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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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LEON DEGRELLE,)	Nos. 87-6486
)	
Plaintiff-Appellant,)	
)	D.C. No. CV-86-3767-RMT
v.)	
)	
SIMON WIESENTHAL CENTER,)	MEMORANDUM*
)	
Defendant-Appellee.)	

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Submitted April 6, 1989 ***
Pasadena, California

Before: FLETCHER and KOZINSKI, Circuit Judges, and JENSEN,**
District Judge.

Appellant appeals from the decision of the district court
dismissing his action under Federal Rule of Civil Procedure
37(b) as a sanction for failure to comply with a court order
regarding discovery. We affirm.

* This disposition is not appropriate for publication and
may not be cited to or by the courts of this circuit except
as provided by 9th Cir. R. 36-3.

** Honorable D. Lowell Jensen, United States District Judge
for the Northern District of California, sitting by
designation.

*** The panel unanimously finds this case suitable for decision without
oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

I.

FACTS AND PROCEEDINGS BELOW

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3 On June 11, 1986, appellant filed an action in the
4 Central District of California alleging that defendant had
5 labeled him as a Nazi war criminal and offered a
6 \$1,000,000.00 reward for his capture. Appellant's amended
7 complaint contains causes of action for racketeering,
8 assault, false imprisonment, invasion of privacy and
9 defamation.

10 On August 15, 1986, appellee noticed appellant's
11 deposition pursuant to Federal Rule of Civil Procedure 30 for
12 September 29, 1986, in Los Angeles, California. Appellant
13 failed to appear for the noticed deposition and filed an
14 "objection to deposition" on September 29, 1986.

15 On October 1, 1986, appellee re-noticed appellant's
16 deposition for November 5, 1986 in Los Angeles. Counsel for
17 appellee received a mailgram from appellant on November 4
18 stating that he would not appear for his deposition the
19 following day. Appellant did not appear for the November 5
20 deposition.

21 Appellee filed a motion to dismiss appellant's complaint
22 under Rule 37(d) of the Federal Rules of Civil Procedure for
23 failure to attend the November 5 deposition. The district
24 court denied the motion by order dated January 13, 1987, but
25 directed appellant to appear for a deposition in Los Angeles
26 within sixty days of receiving notice of a deposition by

1 express mail. The order cautioned appellant that if he
2 failed to appear without first obtaining a protective order,
3 his action would be dismissed.

4 On January 15, 1987, appellee re-noticed appellant's
5 deposition and served appellant with the notice and the
6 district court's January 13 order. The deposition was
7 noticed for April 2, 1987. In response, appellant filed a
8 motion for a protective order under Rule 26(c) of the Federal
9 Rules of Civil Procedure requesting that the deposition be
10 deferred until ten days before trial, or in the alternative,
11 that the deposition be conducted by written interrogatories.

12 On June 5, 1987, the United States magistrate denied
13 appellant's motion for a protective order. The magistrate
14 ruled that: (1) insufficient evidence exists to issue a
15 protective order based on appellant's allegations of poor
16 health; (2) sufficient evidence has been presented to support
17 a finding that appellant cannot afford to travel to Los
18 Angeles; (3) appellee will pay for appellant's round trip
19 airfare from Spain to California; (4) written interrogatories
20 will not suffice in this case; and (5) it is too complicated,
21 expensive and uncertain to conduct the deposition in Spain.
22 The magistrate set August 17, 1987, as the new deposition
23 date. Appellee sent appellant a round trip airline ticket
24 from Spain to Los Angeles by express mail on June 10, 1987.

25 Appellant failed to appear for his deposition on
26 August 17, 1987. Appellee moved for default judgment on
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1 August 19, 1987. Appellant did not oppose the motion. The
2 district court dismissed appellant's action with prejudice
3 under Rule 37(b) on September 10, 1987. Appellant filed a
4 notice of appeal on October 9, 1987.

5 II.

6 DISCUSSION

7 Appellant contends that dismissal of his action under
8 Rule 37(b) for failure to comply with the magistrate's and
9 district court's discovery orders was improper.

10 The sanctions available under Rule 37(b) for failure to
11 comply with a court order regarding discovery include
12 "dismissing the action or proceeding or any part thereof."
13 Fed. R. Civ. P. 37(b)(2)(C). Therefore, the district court
14 had statutory authority to dismiss appellant's action as a
15 sanction for failure to appear for his deposition.

16 This Court may only overrule the district court's
17 dismissal of plaintiff's action under Rule 37(b) if the
18 decision "'exceeded the limits of its discretion.'" United
19 States for the Use and Benefit of Wiltec Guam, Inc. v.
20 Kahaluu Constr. Co., Inc., 857 F.2d 600, 603 (9th Cir.
21 1988) (quoting Halaco Engineering Co. v. Costle, 843 F.2d 376,
22 379 (9th Cir. 1988)); Wyle v. R.J. Reynolds Indus., Inc., 709
23 F.2d 585, 591 (9th Cir. 1983).

24 The standard for determining whether a dismissal is
25 warranted under Rule 37(b) is set forth in Wiltec Guam, Inc.,
26 857 F.2d at 600; see also Malone v. United States Postal

1 Service, 833 F.2d 128, 130 (9th Cir. 1987); Thompson v.
2 Housing Authority, 782 F.2d 829, 831-32 (9th Cir.), cert.
3 denied, 479 U.S. 829 (1986). In Wiltec, this Court stated
4 that "[d]ismissal and default judgment are authorized only in
5 'extreme circumstances.'" Wiltec, 857 F.2d at 603 (quoting
6 Fjelstad v. American Honda Motor Co., Inc., 762 F.2d 1334,
7 1338 (9th Cir. 1985)). To merit such sanctions, the
8 discovery violation must be due to "'willfulness, bad faith
9 or fault of the party.'" Wiltec, 857 F.2d at 603 (quoting
10 Wyle, 709 F.2d at 589).

11 It is clear that appellant's failure to appear for his
12 deposition in Los Angeles was a willful act. This issue is
13 not disputed as appellant states that he refuses to appear
14 for an oral deposition in Los Angeles more than ten days in
15 advance of trial.

16 In addition to making a finding of "willfulness, bad
17 faith or fault of the party," a court must also consider the
18 following five factors in "determining whether to dismiss a
19 case as a punitive measure: '(1) the public's interest in
20 expeditious resolution of litigation; (2) the court's need to
21 manage its docket; (3) the risk of prejudice to the
22 defendants; (4) the public policy favoring disposition of
23 cases on their merits; and (5) the availability of less
24 drastic sanctions.'" Wiltec, 857 F.2d at 603 (quoting
25 Malone, 833 F.2d at 130).

1 In the present case, the first two Wiltec factors, public
2 interest in expeditious resolution of litigation and the
3 court's need to manage its docket, weigh in favor of
4 dismissal of appellant's action. This dispute has taken up a
5 substantial amount of the district court's and magistrate's
6 time. Appellant's deposition was noticed three times.
7 Appellant failed to appear for his deposition on all three
8 occasions, even after being ordered to appear by both the
9 district court and the magistrate. The dispute over
10 appellant's deposition required a total of five written
11 rulings by the magistrate and district court. This case was
12 not proceeding to trial in a timely fashion when the action
13 was dismissed. The action was originally filed on June 11,
14 1986. The case was not close to going to trial or to a
15 hearing on a motion for summary judgment when it was
16 dismissed in September of 1987.

17 The third Wiltec factor, prejudice to the defendants,
18 also weighs in favor of dismissal. The inability of appellee
19 to depose appellant impaired its ability "to go to trial" and
20 threatened to "interfere with the rightful decision of the
21 case." Wiltec, 857 F.2d at 604. Without being able to
22 depose appellant, appellee was unable to prepare for trial or
23 a motion for summary judgment on the merits. Appellant would
24 be a crucial witness at trial and without a prior deposition,
25 appellee would not be competently prepared to cross-examine
26 appellant. Appellee would be severely prejudiced if it was

1 forced to rely on a written deposition or on an oral
2 deposition taken ten days before trial. Such prejudice could
3 lead to an improper resolution of the merits of this action.

4 The fourth Wiltec factor, public policy favoring
5 disposition on the merits, weighs against the dismissal of
6 appellant's action.

7 The fifth factor, consideration of less drastic
8 sanctions, also weighs in favor of dismissal. This factor
9 requires a court to consider less severe penalties before
10 dismissing an action under Rule 37(b). Wiltec, 857 F.2d at
11 604-605; Halaco, 843 F.2d at 380; Hamilton v. Neptune Orient
12 Lines, Ltd., 811 F.2d 498, 500 (9th Cir. 1987). "The
13 consideration of less severe penalties must be a reasonable
14 explanation of possible and meaningful alternatives."
15 Malone, 833 F.2d at 132; Anderson v. Air West, Inc., 542 F.2d
16 522, 525 (9th Cir. 1976). The only exception to this general
17 rule occurs in "exceptional cases, where it is clear that no
18 other alternative would have been reasonable." Wiltec, F.2d
19 at 604; Malone, 833 F.2d at 132. Under this fifth factor,
20 the reviewing court should also look to see if the court
21 below warned of the possibility of dismissal before taking
22 this drastic action. Wiltec, 857 F.2d at 605.

23 The district court in its January 13 order warned
24 appellant that if he did not appear for a properly noticed
25 deposition or obtain a protective order his action would be
26 dismissed under Rule 37(b). Before dismissing appellant's

1 lawsuit, the district court and magistrate considered
2 alternatives to dismissal including allowing appellant to be
3 deposed in Spain, in the United States ten days prior to
4 trial, or through written interrogatories. The court below
5 rejected these alternatives and informed appellant that he
6 risked having his action dismissed if he failed to appear for
7 his August 17 deposition. Moreover, the magistrate ordered
8 opposing counsel to furnish appellant with an airline ticket
9 to Los Angeles which was provided.

10 After considering the factors outlined in Wiltec, this
11 Court holds that the district court gave appellant ample
12 opportunity to comply with its orders regarding discovery,
13 acted appropriately under the circumstances and did not
14 "exceed the limits of its discretion" under Rule 37(b) in
15 dismissing appellant's action.

16 III.

17 CONCLUSION

18 A district court may dismiss an action for failure to
19 comply with a court order regarding discovery under Rule
20 37(b). Such a dismissal order will be reversed only if the
21 lower court "exceeded the limits of its discretion" in
22 dismissing the action. In the present case, the district
23 court acted within the limits of its discretion when
24 dismissing appellant's action for failure to appear at
25 his deposition.

26 AFFIRMED.