIS ALKALI LLC, et al.,

Defendants - Appellees.

No. 23-8079
(D.C. No. 2:20-CV-00216-SWS)
(D. Wyo.)

ORDER

Before **HOLMES**, Chief Judge, **HARTZ**, and **ROSSMAN**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

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