

AUG - 5 1983

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

Judith M. Napier
Clerk U.S. Bankruptcy Court

In the Matter of:)
)
 INDIANA REFRIGERATOR LINES,)
 INC.,)
)
 Debtor.)
)
 INDIANA REFRIGERATOR LINES,)
 INC., Debtor in Possession,)
)
 Plaintiff,)
)
 and)
)
 ST. JOSEPH BANK AND TRUST CO.,)
)
 Co-Plaintiff,)
)
 v.)
)
 ROGERS TRUCK LINES, INC., and)
 CLIFTON H. ROGERS,)
)
 Defendants.)

FILED
 DISTRICT OF NEBRASKA
 AT _____ IA
 AUG - 4 1983
 William L. Olson, Clerk
 By _____ Deputy

CV. 82-0-491
 Bk. 81-86
 A. 81-780

MEMORANDUM AND ORDER

This matter is presently before the Court on an appeal from a judgment by the United States Bankruptcy Court for the District of Nebraska¹ entered on September 10, 1982. A judgment of default, based upon failure to comply with a discovery order of the bankruptcy court was rendered in favor of the plaintiffs-appellees, Indiana Refrigerator Lines, Inc., and St. Joseph Bank & Trust Company (hereafter plaintiffs). Defendants-appellants, Rogers Truck Line, Inc., and Clifton H. Rogers

1. The Honorable David L. Crawford presiding.

(hereafter defendants) now appeal the bankruptcy court's entry of the default judgment. The Court has heard oral argument, has reviewed the briefs of the respective parties and the authorities cited therein, and the entire record submitted on appeal, and concludes that the bankruptcy court's disposition of the matter must be reversed.

The facts are these. On January 16, 1981, the plaintiff, Indiana Refrigerator Lines, Inc., filed a petition under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Nebraska. On November 12, 1981, the plaintiff and St. Joseph's Bank & Trust Company filed an adversary proceeding against the defendants. The plaintiffs alleged that the defendants were indebted to the plaintiffs for approximately \$353,872 for accounts receivable and fraudulent transactions. On February 2, 1982, and February 16, 1982, respectively, the defendants filed their answer and counterclaim setting forth the general denial and four causes of action against the plaintiffs and sought a judgment in excess of \$350,000.

Discovery by all the parties commenced thereafter. Plaintiffs encountered difficulty in arranging the deposition of the defendant, Clifton Rogers, but were finally successful in deposing Rogers on April 19, 1982. During the deposition, Mr. Rogers, on advice of counsel, refused to answer four questions involving his personal financial arrangements.

A pretrial conference was held on July 8, 1982, at which time Mr. O'Brien, counsel for the defendants, filed a motion to withdraw. Judge Crawford continued the pretrial until September 10, 1982. Thereafter, on

July 14, 1982, the plaintiffs filed a motion to compel Mr. Rogers to answer the four questions which they deemed indispensable information for their case. On August 13, 1982, the bankruptcy court sustained the plaintiff's motion and ordered Mr. Rogers to comply within twenty days. Also on the same date the bankruptcy court permitted Mr. O'Brien, defendants' attorney, to withdraw, and defendants elected to proceed *pro se* thereafter. The bankruptcy court gave notice to Mr. Rogers that he must answer the questions within twenty days, which established a deadline of September 2, 1982.

Mr. Rogers elected to bring his answers to the previously scheduled pretrial conference on September 10, 1982, eight days after the deadline of compliance set by the Court. Mr. Rogers appeared *pro se* at the pretrial on September 10, 1982, with his answers. Mr. Rogers admitted receipt of the notice and knowledge of the court order of August 13, 1982. The bankruptcy court found the defendant was in default for failing to answer the four questions as ordered, relying on the sanction authority under Fed.R.Civ.P. 37. The bankruptcy court entered a default judgment in favor of the plaintiffs in an amount in excess of \$350,000, plus interest and the plaintiffs' costs. The defendants then filed this timely appeal, and the sole issue before the Court is whether the bankruptcy court abused its discretion in entering a default judgment against these defendants.²

2. The defendants also raise a due process issue but the court does not address the issue because of its ruling on the principle issue of the propriety of default judgment.

A court has discretion under Rule 37, Fed.R.Civ.P., to impose appropriate sanctions for failure to make discovery or to comply with discovery orders. The various sanctions under Rule 37(b)(2)(A-E), allow the court to treat such failures as contempt of court, to require the payment of reasonable attorney fees, to stay the proceeding until the order is obeyed, to require admissions, to allow designated evidence without further dispute, to strike pleadings, and to enter a dismissal or judgment by default.

This latter sanction of dismissal or default is obviously more severe than the other available sanctions permitted by Rule 37 and, therefore, appropriate only under limited circumstances. *Kropp v. Liebarth*, 557 F.2d 142, 146 (8th Cir. 1977). The Supreme Court and the Eighth Circuit Court of Appeals have strongly indicated that the harsh remedies of dismissal and default should only be used when "the failure to comply has been due to . . . wilfulness, bad faith, or any fault of petitioner." *Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958); *Edgar v. Slaughter*, 548 F.2d 770, 772 (8th Cir. 1977); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1211 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1973).

Moreover, the Eighth Circuit Court of Appeals has held:

Prior to dismissal or entering a default judgment, fundamental fairness should require a district court to enter an order to show cause and hold a hearing, if deemed necessary, to determine whether assessment of costs and attorney's fees or even an attorney's citation for contempt would be a more just and effective sanction. Dismissal and entry of a default judgment should be a rare judicial act.

Edgar v. Slaughter, supra, 548 F.2d at 773.

Although mindful that a Rule 37 sanction is not grounds for a reversal unless it constitutes an abuse of discretion, see *Laclede Gas Co. v. G. W. Warnecke Corp.*, 604 F.2d 561, 565 (8th Cir. 1979), the Court finds such an abuse in granting a default judgment against the defendants under the circumstances of this case. While the Court acknowledges that the defendants were indeed eight days late in complying with the order, it cannot agree that the sanction of a default judgment is appropriate. The facts reveal that Mr. Rogers had been deposed and the subject matter of the discovery order involved four questions that had been objected to during his deposition. Mr. Rogers was proceeding *pro se* at the time he showed up for the pretrial conference on September 10, 1982, with the answers to the four questions. The record does not show that Mr. Rogers' failure to comply on time was flagrant bad faith. Nor was there a hearing to determine such or any indication that consideration was given to the imposition of less severe sanctions.

This Court realizes and appreciates the need for wide judicial latitude in controlling discovery and seeking compliance with court orders. But, such interests must be balanced against the litigants' right to be heard. *Edgar v. Slaughter, supra*, 548 F.2d at 772-73. Because there is a "strong policy favoring a trial on the merits and against depriving a party of his day in court," *Fox v. Studebaker Worthington, Inc.*, 516 F.2d 989, 996 (8th Cir. 1975), the Court cannot approve the default judgment entered against the defendants. The Court finds the entry of a default judgment against the defendants under the circumstances of this case to be an abuse of discretion and that it must be vacated. On remand, the bankruptcy court may, of course, consider the imposition of less extreme sanctions set forth in Federal Rule of Civil Procedure 37(b).

Accordingly, the case is remanded to the bankruptcy court with instructions to reinstate the plaintiffs' complaint and the defendants' counterclaim and to take such other action as it deems proper and which is consistent with this opinion.

IT IS SO ORDERED.

BY THE COURT:

Robert G. Alley

JUDGE, UNITED STATES DISTRICT COURT