UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

DEBORAH L. VERNON Case No. 96-13389 K

Debtor

MARK S. WALLACH, TRUSTEE

Plaintiff

-vs- AP 97-1060 K

DALE W. VERNON

Defendant

Mark S. Wallach, Esq.
Penney, Maier, Wallach & Crowe
169 Delaware Avenue
Buffalo, New York 14202-2403

Plaintiff/Trustee

Wayne I. Freid, Esq.
Freid and Klawon
17 Beresford Court
Williamsville, New York 14221

Attorney for Defendant

Before the Court is the Defendant's Motion to Vacate an Order that struck the Defendant's Answer. Summarizing the facts: This adversary proceeding was commenced in late February of 1997 and followed an ordinary course until June 12, 1997, when the Defendant's

counsel advised his client and the Plaintiff that a potential conflict of interest required that the Defendant obtain other counsel. Subsequently, Defendant's counsel became seriously ill and did not return to his office until late July.

Having heard nothing since June regarding substituted counsel, the Trustee, on September 23, 1997, made a motion to strike the Defendant's Answer. On October 14, this Court ordered that if a Substitution of Counsel form was not filed and the Defendant did not sit for a previously-demanded deposition by November 13, 1997, the Answer would be deemed stricken for failure to make discovery under Rule 37.

A Substitution of Counsel form was not filed until November 17, 1997. A "fax" apparently was sent to the Plaintiff regarding the substitution on November 14 at 4:27 p.m., but that was a Friday, and the requirement of filing was not accomplished until Monday, the 17th. Furthermore, the Defendant did not sit for deposition; rather, the November 14 fax invited the scheduling of the deposition. On November 21, Plaintiff filed a Declaration attesting that the conditions of the October 14 Order had not been met and requesting an Order striking the answer. That Order was granted on November 24. The present Motion to vacate that order was not filed until January 7, 1998.

It seems clear that despite the November 13 deadline set by an explicit Order of the Court (this was not a deadline imposed by some arcane rule), the Defendant did not tender the retainer demanded by substitute counsel until November 12. It also seems clear, however, that Plaintiff was advised by initial counsel and/or substitute counsel no later than November 12, that substitute counsel was coming into the case.

By no means does the Court condone a failure to observe the strict requirement set by its specific order, but: (1) striking of a duly filed answer is a drastic remedy, not to be undertaken lightly (although a different party prevails, it is comparable to dismissal under Rule 11 or 37, and dismissal is not favored in this Circuit[1]) ; and (2) the prejudice to the Plaintiff may be mitigated here by the payment of costs and fees.

It is argued by Defendant's counsel that the only extraordinary expense incurred by Plaintiff here was in having to appear on the present motion. The Court disagrees. Everything undertaken by Plaintiff after, or as a consequence of, the calendar call of September 17, 1997, would operate to Plaintiff's prejudice if the present motion were granted unconditionally. It was on September 17, that Plaintiff appeared at a Calendar Call complaining of having no opposing counsel with whom to engage in discovery, and the Court invited the Motion to strike the Answer, in order to incite the Defendant to action.

It is well within the authority of this Court, faced with the non-appearance of a defendant at a pre-trial conference or a Calendar Call, to grant judgment to the Plaintiff. Defendants are advised of this at least twice: in the pre-trial order and in the scheduling order entered after the pre-trial conference. Striking of the answer and entry of default judgment is the procedure utilized to enforce these warnings against a defendant who does not appear at pre-trial or a Calendar Call. If it is a plaintiff who does not appear, then dismissal of the action is granted. *See* Rule 37(b)(2)(C).

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[1] *See Outley v. City of New York*, 837 F.2d 587, 591 (2d Cir. 1988); *Securities & Exchange Commission v. Research Automation Corp.*, et al., 521 F.2d 585, 588 (2d Cir. 1975).

Here the Court granted yet an extra measure of protection to the Defendant, by granting one last opportunity to avoid the harsh result. Everything that occurred after the Court invited the motion to strike the answer was extra latitude to the Defendant that came at the Plaintiff's expense, which is to say, at the estate's expense . Whether the Defendant's abuses here are deemed to be sanctionable under Rule 11 or under Rule 37, it is clearly provided in those rules that the Court possesses authority to condition the grant of the present motion on the payment to the Plaintiff of his reasonable expenses, including attorney's fees.

It is ordered that if the Defendant wishes to continue to defend this action he may do so only upon the payment, to the bankruptcy estate of Deborah Vernon, of all costs and attorney's fees incident to work done and appearances made after the conclusion of the September 17, 1997 hearing, and up to and including final argument on the present motion. If the parties cannot agree on a reasonable amount to be approved by the Court, the Trustee may make application to the Court to fix it.

If the condition of this Order is met, the parties shall so declare and the Court will vacate the Order striking the answer, and will schedule further proceedings.

SO ORDERED.

Dated: Buffalo, New York
February 9, 1998

/s/ Michael J. Kaplan

Michael J. Kaplan, U.S.B.J.