

**UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

PATRICIA M. SKELLY,

Plaintiff,

v.

Case No. 3:08cv428/MCR/CJK

**OKALOOSA COUNTY, FLORIDA
BOARD OF COUNTY COMMISSIONERS,
in its official capacity; NOLAN HAYNES,
in his individual capacity; DENNIS FIELDS,
in his individual capacity,**

Defendants.

ORDER

Pending before the court is the defendants' motion to strike the pleadings and for dismissal of the complaint as a sanction for the plaintiff's failure to comply with court orders (doc. 231). The plaintiff was required to respond to the motion by Friday, February 22, 2013. A jury trial is scheduled to begin this Monday, February 25, 2013. Having fully reviewed the matter, the court finds that the plaintiff has engaged in a willful pattern of delay and that no sanction less than dismissal will suffice; therefore, defendants' motion will be granted.

Background

This case was filed in September 2008. The defendants moved for summary judgment, which was granted; however, the order was reversed following the plaintiff's interlocutory appeal. *Skelly v. Okaloosa County Bd. of County Com'rs.*, 415 Fed. Appx. 153 (11th Cir. 2011). On remand, this court denied the motion for summary judgment, and the defendants took an interlocutory appeal. The Eleventh Circuit affirmed the denial of summary judgment, *see Skelly v. Okaloosa County Bd. of County Com'rs.*, 456 Fed. Appx. 845 (11th Cir. 2012), and by order dated March 30, 2012, the case was scheduled for trial

on November 26, 2012. Plaintiff's counsel withdrew in May 2012. On June 8, 2012, Skelly notified the court that she intended to proceed *pro se* and to continue searching for replacement counsel.

On June 27, 2012, the court entered a pretrial order in advance of the November 26 trial date, requiring, in part, that the plaintiff provide a pretrial narrative and related exhibit and witness lists by August 24, 2012, with the defendants to file their pretrial narrative and related papers by September 24, 2012, and that the parties confer prior to October 12, 2012, and submit a joint pretrial stipulation by November 2, 2012.¹ (Doc. 199). Three times Skelly waited until the day of the deadline for providing the pretrial narrative and related lists and then filed a motion to extend the deadline. For each extension, she represented that she was actively trying to obtain counsel; twice she stated that recent health issues also had delayed her efforts; and once she represented that she was in the immediate process of retaining an attorney. Three times the court granted her request for an enlargement of time, each of which required a corresponding extension of time for the defendants to comply. Each time, the court granted the extension but clearly stated that the trial date of November 26, 2012, was firm and no continuance would be granted to allow newly retained counsel time to prepare. By the last extension in September, Skelly had already had four months to locate new counsel since her prior counsel withdrew. In granting the third extension of time, the court stated that if the plaintiff, whether represented by counsel or not, failed to comply with the deadline imposed, the case would be dismissed for failure to prosecute and failure to comply with a court order. (Doc. 208). Skelly finally complied on October 5, 2012, providing a pretrial narrative statement and witness and exhibit lists. Because the trial date by then was fast approaching, the defendants had only seven days to file their pretrial narrative and witness and exhibit lists.²

¹ The pretrial order carefully explained for the benefit of the *pro se* plaintiff the reason why this communication and the jointly prepared pretrial stipulation are important.

² Under the original pretrial order, they had thirty days to respond after the date the plaintiff's pretrial narrative and papers were due.

To comply with the pretrial order requiring the parties to confer by October 12, 2012, the defendants attempted to communicate with Skelly by phone and sent her at least three letters. Although the joint pretrial stipulation was due by November 2, 2012, pursuant to the pretrial order, Skelly failed to communicate with them. On November 2, 2012, defendants notified the court that Skelly had failed to confer or participate in the preparation of the joint pretrial stipulation. On November 6, 2012, the court received proof that Skelly had been admitted into a medical facility on November 1, 2012, and was undergoing medical treatment. Her physician notified the court that she was presently under his care and treatment and would be unable to proceed with a trial for three months.

To accommodate her medical condition, the court continued the trial to February 25, 2013. (Doc. 222). The court directed Skelly to notify the court promptly, and in no event later than January 7, 2013, of her release from medical confinement or her status and whether she intended to proceed to trial as scheduled. If able to proceed, Skelly would be required to respond to pending motions *in limine* by February 8, 2013; confer with defense counsel by February 6 and jointly prepare a pretrial stipulation by February 13, 2013; and participate in a telephone pretrial conference on February 15, 2013. The defendants were instructed to notify the court promptly if the plaintiff failed to communicate or confer with them as directed by the court order, and the plaintiff was cautioned that “absent extreme circumstances, failure to comply with the requirements of this order may result in dismissal of this cause for failure to comply with an order of the court and failure to prosecute.” (Doc. 222). Pursuant to this order, Skelly notified the court in early January that she intended to proceed with trial as scheduled on February 25. Thus, the parties proceeded under the deadlines set forth in the pretrial order (doc. 222), and the court referred this matter to the magistrate judge for a settlement conference.³

On February 7, 2013, the defendants filed a notice informing the court that the plaintiff had not complied with the requirement to confer with defense counsel by February 6. Defendants sent Skelly three letters, attempting to contact her and obtain a response

³ The settlement conference took place on February 14, 2013, but ended in an impasse.

so they could schedule a time to confer, but Skelly failed to respond. On February 8, 2013, the court entered an order requiring Skelly to be prepared at the pretrial conference to show cause why she should not be sanctioned or her case dismissed for her failure to confer with defense counsel, as directed in the pretrial order. On February 14, 2013, the court received a written response from Skelly, asserting that on January 25, 2013, she had attempted to contact defense counsel by telephone, and had in fact spoken with him, but she stated defense counsel did not mention any pretrial stipulation.⁴ (Doc. 238). During the telephonic pretrial conference held on February 15, 2013, Skelly stated she was informed of everything in her case and wanted to proceed, but she offered no explanation for her failure to confer with defense counsel or assist in the preparation of the court-ordered joint pretrial stipulation; nor did she explain her failure to respond to the defense attorneys' repeated letters.⁵ Skelly did not mention the January 25th telephone conversation with defense counsel during the pretrial conference, but it is clear from her written response that the pretrial stipulation was not discussed during that conversation.

Defendants request a sanction of striking the pleadings and dismissing the case for the plaintiff's repeated failures to comply with court orders. They argue that Skelly made no attempt to contact them regarding complying with the court's orders to confer and prepare a joint pretrial stipulation, despite their efforts to reach her through several letters, and that she also failed to respond or request an extension of time to comply even after they had filed notice of her noncompliance on February 7, 2013. The defendants also argue that, without any meaningful participation by Skelly, they have been unable to adequately or efficiently prepare for trial and dismissal therefore is appropriate.

⁴ Skelly also filed a motion to continue the trial on grounds that she had found an attorney who would represent her if she obtained a continuance. She additionally represented to the court that she needed a short continuance because of her emotional and physical condition and submitted a letter from her physician stating that a short continuance would be prudent; however, she did not submit any medical records and there was no indication that she was presently suffering from any particular physical or mental infirmity or that any medical restrictions had been imposed on her. The court thus denied the motion to continue (doc. 242).

⁵ Skelly informed the court at the hearing that her address had changed. There is no indication when the change of address occurred, but the first notice she gave of the change was at the pretrial conference. And there was no indication that she failed to receive defense counsel's correspondence.

Because this motion initially was sent to Skelly at her former address, the court required the defendants to re-send it by overnight mail to Skelly's current address, which they did (see doc. 235), and gave Skelly until Friday, February 22, 2013, to respond. The court then learned that Skelly had not served the defendants with her motion to continue and required her to send it to them by overnight mail. The court also gave Skelly a final opportunity to confer with counsel for the defendants and assist in the preparation of a joint pretrial stipulation by Friday, February 22, 2013, the last business day before trial was to commence. (Doc. 236).

The court has now received notice from the defendants that Skelly failed to serve them with all papers she filed with the court as her motion to continue (doc. 243) and that she failed to confer for the preparation of a joint pretrial stipulation, as ordered by the court (doc. 244). Defense counsel states that Skelly has routinely failed to serve defendants with copies of her filings. Also, subsequent to the pretrial conference, the parties mutually scheduled a time to confer telephonically on Wednesday, February 20, at 1:00 p.m., attempting to comply with the court's most recent order (doc. 236). However, Skelly unilaterally cancelled the call 10 minutes prior to the scheduled time, indicating she was suffering from a migraine headache and could not participate. They rescheduled for 1:00 the next day, Thursday, February 21, 2013, but mutually agreed to reschedule the conference for 10:00 a.m. to increase their chance of timely filing a pretrial stipulation on Friday, February 22, 2013, as ordered. Skelly called at 9:45 a.m. on Thursday, indicating the conference needed to be rescheduled late in the afternoon because she was "not mentally capable of proceeding forward with it right now," and they rescheduled the conference for 2:00 p.m. Skelly did not call at the scheduled time. Defense counsel and staff called her twice and received no answer. Shortly thereafter, defense counsel received a call from a woman claiming to be Skelly's sister. She informed counsel that Skelly would not participate in the conference call because "she had to admit herself to a local Tampa Bay area hospital emergency room because of alleged migraines and 'heartache'." When

asked which hospital, the sister claimed she had no idea.⁶

Skelly has not responded to the motion for sanctions and has not conferred with defense counsel or aided in the preparation of a joint pretrial stipulation as ordered.

Discussion

A *pro se* party is not excused from complying with court orders and the relevant rules of substantive law and procedure. See *Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir.) ("If a *pro se* litigant ignores a discovery order, he is and should be subject to sanctions like any other litigant."), *cert. denied*, 493 U.S. 863 (1989). The Federal Rules of Civil Procedure permit the court to impose sanctions against any party who fails to appear at a scheduling or other pretrial conference, is substantially unprepared to participate in a conference, or fails to obey a scheduling or other pretrial order. See Fed. R. Civ. P. 16(f)(1). Additionally, the court must order the party to pay the reasonable expenses, including attorney's fees, incurred because of any noncompliance, unless the noncompliance was substantially justified. See Fed. R. Civ. P. 16(f)(2). Sanctions may consist of those authorized by Rule 37(b)(2)(A)(ii)-(vii), which includes striking pleadings or dismissing the action in whole or in part. Rule 41(b) also provides that a defendant may move to dismiss an action or claim for the plaintiff's failure to prosecute or to comply with the rules or any court order. Fed. R. Civ. P. 41(b); see also *Betty K. Agencies, Ltd. v. M/V Monada*, 432 F.3d 1333, 1337 (11th Cir. 2005). Furthermore, the court has the inherent power to control its docket and the proceedings before it and to impose "reasonable and appropriate sanctions," including dismissal, for conduct demonstrating bad faith. *Martin v. Automobili Lamborghini Exclusive, Inc.* 307 F.3d 1332, 1335 (11th Cir. 2002); *Betty K. Agencies*, 432 F.3d at 1337. The Eleventh Circuit has explained that dismissal with prejudice – whether under the Rules or the court's inherent authority – "is an extreme sanction that may be properly imposed *only* when: (1) a party engages in a clear pattern

⁶ Although Skelly had until today to respond to the motion to dismiss, given her sister's comments as well as her conduct throughout the course of these proceedings, it appears highly unlikely that Skelly will respond to the motion before trial. Even if she did, there is insufficient time for the parties to confer on a joint pretrial stipulation and meaningfully prepare for trial given that it is now past noon on Friday and this trial is scheduled to commence Monday morning.

of delay or willful contempt (contumacious conduct); and (2) the district court specifically finds that lesser sanctions would not suffice.” *Betty K. Agencies*, 432 F.3d at 1337-38 (internal marks omitted). The district court must make findings on both prongs of this analysis before dismissing a complaint with prejudice. *Id.* at 1339.

Defendants cite several cases in which district courts have not hesitated to strike pleadings and dismiss cases or enter a default due to a *pro se* party’s failure to comply with court orders. (See doc. 231, at 8, citing cases). These cases generally involve a party who failed to appear at a pretrial conference, mediation, show cause hearing, or trial; who engaged in willful disregard of the court’s scheduling orders through a pattern of noncompliance; who ignored orders to show cause; or some combination of these factors. See, e.g., *Farris v. United Hoist Equipment, Inc.*, 2008 WL 5381902 (M.D. Fla. Dec.23, 2008); *Glanzrock v. Patriot Roofing Indus., Inc.*, 2008 WL 3833950 (M.D. Fla. Aug.15, 2008); *Varela v. Innovative Wiring Solutions, LLC*, 2008 WL 2700053 (M.D. Fla. Jul.9, 2008); *Coley v. Resort Mgmt. Servs., Inc.*, 2008 WL 341428 (M.D. Fla. Feb.5, 2008). In one case, the district court struck an answer and directed the entry of default against a *pro se* plaintiff for failing to confer and aid in the preparation of the joint pretrial statement, without more. See *Loos v. Club Paris, LLC*, 2009 WL 1458040 (M.D. Fla. 2009) (rejecting *pro se* defendant’s apologies for not knowing the local rules as good cause and finding that the plaintiff could not adequately prepare for trial without meaningful participation by the defendant). Similarly, in *Varela*, a district court found that the *pro se* litigant’s failure on multiple occasions to obey court orders and refusal to respond to opposing counsel’s efforts to “ready the case for trial as ordered” justified striking the pleadings where the case was scheduled for trial in less than two months. 2008 WL 2700053, at *2. Here, as in *Loos* and *Varela*, on which the defendants rely, Skelly has refused to respond to the defendants’ repeated requests to confer and has willfully disregarded the court’s deadlines for both the date to confer and the date to submit the joint pretrial stipulations. See *Loos*, 2009 WL 1458040, at *3 (striking an answer where trial was scheduled to begin in less than a month and “without meaningful participation by the Defendant, the Plaintiff will be unable to adequately prepare for trial,” which was scheduled to begin in less than one

month); *Varela*, 2008 WL 2700053, at *2 (striking an answer where the defendant refused to obey the court's orders or respond to a show cause order, failed to participate in scheduling mediation and the joint pretrial statement and trial was scheduled in less than two months). Skelly has made no attempt to confer and aid in preparing the pretrial stipulation, as ordered by the court, even after the defendants notified the court on February 7 of her failure to comply; although the pretrial stipulation was not due until February 13, she made no effort to comply or seek an extension of time. The court has patiently explained the need for these requirements to Skelly both in the pretrial order and in the pretrial conference, has given her extensions to comply, and has accommodated her hospitalization by continuing the first trial date. She was plainly warned on multiple occasions that her failure to comply with the court's orders would result in dismissal. Also, Skelly appeared by telephone at the pretrial conference on February 15 and the settlement conference on February 14 and participated in a coherent and capable manner. She clearly had the capacity to respond, confer, and participate in preparing the joint pretrial stipulation within the deadlines established in the pretrial order (doc. 222), and she has offered the court no excuse, much less good cause, for her noncompliance.⁷

Furthermore, the plaintiff's conduct throughout these proceedings has demonstrated a willful pattern of delay. After her attorney withdrew in May 2012, she repeatedly used her purported attempts to retain counsel to gain extensions of time to submit her pretrial narrative and witness lists pursuant to the first pretrial order (doc. 199), each time waiting until the last day of the court-imposed deadline to file a motion for extension of the time. She persuaded the court that she had been diligently attempting to locate counsel and was in the process of securing a particular attorney when, in fact, she never retained counsel. In January 2013, the plaintiff represented to the court that she was ready to proceed to trial; she then failed to comply with the court's deadline to confer with the defendants and aid in preparation of the joint pretrial stipulations. Now, after receiving yet another

⁷ Skelly made no response to the show cause order during the pretrial conference regarding her failure to confer, and her written response was not sufficient, stating only that she had spoken with defense counsel but not about the pretrial stipulation.

extension of time, the court has been informed that the plaintiff has again failed to confer with the defendants, as ordered. The court also notes that the plaintiff has repeatedly purported to suffer from debilitating mental and/or physical infirmities when action has been required of her. The timing of her alleged illnesses, which apparently have their onset approximately 10 or 15 minutes before each scheduled time to confer, is suspect, at best.⁸ All of these factors cause the court to conclude that Skelly's failure to comply is a willful attempt to delay these proceedings further. The plaintiff's pattern of willful delay and failure to timely comply with the court's November 2012 pretrial order and the more recent pretrial order (doc. 236) has placed the defendants in the untenable position of having to proceed to trial on Monday without the benefit of conferring with the plaintiff or jointly preparing a pretrial stipulation. The court finds that, at this late stage of the proceedings, no lesser sanction than dismissal will suffice.

Accordingly, the defendants' motion to strike the pleadings and dismiss the cause of action (doc. 231) is GRANTED. The case is dismissed with prejudice, and with costs taxed against the plaintiff. The Clerk is directed to close the file.

DONE AND ORDERED this 22nd day of February, 2013.

s/ M. Casey Rodgers

M. CASEY RODGERS
CHIEF UNITED STATES DISTRICT JUDGE

⁸ The court denied the plaintiff's motion to continue on Monday, February 18, 2013, and her migraines and heart pain appear to have flared up 10 minutes prior to the scheduled time for conferring with defense counsel on Wednesday and 15 minutes prior to the time for the conference on Thursday.