

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 1993

ROBERT MCGUIRE,
Plaintiff,

v.

LORD CORPORATION,
Defendant.

**ORDER ON DEFENDANT'S
MOTION FOR SANCTIONS**

1. **THIS MATTER** is before the Court on Defendant LORD Corporation's ("LORD") Motion for Sanctions Against Plaintiff ("Sanctions Motion") under Rule 37 of the North Carolina Rules of Civil Procedure (the "Rules") filed November 8, 2019 in the above-captioned case. (ECF No. 52.) Having considered the Sanctions Motion, the parties' briefs in support and opposition, the representations of counsel at the hearing on the Motion, and the relevant record, the Court concludes that the Sanctions Motion should be **GRANTED**.

FACTUAL AND PROCEDURAL BACKGROUND

2. This case involves a single-claim shareholder inspection request by Plaintiff-shareholder Robert McGuire ("McGuire") against LORD. The Sanctions Motion arises from McGuire's failure to attend his properly-noticed deposition on October 28, 2019.

3. The facts here are undisputed. By notice dated September 30, 2019 and agreement of counsel, McGuire's deposition was scheduled for Monday, October 28, 2019 at 9:00 AM at the office of McGuire's counsel in Charlotte, North Carolina. (Mot. for Sanctions Against Pl. (Rule 37) Ex. A, ECF No. 52.1; Aff. Charles E. Raynal, IV

Ex. D at 3–5, ECF No. 54.4.) McGuire, LORD’s former “Regional Director, Japan,” (Compl. ¶ 7), resides in Japan and agreed to travel to North Carolina for his deposition. LORD’s counsel agreed to accommodate McGuire’s travel to the United States in scheduling his deposition, and although McGuire filed the case in Wake County and LORD’s counsel is located in Raleigh, LORD’s counsel agreed that the deposition would end at 3:00 PM and take place at the office of McGuire’s counsel in Charlotte to accommodate McGuire’s return travel plans to Japan.

4. On October 9, 2019, McGuire’s counsel advised LORD that McGuire intended to have his friend and out-of-state attorney Edward “Ted” Stokes Johnson, Jr. (“Johnson”) attend the deposition. LORD objected that same day by e-mail, noting that Johnson was not McGuire’s counsel of record in the case, was not admitted *pro hac vice*, and that LORD expected matters confidential to LORD to be discussed during the deposition. (Aff. Charles E. Raynal, IV Ex. D at 4.)

5. On October 18, 2019, McGuire’s counsel again advised LORD that McGuire intended for Johnson to attend the deposition as a “personal family attorney and friend” who would not participate but would remain silent during the deposition. (Aff. Charles E. Raynal, IV Ex. D at 3.) LORD again objected the same day, noting that it had learned that Johnson had formerly represented LORD in various matters and thus had a conflict of interest in taking any role in this case adverse to LORD. (Aff. Charles E. Raynal, IV Ex. D at 2.) When LORD followed up and learned that, despite its objections, McGuire still intended for Johnson to attend the October 28 deposition, LORD submitted a BCR 10.9 request and dispute summary on October 23, 2019.

6. The Court convened a telephone conference on October 24, 2019 to consider the 10.9 request. Based on the parties' submissions and representations at the conference, the Court concluded that McGuire intended Johnson to attend the deposition to provide McGuire legal advice. The Court thus ordered that Johnson could not attend the deposition without first seeking and obtaining *pro hac vice* admission to represent McGuire in this action. The Court issued a written order memorializing its oral ruling on October 25, 2019. (ECF No. 42.)

7. On Sunday, October 27, 2019, the day before the deposition, LORD's counsel left a family vacation early to travel to Charlotte to prepare for McGuire's deposition the following morning. That night, McGuire's counsel sent an e-mail to LORD's counsel requesting a continuance of McGuire's deposition until Johnson could be admitted *pro hac vice*. (Aff. Scott E. Bayzle Ex. A, ECF No. 55.1.) LORD's counsel immediately rejected the request for a continuance. (Aff. Scott E. Bayzle Ex. B, ECF No. 55.2.)

8. The next morning, the day of the deposition, McGuire arrived at his counsel's office in Charlotte with Johnson. After a short time, McGuire's counsel informed LORD's counsel that McGuire would not sit for his deposition, and McGuire and Johnson left the premises. LORD's counsel commenced the deposition and created a record establishing that McGuire did not attend his duly-noticed deposition. (Mot. for Sanctions Against Pl. (Rule 37) Ex. B, ECF No. 52.2.)

9. A few hours after the scheduled start of McGuire's deposition, McGuire filed a motion, (ECF No. 43), and later a revised motion, (ECF No. 46), for Johnson's *pro*

hac vice admission.¹ That same day, LORD’s counsel submitted a second BCR 10.9 request (“Second BCR 10.9 Request”) seeking sanctions against McGuire for his refusal to appear for his duly-noticed deposition. After convening a telephone conference on the Second BCR 10.9 Request on October 30, 2019, the Court permitted LORD to file a motion for sanctions. (ECF No. 49).

10. On November 8, 2019, LORD filed its Sanctions Motion with supporting brief. (ECF Nos. 52–53.) After full briefing, the Court held a hearing on the Sanctions Motion on December 12, 2019, at which all parties were represented by counsel. The Motion is now ripe for determination.

LEGAL STANDARD

11. Trial courts have the inherent authority “to do all things that are reasonably necessary for the proper administration of justice.” *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987). Under Rule 37(d), when a party fails to attend his own duly-noticed deposition, a court “may make such orders in regard to the failure as are just[.]” N.C. R. Civ. P. 37(d). Further, a court “retains inherent authority to impose sanctions for discovery abuses beyond those enumerated in Rule 37.” *Cloer v. Smith*, 132 N.C. App. 569, 573, 512 S.E.2d 779, 782 (1999) (citation omitted). The party seeking sanctions need not show “that it suffered prejudice as a result of the opposing party’s discovery failures or that the opposing party acted willfully.” *Red Valve, Inc. v. Titan Valve, Inc.*, 2019 NCBC LEXIS 57, at *41 (N.C.

¹ The Court denied without prejudice McGuire’s initial Motion for *Pro Hac Vice* Admission of Johnson filed on October 28, 2019. (ECF No. 45.) For purposes of this Order, the Court refers to the Revised Motion for *Pro Hac Vice* Admission of Johnson also filed on October 28, 2019. (ECF No. 46.)

Super. Ct. Sept. 3, 2019) (quoting *Tumlin v. Tuggle Duggins P.A.*, 2018 NCBC LEXIS 51, at *31 (N.C. Super. Ct. May 22, 2018)). However, “[w]illfulness, bad faith, or prejudice to another party may influence the court’s discretion in determining the appropriate sanction.” *Red Valve*, 2019 NCBC LEXIS 57, at *41 (citation omitted) (internal quotation marks omitted). “Sanctions under Rule 37 are within the sound discretion of the trial court and will not be overturned . . . absent a showing of abuse of that discretion.” *Hursey v. Homes by Design*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995) (citation omitted).

12. Under Rule 37(d), a court may, as a sanction, “take any action authorized under subdivisions a, b, and c of subsection (b)(2)” of Rule 37, including “[a]n order striking out pleadings or parts thereof, . . . , or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.” N.C. R. Civ. P. 37(b)(2)(c). Before dismissing an action or striking claims, counterclaims, or defenses, a court must first consider lesser sanctions. *Gillespie v. Majestic Transp., Inc.*, 2017 NCBC LEXIS 44, at * 10–11 (N.C. Super. Ct. May 12, 2017) (citations omitted); see *Goss v. Battle*, 111 N.C. App. 173, 176, 432 S.E.2d 156, 159 (1993) (holding that a trial court must consider lesser sanctions before dismissing the action under Rule 37(d)). “When sanctioning a party under its inherent authority, the court must weigh the circumstances of each case and choose a sanction that, in the court’s judgment, ‘properly takes into account the severity of the party’s disobedience.’” *Red Valve*, 2019 NCBC LEXIS 57, at *42 (quoting *Out of the Box Developers, LLC v. LogicBit Corp.*, 2014 NCBC LEXIS 7, at *10 (N.C. Super. Ct. Mar.

20, 2014)). In addition, when determining the appropriate sanction to impose, “a court may consider the entire record before it.” *Red Valve*, 2019 NCBC LEXIS 57, at *42.

ANALYSIS

13. It is undisputed that McGuire’s deposition was properly noticed on September 30, 2019 to take place on October 28, 2019. It is also undisputed that McGuire was present at his counsel’s Charlotte office on the morning of the deposition but left the premises and refused to attend his deposition.

14. Under Rule 37(d), the failure of a party to attend his own deposition “may not be excused . . . unless the party failing to act *has applied for a protective order.*” N.C. R. Civ. P. 37(d) (emphasis added). It is undisputed that McGuire neither sought nor obtained a protective order to excuse his attendance. Thus, McGuire’s attendance at this deposition was not legally excused, and he therefore had a duty to appear for his deposition on October 28, 2019. Rule 37 permits the imposition of sanctions and attorneys’ fees against McGuire for his failure to attend in these circumstances.

15. McGuire argues that the Sanctions Motion should be denied because he “fully intended to comply with his legal obligations” and the dispute could have been avoided had LORD objected sooner. (Pl. Robert McGuire’s Br. in Opp’n to Def.’s Mot. for Sanctions 4 [hereinafter “Pl.’s Br. in Opp’n”].) McGuire contends that sanctions should be rejected because LORD “fail[ed] to bring this issue to a decision until Mr. McGuire and Ted [Johnson] were already in the air on an international flight headed to the deposition[.]” (Pl.’s Br. in Opp’n 4.)

16. McGuire's arguments are wholly without merit. First, even if McGuire's factual averments were accurate, LORD's alleged conduct in no way relieved McGuire of Rule 37's plain requirement that he apply for a protective order to excuse his attendance at his deposition. Moreover, McGuire's alleged facts are refuted by the undisputed evidence that LORD immediately objected each time McGuire insisted on Johnson's attendance at McGuire's deposition, first on October 9 and again on October 18 and 22. (*See* Aff. Charles E. Raynal, IV Ex. D.) Accordingly, the Court concludes, in the exercise of its discretion, that sanctions are appropriate against McGuire for his unexcused failure to attend and that the Sanctions Motion should therefore be granted.

17. LORD argues that the proper sanction for McGuire's conduct is dismissal of this action. In considering LORD's request, the Court is mindful that it must first consider whether lesser sanctions are appropriate. *See, e.g., Goss v. Battle*, 111 N.C. App. at 176, 432 S.E.2d at 159. Here, McGuire's failure to attend his deposition worked regrettable inconvenience on LORD's counsel, was particularly galling considering LORD's accommodation of McGuire's travel plans, and was in plain violation of McGuire's responsibilities under Rules 26, 30, and 37. *See* N.C. R. Civ. P. 26, 30, 37. That said, there is no evidence that McGuire has engaged in a pattern of misconduct, McGuire appears to have been motivated by his desire to have Johnson attend his deposition rather than to flout the Court's rules, and it appears that McGuire's counsel had some access challenges in reaching him immediately prior to the deposition. Based on these facts and mindful that the "[i]mposition of sanctions

that are directed to the outcome of the case, such as dismissals, . . . are examined in the light of the general purpose of the Rules to encourage trial on the merits[.]” *Red Valve*, 2019 NCBC LEXIS 57, at *62, the Court concludes, in the exercise of its discretion, that dismissal is an excessive sanction in the circumstances of this case.

18. The Court has considered lesser sanctions, including those identified under Rule 37(b)(2)(a)–(c), and concludes, in the exercise of its discretion, that the appropriate sanction for McGuire’s conduct in these circumstances is to permit LORD to depose McGuire at LORD’s counsel’s offices in Raleigh, North Carolina at a mutually convenient time and date for up to seven hours of on-the-record examination.

19. In addition, under Rule 37(d), “the court shall require the party failing to [attend his own properly-noticed deposition] to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.” N.C. R. Civ. P. 37(d). Based on the evidence of record, the Court concludes, in the exercise of its discretion, that McGuire’s failure to attend his deposition was not “substantially justified” and that there are no circumstances that make an award of reasonable expenses against McGuire “unjust.”

20. Based on the Court’s review of the materials filed in support of the Sanctions Motion, the Court concludes, in the exercise of its discretion, that the requested expenses are reasonable and that McGuire should reimburse LORD for these expenses. (*See* Aff. Scott E. Bayzle 2–3, Exs. B–E.) In particular, the Court has

considered the factors of Rule 1.5(a) of the Revised Rules of Professional Conduct and finds that the attorneys' fees requested are reasonable considering those factors. *See* N.C. Rev. R. Prof. Conduct 1.5(a).

21. **WHEREFORE**, the Court, in the exercise of its discretion and for good cause shown, hereby **GRANTS** the Sanctions Motion and hereby **ORDERS** as follows:

- a. McGuire shall appear for his deposition at the offices of LORD's counsel in Raleigh, North Carolina for seven (7) hours of on-the-record examination at a mutually convenient time and date but in any event no later than February 10, 2020.
- b. McGuire shall pay to LORD its reasonable expenses, including attorneys' fees, caused by his unjustified failure to attend his deposition in the total amount of \$8,866.47 within forty-five (45) days after the entry of this Order.

SO ORDERED, this the 9th day of January, 2020.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge