

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

ELIYAHU MIRLIS,

Plaintiff,

v.

SARAH GREER,

Defendant.

No. 3:18cv2082(MPS)

ORDER IMPOSING DISCOVERY SANCTIONS

Plaintiff Eliyahu Mirlis (“Plaintiff”) commenced this action against the defendant Sarah Greer (“Defendant”) to recover funds that he alleges were fraudulently transferred to the defendant to avoid paying the judgment entered against her husband, Daniel Greer, and the Yeshiva of New Haven. *See Mirlis v. Greer*, 3:16cv678(MPS). In response to her persistent noncompliance with the Court's discovery orders, the plaintiff sought sanctions (ECF No. 99) and the Court ordered the defendant to show cause why default should not enter against her. (ECF No. 100.) The defendant failed to respond to that order. For the reasons set forth herein, default is entered as to the defendant as to liability.

I. Background

In May 2019, the plaintiff served discovery requests seeking the defendant's financial information, including her bank accounts, retirement account, and household expenses. The defendant did not respond. The plaintiff moved to compel and on August 26, 2019, the court granted the plaintiff's motion to compel and ordered the defendant to comply within 14 days. (ECF No. 69.) Still the defendant did not respond. On September 17, 2019, the plaintiff filed a motion for sanctions seeking compliance with the discovery requests, an award of sanctions pursuant to

Fed. R. Civ. P. 37, and a warning that the defendant's further noncompliance may result in a default judgment and/or contempt sanctions. (ECF No. 77.) On October 2, 2019, the Court granted the motion and again ordered the defendant "to respond in full to the outstanding discovery requests." (ECF No. 83.) The Court also ordered the defendant to pay the plaintiff's attorney's fees relating to the motion for sanctions and to file an affidavit setting forth with specificity the steps that she had taken to comply with the plaintiff's discovery requests. (ECF No. 83 at 4, ECF No. 89 ordering defendant pay to the plaintiff, by check or money order made payable to plaintiff's counsel as trustee, the amount of \$2,512.50.) As a final measure, the Court warned the defendant that "[f]ailure to comply with this order may result in a default judgment or additional sanctions, including an order of contempt imposing a fine for every day of continued noncompliance."

When the defendant finally did serve responses to the production requests, her response was "I do not have any" and that the documents might be with her attorney or her bank. *See* ECF No. 92-1 at 3-4. In response, on November 26, 2019, the plaintiff filed a second motion for sanctions indicating that the defendant had neither produced the discovery nor paid the sanctions award. (ECF No. 91.) As relief, the plaintiff sought an award of attorney's fees and entry of default judgment. The defendant did not file a response to the motion. On January 6, 2020, the Court granted the motion in part, finding that some, if not all, of the requested documents were in the defendant's possession, custody, or control, Fed. R. Civ. P. 34(a)(1), but that she had disregarded her obligation to obtain and produce them. (ECF No. 93.) The Court ordered the defendant to show cause within 14 days "why default should not enter such that liability is established and the plaintiff need only prove damages upon applying for default judgment." (ECF No. 93 at 2.) The Court further stated that the defendant could "satisfy th[e] order to Show Cause by obtaining and fully producing the records within 14 days of this Order and filing on the docket an affidavit

averring, under oath, that she had done so." (ECF No. 93 at 2.) Finally, the Court warned that "[f]ailure to respond to this Order will result in the entry of default." (ECF No. 93 at 2.) The defendant did not respond.

Thereafter, the Court stayed further proceedings pending a ruling by the Court of Appeals in the underlying case. (ECF No. 98.) The Court stated that "[s]hould the Court of Appeals uphold the judgment, in whole or in part, the Court will set a new schedule at that time and also consider whether to enter a default against the defendant." (ECF No. 98.)

On March 3, 2020, the Court of Appeals affirmed the judgment in the underlying case, *Mirlis v. Greer*, 952 F.3d 36 (2d Cir. 2020), and the plaintiff filed a motion (ECF No. 99) requesting that the Court grant the relief sought in plaintiff's second sanctions motion (ECF No. 93) of monetary sanctions and entry of default as to liability. On April 22, 2020, the Court entered the following order:

In light of the Second Circuit's affirmance of the underlying judgment, in light of the Plaintiff's motion (ECF No. 99), and in light of the history of the defendant's noncompliance with court orders in this case, the defendant shall, within 14 days of this order, show cause why this court should not enter a default against her.

(ECF No. 100.) The defendant did not respond.

II. Legal Standard

Federal Rule of Civil Procedure 37(b)(2) provides that a court may impose sanctions against a party that "fails to obey an order to provide or permit discovery." *Salahuddin v. Harris*, 782 F.2d 1127, 1132-33 (2d Cir. 1986). Rule 37 provides in part that if a party "fails to obey an order to provide . . . discovery, . . . the court where the action is pending may issue further just orders," including

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(A). The decision to impose sanctions under Rule 37 “is committed to the sound discretion of the district court.” *Luft v. Crown Publishers, Inc.*, 906 F.2d 862, 865 (2d Cir. 1990). “[D]ismissal or default imposed pursuant to Rule 37 is a ‘drastic remedy.’” *S. New England Tel. Co. v. Glob. NAPS Inc.*, 624 F.3d 123, 144 (2d Cir. 2010). “Despite the harshness of these measures, however, “discovery orders are meant to be followed, . . . and dismissal or default is justified if the district court finds that the failure to comply with discovery orders was due to willfulness, bad faith, or any fault of the party sanctioned.” *Id.* (internal quotation marks and citations omitted).

In imposing sanctions under Rule 37, a court may consider various factors, including: “(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance; and (4) whether the non-compliant party had been warned of the consequences of noncompliance.” *Funk v. Belneftekhim*, 861 F.3d 354, 366 (2d Cir. 2017) (internal quotation marks and citation omitted). “[T]hese factors are not exclusive, and they need not each be resolved against the party challenging the district court’s sanctions for [the Court of Appeals] to conclude that those sanctions were within the court’s discretion.” *Glob. NAPS Inc.*, 624 F.3d at 144.

III. Discussion

After due consideration of these factors in this matter, the Court finds that default should be entered against the defendant as to liability.

1. *Willfulness*

The defendant acted willfully by repeatedly failing to respond to a series of Court orders requiring the production of documents. In August 2019 (ECF No. 69), October 2019 (ECF No. 83), and again in January 2020 (ECF No. 93), the Court ordered the defendant to comply with the discovery requests that the plaintiff propounded in May 2019. In response to the Court's October 2, 2019 order, the defendant disingenuously responded that she did not have the requested documents in her possession, even though the requested documents included her bank statements and retirement account information. In January and again in April 2020, the Court ordered the defendant to show cause why default should not enter for her failure to comply. Still the plaintiff failed to respond. In view of the defendant's deliberate and persistent violation of the Court's orders, this factor weighs in favor of finding default an appropriate sanction.

2. *Lesser Sanctions Would Be Ineffective*

This factor also weighs in favor of finding default appropriate. As indicated, the Court previously imposed monetary sanctions against the defendant for failure to comply with the Court's order. *See* ECF Nos. 83, 89. Based on the sanctions that have already been imposed in this case, as well as the repeated warnings of case-ending sanctions, *see infra*, lesser sanctions would not be effective. The defendant's conduct makes clear that she will not comply with the Court's discovery orders, rendering any sanction short of default judgment “an exercise in futility.” *Urbont v. Sony Music Entm't*, No. 11CV4516(NRB), 2014 WL 6433347, at *3 (S.D.N.Y. Nov. 6, 2014); *see also Chowdhury v. Hamza Exp. Food Corp.*, 308 F.R.D. 74, 83 (E.D.N.Y. 2015) (finding lesser sanction than default would not be efficacious where defendants failed to satisfy their court-ordered discovery obligations despite previous sanctions for non-compliance).

3. *Duration of Non-Compliance*

The plaintiff served the discovery requests in May 2019. Following the defendant's failure to respond to the plaintiff's discovery requests, the Court granted the plaintiff's motion to compel in August 2019. (ECF No. 69.) Since that time, the Court granted two motions for sanctions. (ECF Nos. 83, 93.) In April 2020, the Court issued an Order to Show Cause, affording the plaintiff a final opportunity to comply before the imposition of sanctions. (ECF No. 98.) The defendant's noncompliance spanned six months, which is more than sufficient to warrant default judgment. *See Local Union No. 40 of the Int'l Ass'n of Bridge v. Car-Wi Const.*, 88 F. Supp. 3d 250, 265 (S.D.N.Y. 2015) ("durations of time as brief as a few months have been held to weigh in favor of dispositive sanctions . . . [a]nd periods of six months or more weigh even more heavily toward such remedies") (collecting cases).

4. *The Defendant Was Warned*

The defendant received ample warning of the possible sanction of default judgment. Starting in October 2019, the defendant was notified that failure to comply with the Court's order "may result in a default judgment or additional sanctions, including an order of contempt imposing a fine for every day of continued noncompliance." (ECF No. 83.) In January 2020, the Court again warned her that her noncompliance would result in the entry of default "such that liability is established and the plaintiff need only prove damages upon applying for default judgment." (ECF No. 93 at 2.) Furthermore, on January 28, 2020, the Court stated that upon re-opening the case, "the Court will consider whether to enter default" (ECF No. 95.) Finally, on April 8, 2020, the plaintiff requested that the Court adjudicate his prior request for entry of default as to liability and an award of monetary sanctions as requested in his second sanctions motion. (ECF No. 99.) The Court issued an order to show cause ordering the defendant to "show cause why this court

should not enter a default against her." (ECF No. 100.) In view of the record of explicit warnings that default would enter, the defendant had ample notice. This final factor also weighs in favor of finding default judgment appropriate.

For these reasons, the defendant's noncompliance warrants the imposition of the sanction of default pursuant to Rule 37(b)(2)(iv). Liability having been established, the plaintiff may, within 30 days of this order, file a motion for default judgment as to damages, together with evidence, including affidavits and other documentary evidence, that will allow the Court to calculate damages with reasonable certainty.

IT IS SO ORDERED.

Dated: Hartford, Connecticut
June 2, 2020

_____/s/_____
Michael P. Shea, U.S.D.J.