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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: January 24, 2006
Decided: January 27, 2006

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Mr. David Burleigh
2 Edgewood Road
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Re: *Midland Interiors, Inc. v. David Burleigh and Window & Carpet Treatment, Inc.*, Civil Action No. 18544

Dear Counsel and Mr. Burleigh:

Plaintiff, Mid-Land Interiors, Inc. ("Mid-Land"), brought this action against David Burleigh ("Burleigh") and Window Treatment & Carpet, Inc. ("Window Treatment") (collectively referred to as "Defendants") to enforce a judgment entered against Window Treatment on December 9, 1997 in the amount of $7,180.37. Mid-Land now asks this Court to sanction Burleigh under Rule 37(b)(2)(C) by entering a default judgment against him due to his failure to comply with discovery requests and fraud. For the reasons set forth below, Mid-Land's motion is denied.

I. FACTS

Between early 1996 and the fall of the same year, Mid-Land contracted with Window Treatment to provide carpet for certain installations performed by Window

Treatment.[1] Subsequently, Window Treatment breached the contracts by not paying the amounts it owed Mid-Land. As a result of the breach Mid-Land obtained a final judgment from Justice of the Peace Court 12 for $7,180.37 plus costs and post judgment interest. That judgment was transferred to the Superior Court on October 26, 1999. Mid-Land now seeks to enforce the judgment.

Mid-Land filed suit in this Court on December 12, 2000, seeking to hold Burleigh personally liable for all judgments against Window Treatment and a court order directing an accounting or imposition of a constructive trust over all proceeds and profits Burleigh received from Window Treatment. Since that time Mid-Land sought to depose Burleigh, pursuant to proper notice, on: November 30, 2001; January 18, 2002; June 24, 2002; October 11, 2002; February 6, 2003; March 13, 2003; May 9, 2003; September 27, 2005; October 11, 2005; and October 13, 2005.

On July 16, 2002, Mid-Land filed a Motion to Compel the Deposition of Burleigh. Shortly thereafter, Burleigh stated that he would cooperate and attend the deposition. Consequently, Mid-Land withdrew its Motion to Compel on August 11, 2002.

Thereafter, a deposition was scheduled for 2 p.m. on October 11, 2002. At noon on the day of the deposition Burleigh notified Mid-Land that he had no intention of participating. Burleigh offered no further explanation.

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[1] Burleigh is Window Treatment's sole officer, director, stockholder, and employee.

Shortly thereafter Mid-Land again moved this Court to compel Burleigh's active participation in the discovery process. The Court issued an order on December 12, 2002 requiring Burleigh to attend the next scheduled deposition. The order further informed Burleigh that he was still considered under subpoena and thus required to answer all deposition questions fully and completely. Lastly, the Court ordered Burleigh to pay Mid-Land's attorney's fees of $500.00 plus the costs incurred as a result of the October 11 cancellation.

The next deposition was scheduled for February 6, 2003. In the early morning on the day of the deposition Burleigh left a message that he had become ill and needed to go to the doctor. Hence, the deposition was rescheduled for March 13, 2003. That deposition was postponed after Mid-Land's attorney received a note from Burleigh's physician. Master in Chancery Sam Glasscock, however, found that Burleigh altered the doctor's note provided to Mid-Land's counsel in order to avoid the scheduled deposition.[2] Master Glasscock described Burleigh's attempt to avoid the deposition as "inimical to the orderly process of justice and demonstrate[ing] contempt for our system of justice and for this court."[3]

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[2] Pl.'s Opening Br. in Supp. of its Mot. for Case Dispositive Default J. ("POB"), Ex. B, at 2.

[3] *Id*.

On May 9, 2003, Burleigh appeared for his deposition. Contrary to the December 12, 2002 order, however, he refused to answer any questions related to piercing the corporate veil.

Burleigh later filed for Chapter 7 bankruptcy. He did not notify the Court of his petition for bankruptcy, however, until September 25, 2003, more than a month after he filed.

With regard to the bankruptcy proceeding, on September 21, 2004 Mid-Land filed a proof of claim. On or about November 11, 2004, United States Bankruptcy Judge Peter J. Walsh ordered that Burleigh obtain commensurate and sufficient funds to carry out his plan by November 30, 2004. The plan required Burleigh to place funds related to disputed claims in escrow with the Bayard Law Firm, which would hold them until the conclusion of the litigation. On March 1, 2005 Burleigh was granted discharge.

Burleigh's next deposition was scheduled for September 19, 2005. Burleigh again failed to attend the deposition and did not send notice to Mid-Land concerning his inability to attend.

The next deposition was rescheduled for October 11, 2005. According to Mid-Land on October 17 they received a letter from Burleigh dated October 8, 2005 and postmarked October 14, 2005,[4] notifying Mid-Land that he could not attend the October 11 deposition because his uncle passed away and Burleigh had family members

[4] *See* POB, Ex. E.

coming into town.[5] Mid-Land then rescheduled the deposition for October 13, 2005, but Burleigh again was unable to attend because that was the day of the funeral.[6]

II. ANALYSIS

A. Applicable Standard

This Court has discretion to enter default judgment for failure to comply with court-ordered discovery under Court of Chancery Rule 37(b)(2)(C), if there has been a willful or conscious action illustrating disregard for the Court, its orders or the discovery process.[7] Rule 37(b)(2)(C) states, in relevant part:

> *(b) Failure to comply with order*
>
> > (2) Sanctions by Court – If a party . . . fails to obey an order to provide or permit discovery, including an order made under paragraph (a) of this rule or Rule 35, the Court may make such orders in regard to the failure as are just, and among others the following:
> >
> > > (C) 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.

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5 *See* Letter to Court dated October 24, 2005 from David Burleigh and enclosed letter dated October 8, 2005.

6 *Id.* (The obituary for Burleigh's uncle, Robert Burleigh, is attached to the October 24 letter to the Court).

7 *Sundor Elec., Inc. v. E.J.T. Constr. Co.*, 337 A.2d 651, 652 (Del. 1975); *Parker v. Assiniboia Corp.*, 1986 WL 628579, at *1-2 (Del. Ch. Jan. 31, 1986); *In re Estate of Jones*, 2001 WL 11811, at *2 (Del. Feb. 2, 2001); *Beck v. Atlantic Coast PLC,* 868 A.2d 840 (Del. Ch. 2005).

B. Mid-Land's Motion

Mid-Land argues that Burleigh's failure to attend nine depositions, combined with the altered doctor's note, warrants imposition of a default judgment against Defendants. Burleigh responds that he adequately explained his absence from the depositions and will attend a future deposition.

Even after a court finds that a party failed to comply with a court order, a motion for default judgment under Rule 37(b)(2)(C) will be granted only when "no other sanction would be more appropriate under the circumstances."[8] Where a conscious and willful action goes beyond mere delay of the discovery process into obstruction of discovery and therefore justice, however, the extreme sanction of a default judgment is appropriate. This is especially true in view of the strong policy interests protected by Rule 37(b)(2)(C).[9] Additionally, every reasonable effort must be made to ensure that obstruction-based conduct will not be repeated by any party, because the judicial purpose of Rule 37 sanctions is to "penalize those whose conduct may be deemed to warrant such sanction . . . [and to] deter those who might be tempted to such conduct . . . ."[10]

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8 *Sundor Elec.*, 337 A.2d at 652; *Parker*, 1986 WL 628579, at *2.

9 *Beck*, 868 A.2d at 855.

10 *Parker*, 1986 WL 628579, at *2 (quoting, in part, *Nat'l Hockey League v. Metro Hockey Club*, 96 S. Ct. 2778, 2781 (1976)); *see also Beck*, 868 A.2d at 855.

The facts in *Trans World Airlines v. Hughes*[11] are very similar to the present case. In *Trans World* the court entered a default judgment because the defendant avoided his deposition for two years. The defendant also engaged in forgery to avoid a deposition. These activities convinced the court that defendant would continue stalling the litigation if allowed to proceed. Consequently, the court ruled a default judgment to be a proper sanction for such deliberate misdeeds and disregard for the legal system.

Similarly, in this case I will not tolerate abuse of the discovery process. Burleigh's actions may well rise to the level that warrants sanctioning him with a default judgment. He was not candid with the Court on a previous occasion and I am unsure about the timeliness of his notification that he could not attend the October 11, 2005 deposition. Although I could impose the harsh sanction of a default judgment in this case, I have chosen not to at this stage because I have never had Burleigh in my court, and Mid-Land has never submitted a motion to compel to me. Moreover, due to the murkiness of the factual record as to what has occurred procedurally since the bankruptcy I am reluctant to enter a default judgment. If possible, I strongly prefer resolving matters on the facts.

"Discovery abuse has no place in our courts, and the protection of litigants, the public, and the bar demands nothing less than that our trial courts be diligent in promptly and effectively taking corrective action to 'secure the just, speedy and inexpensive

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11 449 F.2d 51 (2d Cir. 1971)

determination of every proceeding' before them."[12] I simply will not tolerate any continuation of Burleigh's failure to cooperate in discovery. Therefore, I order that Burleigh appear in the New Castle County Courthouse for a deposition on Tuesday, January 31, 2006 at 9:30 a.m. At the deposition Burleigh shall answer all questions unless they call for information protected by the attorney client privilege or work product immunity. Further, if any dispute arises during the deposition, I will hear argument on it on January 31 before the deposition adjourns. If Burleigh does not comply with this Order, I will not hesitate to enter a default judgment against him.

III. CONCLUSION

For the reasons stated, I order Burleigh to appear for deposition at the New Castle County Courthouse on Tuesday, January 31, 2006 at 9:30 a.m.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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[12] *Beck*, 868 A.2d at 855.