

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 05-12035-RGS

YONG LI,)
)
Plaintiff,)
V.)
)
RAYTHEON COMPANY, IAN C.)
MITCHELL, and ARTHUR BULIUNG,)
)
Defendants. _____)

**DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR PLAINTIFF'S
FAILURE TO APPEAR AT HER DEPOSITION OR, IN THE
ALTERNATIVE, TO COMPEL APPEARANCE AT DEPOSITION**

Defendants, Raytheon Company, Ian C. Mitchell, and Arthur Buliung, hereby move pursuant to Fed.R.Civ. P. 37(d) to dismiss the plaintiff's complaint due to her failure to appear at her duly noticed deposition. Alternatively, the defendants seek an order requiring plaintiff to appear at her deposition within fifteen (15) days of the Court's ruling on the instant motion, under penalty of dismissal. Finally, the defendants request that the Court order the plaintiff to pay the costs and attorneys' fees incurred by the defendants in bringing this motion pursuant to Fed.R.Civ.P. 37(a)(4)(A). In further support of this motion, the defendants state as follows:

1. The plaintiff's deposition was duly noticed for June 12, 2006 and rescheduled to June 14, 2006 at the plaintiff's request. In addition, at the plaintiff's request, counsel for the defendants retained a Mandarin Chinese interpreter for the deposition because of the plaintiff's difficulty with English. Further, the defendants agreed to permit the plaintiff's psychologist to sit outside the conference room in the event the plaintiff needed the psychologist's assistance. The deposition commenced on June 14 at 10:25 a.m. but was suspended after only one and a half hours, at 11:55 a.m., because the plaintiff refused to continue. Counsel for the defendants

offered the plaintiff as much time as she needed to meet with her psychologist or to otherwise take intermittent breaks. However, the plaintiff indicated that she could not continue and that the deposition would have to be completed on some date in the future.

2. On June 28, 2006, the parties confirmed that the plaintiff would appear for the remainder of her deposition on July 11, 2006, with an additional carryover day (July 12, 2006), if necessary. However, on July 5, 2006, the plaintiff informed counsel for the defendants that she would not appear for her deposition on the grounds that defendants would not agree to additional depositions of Raytheon employees, which had not been timely noticed.

3. On July 7, 2006, counsel for the defendants contacted the plaintiff and demanded that she appear for her deposition on July 11, 2006 as previously agreed. The plaintiff refused, and again asserted that she would not appear unless the defendants agreed to permit her to take (untimely) depositions of certain Raytheon employees. The plaintiff did not appear for her scheduled deposition on July 11, 2006, thereby requiring the defendants to file the instant motion.

4. Pursuant to Rule 37(d), dismissal as set forth in Rule 37(b)(2)(c) is an appropriate remedy if a party willfully fails to appear for her deposition after being served with proper notice. The plaintiff's tit-for-tat refusal to follow through with her agreement to continue her deposition unless and until the defendants agreed to permit untimely depositions of Raytheon employees is insufficient to justify or excuse plaintiff's failure to appear for her deposition.

5. Dismissal is consistent with the Federal Rules of Civil Procedure and is especially called for where, as here, the deponent simply fails and refuses to appear for her deposition, after the defendants agreed to continue the deposition to July 11 to accommodate the plaintiff. There is "nothing in the rule that states or suggests that the sanction of dismissal can be used only after

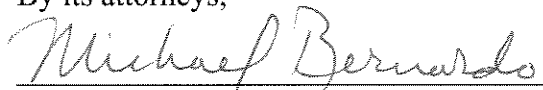
all the other sanctions [available under Rule 37] have been considered or tried.” Guex v. Allmerica Financial Life Ins. & Annuity Co., 146 F.3d 40, 42 (1st. Cir. 1998)(plaintiff’s failure to appear at his deposition justified prejudicial dismissal of suit). The plaintiff’s decision to unilaterally cancel her deposition unless and until the defendants gave in to her unjustified demands to take untimely depositions of Raytheon employees is unjustified and constitutes sufficient grounds for dismissal of her case with prejudice.

WHEREFORE, the defendants respectfully request that plaintiff’s complaint be dismissed with prejudice. In the alternative, the defendants respectfully request that plaintiff be ordered to appear for her deposition within fifteen (15) days of the Court’s ruling on the instant motion, under penalty of dismissal. Further, the defendants request that the Court order the plaintiff to pay the costs and attorneys’ fees incurred by the defendants in bringing this motion pursuant to Fed.R.Civ.P. 37(a)(4)(A).

Respectfully submitted,

RAYTHEON COMPANY, IAN C. MITCHELL,
and ARTHUR BULIUNG

By its attorneys,



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Dated: July 21, 2006

LOCAL RULE 7.1 & 37.1 CERTIFICATION

The undersigned counsel hereby certifies that as Raytheon's counsel he has conferred with the *pro se* plaintiff, through telephonic communications on July 18, 2006, and attempted in good faith to resolve or narrow the issues raised in this motion.


Michael R. Bernardo

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