

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WHEEL OUTLET OF GEORGIA, INC.,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO.
vs.	:	
	:	1:04-CV-1602-CC
TRU SPINNERS INTERNATIONAL, INC., AMERICAN TRU SPINNERS, INC., TRU SPINNERS, INC., JAMES D. GRAGG, ELIZABETH M. GRAGG, CHARLES ABRAHAM, and DENISE FENIMORE,	:	
	:	
Defendants.	:	

ORDER AND DEFAULT JUDGMENT

This matter is presently before the Court on Defendants’ Motion for Sanctions Against Plaintiff Pursuant to Fed. R. Civ. P. 37 [Doc. No. 31].¹ In this motion, Defendants assert that Plaintiff failed to comply with previous orders of this Court. Namely, Defendants state that Plaintiff has refused to provide responses to their discovery requests, in violation of an Order of this Court dated June 19, 2006 (hereinafter the “June 2006 Order”). In addition, the Court notes that Plaintiff, a corporation, has failed to obtain counsel, in violation of the June 2006 Order. For the reasons stated below, the Court **GRANTS** Defendants’ motion.

Defendants urge the Court to impose sanctions and cite Fed. R. Civ. P. 37(b)(2)(C) as authority. Defendants ask the Court to strike Plaintiff’s pleadings and/or dismiss Plaintiff’s claims with prejudice. Defendants also request that the Court hold Plaintiff in contempt, enter a default judgment against Plaintiff on

¹ This motion was filed by Defendants American TRU Spinners, Inc. and James D. Gragg. The Court’s references to “Defendants” in this Order include only the aforementioned parties, unless otherwise noted.

Defendants' counterclaims, and award reasonable expenses and attorney fees.

As an initial matter, because Plaintiff has failed to obtain counsel to represent it in this action, in direct violation of this Court's June 2006 Order, the Court finds that Plaintiff's claims should be dismissed with prejudice for failure to prosecute, pursuant to Fed. R. Civ. P. 41(b) and Local Rule 41.3A(1). Dismissal with prejudice is appropriate in this case because Plaintiff has willfully failed to make this case ready for trial both by failing to obtain counsel who can appear in this Court to prosecute this action and by failing to respond to Defendants' discovery requests, in violation of this Court's June 2006 Order. Plaintiff has shown absolutely no interest in proceeding with its claims in this case. Indeed, the docket reflects that Plaintiff has not filed any submissions in more than eighteen months. The Court must conclude that Plaintiff's failure to prosecute this action has been willful. Plaintiff's claims against all Defendants are hereby **DISMISSED with prejudice**.

Defendants additionally seek a default judgment against Plaintiff on their counterclaims. The record reflects that, on May 26, 2005, Defendants filed an answer to Plaintiff's complaint in this action and asserted the following counterclaims against Plaintiff: (1) unfair competition under the Lanham Act; (2) false advertising under the Lanham Act; (3) breach of contract; (4) breach of the duty of good faith and fair dealing; (5) unjust enrichment; (6) expenses of litigation; (7) punitive damages; and (8) declaration of trademark non-infringement. The Eleventh Circuit has noted that "a default judgment sanction requires a willful or bad faith failure to obey a discovery order." Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1542 (11th Cir. 1993) (citation omitted). "Violation of a discovery order caused by simple negligence, misunderstanding, or inability to comply will not justify a Rule 37 default judgment or dismissal." Id. (citations omitted) "Finally, the severe sanction of a dismissal or default judgment is appropriate only as a last resort, when less

drastic sanctions would not ensure compliance with the court's orders." Id. (citation omitted). In the instant case, Plaintiff has entirely ignored this Court's instruction to respond to Defendants' discovery requests. Plaintiff has had ample time to comply with this Court's June 2006 Order. Plaintiff has not, however, provided any explanation for its failure to comply. Indeed, Plaintiff filed no response to Defendants' motion for sanctions and apparently has not attempted to contact Defendants or Defendants' counsel to confer regarding this issue. The Court can only conclude that Plaintiff's failure to comply has been willful. The only appropriate sanction in this case is to strike Plaintiff's answer to Defendant's counterclaims [Doc. No. 15] and enter default judgment against Plaintiff. See Malautea, 987 F.2d at 1544 ("[A] default sanction may be proper even when not preceded by the imposition of lesser sanctions."). In addition, pursuant to Fed. R. Civ. P. 37(b)(2), the Court awards Defendants reasonable attorney fees caused by Plaintiff's failure to obey this Court's June 2006 Order. The Court **DIRECTS** Defendants to submit an affidavit supporting both the amount and reasonableness of the attorney fees incurred within ten (10) days of the date of this Order.

Judgment is hereby entered in favor of Defendants and against Plaintiff on Defendants' counterclaims. Plaintiff is permanently enjoined from false advertising and from making statements that could deceive or mislead consumers that Plaintiff's products are licensed by Defendant American Tru Spinners, Inc. under patents and/or trademarks owned by Defendant. Defendants' products are declared as non-infringing of the trade dress or trademarks of Plaintiff. This Court will hold an evidentiary hearing on May 29, 2007 at 9:30a.m. to determine the amount of actual, compensatory and/or punitive damages and attorney fees, if any, that should be awarded in this action.

SO ORDERED this 23rd day of April, 2007.

s/ CLARENCE COOPER

CLARENCE COOPER
UNITED STATES DISTRICT JUDGE