

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324a Proceeding
) CASE NO. 92A00215
DAVID DAY d.b.a.)
DAVID DAY MASONRY)
Respondent.)
_____)

ORDER GRANTING COMPLAINANT'S
MOTION TO COMPEL

I. Procedural History

Since Respondent, appearing pro se, had repeatedly refused service of the Complaint in this case, on October 27, 1992, pursuant to my Order of October 19, 1992, Respondent was personally served with the Complaint. Subsequently, Respondent filed two (2) improper answers before it filed an acceptable one on December 2, 1992.

At the second prehearing telephonic conference, on March 10, 1993, Complainant stated that Respondent had twice refused certified mail service of Complainant's discovery requests and that it intended to file a Motion To Compel. At that time, I explained the significance and consequences of a motion to compel, an order to compel, and noncompliance with an order to compel. I indicated to Respondent that this was a serious matter and that should he not cooperate, all discovery concerns could be determined to be adverse to him, resulting in an order granting Complainant's requested relief.

On April 2, 1993, Complainant filed a Motion To Compel Discovery, a Request To Deem Request For Admissions Admitted and a memorandum in support thereof. On April 12, 1993, Complainant filed its status report and stated that there had been no further contact between the parties.

II. Discussion

Complainant asserts that on February 18, 1993 and March 4, 1993, Respondent refused to accept mail delivery of Complainant's February 17, 1993 service of its First Request For Admissions and its First Request For Production of Documents. In fact, on March 4, 1993, Respondent telephonically informed Complainant that it had refused delivery of these documents. Using due diligence, Complainant reserved these discovery requests on that date. These also were refused. Further, although all these requests were available for pickup at the Post Office until March 12, 1993, Respondent did not do so.

On March 10, 1993, at a prehearing telephonic conferences I discussed the matter of refusing these discovery requests with Respondent as I discussed above.

Upon reviewing the record, I find that Respondent is properly before the Court as effective service was made. C.R. Trieschmann v. 347-349 East 53rd St. Owners, Inc., 1993 U.S. Dist. Lexis 282 (S.D. N.Y. 1993). Thus, there is no issue of whether Respondent is on notice of this action.

Under the regulations, as opposed to service of the Complaint and Notice Of Hearing which is complete upon receipt by the Respondent, discovery requests are served upon mailing. 28 C.F.R. 68.3, 68.6(a). Here, there cannot be an argument by Respondent that it lacked notice of the requests as Respondent had notified Complainant that it was aware of said requests and had refused them. Further, I agree with the reasoning in Bluhm v. Higgins, 1992 U.S. Dist. Lexis 18756 (D. Kan. 1992) (citing to U.S. v. Bolton, 781 F.2d 528, 532-33)(6th Cir. 1985), cert. denied, 476 U.S. 1158 (1986); Hoffman v. National Equipment Rental, Ltd., 643 F.2d 987, 990) (4th Cir. 1981), wherein the court held that there was no due process violation by service by certified mail when the letter is returned marked "refused". Thus, based on the unopposed facts, I find that Respondent has been properly served with the discovery requests.

In granting Complainant's motion, I have considered that Respondent has been educated as to the consequences of his conduct, that Respondent appears to be acting in bad faith, that Respondent's conduct is prejudicial to Complainant in that it is preventing a timely prosecution of this case, and that the Respondent is prejudicing the

Court in that it is preventing judicial economy. Bluhm, 1992 U.S. Dist. Lexis 18756 (D. Kan. 1992). Intentional evasion of service of process is considered serious by the Courts. Resolution Trust Corporation v. Caucino, 1992 U.S. Dist. Lexis 13941 (D.N.J. 1992) (citing to Lovelace v. Acme Markets, Inc., 820 F.2d 81, 84). See also Serlin v. Arthur Andersen, 145 F.R.D. 494 (1993).

As such, I am granting Complainant's Motion To Compel. Complainant is directed to reserve its discovery requests by certified mail and by regular mail. Respondent is directed to accept delivery by both methods and to respond to the requests within twenty (20) days of receipt. In no event, unless Complainant requests otherwise, may Respondent's responses be served on Complainant later than May 20, 1993. Should delivery be refused or frustrated again by Respondent, Complainant should so notify this Court and I will consider granting Complainant's Motion To Deem Admissions Admitted as well as other sanctions against Respondent, including inferring that all responses to the other discovery request are adverse to Respondent.

IT IS SO ORDERED this 22nd day of April, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge