

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN HEWETT,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	CIVIL ACTION NO. H-05-4353
	§	
LOWE’S HOME CENTERS, INC.,	§	
<i>Defendant.</i>	§	

MEMORANDUM AND RECOMMENDATION

Defendant Lowe’s Home Centers, Inc. (Lowe’s) has filed a motion to dismiss this case with prejudice for want of prosecution (Dkt. 14). Plaintiff has not responded. The court recommends that the motion be granted.

Federal Rule of Civil Procedure 41(b) provides that a defendant may move for dismissal of an action based on the “failure of the plaintiff to prosecute or to comply with these rules or any order of court.” A dismissal with prejudice “is an extreme sanction that deprives the litigant of the opportunity to pursue his claim.” *Berry v. CIGNA/RSI-Cigna*, 975 F.2d 1188, 1191 (5th Cir. 1992). However, a dismissal with prejudice may be warranted where (1) there is a clear record of unreasonable delay or contumacious conduct by plaintiff and (2) the court determines that lesser sanctions would not prompt diligent prosecution, or lesser sanctions have been employed but proved to be futile. *Morris v. Ocean Sys., Inc.*, 730 F.2d 248, 251-52 (5th Cir. 1984). The court should also consider aggravating factors, such as (1) whether the plaintiff personally, and not counsel, contributed to the delay; (2) whether the defendant was actually prejudiced by the delay; and (3) whether the plaintiff intentionally

caused the delay. *Id.* A district court's dismissal with prejudice for failure to prosecute is based upon the court's power to manage and administer court affairs and to ensure orderly and expeditious disposition of cases. The decision is reviewed for abuse of discretion. *Berry*, 975 F.2d at 1191.

Plaintiff John Hewett filed this action on December 27, 2005 alleging age and disability discrimination. Despite numerous requests by Lowe's for the plaintiff's deposition, plaintiff's counsel has been unable to contact his client to schedule a deposition. A deposition was noticed for September 21, 2006, but Hewett failed to appear despite his lawyer's efforts to locate him. As of November 16, 2006, Hewett has not contacted his counsel, and his counsel has been unable to locate him.

Hewett has a clear record of unreasonable delay in this case. Given the inability of counsel to locate his client, a lesser sanction would not have any impact on his behavior. Moreover, fault for the delay appears to lie solely with Hewett, not his counsel. The discovery deadline in this case is November 30, 2006. It is impossible to meet this deadline, or any new deadline the court may set, without the participation of Hewett. Therefore, Hewett's behavior has actually prejudiced Lowe's. Finally, while the reason for Hewett's disappearance is not known, his failure to contact his lawyer to explain his absence at the deposition and overall failure to prosecute this action leads the court to conclude that he is intentionally failing to prosecute this case.

For the above reasons, the court recommends that Lowe's motion to dismiss this action with prejudice be granted.

Plaintiff's counsel is ordered to immediately send a copy of this memorandum and recommendation to Hewett at his last known address.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. PRO. 72.

Signed at Houston, Texas on November 17, 2006.



Stephen Wm Smith
United States Magistrate Judge