

**Egregious Discovery Misconduct Warrants Court's Entering
of Order of Default Against the Offending Party**

By

Svetlana (Lana) U. Sheshina, Esq.
Schwartz Semerdjian Ballard & Cauley LLP

In the case of *Dreith v. Nu Image, Inc.* (2011) 648 F.3d 779 the Federal District Court ("court") entered a default against defendants who engaged in discovery misconduct. Defendants timely filed an appeal. The Appellate Court affirmed.

Plaintiff, the administrator of Film Musicians Secondary Markets Fund ("Plaintiff"), beneficiaries of which are musicians who are contractually entitled to deferred wages ("residuals") derived from revenues earned in secondary market of the films they helped create. Per the terms of the agreement between the musicians and the film companies, the Administrator of the Fund had a right to have access to all books and records upon demand. The film companies did not comply with the agreement and did not allow the inspection of the books and records to determine how much in residuals the film companies owed to the Plaintiff. Plaintiff attempted to resolve the issue amicably through informal requests to inspect the books and records which gone unanswered. Plaintiff filed this lawsuit.

Upon filing, the court issued a case notice ordering parties to schedule an initial meeting and file a joint report thereon, as well as admonishing counsel, that non-compliance with the local rules and Federal Rules of Civil Procedure "MAY LEAD TO THE IMPOSITION OF SANCTIONS WHICH MAY INCLUDE THE STRIKING OF PLEADINGS AND ENTRY OF JUDGMENT OR DISMISSAL OF THE ACTION." The Defendants responded to the order with motions to dismiss and for a more definitive statement and refused to meet or file the requisite joint report.

The court denied motions to dismiss and for a more definitive statement. Plaintiff and Defendants agreed for Defendants to produce responses to discovery by a specific date. Instead, Defendants without providing the responses moved for summary judgment. Plaintiff opposed the summary judgment on the basis that it did not receive any documents, responses or initial Rule 26 disclosures from the Defendants. Defendants responded that this was not a proper basis for opposing a summary judgment and that numerous documents were produced during informal settlement negotiations.

Subsequently, Defendants appeared ex-parte seeking to postpone the pretrial production to after the hearing on their motions for summary judgment. The court denied this request and later denied Defendants motions for summary judgment, ordering Defendants to provide initial disclosure, respond to discovery and schedule depositions. The Defendants did not comply with this order.

The pretrial order was to be filed jointly, but the Defendants, after exchanging drafts with Plaintiff filed an independent pretrial order.

Subsequently, Plaintiff received supplement discovery from Defendants where they answered only four of the twenty-four propounded interrogatories, objecting entirely to the rest.

At the pretrial conference, the court inquired as to why the discovery related to summary judgment was not previously produced, the counsel for Defendants responded that it previously could not be located but later was found in storage. The court also characterized the objections to the twenty out of twenty-four interrogatories as “silly ... absolutely silly objections.” The court continued to state “I told you guys not to do what you are doing. I told you start trying this case and not play games, and you didn’t do it.” The court then entered default against Defendants and ordered them to produce “all records and books within their custody... showing or evidencing receipt of money or other consideration by defendants from or in connection with the movies within five (5) days of this Order.”

Subsequently, Plaintiff moved for an order to compel Defendants’ compliance with court’s prior orders. In response to the Plaintiff’s motion, well after the court’s deadline, the Defendants produced some documents and stated that they did not have any additional documents sought by Plaintiff. In granting Plaintiff’s motion, the court stated “I’ve had enough now. The next time you come to this court somebody is going to jail. Now get those documents.”

Notwithstanding Defendants earlier claims that they did not have any additional documents, Defendants produced an additional 1,500 pages of discovery. Subsequently, the court ordered Defendants to produce documents that would assist the court among other things, in calculating of the amount of residuals owed to Plaintiff. The day after the order, Defendants substituted counsel, which caused the Judge to recuse himself due to a relationship with new counsel. The case was reassigned to a new Judge.

The new Judge heard Plaintiff’s motion for default judgment and Defendants arguments and issued an order granting Plaintiff’s motion as to liability, revisiting prior order by the former Judge. However, because the new Judge was not satisfied with the competing declarations as related to damages, he ordered Defendants to produce “all of the information upon which their underlying calculations are based.” The Judge set a new hearing with a purpose to ensure Defendants compliance with production of the necessary information.

Defendants failed to appear, due to a calendaring error by the trial counsel. The District Judge referred the case to Magistrate Judge to examine Defendants compliance with its earlier order. The Magistrate Judge found that the Defendants failed to comply and ordered production of the missing material.

Subsequently, the court entered a default judgment in the amount of \$1.1 million after conducting a formal damages hearing.

On appeal the Defendants raised only two issues: (1) whether the court lacked the power to impose default as a sanction for discovery misconduct, and (2) assuming such power, whether the court abused his discretion by imposing default rather than lesser sanctions. At the hearing, Defendants disclaimed interest in any other issues except the court’s power to issue a default.

In reviewing the decision, the Appeals Court engaged in de novo review of whether the court had the power to impose the sanction. The Court decided that it had, stating that Federal Rule of Civil Procedure Rule 37(b) specifically allows the court to dismiss an action or render a default judgment if a party fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35 or 37(a).

Defendants argued that the court did not have power to impose sanction because: (1) the default resulted from no noticed motion by Plaintiff and (2) the court's original discovery order was invalid since it was issued prior to the noticed motion to compel.

The Court stated that both of these arguments fail. First, Rule 37(b) does not require a noticed motion or opportunity to be heard prior to imposition of the sanctions – including default. Second, sanctions may be imposed even for violations of court's oral order, as long as a party has "unequivocal notice that a court has asked that certain documents be produced." *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.* (9th Cir. 1992) 982 F.2d 363, 368. (Citing *Henry v. Sneiders* (9th Cir. 1974) 490 F.2d 315, 318.)

Furthermore, "Rule 16 of the Federal Rules of Civil Procedure authorizes a district court to enter a scheduling order Fed.R.Civ.P. 16(b)(1). Violations of a scheduling order may result in sanctions, including dismissal under Rule 37(b)(2)(C)." *Atchison, Topeka and Santa Fe Ry. Co. v. Hercules, Inc.* (9th Cir. 1998) 146 F.3d 1071, 1073. The Court noted that the district court's order of default was precipitated not only by the Defendant's violation of its original discovery order but also their failure to adhere to scheduled dates for initial disclosures and joint pretrial order. These violations gave power to the court to issue a default order sua sponte.

The Court also held that the district court did not abuse its discretion. Although a dismissal is a harsh penalty to be imposed only in extreme circumstances, the Court will only overturn it if it has "definite and firm conviction that it was outside the acceptable range of sanctions. There are five factors that the court looks at (1) the public's interest in expeditions resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the other party; (4) the public policy favoring the dispositions of cases on their merits; and (5) the availability of less drastic sanctions. (Citing *Malone v. United States Postal Service* (9th Cir. 1987) 833 F.2d 128, 130.)

Although, the first Judge did not explicitly go through *Malone* factors in ordering dismissal, the second Judge did. In regards to the first three factors the court found they "weightily" favored default. The defendants delayed resolution of the case, interfered with court's management of its docket and the defendants' actions "made it impossible for Plaintiff to adequately prepare itself for trial." The fourth factors always weights against dismissal. The fifth factor, imposition of lesser sanctions, is a difficult one, but the court correctly found that it weighted in favor of default. The court described defendants' action as egregious. Under "egregious circumstances ... it is unnecessary (although still helpful) for a district court to discuss why alternatives to dismissal are infeasible." *Malone*, 833 F.2d at 132.

Thus, the Appeals Court upheld the district court's decision.