

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:)	Case No. 05-15896
)	
GLORIA GRISCHKAN,)	Chapter 13
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
)	
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MORTGAGE ELECTRONIC)	Adversary Proceeding No. 05-1222
REGISTRATION SYSTEMS, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	<u>MEMORANDUM OF OPINION</u>
GLORIA GRISCHKAN and)	
MICHAEL GRISCHKAN,)	
)	
Defendants.)	

Plaintiff Mortgage Electronic Registration Systems, Inc. (MERS) filed this adversary proceeding to request injunctive, *in rem*, and other equitable relief with respect to real property located at 28575 Settlers Lane, Pepper Pike, Ohio. Defendants Michael Grischkan and Gloria Grischkan filed a counterclaim which states three counts. The first two counts request a determination that a previous *in rem* order of this court with respect to the property is void and an award of damages for violation of the automatic stay based on foreclosure activity. The third count requests injunctive relief to prevent MERS from evicting the Grischkans from the property.

MERS now requests sanctions against the Grischkans in the form of judgment on the complaint and dismissal of the counterclaim with prejudice based on their failure to provide

discovery. For the reasons stated below, MERS's request states good cause and is granted. (Docket 42, 48).

JURISDICTION¹

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 152(b)(2)(O).

DISCUSSION

After consultation with counsel, this court entered a case scheduling order which established dates to control this proceeding and set October 21, 2005 as the discovery deadline. (Docket 28). The scheduling order requires the parties to make good faith efforts to resolve discovery disputes and provides that failure to comply with its terms may result in dismissal, default judgment, or other appropriate sanctions.

MERS presented the Grischkans with a combined discovery request on September 28, 2005 that included interrogatories, requests for production of documents, and admissions. The Grischkans did not respond to this request within the time provided by the rules. MERS's counsel faxed a letter to the Grischkans' counsel on November 4, 2005 asking that the discovery be provided by November 11, 2005. The Grischkans have not provided the discovery to date.

On November 17, 2005, MERS filed its request for an order on the Grischkans to show cause why sanctions should not be imposed based on their failure to provide discovery. (Docket 42). The court issued an order granting the motion and giving the Grischkans until November 25, 2005 to provide any information they wished the court to consider on the issue. (Docket 43).

¹ The court dismissed Gloria Grischkan's chapter 13 case with sanctions, retaining jurisdiction to adjudicate this adversary proceeding. *See* case no. 05-15896, docket 30.

The Grischkans did not file anything. The court then entered an order finding that the matters which MERS had requested admitted were deemed admitted by rule based on the Grischkans' failure to respond. (Docket 45). The court also gave MERS leave to supplement its motion by December 16, 2005 to identify in greater detail the discovery requested and the prejudice caused by the failure to provide discovery, as well as to request a specific sanction. The order provided that the Grischkans had until December 23, 2005 to respond. MERS filed a timely supplement to its motion. The Grischkans did not respond.

Federal rule of civil procedure 37(b)(2) lists sanctions which a court may impose on parties who fail to obey an order to provide or to permit discovery. *See* FED. R. CIV. P. 37(b)(2) (applicable to bankruptcy proceedings under FED. R. BANKR. P. 7037). Rule 37 authorizes a court to enter several types of orders including an order “dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]” FED. R. CIV. P. 37(b)(2)(C). *See also* FED. R. BANKR. P. 7016 (as it incorporates Fed. R. Civ. P. 16(f) which provides for the entry of a sanction order under rule 37(b)(2)(B), (C), or (D) where a party has failed to obey a scheduling order).

The decision to impose a sanction of dismissal or entry of default judgment is submitted to this court's discretion:

Simply put, “if a party has the ability to comply with a discovery order and does not, dismissal,” and we add or entry of default, “is not an abuse of discretion.” Just as “[d]ismissal of an action for failure to cooperate in discovery is a sanction of last resort that may be imposed only if the court concludes that a party's failure to cooperate in discovery is due to willfulness, bad faith, or fault,” so, too, is entry of default judgment. Additional factors to consider . . . include “whether the adversary was prejudiced by the dismissed [or defaulting] party's failure to cooperate in discovery,

whether the dismissed [or defaulting] party was warned that failure to cooperate could lead to dismissal [or default], and whether less drastic sanctions were imposed or considered before dismissal [or default] was ordered.”

Bank One of Cleveland, N.A. v. Abbe, 916 F.2d 1067, 1073 (6th Cir. 1990) (quoting *Regional Refuse Sys. v. Inland Reclamation Co.*, 842 F.2d 150 (6th Cir. 1988)) (citations omitted). The court must, therefore, consider these four factors to assess whether default judgment on the complaint and dismissal of the Grischkans’ counterclaim is an appropriate sanction: (1) whether the Grischkans failure to cooperate in discovery was due to willfulness, bad faith, or fault; (2) whether MERS was prejudiced by the Grischkans’ failure to cooperate in discovery; (3) whether the Grischkans were warned that failure to cooperate could lead to dismissal or entry of default judgment; and (4) whether less drastic sanctions are appropriate.

The Grischkans’ bad faith and disregard in these proceedings is apparent. As this court previously held:

The discovery issue before the court arises in a case that the court has described, on the record, as one of the two most egregious abuses of the bankruptcy system the court has seen, the other one being the cases filed by the debtor’s spouse. In a nutshell, Gloria Grischkan and Michael Grischkan have collectively filed five chapter 13 cases in an attempt to prevent secured creditor Mortgage Electronic Registration Systems, Inc. from obtaining possession of and selling residential property valued at \$615,000.00 that the Grischkans have occupied since 1999 without making one payment on the note that secures the mortgage on the house

The Grischkans and MERS have a long history of dealings with respect to property located at 28575 Settlers Lane, Pepper Pike, Ohio (the property). Gloria Grischkan purchased the property in 1999 and has lived there ever since with her husband, Michael Grischkan. Gloria Grischkan borrowed \$265,000.00 to purchase the property; MERS holds the note which is secured by a mortgage from both Grischkans on the property. Michael Grischkan has a dower interest, only, in the property. Gloria Grischkan has never made a payment under the note. MERS filed a state court

complaint on the note and to foreclose the mortgage in 1999. A sheriff's sale of the house was first set for September 10, 2001.

To stop MERS's efforts to foreclose on the property, Michael Grischkan filed four bankruptcy cases. See memorandum of opinion and order, case no. 04-22330 (docket 30, 31). On April 13, 2004, the court entered an order in his third case granting MERS *in rem* relief against the property (the *in rem* order). See case no. 03-18733, docket 46. The *in rem* order provides that "any stay under § 362(a) of the Bankruptcy Code as to future bankruptcy filings will not be imposed upon the . . . property for a period of 180 days following the entry of [the] Order." The property was sold at foreclosure (apparently to MERS) on September 27, 2004 and the state court confirmed the sale on October 7, 2004. MERS then attempted to obtain possession by evicting the Grischkans, who at that point had lived in the house "rent free" for more than four years.

On April 28, 2005, Gloria Grischkan filed her chapter 13 case to stop the eviction proceeding. On September 20, 2005, the court dismissed her case with sanctions (a 180-day bar against refiling), retaining jurisdiction to adjudicate this adversary proceeding.

(Docket 45). Given this context, the Grischkans' continuing failure to provide the discovery, their failure to respond to the motion for a show cause order, and their failure to respond to the supplemental motion show can only be characterized as a willful, bad faith failure to participate in the discovery process.

MERS is clearly prejudiced by the Grischkans' failure to participate in discovery as it is unable to adequately prepare for trial without the requested discovery.

The Grischkans have been given ample notice that their failure to respond to MERS's discovery requests could result in the entry of default judgment against them and dismissal of their counterclaim. The scheduling order gave the first express notice that sanctions were a possibility if a party failed to comply with the order. Additionally, the Grischkans have been on notice since the show cause order was entered on November 18, 2005 that sanctions might be imposed if their failure to cooperate continued. And on December 5, 2005, the court order

finding certain matters admitted warned them that: **The Grischkans are on notice that one possible sanction [for failure to provide discovery] is the dismissal of their counterclaim with prejudice and/or entry of judgment against them on the complaint.** (Emphasis in original).

While entry of default judgment against the Grischkans and dismissal of their counterclaim is a harsh sanction, it is entirely warranted by the facts. The Grishkans have filed five bankruptcy cases in an attempt to prevent MERS from obtaining possession of the property. This court retained jurisdiction over this adversary proceeding to allow MERS to obtain a final resolution of the issues surrounding the property. The Grischkans have had several months to provide the requested discovery and have not done so. They have not opposed MERS's request for sanctions despite several opportunities to do so. The Grischkans' filing history and their willful indifference to the discovery process and to the sanction proceedings establish that the entry of default judgment and the dismissal of the Grischkans' counterclaim is an appropriate sanction under the circumstances.

For the reasons stated, MERS's request for sanctions is granted. MERS is granted judgment on its complaint and the Grischkans' counterclaim is dismissed with prejudice. A separate judgment will be entered reflecting this decision.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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MORTGAGE ELECTRONIC)	Adversary Proceeding No. 05-1222
REGISTRATION SYSTEMS, INC.,)	
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Plaintiff,)	
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v.)	
)	<u>JUDGMENT</u>
GLORIA GRISCHKAN and)	
MICHAEL GRISCHKAN,)	
)	
Defendants.)	

For the reasons stated in the memorandum of opinion filed this same date, Mortgage Electronic Registration Systems, Inc. (MERS) is granted default judgment on the complaint. As a result, the real property located at 28575 Settlers Lane, Pepper Pike, Ohio is not subject to the automatic stay provisions of the bankruptcy code in a case filed by defendants Gloria Grischkan and Michael Grischkan for so long as MERS or its successor or assigns holds or owns the note and mortgage secured by the property. In addition, the Grischkans' counterclaim is dismissed with prejudice.

IT IS SO ORDERED.



 Pat E. Morgenstern-Clarren
 United States Bankruptcy Judge