IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

NORTH 4TH STREET, LLC,	:	
Plaintiff	:	**NO. CV-18-0689**
	:	
vs.	:	
	:	
PETER L. STANISH,	:	**CIVIL ACTION – LAW**
LAURA COOPER,	:	
and 338 MADISON AVENUE,	:	
LLC,	:	**MOTION FOR SUMMARY JUDGMENT**
Defendants	:	

OPINION

I. Factual and Procedural Background

This case arises out of Defendants' alleged breach by the way of default of an Installment Sales Agreement. The Complaint was filed on May 15, 2018 and Defendants' Answer to the Complaint with New Matter was filed on April 22, 2019. Plaintiff served interrogatories and a request for production of documents on the Defendants on November 4, 2019, both of which went unanswered. On February 3, 2020, Plaintiff filed a Motion to Compel Defendants' discovery responses and, as a result, this Court issued an Order on February 6, 2020 directing all Defendants to file and serve verified responses within thirty (30) days. If any of the Defendants so fail, then that Defendant "shall be precluded from offering any evidence that contradicts the allegations of the Plaintiff's Complaint, both at trial and under any dispositive motions filed by Plaintiff." *See February 6, 2020 Order.* Defendants do not dispute that they have failed to respond to Plaintiff's discovery. For these reasons and based upon the Court's prior Order, Plaintiff now files a Motion for Summary Judgment to which the

Defendants responded on May 11, 2020. Oral argument was held on May 22, 2020.

II. Arguments

Plaintiff argues that, since the Court had the discretion, pursuant to Pa.R.C.P. 4019(a)(1), to impose sanctions as it did in the February 6th Order, this Court should now grant it summary judgment. Defendants respond to Plaintiff's motion with the argument that, despite their counsel being copied, they never received the Court's Order directing them to comply with Plaintiff's discovery requests. When Plaintiff filed its Motion to Compel discovery, its Counsel sent a cover letter to Defendants' Counsel stating that he will forward the Court's Rule to Show Cause once it is issued. However, since the Court did not issue a Rule to Show Cause, Defendants never received one and allegedly never received the Order that the Court did issue. Defendants further argue that, even if they had received the Court's Order, the proper procedure would have been to file a Motion for Sanctions, not a Motion for Summary Judgment. Defendants state that, even if summary judgment is a proper sanction, Plaintiff still cannot be entitled to summary judgment as a matter of law because of the rule against the exclusive use of oral testimony as set forth in N*anty-Glo Borough v. Am. Surety Co.*, 163 A. 523 (Pa. 1932). Finally, Defendants point out in their response that there is a case pending in Berks County involving the same parties and ask for either a transfer of this case from Lycoming to Berks or a determination of a motion based on forum non-conveniens.

III. Discussion

Plaintiff is correct that the trial court has the discretion to impose sanctions when a party fails to serve answers to interrogatories, fails to respond to a request for production of documents, or otherwise fails to obey a court order respecting discovery. Pa.R.C.P. 4019(a)(1)(i), (vii), and (viii). Specifically, Pa.R.C.P. 4019 states, in pertinent part, "The court . . . may make an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or entering a judgment of non pros or by default against the disobedient party or party advising the disobedience." Pa.R.C.P. 4019(c)(3).

In making these determinations, the Court is required to "strike a balance" between prompt disposition and substantive rights of the parties. *Miller Oral Surgery, Inc. v. Dinello*, 611 A.2d 232, 234 (Pa. Super. 1992). The sanction imposed by the Court "must be appropriate when compared to the violation of the discovery rules." *Steinfurth v. LaManna*, 590 A.2d 1286, 1288 (Pa. Super. 1991), *citing Pride Contracting, Inc. v. Biehn Construction, Inc.,* 553 A.2d 82 (Pa. Super. 1989). There are five factors that the Court must consider when sanctioning a discovery violation which include:

1. The nature and severity of the discovery violation;
2. The defaulting party's willfulness or bad faith;
3. Prejudice to the opposing party;
4. The ability to cure the prejudice; and
5. The importance of the precluded evidence in light of the failure to comply.

Croydon Plastics Co., Inc. v. Lower Bucks Cooling & Heating, 698 A.2d 625, 629 (Pa. Super. 1997).

Plaintiff cites two cases in support of its argument; however, the facts in both cases are factually distinguishable from the present facts. The court in *Miller Oral Surgery, Inc. v. Dinello* held that summary judgment was appropriate when the Defendants failed for over one year to comply with discovery requests and when testimony regarding their failure to comply made clear that they did not intend to comply with the court's order. *Miller*, 611 A.2d at 235. The Court in *Croydon Plastics Co. v. Lower Bucks Cooling & Heating* held that the dismissal of an action was appropriate when Plaintiff repeatedly violated discovery orders and when its testimony regarding the dilatory behavior was "implausible, incredible and irrelevant." *Croydon*, 698 A.2d at 629.

Here, Defendants have failed to comply with the Court's Order one time, an Order that they allege was never received. However, they were aware that a Motion to Compel was filed and still failed to follow up with Plaintiff's Counsel in any way regarding the status of the missing discovery. During oral argument, Defendants' Counsel admitted that the discovery responses are approximately sixty percent complete. This progress, however lacking in timeliness, does not evidence bad faith. The prejudice to the Plaintiff, if any, is easily curable since it will be able to conduct discovery going forward as if the Defendants would have answered the written discovery in a timely manner. Plaintiff has not alleged, for example, that there is a piece of evidence that was spoiled due to Defendants' failure to respond.

Summary judgment as a sanction should only be imposed in extreme circumstances and would be would be strictly scrutinized on appeal. *Steinfurth*, 590 A.2d at 1288. Here, summary judgment, in relation to the discovery violation, is an extreme punishment. That is not to say, however, that the Defendants should not receive any punishment and the Court will enter appropriate sanctions against the Defendants as set forth in the Order below.

Since we have decided that summary judgment is not an appropriate sanction here, we need not analyze *Nanty-Glo* and how it applies in this case. Finally, since there is no current motion to coordinate this action with the action in Berks County, we need not discuss it here, as it is irrelevant to the proceedings at hand.

ORDER

AND NOW, this **29th** day of **May, 2020**, upon consideration of Plaintiff's Motion for Summary Judgment and Defendants' Response thereto, it is hereby Ordered that Plaintiff's Motion for Summary Judgment is **DENIED.** Within twenty (20) days of the date of this Order, Defendants shall answer and respond to Plaintiff's interrogatories and request for production of documents served on November 4, 2019 without objection. Failure to comply with this Order will result in the Court's consideration of a Motion for Sanctions including, but not limited to, a renewed Motion for Summary Judgment.

Within fourteen (14) days after receipt of Defendants' answers and responses, Plaintiff shall indicate to Defendants whose deposition(s), if any, it

wishes to take. Finally, based upon Defendants' Counsel's statement made during oral argument that Defendants did not foresee needing to conduct any discovery, Defendants are hereby precluded from requesting any form of discovery in this matter.

BY THE COURT,

_____
Hon. Ryan M. Tira, Judge

RMT/ads

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