

STATE OF NORTH CAROLINA
NEW HANOVER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 4611

HE CHI; BIAN YIDE; CAO YONGJIE;
CHEN MINZHI; CHENG TAO; HU
KUN; LIANG JINGQUAN; LUO PENG;
MA QIHONG; MA WEIGUO; SONG
YING; WANG JIAN; WANG LING;
WANG XUEHAI; XIE QIN; YE XIAFEN;
and ZHANG YUNLONG,
Plaintiffs,

v.

NORTHERN RIVERFRONT MARINA
AND HOTEL LLLP; NRMH HOLDINGS
LLC; NRMH HOTEL HOLDINGS LLC;
USA INVESTCO LLC; PAC RIM
VENTURE LTD.; RIVERFRONT
HOLDINGS II LLC; WILMINGTON
RIVERFRONT DEVELOPMENT LLC;
GOLDEN MARINA LLC; CIRCLE
MARINA CARWASH, INC.; CHARLES
J. SCHONINGER; JOHN C. WANG;
JIANGKAI WU; CHRISTOPHER
ARDALAN; and GONGZHAN WU,
Defendants.

**ORDER ON
NRMH DEFENDANTS' MOTION FOR
CONTEMPT AND SANCTIONS
AGAINST PLAINTIFF CAO YONGJIE**

1. **THIS MATTER** is before the Court on the NRMH Defendants'¹

Motion for Contempt and Sanctions Against Plaintiff Cao Yongjie Pursuant to N.C.

R. Civ. P., Rule 37(b)(2) and (d) (the "Motion"), (ECF No. 222). Plaintiff Cao Yongjie

("Plaintiff Yongjie") neither filed a responsive brief nor appeared for the hearing.

The Court therefore treats the motion as uncontested. *See* Business Court Rule

("BCR") 7.6.

¹ The NRMH Defendants refer to Defendants Northern Riverfront Marina and Hotel, LLLP, Wilmington Riverfront Development, LLC, and Charles J. Schoninger.

2. Having considered the Motion, the NRMH Defendants' briefing, and other relevant matters of record, the Court hereby **GRANTS** in part and **DENIES** in part the Motion for the reasons stated herein.

I. FINDINGS OF FACT²

3. Plaintiff Yongjie is one of a group of Chinese citizens who invested in a real estate development on the riverfront in downtown Wilmington, North Carolina. The Plaintiffs' allegations are recounted at length in the Court's previous orders. *See, e.g., Chi v. N. Riverfront Marina & Hotel LLLP*, 2023 NCBC LEXIS 89, at **2-16 (N.C. Super. Ct. July 27, 2023).

4. On 7 September 2022, the NRMH Defendants served interrogatories and requests for production of documents on Plaintiff Yongjie. In addition, the NRMH Defendants noticed Plaintiff Yongjie's deposition for 7 December 2023 at 9:00 AM.³ (Moving Defs.' Memo. Support Mot. Contempt and Sanctions Against Pl. Cao Yongjie ["NRMH Defs.' Br."] Ex. A – Dep. Not. Sent on 12.17.23, ECF No. 223.1.) Plaintiff Yongjie objected to the written discovery and failed to appear for his deposition. (Aff. of George Mason Oliver ["Oliver Aff."] ¶ 11, ECF No. 224.)

5. On 11 December 2023, the NRMH Defendants moved pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure [the "Rule(s)"] to dismiss

² Any determination later stated as a conclusion of law that should have been stated as a finding of fact is incorporated in these findings of fact. *See Rutherford Elec. Mbrshp. Corp. v. Time Warner Entertainment-Advance/Newhouse P'ship*, 240 N.C. App. 199, 215 (2015) ("[C]onclusions of law which are mischaracterized as findings of fact will be treated on review as conclusions of law.").

³ The notice was later amended to reflect a change in location, but not the date or time. (NRMH Defs.' Br., Ex. B—Am. Dep. Not. Sent 12.1.23, ECF No. 223.2.)

Plaintiff Yongjie’s claims for failure to prosecute. (Moving Defs.’ Mot. Dismiss Claims Pl. Cao Yongjie Pursuant N.C. R. Civ. P., Rule 41(b) [“Mot. Dismiss Pl. Yongjie”], ECF No. 181.) The Court denied the motion without prejudice to the NRMH Defendants’ ability to file a motion to compel discovery. (Order Defs.’ Mots. Dismiss Claims Bian Yide and Cao Yongjie [“Dismissal Order”] ¶¶ 8-10, ECF No. 183.)

6. On 17 January 2024, the NRMH Defendants filed a Motion to Compel pursuant to Rules 37(a)(2) and 37(d), seeking an order compelling Plaintiff Yongjie to respond to their interrogatories and document requests and to appear for his deposition. (Moving Defs.’ Mot. Compel Pl. Cao Yongjie Pursuant to N.C. R. Civ. P., Rule 37(a)(2) and (d), ECF No. 195.)

7. Meanwhile, in part due to concern expressed by Plaintiffs’ counsel that their clients, including Plaintiff Yongjie, were nonresponsive, (*see* Mot. Leave Withdraw Counsel All Pls., ECF No. 159), the Court permitted Plaintiffs’ counsel to withdraw following the close of an extended fact discovery period on 31 January 2024,⁴ provided certain requirements were met. A key condition of counsel’s withdrawal was that they ensure that each Plaintiff understood his or her obligation to provide and maintain reliable contact information with the Court,

⁴ At earlier points in the litigation, the parties jointly requested extensions of the fact discovery period, and the Court granted their requests. As a result, the deadline for fact discovery in this matter was extended from 1 February 2023, (ECF No. 61), to 15 January 2024, (ECF No. 131). In addition, to ensure that Plaintiffs had sufficient time to complete discovery given the communication issues their counsel reported, the Court, acting *sua sponte*, amended the Case Management Order on 5 January 2024 to extend the fact discovery period to 31 January 2024. (Third Am. Case Mgmt. Order, ECF No. 191.)

including both email and physical addresses. (Order on Mots. Leave Withdraw [“Withdrawal Order”] ¶ 23b., ECF No. 190; Third Am. Case Mgmt. Order ¶ 2, ECF No. 190.)⁵

8. Thereafter, in an order dated 16 February 2024 (the “Order Compelling Discovery”), the Court granted the NRMH Defendants’ motion to compel and ordered Plaintiff Yongjie both (a) to respond fully to written discovery (specifically Requests for Production 1, 2, 3, 7, 8, 9 and Interrogatories 2, 7, 8, 9, 10, 11, and 13), and (b) to appear for his deposition to be re-noticed by the NRMH Defendants by 8 March 2024. The Court warned Plaintiff Yongjie that “failure to comply with this Court’s Order may result in severe sanctions, including dismissal of his claims.” (Order on NRMH Defs.’ Mot. Compel Pl. Cao Yongjie [“Order Compelling Discovery”] ¶ 12, ECF No. 215.)⁶ Plaintiff Yongjie was still represented by counsel when the Order Compelling Discovery was entered, and the Court’s electronic system served the order on his counsel.⁷

⁵ In response to the Withdrawal Order, each plaintiff, including Plaintiff Yongjie, provided the Court with both a current email address and a physical address. To verify Plaintiffs’ email addresses, on 22 February 2024, the Court sent an email to all Plaintiffs asking each Plaintiff to respond and confirm receipt of the email. On 28 February 2024 at 10:45 PM, Plaintiff Yongjie responded, confirming his receipt of the email.

⁶ In addition, the Court permitted the NRMH Defendants to petition for reasonable attorneys’ fees and costs incurred with respect to their motion to compel. (Order Compelling Discovery ¶ 13.)

⁷ The Court’s conditions were not satisfied, and withdrawal did not occur until 29 February 2024. (Order Withdrawal Pls.’ Counsel, ECF No. 218.)

9. On 20 February 2024, the NRMH Defendants noticed Plaintiff Yongjie's deposition for 6 March 2024. (NRMH Defs.' Br., Ex. C-2d Am. Dep. Not. Sent 2.20.24, ECF No. 223.3.)

10. On 4 March 2024, the NRMH Defendants filed and served their fee petition resulting from the earlier motion to compel. (Moving Defs.' Petition for Fees and Costs Against Pl. Cao Yongjie, ECF No. 219.) Plaintiff Yongjie did not file a response. In an order dated 11 April 2024 (the "Fee Petition Order"), the Court awarded the NRMH Defendants fees and required Plaintiff Yongjie to pay the award within thirty days. (Order on NRMH Defs.' Petition Fees and Costs Against Pl. Cao Yongjie ¶ 19, ECF No. 230.)

11. On 6 March 2024, Plaintiff Yongjie failed to appear a second time for his properly-noticed deposition. Plaintiff Yongjie also failed to respond to written discovery by 8 March 2024, as he had been ordered. (Oliver Aff. ¶ 11; NRMH Defs.' Br. ¶¶ 25-26.)

12. On 15 March 2024, the NRMH Defendants filed the instant Motion and its supporting brief. (ECF Nos. 222, 223.) Per BCR 5.2(c), Plaintiff Yongjie had until 4 April 2024 to respond. He did not respond. Accordingly, the Court treats the Motion as uncontested pursuant to BCR 7.6 ("If a party fails to file a response within the time required by this rule, the motion will be considered and decided as an uncontested motion.").⁸

⁸ Further, when scheduling a hearing on the Motion, the Court requested via email that Plaintiff Yongjie and the NRMH Defendants state their preferences regarding the date. The NRMH Defendants responded with available dates and consented to a virtual hearing. Plaintiff Yongjie did not respond.

13. The Court held a hearing in this matter on 29 April 2024. (Not. H'rg, ECF No. 229.) Plaintiff Yongjie did not appear. The Motion is now ripe for consideration.

II. CONCLUSIONS OF LAW⁹

14. Rule 37(b)(2) of the North Carolina Rules of Civil Procedure (the “Rule(s)”) provides that, when a party “fails to obey an order to provide or permit discovery . . . a judge of the court in which the action is pending may make such orders in regard to the failure as are just[.]” N.C. R. Civ. P. 37(b)(2). Among the sanctions that may be considered are entry of an order either establishing facts, excluding evidence, striking pleadings or, in severe cases, dismissing the action. *Id.*

15. In addition, when a party fails to attend his own deposition or serve answers to interrogatories or requests for inspection, “the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) above.” N.C. R. Civ. P. 37(d).

16. Both Rule 37(b)(2) and Rule 37(d) also provide that “the court shall require the party failing [to obey the order or to otherwise appear for deposition or respond to discovery] to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially

⁹ Any findings of fact that are more appropriately deemed conclusions of law are incorporated by reference into the Court’s analysis and conclusions of law. *See Sheffer v. Rardin*, 208 N.C. App. 620, 624 (2010) (findings of fact that are more properly designated as conclusions of law are treated as conclusions of law for the purposes of appeal).

justified or that other circumstances make an award of expenses unjust.” N.C. R. Civ. P. 37(b)(2), (d).

17. Generally, the Court has “broad discretion . . . with regard to sanctions.” *Battle v. Sabates*, 198 N.C. App. 407, 417 (2009) (quoting *Rose v. Isenhour Brick & Tile Co.*, 120 N.C. App. 235, 240 (1995)). *See also Hudson v. Hudson*, 34 N.C. App. 144, 145 (1977); *cf. Beard v. N.C. State Bar*, 320 N.C. 126, 129 (1987) (in addition to the authority provided by Rule 37, trial courts have inherent authority “to do all things that are reasonably necessary for the proper administration of justice.”).

18. The Court need not consider the offending party’s willfulness or bad faith when imposing sanctions. Similarly, the party seeking sanctions need not show that it has been prejudiced by the sanctionable conduct, although each of these factors may guide the Court’s determination of an appropriate sanction. *See Out of the Box Developers, LLC v. LogicBit Corp.*, 2014 NCBC LEXIS 7, at **8 (N.C. Super. Ct. Mar. 20, 2014) (citing *Henderson v. Wachovia Bank of N.C., N.A.*, 145 N.C. App. 621, 629 (2001) and *Clark v. Penland*, 146 N.C. App. 288, 291 (2001)).

19. Here, the requested sanction is dismissal of Plaintiff Yongjie’s claims. The NRMH Defendants further request that Plaintiff Yongjie’s response to their counterclaim be stricken and that judgment with respect to that claim be entered against Plaintiff Yongjie. (NRMH Defs.’ Br. 8.)

20. To be sure, violation of a court order may result in dismissal. *See e.g., Cheek v. Poole*, 121 N.C. App. 370, 374-75 (1996) (dismissing action for party’s

failure to obey a discovery order); *Hursey v. Homes by Design*, 121 N.C. App. 175, 179 (1995) (same); *Lincoln v. Grinstead*, 94 N.C. App. 122, 124-25 (1989) (same).

Before imposing this severe sanction, however, the Court considers whether lesser sanctions would be effective. *See Foy v. Hunter*, 106 N.C. App. 614, 620 (1992)

(“Before dismissing an action with prejudice, the trial court must make findings and conclusions which indicate that it has considered these less drastic sanctions.”).

However, “the trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate.” *Badillo v.*

Cunningham, 177 N.C. App. 732, 735, *aff’d* 361 N.C. 112 (2006). *See also Global*

Furniture, Inc. v. Proctor, 165 N.C. App. 229, 233 (2004) (“The trial court is not required to *impose* lesser sanctions, but only to *consider* lesser sanctions.”

(emphasis in original) (citations omitted)). Nevertheless, the Court is mindful that,

because “[d]ismissals in general are viewed as the harshest of remedies in a civil case,” the sanction of dismissal “should not be imposed lightly.” *Page v. Mandel*,

154 N.C. App. 94, 100 (2002).¹⁰

¹⁰ Dismissal as a sanction is authorized by statutes other than Rule 37. *See, e.g.*, N.C. R. Civ. P. 41(b) (permitting trial courts to dismiss an action involuntarily for failure to prosecute or otherwise comply with an order of the court). When assessing dismissal as a sanction pursuant to Rule 41, for example, our appellate courts have instructed the trial courts to weigh three factors: “(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any to the defendant; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice.” *Wilder v. Wilder*, 146 N.C. App. 574, 578 (2001). *See also Green v. Eure*, 18 N.C. App. 671, 672 (1973) (finding dismissal for failure to prosecute “is proper only [when] the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action toward its conclusion.” (citing 5 James W. Moore, et al., *Moore’s Federal Practice* § 41.11[2] (2d ed. 1961))). Although it is not required to do so, the Court considers the Rule 41 factors with respect to this Rule 37 motion.

21. Here, the NRMH Defendants have moved for sanctions against Plaintiff Yongjie as a result of his failure to comply with the Order Compelling Discovery, requiring him to respond fully to written discovery and appear for his deposition. They contend that Plaintiff Yongjie's refusal to participate meaningfully in discovery for the more than two years that this case has been pending has impeded the progress of the case and that they know of no sanction, short of dismissal, that would remedy the situation at this late stage. (NRMH Defs.' Br. 6-7.)

22. Indeed, even though the Court extended the discovery period in an effort to accommodate the parties, the NRMH Defendants complain that this extended period closed on 15 January 2024, without Plaintiff Yongjie's compliance. Similarly, the time frame afforded by the Court's Order Compelling Discovery came and went, again with no apparent effort from Plaintiff Yongjie to comply with the discovery rules, the Amended Case Management Order, or the Court's Order Compelling Discovery. Accordingly, the NRMH Defendants request that the Court (1) dismiss Plaintiff Yongjie's claims against them; (2) strike Plaintiff Yongjie's answer to the counterclaim and enter judgment in the NRMH Defendants' favor; and (3) award them the reasonable fees and expenses that have arisen from the scheduling of Plaintiff Yongjie's failed deposition and this Motion.

23. Upon review of the Motion, its supporting brief, and other relevant matters of record, and after consideration of lesser sanctions, the Court agrees with

movants that dismissal of Plaintiff Yongjie's claims against them is warranted.¹¹ The Court found the NRMH Defendants' prior Rule 41 motion to be premature because there was nothing to suggest that Plaintiff Yongjie would refuse to comply with a Court order entered under Rule 37. (Dismissal Order ¶¶ 8-9.) That is no longer the case. Plaintiff Yongjie has failed or refused to comply with the plain language of the Court's Order Compelling Discovery by not responding to specific interrogatories and requests for documents and by failing to appear a second time for a properly noticed deposition.

24. Notably, Plaintiff Yongjie did not move for a protective order or otherwise register an objection to this discovery. He simply went silent, a "response" the Rules do not countenance. *See* N.C. R. Civ. P. 37(d) official cmt. (1975) ("A provision is added to make clear that a party may not properly remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests to inspect as improper and objectionable. If he desires not to appear or not to respond, he must apply for a protective order. . . . [T]otal noncompliance with which Rule 37(d) is concerned may impose severe inconvenience or hardship on the discovering party and substantially delay the discovery process.").

25. The Court is not unsympathetic to Plaintiff Yongjie's recent decision to consent to withdrawal of his counsel and to proceed *pro se*. However, this matter was stayed for a period to allow Plaintiff Yongjie time to retain new counsel. He did

¹¹ Given the Court's dismissal of Plaintiff Yongjie's claims, the NRMH Defendants' motion to hold Plaintiff Yongjie in contempt of court shall be **DENIED**.

not. In addition, the Court did not permit Plaintiffs' counsel to withdraw until procedures were put in place to (1) translate the Court's and opposing counsel's communications, (2) explain the North Carolina Rules of Civil Procedure, the Case Management Order, and this Court's Rules, and (3) set up an account on the Court's electronic filing system, and (4) instruct Plaintiff Yongjie on its purpose and use. (Withdrawal Order ¶ 22b.; Order Withdrawal Pls.' Counsel, ECF No. 218.) The Court is left to conclude, therefore, that Plaintiff Yongjie's silence does not result from a language barrier or from ignorance of his duties as a litigant. In particular, his failure to comply with the Order Compelling Discovery at best exhibits deliberate indifference, and at worst, it exhibits a purposeful effort to stall the litigation. Either way, a severe sanction is appropriate.

26. The Court further concludes that Plaintiff Yongjie's failure to meet his discovery obligations, including his failure to comply with this Court's Order Compelling Discovery, have prejudiced the NRMH Defendants' ability to defend the claims brought against them. The fact discovery period, even though extended, has now been closed for several months, and the Amended Case Management Order requires the parties to finish expert discovery by 13 May 2024 and to file post discovery dispositive motions by 26 June 2024. (Third Am. Case Mgmt. Order ¶ 2, ECF No. 191.) Plaintiff Yongjie's refusal to participate in fact discovery, including by twice refusing to appear for his own deposition, has resulted in his case not progressing with the others.

27. Moreover, after consideration, the Court further concludes that no sanction short of dismissal will remedy this prejudice. There is nothing further the Court or the remaining parties can do to persuade Plaintiff Yongjie to participate in his own case. The Court observes that Plaintiff Yongjie was specifically warned that his failure to comply with the Order Compelling Discovery could result in the dismissal of his action. (Order Compelling Discovery ¶ 12.)

28. Accordingly, the Court **GRANTS** the Motion and hereby **DISMISSES** Plaintiff's Yongjie's claims. Given his recent *pro se* status, however, the Court, in its discretion, determines that the dismissal is **WITHOUT PREJUDICE**.¹²

29. On the other hand, the NRMH Defendants' counterclaim is not dependent on Plaintiff Yongjie's responses to discovery. Rather, the claim is based on the indisputable fact that all of the counterclaim defendants, including Plaintiff Yongjie, filed an unsealed, unredacted copy of the Offering Circular for the real estate development at issue in the public record despite a nondisclosure agreement. (Answer & Countercl. to First Am. & Verif. Compl. 45-49, ECF No. 35.) While his failure to comply with this Court's Order Compelling Discovery is worthy of sanction, the Court does not conclude that the NRMH Defendants have been unduly prejudiced in their ability to pursue their counterclaim as a result of Plaintiff Yongjie's inaction.

30. That said, Plaintiff Yongjie shall be required to pay the reasonable expenses, including attorney's fees, caused by his noncompliance. In their Motion,

¹² "The decision to dismiss an action with or without prejudice is in the discretion of the trial court[.]" *First Fed Bank v. Aldridge*, 230 N.C. App. 187, 191 (2013)

the NRMH Defendants seek fees related to Plaintiff Yongjie's 6 March 2024 failed deposition in the amount of \$369.00 for 0.9 hours of work performed by Mr. George Oliver, a partner with twenty-four years of experience, at an hourly rate of \$410.00; \$99.00 for 0.36 hours of work performed by Ms. Linda Bird Green, an associate with ten years of experience, at a rate of \$275.00 per hour; and \$540.60 for 3.18 hours of work performed by an unidentified paralegal at a rate of \$170.00 per hour. The total amount sought is \$1,008.60 and results from counsel's efforts (1) to schedule and prepare for Plaintiff Yongjie's failed deposition and (2) to draft and file the NRMH Defendants' motion to compel. (*See* NRMH Defs.' Br., Ex. D, ECF No. 223.4.)

31. The NRMH Defendants also seek to be reimbursed for attorneys' fees expended preparing this Motion in the amount of \$615.00 for 1.5 hours performed by Mr. Oliver at an hourly rate of \$410.00 per hour, \$57.75 for 0.21 hours of work performed by Ms. Green at an hourly rate of \$275.00 per hour, and \$1,458.60 for 8.58 hours of work performed by an identified paralegal at an hourly rate of \$170.00 per hour. The total amount sought for this work is \$2,131.35. (NRMH Defs.' Br., Ex. G, ECF No. 223.7.)

32. Altogether, the NRMH Defendants seek to recover \$3,139.95 in attorneys' fees.

33. The Court has previously determined pursuant to Rule 1.5 of the Revised Rules of Professional Conduct that the hourly rates charged by counsel for the NRMH Defendants are reasonable. (Order on NRMH Defs.' Petition Fees and

Costs Against Pl. Cao Yongjie ¶¶ 8-17, ECF No. 230.) Upon review of the time records submitted, the Court further finds that the amount of time expended for the tasks described is reasonable. Therefore, the Court concludes that the total amount sought in attorney's fees for the work performed in preparing and scheduling Plaintiff Yongjie's 6 March 2024 deposition and preparing the Motion is reasonable, and the Rule 1.5 factors weigh in favor of approving these fees. Accordingly, the Court **APPROVES** the request for fees in the total amount of \$3,139.95.

34. The NRMH Defendants also seek to recoup \$648.00 in court reporter's fees and \$1,800.00 in interpreter's costs. They have produced invoices supporting their request. (NRMH Defs.' Br., Exs. E, F.) The Court concludes that retention of both a court reporter and an interpreter were necessary. Accordingly, the Court hereby **APPROVES** the requested expenses totaling \$2,448.00.

35. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **GRANTS** in part and **DENIES** in part the Motion and **ORDERS** as follows:

- a. All claims asserted by Plaintiff Yongjie in this matter are hereby **DISMISSED WITHOUT PREJUDICE**.
- b. The Court awards the NRMH Defendants their attorneys' fees and expenses in the total amount of \$5,587.95. Plaintiff Yongjie is **ORDERED** to pay said amount to counsel for the NRMH Defendants within thirty (30) days.
- c. To the extent the NRMH Defendants seek to hold Plaintiff Yongjie in contempt, the Motion is **DENIED**.

d. The Court retains jurisdiction over Plaintiff Yongjie with respect to enforcement of all orders entered in this matter, to include this Order, and the Court's Order on NRMH Defendants' Petition for Fees and Costs Against Plaintiff Cao Yongjie (ECF No. 230), as well as with respect to disposition of the NRMH Defendants' counterclaim.

IT IS SO ORDERED, this the 2nd day of May, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases