STATE OF WISCONSIN | CIRCUIT COURT BRANCH I | BROWN COUNTY

MARCO ARAUJO, M.D.,

Plaintiff,

vs.

RONALD H. VAN DEN HEUVEL and GREEN BOX, N.A. GREEN BAY, LLC,

Defendant.

DECISION AND ORDER

Case No. 13-CV-~~468~~ 463

Before the Court is the Plaintiff Marco Araujo's ("Araujo") motion to strike the Defendants' answer and for default judgment. As a basis for the motion, Araujo asserts that Defendants Ronald Van Den Heuvel ("Van Den Heuvel") and Green Box, N.A. Green Bay, LLC ("Green Box") failed to comply with an October 4, 2013 Court Order granting Araujo's motion to compel discovery. In response, Defendants argue that they never received correspondence from Araujo after their initial attorney withdrew from the case, and were therefore unaware of the discovery dispute or the order granting Plaintiff's motion to compel. For the following reasons, Araujo's motion to strike and motion for default judgment are **GRANTED**.

PROCEDURAL BACKGROUND

On March 21, 2013, Araujo filed an amended summons and complaint against Defendants seeking to recover damages from Defendants relating to Araujo's investment in Van Den Heuvel's business, namely Green Box. Araujo asserts that Defendants breached their contract with Araujo, committed fraud, committed negligent and strict liability misrepresentation, engaged in deceptive advertising, and misappropriated the money that Araujo invested into Green Box. Araujo claims that he

is therefore entitled to recover pursuant to Wisconsin securities law, to rescind the contract with return of consideration paid plus interest, and to punitive damages.

Defendants filed their Answer on April 10, 2013. The Answer was signed by their now-former counsel Ty C. Willinghanz ("Willinghanz"). In that Answer, in addition to denying Araujo's claims, Defendants raised a number of affirmative defenses including that Araujo failed to state a claim upon which relief could be granted, lacked the specificity required by the Wisconsin Statutes, was barred by the statute of limitations and the Doctrine of Clean Hands, lacked standing, waived certain claims, and failed to perform due diligence in investigating the claims made by the defendant.

On May 15, 2013, Araujo served the Defendants with his first set of interrogatories and first request for document production. (Smies Aff. ¶ 2.) The interrogatories sought information related to, *inter alia*, Green Box's accounting practices, advertising materials, financial records, and employees, and the accounting of the $600,000 Araujo paid to Green Box and/or Van Den Heuvel. Araujo's document production request sought Green Box's corporate records, communications between Defendants and Araujo, and Green Box's correspondence. On June 5, 2013, Willinghanz sent answers to the first set of interrogatories to Araujo, and indicated that responses to the document production request would be forthcoming. (Smies Aff. ¶ 3.)

On August 6, 2013, Araujo filed a motion to compel production of documents and answers to interrogatories, alleging that the first set of interrogatory answers was incomplete and deficient and that Araujo had not yet received any of the requested documents. (Smies Aff. ¶ 4.) On August 13, 2013, Willinghanz filed a motion to withdraw as Defendants' counsel. Van Den Heuvel contends that he contacted Araujo's attorneys in August 2013 to inform them that correspondence should be directed to him until he was able to retain substitute counsel. (Van Den Heuvel Aff. ¶ 7). However, Araujo's

attorneys deny they received such a message or spoke to Van Den Heuvel prior to November 25, 2013. (Smies Second Aff. ¶ 4).

On September 20, 2013, the Court held a scheduling conference and Willinghanz appeared by telephone for Defendants. (Peterson Aff. ¶ 2.) Defendants did not respond to the Motion to Compel, nor did they appear either personally or by counsel at the September 30, 2013 hearing on the motion to compel.

On October 4, 2013, the Court entered an Order granting Araujo's motion to compel. The Order mandated that Van Den Heuvel and Green Box produce the requested information and documents to Araujo on or before November 1, 2013. At this time, Araujo has not received any of the documents or information that the Court ordered Defendants to produce. (Smies Aff. ¶ 7.)

On August 27, 2014, the Court issued an order allowing Green Box's counsel to withdraw from the case. A notice of appearance and amended answer were filed by successor counsel, appearing on behalf of both Defendants, on September 5, 2014. Araujo now asks the Court to strike Defendants' Answer for failure to comply with discovery rules and the Court's prior order to compel. Defendants argue that they were unaware of the discovery dispute because they never received any correspondence from Araujo after Willinghanz withdrew from the case.

FACTUAL BACKGROUND

In June 2013, Willinghanz notified Defendants that his license was suspended due to unpaid bar dues and incomplete continuing legal education requirements. (Van Den Heuvel Aff. ¶ 3; Willinghanz Dep. Jun. 17, 2014, 18:22-24, 19:1-4.) In a deposition on June 17, 2014, Willinghanz testified that he advised Van Den Heuvel to find substitute counsel around this time, and that he advised Van Den Heuvel to retain substitute counsel "more than once." (Willinghanz Dep. 22:1-5, 23:14-25.) Some time between June and August 2013, Van Den Heuvel offered to help Willinghanz pay the necessary fees to

get his license reinstated, but funding was not available to reinstate Willinghanz' license in time. (Willinghanz Dep. 20:3-23.) By August 13, 2013, Willinghanz informed Defendants that he had to withdraw from the case because his license had not been reinstated. (Van Den Heuvel Aff. ¶ 5; Willinghanz Dep. 20:3-23.)

Willinghanz also informed Van Den Heuvel and other Green Box employees about the outstanding discovery requests. (Willinghanz Dep. 25:20-25.) At a later date, Willinghanz informed Van Den Heuvel and others that some discovery requests remained unfulfilled, but received the response that individuals who would be able to locate the responsive documents no longer worked for Green Box. (Willinghanz Dep. 28:10-25, 29:20-23.) Willinghanz testified at a deposition that Van Den Heuvel's attitude towards litigation was "that lawsuits, you know, when things just aren't really happening, when there's no hearings, there's no need for counsel." (Willinghanz Dep. 31:15-22.)

Until Willinghanz withdrew from the case, his office was located at the same physical location as Green Box. (Willinghanz Dep. 37:7-20.) Willinghanz' mail, both before and during his suspension and absence, was delivered to mailboxes at the same physical address as Green Box's mail. (Willinghanz Dep. 38:13-15.) At that time, the mail for all tenants in the building was often collected by employees of Green Box, who would leave Willinghanz' mail on his desk. (Willinghanz Dep. 40:20-25, 42:12-25.) After his license was suspended, Willinghanz removed his belongings from the office, did not check his mailbox or voicemail, and did not come into the office frequently. (Peterson Aff. ¶ 2.) Willinghanz' desk and a number of other items were moved into storage. (Willinghanz Dep. 39:1-21.) One letter from Araujo's attorney was located in a box of Willinghanz' belongings in November 2013. (Van Den Heuvel Aff. ¶ 8.)

ANALYSIS

Under the Wisconsin Statutes section 804.12(2), if a party fails to comply with an order to provide or permit discovery, "the court in which the action is pending may make such orders in regard to the failure as are just," including:

> An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party

Wis. Stat. § 804.12(2)(a)3. (2011-12). In considering what sanctions are appropriate for the disobedient party, the court must "focus on the degree to which the party's conduct offends the standards of trial practice." *Brandon Apparel Grp., Inc. v. Pearson Props., Ltd.,* 2001 WI App 205, ¶ 11, 247 Wis. 2d 521, 634 N.W.2d 544 (internal citations omitted). However, "to enter a default judgment, the trial court must determine that the noncomplying party's conduct is egregious or in bad faith and without a clear and justifiable excuse." *Smith v. Golde*, 224 Wis. 2d 518, 526, 592 N.W.2d 287 (Ct. App. 1999). A party acts in bad faith when it "intentionally or deliberately delay[s], obstruct[s] or refuse[s] the requesting party's discovery demand," or commits misconduct which is unintentional but "so extreme, substantial, and persistent that it can properly be characterized as egregious." *Hudson Diesel, Inc. v. Kenall,* 194 Wis. 2d 531, 543, 535 N.W.2d 65 (Ct. App. 1995).

Defendants argue that sanctions are inappropriate in this case because the discovery violations were committed by Willinghanz, and Defendants had no knowledge of the ongoing discovery dispute and acted promptly when they learned of the dispute. Defendants correctly argue that an attorney's culpable conduct cannot be imputed to the client. *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶ 61, 299 Wis. 2d 81, 726 N.W.2d 898. However, in this case the Court finds that *Defendants'* conduct, though arguably unintentional, was so extreme, substantial, and persistent that it rises to the level of egregious behavior warranting a default judgment.

First, although the original discovery issues may have begun with Willinghanz' actions (or lack thereof), there is evidence that Defendants were aware of the situation and failed to take appropriate actions to remedy the potential problem when it arose. Both Willinghanz and Van Den Heuvel agree that Willinghanz first approached Van Den Heuvel about the status of his suspended license in June 2013. Willinghanz asserted that he then told Van Den Heuvel that substitute counsel would be needed to represent Defendants in this matter. Willinghanz also testified that he and Van Den Heuvel responded to the first set of interrogatories, that he informed Van Den Heuvel when Araujo's attorneys challenged the responses as incomplete, and that Van Den Heuvel and other Green Box employees knew that there were unanswered discovery requests pending.

Additionally, Van Den Heuvel is not a stranger to the workings of the legal system. The Wisconsin Court System Circuit Court Access website identifies 79 cases involving an individual with the last name "Van Den Heuvel" and the first name "Ron" in Brown County, Wisconsin alone. (Smies Second Aff. ¶ 7). The Court is therefore unable to believe that Van Den Heuvel was caught completely by surprise when he found the letter regarding the discovery dispute in November 2013. Van Den Heuvel knew that some discovery had been provided to Araujo's attorneys, as he actively participated in drafting the responses to the first set of interrogatories.

There is also evidence that the inadequacies of those answers and the unanswered discovery requests were at least mentioned to Van Den Heuvel. Someone completely inexperienced in litigation may not understand the importance of discovery demands, but Defendants are not unexperienced litigants. At the very least, correspondence mailed to Defendants' former attorney at Green Box headquarters months after he had resigned, identifying the sender as the law firm Defendants knew to be representing plaintiffs in this case should have raised red flags alerting Defendants to the existence of a potential problem.

Furthermore, Defendants argue that as soon as they became aware of the discovery disputes, they took immediate action to rectify the situation. This claim is completely contradicted by the evidence. Even if Defendants did not learn about the discovery dispute until Van Den Heuvel found correspondence from

Araujo's attorneys when he was moving a box in November 2013, they have failed to take any action to fulfill the Order compelling discovery since that time. While Defendants have indeed corresponded with this Court regarding their reasons for not complying with the discovery demands, Defendants are not blameless because they have failed to remedy the situation in any fashion since it came to light over 10 months ago.

Finally, there is no less severe sanction available to the Court to remedy Defendants' discovery violations short of striking the Answer and granting default judgment for Araujo. *See Hudson Diesel*, 194 Wis. 2d at 545. The reasonable interrogatories and document requests directly relate to Araujo's various claims that Defendants misrepresented the nature of Araujo's investment and later misappropriated the money that Araujo actually invested, and without that information the case has been unable to proceed. Defendants have categorically failed to comply with a court order compelling discovery for Araujo since October 2013, have not suggested any less severe sanctions which would remedy their discovery violations, and have not even indicated that they are willing and able to comply with the October 4, 2013 Order. Because of this, Araujo has not been able to conduct discovery to adequately investigate his claims against Defendants for over a year. Given the extensive, substantial, and persistent nature of these discovery violations, the Court has no adequate alternative but to dismiss. Therefore, the Defendants' answer is stricken, and default judgment will be granted in favor of Araujo.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby **ORDERED** that Araujo's motion to strike Defendants' answer is **GRANTED**. Accordingly, Araujo's motion for default judgment is also **GRANTED**.

Dated at Green Bay, Wisconsin, this 2nd day of October, 2014.

BY THE COURT:

Honorable Donald R. Zuidmulder
Circuit Court Judge, Branch I