

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: (SUMMARY ORDER). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of October, two thousand nine.

PRESENT:

PIERRE N. LEVAL,
REENA RAGGI,
Circuit Judges,
JOHN GLEESON,*
District Judge.

RESTITUTO EMBUSCADO,
Plaintiff-Appellant,

v.

No. 08-1268-cv

DC COMICS, WARNER BROS.
ENTERTAINMENT COMPANY, INC.,
TIME WARNER INC., formerly
known as AOL TIME WARNER
CABLE, INC.,
Defendants-Appellees.

* District Judge John Gleeson of the United States District Court for the Eastern District of New York, sitting by designation.

FOR APPELLANT: Restituto Embuscado, pro se, New York, New York.

FOR APPELLEES: Patrick T. Perkins, Perkins Law Office, P.C., Cold Spring,
New York.

Appeal from a judgment of the United States District Court for the Southern District of New York (Colleen McMahon, *Judge*; Douglas F. Eaton, *Magistrate Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on February 8, 2008 is AFFIRMED.

Restituto Embuscado appeals the dismissal of his two complaints pursuant to Fed. R. Civ. P. 37(b) and (d) for failure to comply with the district court's discovery orders. We assume the parties' familiarity with the facts and the record of prior proceedings, which we reference only as necessary to explain our decision.

Dismissal pursuant to Fed. R. Civ. P. 37 is warranted "where a party fails to comply with the court's discovery orders willfully, in bad faith, or through fault." John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc., 845 F.2d 1172, 1176 (2d Cir. 1988). In determining whether a Rule 37 dismissal is appropriate, a court may consider a variety of factors, including: "(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance[;] and (4) whether the non-compliant party had been warned of the consequences of . . . noncompliance." Agiwal v. Mid Island Mortgage Corp., 555 F.3d 298, 302 (2d Cir. 2009) (internal quotation marks omitted). We review a Rule 37 dismissal for abuse of discretion. See David Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1365 (2d Cir. 1991).

Here, the record demonstrates thoughtful consideration of all four factors. Specifically, Magistrate Judge Eaton's report, whose recommendation for dismissal was adopted by Judge McMahon, makes the following findings: (1) over a period of three months, from September through November 2007, Embuscado violated a series of court orders requiring the production of documents and appearance for deposition; (2) Embuscado's violations were willful and deliberate; (3) Embuscado's deliberate and persistent noncompliance rendered lesser sanctions inappropriate; and (4) defendants' October 2007 motion, combined with the magistrate judge's November 2007 warnings concerning possible dismissal, provided Embuscado with sufficient notice that further delay would result in dismissal. On this record, we identify no abuse of discretion in the district court's Rule 37 dismissal.

We have considered all of Embuscado's remaining arguments and conclude that they are without merit. Accordingly, the judgment of the district court is AFFIRMED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

By: _____