

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

ERIC JONES, *et al.*, *

Plaintiffs, *

v. * Civil No. CCB-05-1287

SUSAN MURPHY, *et al.*, *

Defendants. *

* * * * *

**DEFENDANTS' MOTION TO DISMISS CLAIMS OF PLAINTIFFS ERIC
JONES AND DAVID COLYNS**

Defendants William Jednorski and Susan Murphy, through counsel, respectfully move to dismiss all individual claims filed by Plaintiffs Eric Jones and David Colyns pursuant to Rules 37(d) and 41(b) of the Federal Rules of Civil Procedure. Since before August 5, 2008, Plaintiffs Jones and Colyns have failed to participate in discovery or otherwise prosecute the claims they have made against the Defendants in this case. As such, their remaining individual claims against Defendants Jednorski and Murphy should be dismissed.

BACKGROUND

Plaintiffs initiated this lawsuit on May 12, 2005, naming Eric Jones as an individual defendant and as a proposed class representative. (Paper No. 1.) David Colyns was added as an individual plaintiff and proposed class representative by Plaintiffs' Third Amended Complaint, filed on April 10, 2006. (Paper No. 55.) On

August 5, 2008, Defendants sent a notice of depositions to Plaintiffs' counsel noting depositions for each of the named plaintiffs in the case, including Plaintiffs Jones and Colyns, and requesting that each plaintiff produce certain documents pertaining to the allegations set forth in the complaint. *See* Ex. 1, Notice of Depositions Upon Oral Examination. Between August and October 2008, Plaintiffs' counsel reported that they were unable to make contact with either Jones or Colyns. In a Joint Status Report filed on October 17, 2008, Plaintiffs' counsel explained that they had been "unable to produce" Plaintiffs Jones and Colyns for their depositions and also withdrew their request that those two individuals be designated as class representatives. (Paper No. 225, at 3; *see also* Paper No. 243, at 33 n.14). Plaintiffs Jones and Colyns were never deposed, and have apparently not participated in any way in this case since at least August 2008.

On April 22, 2013, Plaintiffs' counsel filed a motion asking to withdraw their appearances for Plaintiffs Jones and Colyns. (Paper No. 458). The motion stated that counsel had not had contact with either Mr. Jones or Mr. Colyns since before October 17, 2008 (Paper No. 458, at 1), and were unable to act on their claims without their involvement (*Id.* at 2). The Court granted the motion on April 26, 2013. (Paper No. 467).

ARGUMENT

Because Plaintiffs Jones and Colyns were withdrawn as class representatives, their only remaining claims are individual claims. Those claims should be dismissed under Federal Rules of Civil Procedure 37(d) and 41(b) because both plaintiffs have failed to

participate in the prosecution of this case and have violated the Federal Rules of Civil Procedure pertaining to discovery by, among other things, failing to appear for depositions.

I. PLAINTIFFS JONES AND COLYNS EACH FAILED TO APPEAR FOR THEIR OWN DEPOSITIONS, WARRANTING THE DISMISSAL OF THEIR CLAIMS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 37(D).

The claims filed by Plaintiffs Jones and Colyns should be dismissed pursuant to Federal Rule of Civil Procedure 37(d) because each failed to appear for deposition after being served with proper notice, and otherwise failed to participate in the discovery process since at least August 2008. *See* Fed. R. Civ. P. 37(d)(1)(A)(i) & 37(b)(2)(A)(v). In determining whether to impose sanctions under Rule 37(d), courts consider (1) whether a party acted in bad faith; (2) the amount of prejudice their noncompliance caused; (3) whether there is a need for deterrence of this particular type of noncompliance; and (4) whether less drastic sanctions would be effective. *See Mut. Fed. Sav. & Loan Ass'n v. Richards & Assocs.*, 872 F.2d 88, 92 (4th Cir. 1989).

“A party’s total failure to comply with the mandates of discovery, with no explanation for that failure, can certainly justify the harshest of sanctions.” *Warren v. United States*, No. DKC-10-3015, 2011 U.S. Dist. LEXIS 90658, at *4-5 (D. Md. Aug. 15, 2011). Here, without any explanation, Plaintiffs Jones and Colyns failed to appear for depositions. *See id.* (finding that the plaintiff acted in bad faith where she failed to attend her own deposition or otherwise abide by the rules of discovery). According to the filing

by their former counsel, Plaintiffs Jones and Colyns failed to respond to their attorneys' inquiries for over four years.

“The purpose of pre-trial discovery is for a litigating attorney to obtain information from the opposing party, information which in many cases is not otherwise available.” *Id.* at *7 (quoting *Middlebrooks v. Sebelius*, No. PJM-04-2792, 2009 U.S. Dist. LEXIS 71966, 2009 WL 2514111, at *3 (D. Md. Aug. 13, 2009)). A failure to comply with discovery rules must be deterred, as “[t]here is no doubt” that Plaintiffs Jones and Colyns’s failure to participate in this case since at least 2008 has “resulted in prejudice to [the Defendants] by preventing [them] from conducting discovery, evaluating the merits of the claims against [them], and from adequately preparing [their] defense to” the individual claims of Jones and Colyns. *Aerodyne Sys. Eng’g, Ltd. v. Heritage Int’l Bank*, 115 F.R.D. 281, 288 (D. Md. 1987). In light of the fact that even Plaintiffs’ counsel has been unable to make contact with Plaintiffs Jones and Colyns since at least October 2008, it is clear that a less drastic sanction would not be effective here. Thus, dismissal of the individual claims of Plaintiffs Jones and Colyns is appropriate.

II. THE CLAIMS BROUGHT BY PLAINTIFFS JONES AND COLYNS SHOULD BE DISMISSED PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 41(B).

Plaintiffs Jones and Colyns’s claims should also be dismissed pursuant to Federal Rule of Civil Procedure 41(b) because they have failed to prosecute those claims, or otherwise to comply with the federal rules pertaining to discovery. *See Fed. R. Civ. P.*

41(b). In evaluating whether to dismiss an action under these circumstances, district courts consider “(1) the degree of personal responsibility of the plaintiff, (2) the amount of prejudice caused the defendant, (3) the existence of a drawn out history of deliberately proceeding in a dilatory fashion, and (4) the existence of sanctions less drastic than dismissal.” *Herbert v. Saffell*, 877 F.2d 267, 270 (4th Cir. 1989) (internal quotation marks omitted). Here, each of these four factors weighs in favor of dismissal.

Plaintiffs Jones and Colyns are personally responsible for their failure to participate in the prosecution of this case or to abide by the discovery rules. Under Rule 41(b), a plaintiff is personally responsible for his unavailability where he has failed to provide adequate contact information. *See O’Neal v. Cook Motorcars, Ltd.*, No. L-96-1816, 1998 U.S. Dist. LEXIS 10180, *3-4 (D. Md. April 1, 1998) (dismissing claims made by plaintiff who failed to provide an adequate telephone number or residential address, and thus failed to appear for his deposition); *see also Van Gorkom v. Deutsche Bank*, No. WDQ-04-2802, 2007 U.S. Dist. LEXIS 100294, at *5 (D. Md. July 12, 2007) (citing plaintiff’s refusal to agree to a deposition date, answer interrogatories, or produce documents as evidence of the plaintiff’s history of deliberate delay). Here, Plaintiffs Jones and Colyns apparently failed to provide their own counsel with updated contact information, making it impossible for the Defendants to obtain discovery to defend against their claims. Plaintiffs Jones and Colyns now have a “long history of proceeding in a dilatory fashion,” and should not be allowed to move forward in this case. As such, the sanction of dismissal is warranted.

CONCLUSION

The claims filed by Plaintiffs Jones and Colyns should be dismissed with prejudice.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General

/s/

BEATRICE NUÑEZ-BELLAMY, Bar No. 29582
MATTHEW J. FADER, Bar No. 29294
WILLIAM F. BROCKMAN, Bar No. 26576
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
410-576-7906 (tel.); 410-576-6955 (fax)
bnunezbellamy@oag.state.md.us
mfader@oag.state.md.us
wbrockman@oag.state.md.us

Attorneys for Defendants William Jednorski
and Susan Murphy

Dated: May 1, 2013

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NOTICE OF DEPOSITIONS UPON ORAL EXAMINATION

Notice is hereby given, pursuant to Federal Rule of Civil Procedure 30(b)(1), that Defendants, by their undersigned counsel, will take the depositions of the following Plaintiffs at LAD Reporting, 10 North Calvert Street, Suite 141, Baltimore, Maryland 21202 (telephone #410-539-3664) on the dates and at the times indicated:

<u>Plaintiff</u>	<u>Date</u>	<u>Time</u>
Eric Jones	9/10/08	10:00 a.m.
Dana T. West	9/10/08	1:00 p.m.
Tonia Bowie	9/11/08	10:00 a.m.
David Colyns	9/11/08	1:00 p.m.
Gary Saunders	9/16/08	10:00 a.m.
Michael Washington	9/16/08	1:00 p.m.
Kevin Adams	9/18/08	10:00 a.m.
Aaron Ross	9/18/08	1:00 p.m.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2008, a copies of the foregoing Notice of Depositions upon Oral Examination were mailed electronically to all attorneys of record in this case.

_____/s/_____
KARL A. POTHIER
Assistant Attorney General

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* * * * *

ORDER

Upon consideration of Defendants' Motion to Dismiss Claims of Plaintiffs Eric Jones and David Colyns, and any response, that motion is GRANTED, and it is ORDERED that Plaintiffs Eric Jones and David Colyns's individual claims against the Defendants are DISMISSED WITH PREJUDICE.

Dated: _____

Honorable Catherine C. Blake
United States District Judge