ORDER 3370

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FILED

AUG - 4 2006

RONALD A. LONGTIN, JR., CLERK

By: [signature]
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

GLORIA KENDALL,

Plaintiff,

v.

LAUB & LAUB, LTD., a Nevada corporation, JOE M. LAUB, MELVIN LAUB, and DOES I-V, inclusive,

Defendants.

_____/

Case No. CV03-03696

Dept. No. 7

ORDER GRANTING SANCTIONS

This matter having come regularly for decision pursuant to Plaintiff Gloria Kendall's Motion for Sanctions filed July 7, 2006 against Defendants Laub & Laub, Joe M. Laub and Melvin Laub (collectively, "Defendants") with regard to alleged discovery abuses in this matter. A status hearing was held in this matter on July 27, 2006.

Plaintiff, Gloria Kendall was present and was represented by her counsel Stephen H. Osborne, Esq. and Peter Chase Neumann, Esq. Defendants, Laub & Laub, Melvin Laub and Joe M. Laub were present in Court and were represented by Eugene T. Wait, Jr. Defendants' other associated counsel were not present in Court.

Based upon the Motion, the Opposition filed on July 17, 2006, the Reply filed on July 24, 2006 and all the exhibits and affidavits in support of these papers; all the papers, pleadings and orders filed with the Court and the argument presented by counsel at the hearing, and for good cause shown, the Court makes the following findings of fact and conclusions of law.

FINDINGS

The Court finds that the Defendants in this case have engaged in a pattern of dilatory conduct, delay and obstruction in an attempt to delay the trial of this matter. In arriving at this conclusion, the Court has reviewed the extensive pleadings filed in this matter, covering a period exceeding three years, during which the Hon. Peter Breen also served as the District Judge of this Department. A history of pleadings relevant to Plaintiff's Motion for Sanctions herein include the following:

1. On July 9, 2003 Defendants filed a Motion to Stay and to Compel Arbitration, which was opposed by Plaintiff. Defendants unilaterally withdrew this Motion on July 30, 2004.

2. On September 18, 2003, Defendants filed a "Renewed Motion to Stay Proceedings and to Compel Arbitration," to which Plaintiff once again filed an opposition.

3. On October 23, 2003 Judge Breen entered an order denying the Defendants' Motion to Stay Proceedings and Compel Arbitration, based on a finding that the Laub & Laub "binding arbitration clause," embedded in Laub's Sept. 9, 1999 contingent fee agreement with Ms. Kendall, was legally unenforceable because it was

an unfair contract of adhesion that was both procedurally and substantively unconscionable.

4. On November 11, 2003, Defendants filed a Notice of Appeal from Judge Breen's Order.

5. On May 21, 2004, Defendants filed, in this Court, a Motion for Stay of Proceedings pending their interlocutory appeal to the Supreme Court. Plaintiff requested that the Sept. 13, 2004 trial date be preserved.

6. On June 10, 2004, Judge Breen issued an Order Granting Motion to Stay Proceedings but Denying Defendants' Request to Vacate Trial Date. (This date was later vacated due to Defendants' appeal.)

7. Pursuant to the Nevada Supreme Court rules, the appeal was assigned to the settlement program. The settlement judge convened the parties on June 8th and again on July 1st, 2004 without achieving resolution of the appeal.

8. On July 9, 2004, Defendants filed a Motion to Vacate the September 13, 2004 trial date, attaching a July 13, 2004 Supreme Court "Order Reinstating Briefing" ordering appellants Laub & Laub to filed their Opening Brief within 120 days.

9. On July 21, 2005 a 3-judge panel of the Nevada Supreme Court issued an Order Dismissing Appeal of Laub & Laub. In this Order, the Nevada Supreme Court notes that the settlement judge filed a report concluding that Defendants failed to participate in good faith in the settlement conference program. Order, p.1. One of the Defendants failed to appear at the first settlement conference. See id. The parties appeared to reach a settlement and then the non-appearing Defendant rejected the settlement agreement at the second settlement conference. See Order, pp. 1-2. The

Supreme Court goes on to state that when Plaintiff moved to dismiss the appeal, Defendants moved for an extension of time to respond and then filed a notice of non-opposition. See Order, p.2. The Nevada Supreme Court then concludes, "[c]ause appearing we approve the recommendation of the settlement judge and grant respondent's motion, in part. Although we decline to impose monetary sanctions, *we strongly admonish appellants and counsel for appellants for not fully complying with the requirements of NRAP 16(e).* Accordingly, pursuant to the recommendation of the settlement judge, respondent's motion and appellants' non-opposition, *this appeal is dismissed.* It is so Ordered." (emphasis added). Order, p.3.

10. On September 28, 2005 a renewed Application for Setting was signed by counsel for the parties, resetting this trial once more, this time to August 21, 2006.

11. On July 7, 2006 (the last day permitted for discovery in this matter under Rule 26, NRCP), Plaintiff filed her Motion for Sanctions against Defendants, as stated at the beginning of this Order. Defendants opposed the motion, and the Plaintiff replied thereto and submitted the motion to this Court for its decision, resulting in this Court ordering the parties and their counsel to appear in open court on July 27, 2006.

CONCLUSIONS

The Defendants have shown a pattern of dilatory conduct and delay, and a pattern of obstruction in an attempt to delay the trial of this matter. This pattern began with the Defendants' unilateral withdrawal of their motion to stay this matter and compel binding arbitration, after Plaintiff had filed her opposition to the motion. It was improper for Defendants to simply withdraw their motion without either a stipulation between the parties for them to do so, or an Order from the Court granting them leave to withdraw

the motion. Despite this withdrawal, immediately after the matter was set, Defendants re-filed their motion to stay the proceedings and compel Plaintiff to submit to binding arbitration. This is evidence of Defendants' intent to delay these proceedings from the inception of the case.

The conduct of the Defendants during their nearly two-year appeal to the Nevada Supreme Court is further evidence of an intent to delay and to obstruct the normal administration of Plaintiff's civil action against Defendants. The Supreme Court found that Defendants' conduct at the court ordered settlement conferences during the appeal amounted to a failure to participate in good faith and comply with Nevada Rules of Appellate Procedure. The fact that Defendants requested an extension of time to respond and then filed a Notice of Non-Opposition is further evidence of Defendants' lack of good faith in conducting their appeal, and the evidence of Defendants' continuing pattern of obstructive and dilatory conduct in this case. Indeed, the filing of the appeal needlessly cost nearly two years of delay and wasted attorneys fees, costs and judicial resources.

This Court also concludes that the Defendants have willfully failed to participate appropriately and to comply with the Nevada Rules of Civil Procedure governing discovery. The most recent and glaring example, although not the only one, is the failure of the Defendants Melvin Laub and Joe Laub, as well as their staff attorney Mr. Maier and their designated opinion expert, to appear at depositions which Plaintiff properly and timely noticed for hearing July 5 and July 6, 2006. In opposing Plaintiff's Motion for Sanctions, Defendants have failed to demonstrate that any of the deponents were unavailable on the dates noticed for the depositions, or that their other associated

counsel, Mr. Atcheson or Mr. Dickerson were unavailable, even if Mr. Wait was unable to proceed on the dates for which the depositions were noticed. Because Defendants failed to obtain an order staying the depositions or a protective order, there was no legally appropriate reason for the deponents not to appear as noticed for their depositions. Plaintiff's counsel were faced with a July 7th discovery cutoff deadline in this case and were not required to agree to hold the depositions on a date outside the discovery cutoff date. While it is true that Defendants' counsel filed a Motion for Protective Order, Defendants failed to apply for an order shortening time for Plaintiff to respond, and failed the have the matter heard and decided prior to the July 5th and 6th deposition dates.

Accordingly, this Court finds that the failure of the Defendants Melvin Laub and Joe Laub, to appear for their properly noticed depositions on July 5, 2006, and the further failure of Defendants' staff attorney employee, and designated expert, to appear for their properly noticed depositions on July 6, 2006, was a willful violation of the discovery rules, including NRCP 37(d), *Failure of party to attend at own deposition.*

Therefore, it is appropriate to impose significant sanctions upon the Defendants in this case. The Court has applied the guidelines which have been issued by the Nevada Supreme Court in the cases of *Young v. Johnny Ribeiro Bldg., Inc*, 106 Nev. 88, and *Stubli v. Big D Int'l Trucks, Inc.*, 107 Nev. 309, to the conduct of the Defendants here. The selection of a particular sanction for discovery abuses under NRCP 37 is generally a matter committed to the sound discretion of the District Court. See *Stubli.* Applying the *Stubli* seven-factor test to the conduct of the Defendants in this case, this Court finds as follows:

(1) The degree of willfulness of the offending party: Here, the Defendants have exhibited a pattern of delay and obstruction of the litigation process, from the initial stages of the litigation in 2003. The Defendants, who are themselves attorneys, are in a unique position to know the consequences of their actions or inactions, and there is no excuse for their failure to attend their own depositions. They had to have known the consequences of failing to appear without obtaining a protective order.

(2) The extent to which the non-offending party would be prejudiced by a lesser sanction: The Court notes that the Plaintiff is an elderly person. This case has been delayed for three years, largely because of the Defendants' conduct. The Plaintiff has incurred costs and additional delay because of this delay and because the depositions have not been allowed to occur as noticed. There is significant prejudice to the non-offending party for which lesser sanctions would not adequately compensate.

(3) The severity of the sanction of dismissal relative to the severity of the discovery abuse: The Court views the Defendants' continuing dilatory and obstructive conduct in this case has severe, which warrants severe sanctions. However, the Court has decided not to strike the Defendants' answer and enter default judgment against them. Lesser sanctions will be imposed.

(4) Whether any evidence has been irreparably lost: There are no allegations of loss of evidence in the Motion, therefore this factor is unknown and will not be considered by the Court as enhancing the need for sanctions in this matter.

(5) The policy favoring adjudication on the merits: The Court acknowledges this policy, and believes it has balanced that policy at arriving at the sanctions to be imposed.

(6) Whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney: In this case, the Defendants are themselves attorneys who know or should know the consequences of their actions. Under the circumstances, they will not be unfairly penalized by the sanctions to be imposed.

(7) The need to deter both the parties and future litigants from similar abuses. This Court takes the seventh factor announced in the *Stubli* decision very seriously. Although the consequences of Defendants' conduct in this case are not as damaging as that described in the *Riberio* or *Stubli* decisions of the Supreme Court, this Court nevertheless finds that Defendants have caused significant problems by their willful dilatory tactics and failure to comply with the rules of procedure which govern all attorneys and litigants who come before our courts.

This Court finds that the conduct of the Defendants warrants severe sanctions, which are hereby imposed upon the Defendants as follows:

First, it is ordered that the Defendants' designated expert, Mr. Kirsh, will not be permitted to testify at trial. Defendants' counsel has indicated in his pleadings that Mr. Kirsh did not have an opinion, which was the reason Defendants tendered for not producing him for his deposition. The discovery cutoff date was July 7th, and this Court therefore finds it an appropriate sanction, *inter alia*, for the Defendants to be precluded from calling an expert witness in their defense at trial.

Secondly, the Court orders that with respect to the testimony of defendant's employee, Mr. Maier, Plaintiff will be permitted to take his deposition next week, but the Defendants will not be permitted to call him to testify on behalf of the defense at trial, as a sanction for their failure to produce him as noticed.

Third, with respect to the Order of this Court on July 21, 2006, in which the Defendants were ordered to produce certain documents within ten (10) days as described in that Order, it is ordered that the ten-day period which commenced on July 21st is continuing to run and the Defendants are required to produce said documents within that ten-day period. Failure to comply will result in this Court striking Defendants' Answer and entering default judgment.

Fourth, it is Ordered that the Defendant are required to pay to Plaintiff, within ten days of the July 27, 2006 hearing conducted by this Court, the reasonable value of Plaintiff's attorney's fees and costs associated with the failure of the Defendants and Mr. Maier and Mr. Kirsch to attend their duly noticed depositions of July 5 and July 6, 2006, as well as the reasonable value of Plaintiff's attorneys fees in the preparation and defense of the Plaintiff's Motion For Sanctions. Plaintiff's counsel shall file, no later than Tuesday August 1, 2006, an affidavit of attorney's fees and costs with the Court, demonstrating the professional time which was expended on the above-described matters. If the Defendants object to the reasonableness of Plaintiff's attorneys' fees or costs, they may do so within two days of being served with said affidavit of costs and fees.

Fifth, it is ordered that the Defendants shall produce both Defendants, Joe Laub and Melvin Laub, as well as their employee Mr. Maier, for videotaped and steno typed depositions at the convenience of the Plaintiff's counsel, Plaintiff's counsel have indicated in open court that they would prefer to take the deposition of Fred Maier on August 3 at 10:00 a.m.; the deposition of Joe Laub on August 3 at 2:00 p.m. (or upon completion of Mr. Maier's deposition); of Melvin Laub on August 4 at 10:00 a.m.; all of

which will be taken in a room in the Washoe County Courthouse within reasonably close proximity to this Courtroom, so that if there are any disputes that need Court resolution, it will be convenient for the Court and the parties.

Sixth, upon request of counsel for Defendants, Defendants will be permitted to take the deposition of Plaintiff, Ms. Kendall, on August 4th as the last deposition in this case, following that of Melvin Laub. Plaintiff's deposition shall not exceed two and one-half hours.

Seventh, the parties are directed, pursuant to Supreme Court Rule 252, to attend a settlement conference to be convened by the Hon. Brent Adams, District Judge in Department Six, as soon as possible. If Judge Adams can do so on Monday, July 31st, 2006, this would be preferable to the Court. In the event that Judge Adams reports that the parties do not proceed in good faith at the settlement conference, this Court will entertain a motion for sanctions against the offending party.

Eighth, defense counsel may submit a motion to impose reasonable limitations on the plaintiff's use of the videotaped graphic images of Defendants Laub and Laub's videotaped deposition testimony, which the Court will consider, and will also consider any opposition thereto by Plaintiff's counsel. At minimum, Plaintiff shall be permitted to fully utilize the videotaped depositions to prepare for, and try, this case, as contemplated by Nevada Rules of Civil Procedure.

Ninth, Defendants shall file any Reply to Plaintiff's Opposition to Defendants' Motion for discovery applicable to Defendants' first set of discovery interrogatories or requests that were propounded.

Tenth, the Court finds that Defendants' second set of discovery interrogatories and requests were propounded too late to require Plaintiff to respond by the July 7th discovery cutoff date; therefore, Plaintiff is relieved from the obligation to answer or respond to the Defendants' second set of discovery.

IT IS SO ORDERED.

Dated this 4 day of Aug, 2006.

Judge Robert Peck
DISTRICT JUDGE

CERTIFICATE OF SERVICE BY MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court, in and for the County of Washoe; and that on this 4th day of August, 2006, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

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