United States Court of Appeals
For the First Circuit

No. 10-1706

ROBERTO MORGALO,

Plaintiff, Appellant,

v.

RUBEN BLADES AND RUBEN BLADES PRODUCTIONS, INC.,

Defendants, Appellees.

Torruella, Boudin and Lipez,
Circuit Judges.

JUDGMENT

Entered: February 27, 2012

Appellant-plaintiff Roberto Morgalo appeals from the district court's Judgment dated June 3, 2010, dismissing the defamation complaint filed by Morgalo against Ruben Blades and Ruben Blades Productions, Inc. (RBPI). The dismissal was imposed, pursuant to Fed.R.Civ.P. 37(b)(2)(A), as a sanction for failure to serve a timely and complete Answer to the Second Set of Interrogatories propounded by Blades.

"'A district court may dismiss an action for non-compliance with a discovery order.' 'When a district court invokes this power, our review is for abuse of discretion.'" Malloy v. WM Specialty Mortg. LLC, 512 F.3d 23, 26 (1st Cir. 2008)(citations omitted). This court "show[s] considerable deference 'to the district court's on-the-scene judgment' when selecting the appropriate sanction." Vallejo v. Santini-Padilla, 607 F.3d 1, 9 (1st Cir. 2010).

> Where, as here, the dismissal is with prejudice, we consider a variety of substantive and procedural factors to determine whether that ultimate sanction was within the district court's discretion. "'Among [the substantive factors] commonly mentioned (this list is not complete) are the severity of the violation, the legitimacy of the party's excuse, repetition of violations, the deliberateness vel non of the misconduct, mitigating excuses, prejudice to the other side and to the operations of the court, and the adequacy of lesser sanctions.'" As to procedure, we consider whether the offending party was given sufficient notice and opportunity to explain its

noncompliance or argue for a lesser penalty.

Malloy, 512 F.3d at 26.

The district court correctly identified the relevant factors to be considered in determining the sanction to impose for violation of the discovery deadline. In determining that dismissal was the appropriate sanction, the court found that Morgalo's conduct in stopping answering the interrogatories after reaching what it believed to be the numerical limit under Fed.R.Civ.P. 33(a)(1) "violates a clearly defined discovery rule." Because we disagree with that conclusion, as a matter of law, we find that the dismissal on that basis, and weighing all of the relevant factors, was an abuse of discretion.

Fed.R.Civ.P. 33(a)(1) provides that "[u]nless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2)." Here, the parties did not stipulate and the court did not order that the number of interrogatories would be increased, nor did Blades request leave to serve additional interrogatories. Therefore, the parties were limited to filing "25 interrogatories, including all discrete subparts."

Rule 33(b)(2) provides the "[t]he responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or ordered by the court." Fed.R.Civ.P. 33(b)(2)(emphasis added). In the only Case Management Memorandum filed in these cases, pursuant to Fed.R.Civ.P. 26(f) and 16(b) (prior to the date that the defamation case was consolidated with the breach-of-contract case), the parties stipulated that the time to respond to interrogatories would be extended from 30 days to 60 days after service.

On 1/22/10, Ruben Blades propounded a Second Set of Interrogatories upon Morgalo. The filing did not purport to be from RBPI, but from Blades alone. It contained forty-six questions. On 2/18/10, Morgalo informed Blades via e-mail that he believed that the number of interrogatories exceeded the number permitted under Rule 33. He filed a copy of that e-mail with the district court on 2/19/10, as an appendix to his Urgent Motion Requesting an Order to Compel Blades to Attend his Disposition, and indicated that he objected to the interrogatories. Neither the court nor Blades specifically addressed the issue raised by Morgalo of the appropriate number of interrogatories prior to the filing of defendants' Motion to Dismiss.

Morgalo filed his Answer to the Second Set of Interrogatories on 3/23/10. The district court found that the parties had agreed to extend the deadline for filing an Answer to 3/20/10. If the sixty-day period stipulated to in the Case Management Memorandum applied, the deadline for responding to the Second Set of Interrogatories was 3/23/10. However, since neither party has relied upon or referred to that extended deadline we will assume that the 3/20/10 deadline applied and that the Answer was served three days late. As the district court acknowledged, ordinarily a delay of that magnitude would not trigger dismissal. See Malot v. Dorado Beach Cottages Assocs., 478 F.3d 40, 44 (1st Cir. 2007) ("We tend to reserve dismissal with prejudice for delays measured in years, while reversing dismissals for conduct resulting in delays of merely a few months").

In concluding that dismissal was the appropriate sanction in this case, the court relied upon Morgalo's "not objecting in a timely manner and then . . . selectively answering the interrogatories he wished to answer, in this case, the first 19." Neither justification is supported by the record or the governing law. As discussed above, Morgalo notified both Blades and the court within one month of receiving the Second Set of Interrogatories that he believed that they exceeded the number allowed under Rule 33. Morgalo filed written objections to the interrogatories in excess of the allowed number when he filed his Answer, consistent with the governing Rule. See 7 Moore's Federal Practice 3d § 33.170, p.33-96 (3d ed. 2011) (stating that under Rule 33(b)(2), "[o]bjections and separate answers to each interrogatory not objected to must be served together").

Morgalo submitted answers to the first nineteen interrogatories (calculating that, with subparts, that counted as twenty-five interrogatories) and objected to the remaining interrogatories (Questions 20 through 46). The district court found that Morgalo incorrectly calculated the number of interrogatories permitted, reasoning that "the fact that there are two parties being sued by Mr. Morgalo would double the normal limit of 25 written interrogatories generally allowed." But, the Second Set of Interrogatories served upon Morgalo identified Blades alone as the propounding party, with no mention of RBPI. And, it is also unclear whether this might be one of the "instances [in which] nominally separate parties should be considered one party for purposes of the 25-interrogatory limitation." 7B Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure, § 2168.1, p. 42 (3d ed. 2010). Morgalo's belief that the number of interrogatories exceeded the limit under Rule 33 was at least reasonable.

Answering only the interrogatories considered to be within the numerical limit and objecting to the remaining ones was consistent with prevailing law. "It appears that when a party is served with interrogatories in excess of the numerical limits, the party may answer the first 25, and object to the remainder." 7 Moore's Federal Practice 3d, § 33.30[1] (emphasis added); see, e.g., Smith v. Café Asia, 256 F.R.D. 247, 254 (D.D.C. 2009). "The propounding party would then be required to move to compel further answers." 7 Moore's Federal Practice 3d, § 33.30[1]; cf. 7B Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure, § 2168.1, p. 42 (3d ed. 2010) (party should not be allowed to "selectively answer[]" or "pick and choose" which of the interrogatories to answer when it believes that the numerical limitation has been exceeded).

We disagree with the district court's conclusion that Morgalo's Answer to the Second Set of Interrogatories "violates a clearly defined discovery rule." Therefore, that faulty conclusion cannot support the order of dismissal. We recognize that there were repeated delays in Morgalo's responses to discovery requests during the course of the litigation, especially during the year that he was proceeding pro se. However, in view of the mitigating circumstances, including shared responsibility with other parties for some of the delays, dismissal of the case on those grounds alone would be an abuse of discretion. We also note that the reference in the court's March 19, 2010 Opinion and Order to dismissal as one possible sanction for spoilation of evidence did not serve to forewarn Morgalo that tardiness in responding to a discovery request, even by a few days, would result in dismissal of the defamation action. See Garcia-Perez v. Hospital Metropolitano, 597 F.3d 6, 9 (1st Cir. 2010).

The district court Judgment dated June 3, 2010, dismissing the defamation complaint filed

by Morgalo against Ruben Blades and Ruben Blades Productions, Inc. (RBPI), is reversed and the case is remanded for further proceedings.

By the Court:

/s/ Margaret Carter, Clerk.

cc:
Honorable Justo Arenas, United Sates District Court Magistrate Judge for the District of Puerto Rico
Frances Rios de Moran, Clerk, United States District Court for the District of Puerto Rico
Jose A. Hernandez-Mayoral
Juan H. Saavedra-Castro
Eduardo J. Corretjer-Reyes
Pamela D. Gonzalez-Robinson
Israel O. Alicea-Luciano
Juan M. Frontera-Suau