



**IT IS ORDERED as set forth below:**

**Date: February 13, 2015**

**Barbara Ellis-Monro  
U.S. Bankruptcy Court Judge**

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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

IN RE:

THONG HIEU NGUYEN,

Debtor.

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DISCOVER BANK,

Plaintiff,

v.

THONG HIEU NGUYEN,

Defendant.

CASE NO. 13-77157-BEM

CHAPTER 7

ADVERSARY PROCEEDING NO.  
14-5090-BEM

**ORDER**

This matter comes before the Court on Plaintiff's Motion for Sanctions. [Doc. No. 15.] Plaintiff asks the Court to strike Defendant's answer and enter default judgment due to Defendant's failure to respond to discovery requests. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

## **I. Findings of Fact**

On March 24, 2014 Plaintiff filed a complaint to determine dischargeability of its debt under 11 U.S.C. § 523(a)(2)(C)(i)(I) based on consumer charges for luxury goods totaling more than \$650 within 90 days prior to the petition date. [Doc. No. 1.] Defendant filed an answer on April 22, 2014, denying that the purchases were for luxury goods. [Doc. No. 5.] The parties filed a Joint Motion to Extend Time to Conduct Discovery on July 3, 2014. [Doc. No. 7.] The Court granted the motion and extended discovery until September 1, 2014. [Doc. No. 8.] On July 25, 2014, Plaintiff's counsel filed a certificate of service indicating he had served Defendant's counsel on that date with requests to admit, interrogatories, and request for production of documents.

On November 5, 2014, the Court held a status conference, at which time Plaintiff's counsel reported that Defendant had failed to respond to any of the discovery requests and that Plaintiff intended to seek sanctions under Federal Rule of Civil Procedure 37. Defendant's counsel indicated that all or most of the purchases at issue were not luxury goods and that Plaintiff already had all the records of the purchases. The Court advised Defendant's counsel of his duty to respond to discovery and entered an order giving the parties until December 5, 2014, to file any motions for sanctions or dispositive motions. [Doc. No. 13.] On November 14, 2014, Plaintiff filed the motion at issue and an affidavit by Plaintiff's counsel that he made a good faith effort to elicit responses to his discovery requests. [Doc. No. 16.] On December 2, 2014, Defendant filed a response to the motion for sanctions and filed responses to interrogatories, requests for admission, and requests for production. [Doc. Nos. 17-20.]

## II. Conclusions of Law

Plaintiff asks the Court to strike Defendant's answer, enter a default judgment, and award attorney fees as a result of Defendant's failure to answer discovery. Under Federal Rule of Civil Procedure 37(d)(1)(A)(ii), made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7037, the Court may award sanctions when "a party, after being properly served with interrogatories under Rule 33 ... fails to serve its answers, objections, or written response." The type of sanctions available include:

any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(d)(3). Under Rule 37(b)(2)(A)(iii) and (vi), the Court may strike a pleading and render a default judgment against the disobedient party. While the Rule gives the Court broad discretion to fashion appropriate remedies, the severe sanctions sought by Plaintiff require a finding of willful or bad faith failure to comply with discovery requests as well as a finding that lesser sanctions are insufficient to deter the complained of conduct. *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1542 (11th Cir. 1993); *Rasmussen v. Central Florida Council Boy Scouts of America, Inc.*, 412 Fed. Appx. 230, 232 (11th Cir. 2011). Further, striking pleadings and entering default judgment is not an appropriate discovery sanction in "the absence of either a motion to compel ... or an order of the court compelling discovery." *U.S. v. Certain Real Property Located at Route 1, Bryant, Ala.*, 126 F.3d 1314, 1318 (11th Cir. 1997).

At the hearing on November 5, 2014, Defendant's counsel stated that he failed to answer discovery because Plaintiff already had records of all the charges at issue and the charges are not for luxury goods. Defendant's counsel contended in a later pleading that after the hearing,

he reached out to Plaintiff's counsel by email to discuss the possibility of settlement but received no response. On November 10, 2014, however, Defendant's counsel asserted he received an email from Plaintiff's counsel inquiring about the status of discovery. Defendant's counsel replied with a renewed offer to settle, which went unanswered. [Doc. No. 17, ¶¶ 1-5.] Defendant's counsel further contended that striking Defendant's answer would result in an admission that all charges at issue were for luxury goods which is contrary to the facts and, consequently, would be manifestly unjust. [Id. ¶¶ 7-9.] Approximately two weeks after Plaintiff filed its motion for sanctions, Defendant served responses to all Plaintiff's discovery requests.

While Defendant cannot avoid imposition of sanctions by answering discovery after a motion for sanctions has been filed, "the court may consider the belated response in determining what sanction, if any, to impose ...." 8B Wright & Miller, Federal Practice & Procedure § 2291 (3d ed.). In this case, at the November 5, 2014 hearing, the Court directed Defendant to answer the discovery requests and also instructed the parties to consider settlement. However, Plaintiff never filed a motion to compel discovery and the Court never issued an order compelling discovery. Therefore, under 11th Circuit precedent, the Court cannot strike Defendant's answer and enter default judgment. *Route 1*, 126 F.3d at 1318. Even if the Court's direction to Defendant's counsel regarding discovery could be considered an order for purposes of *Route 1*, Defendant's conduct does not rise to the level of bad faith necessary to justify a default judgment. Defendant has exhibited a certain lack of diligence and an apparent desire to attempt settlement before responding to discovery. However, Defendant has now responded to the discovery requests, demonstrating that lesser sanctions—indeed the mere threat of sanctions—were sufficient to deter the objectionable conduct. For the forgoing reasons, the Court will not strike Defendant's answer and will not render default judgment for Plaintiff.

The Court will now consider whether to award Plaintiff reasonable expenses. While Defendant's failure to timely respond to discovery may not have been undertaken in bad faith, Defendant has not shown his dilatoriness was substantially justified. For purposes of Rule 37, "[s]ubstantially justified means that reasonable people could differ as to the appropriateness of the contested action." *Maddow v. Procter & Gamble Co., Inc.*, 107 F.3d 846, 853 (11th Cir. 1997) (finding that plaintiffs were substantially justified in relying on Supreme Court dicta and out-of-circuit case law to resist discovery of certain information when no in-circuit case law on the issue existed). *Pegoraro v. Marrero*, 281 F.R.D. 122, 134 (S.D.N.Y. 2012) (no attorney fees awarded where party resisting discovery successfully defended against a motion to compel). In this case, Defendant did not object to the discovery requests or otherwise indicate they might be improper. Defendant expressed an interest in settling the case, questioned the factual basis of the case, and indicated his belief that Plaintiff was already in possession of documentation of the charges at issue. However, none of these factors justifies failing to timely respond to discovery requests nor do they establish that an award of expenses would be unjust. Therefore, the Court will award Plaintiff expenses incurred in connection with Plaintiff's motion for sanctions, including attorney fees, to be paid by Defendant's counsel. Fed. R. Civ. P. 37(d)(3).

Accordingly, it is ORDERED that Plaintiff's motion is GRANTED in part and DENIED in part.

It is further ORDERED that counsel for Defendant shall pay Plaintiff the expenses of bringing the motion for sanctions, including attorney fees. The Court will set an evidentiary hearing by separate order to determine the amount of the expenses.

**END OF ORDER**

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