

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

ERNEST TAYLOR

VERSUS

CIVIL ACTION

NO.: 13-00579-BAJ-RLB

THE CITY OF BATON ROUGE, ET AL

**RESPONSE OF JAMES HILBURN AND TEDRICK KNIGHTSHEAD
TO THE COURT'S ORDER TO SHOW CAUSE WHY SANCTIONS
SHOULD NOT BE IMPOSED**

Respondents, Hilburn and Knightshead, respectfully submit that sanctions are not appropriate in this matter. Failure to file a written answer is not subject to sanction as a violation of the Federal Rules of Civil Procedure. The only "sanction" provided in the rules is a judgment of default, and then only when no written answer has been filed and the matter has not been otherwise defended (Rule 55(a)).

Respondents submit that the record of these proceedings and the evidence that respondents anticipate will be introduced at hearing will establish that this matter has been properly defended by Hilburn. As will be shown, at the time plaintiff's attorney requested a default, and at the time the Court ordered this matter for hearing, a scheduling order had been in place since April 16, 2014, setting a trial on June 22, 2015, and providing, among other deadlines, December 14, 2014, for filing dispositive motions.

As will be seen from the scheduling order itself, Hilburn had raised defendants' position.

At the time that Hilburn retired and the file turned over to Knightshead, Knightshead was not advised that any pleadings were due because none were.

It is respectfully submitted that evidence to be introduced at hearing of this matter will establish the following facts.

Hilburn was assigned, as an assistant parish attorney, to represent all of the defendants except D. Wayne White, upon whom service was never perfected. Plaintiff's suit was a claim for damages based upon plaintiff's arrest by city police officers and a resulting prosecution pending in city court. Plaintiff maintained that the arrest was unlawful and that the ordinance upon which it was based was unconstitutional.

Since plaintiff named the parish attorney and the city prosecutor, along with police officers, as defendants, once the suit was filed, the city prosecutor recused herself from the prosecution and the matter was assigned to the attorney general's office.

Upon speaking to Mr. Kurt Wall, the assistant attorney general who was assigned the prosecution, Hilburn learned that there was a possibility that some or all of the charges might be dismissed. Hilburn was of the opinion that if the charges were not dismissed, then it would be appropriate to file a request for a stay order pending the outcome. On the other hand, if the prosecution was dismissed, then it would be appropriate to file motions to dismiss the civil action on the basis of absolute prosecutorial immunity on the part of the city prosecutor and qualified immunity on the part of the police officers.

Hilburn, during this time, was communicating with plaintiff's attorney, Mr. Donahue, and the latter was well aware that Hilburn was representing the defendants and was well aware of Hilburn's desire to wait until some decision was made with regard to the criminal prosecution. Plaintiff's attorney never voiced any objection to this plan, and never, until filing a motion for default, expressed any concern that no formal answer was to be filed until the criminal matter had been determined.

In fact, in a Motion to Continue Scheduling Conference filed on December 4, 2013, by Mr. Donahue (Document 5), Mr. Donahue wrote the following:

On October 31, 2013, the Court issued an Order setting a scheduling conference for December 19, 2013, (Doc. 4). Since that time, counsel for the parties have been in contact, and have been working to assess the case and determine the items that need to be addressed in the scheduling order that is to be issued by the court. These efforts have been frustrated by ongoing proceedings in Baton Rouge City Court related to Plaintiff's claim and the recent recusal of the City Prosecutor's office from that case. It is currently unknown what entity or political subdivision is in possession of Mr. Taylor's criminal file, and who will assume responsibility for prosecuting the criminal charges. In the interest of making the most effective use of the Court's time, counsel for the parties agree that it will be beneficial to continue the conference currently scheduled for December 19, 2013, in order to allow the parties to attempt to sort out the issues described above.

In that same document, as a certificate of service, Mr. Donahue wrote: "I hereby certify that in an attempt to resolve the issues described in the above Motion, I conferred with James Hilburn, counsel for Defendants, who joined in the request for the relief identified above."

Hilburn had been in other later discussions with Assistant Attorney General Wall about the pending criminal charges. Mr. Wall indicated that while he would probably not prosecute the gun charge, no final determination had been made regarding the remaining charges. It appears Mr. Wall dismissed all charges against Mr. Taylor on April 28, 2014.

Subsequently, on March 5, 2014, a status report, bearing the (electronic) signatures of both Mr. Donahue and Mr. Hilburn was filed by Mr. Donahue (Document 9). That document, at page 2 contains the following:

“2. Defendant claims: The defendants deny that the plaintiff’s constitutional rights were violated by these defendants, and deny the specific factual allegations of the complaint against these defendants.”

And, under section D 2 of that report:

“Defendants’ Statement of Issues:

“A. Whether the plaintiff’s constitutional and/or statutory rights were violated.

“ B. The damages, if any, suffered by the plaintiff.

“C. Whether defendant (sic) is entitled to attorney’s fees under 42 U.S.C. 1988”

In the section “Discovery” in that status report, Mr. Donahue writes, “Preliminary discussions have been held regarding written discovery and the depositions of Officers Thomas and Winneman, but no formal requests have yet been made.”

Mr. Hilburn, on the part of the defendants, wrote: “Interrogatories and Requests for Production Propounded will be served on Plaintiff.”

Section H of the status report sets out a scheduling order:

“ April 28, 2014, for amending, the complaint, adding new parties, claims, counterclaims, or cross claims.

“April 14, 2014, for exchanging initial disclosures.

“July 31, 2014, for completing discovery, except experts.

“Filing dispositive and Daubert motions: December 1, 2014.”

The following day, March 6, 2014, the Court, through Magistrate Bourgeois, issued a scheduling order (document 10) that contained the dates agreed upon by the parties and set deadlines in the year 2015 for additional motions.

The status report constructed by Mr. Donahue and Mr. Hilburn was submitted to the court on March 5, 2014. Nevertheless, even after having agreed to the dates set out in the status report and after agreeing in that report (Section J, Other Matters, page 5) that there were no other matters outstanding, Mr. Donahue filed a motion for preliminary default the following month (Document 15). At the time Donahue moved for a default in May, Hilburn still had until December 1, 2014, to file dispositive motions (Document 10).

It is Hilburn's position, submitted with all respect, that the parties clearly understood that Hilburn intended to file either a request for a stay order or a motion to dismiss on the grounds of immunity, depending upon the resolution of the criminal charges, and Hilburn was justified in believing that Donahue understood and agreed.

In any event, the issue was joined. As set out above, the status report signed by both parties sets out a defense on the part of the defendants and effectively joins the issue.

Rule 55(a) of the Federal Rules of Civil Procedure provides that a default may be entered when the defendant has failed to plead or otherwise defend. It is respectfully submitted that the status report constitutes a sufficient pleading, and clearly demonstrates that Hilburn was defending.

Mr. Hilburn retired from the parish attorney's office on March 27, 2014. It had been determined that Knightshead was to be assigned those of Hilburn's files that were pending in federal court. Until April 16, 2014, when he was notified by Hilburn of the request for default,

Knightshead had not received the file. Hilburn had not advised that the matter required that an answer be filed.

There was no reason for Hilburn to point to this file as needing immediate attention because according to the scheduling order, there was no imminent deadline.

Knightshead did not have an opportunity to review the file until April 17, 2014, when he received an e-mail from Hilburn forwarding notification that the clerk of court had entered a default. Mr. Knightshead at that point had no idea what was going on. He had no knowledge of the discussions between Hilburn and Donahue, and felt that in order to preserve his client's position he had to file an answer in order to avoid a confirmation of the default. April 17, 2014, was the day before Good Friday, and the office closed at 2PM. He and his secretary remained late in order to prepare and file a motion to enroll and an answer to the complaint.

Knightshead's position is two-fold. Prior to the entry of the default, he had no reasonable opportunity to review the file and discover that no answer had been filed because he was not advised that there was any danger of a default judgment. He was not advised of such a danger because Hilburn felt that Donahue would abide by the scheduling order. Further, had he reviewed the file, he would have discovered the scheduling order and assumed that the next date of any consequence was that set out in the scheduling order.

As noted by counsel for Roper, at pages 6 -7 of their memorandum, the answer filed by Knightshead was filed within the delays permitted by the scheduling order for filing amending pleadings. The jurisprudence cited by Roper's counsel establish that such filing is permissible.

Respondents request the Court's permission to adopt the argument set out by counsel for Roper to the effect that the contributions of Hilburn to the status report and scheduling order amount to an answer on behalf of the defendants. (See pages 4 - 5 of the Roper memorandum.)

Respondents respectfully submit that there is no factual or legal basis in this matter that would justify sanctions, and respondents' request the Court's permission to adopt the argument and supporting citations set out in Roper's memorandum relative to that position as set out on page 7 of the Roper memorandum.

Respondents respectfully submit that there is no legal or factual basis for the imposition of sanctions in this matter.

BY ATTORNEYS:

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CERTIFICATE

I hereby certify that a copy of the foregoing Response of James Hilburn and Tedrick Knightshead to the Court's Order to Show Cause Why Sanctions Should Not Be Imposed was this date electronically filed with the Clerk of Court using the Court's CM/ECF system. Notice of this filing will be sent to Mr. Terrance Donahue, Jr., by operation of the Court's electronic filing system.

Baton Rouge, Louisiana, this 7th day of July, 2014.

/s/Frank J. Gremillion
Frank J. Gremillion

IN THE UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

ERNEST TAYLOR

Plaintiff,

VS.

THE CITY OF BATON ROUGE, ET AL.

Defendants.

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CIVIL ACTION

NO. 13-579-BAJ-RLB

STATUS REPORT

A. JURISDICTION

1. What is the basis for the jurisdiction of the Court?
 - a. Plaintiff: This Court has jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. §§ 1331, 1343, and 1367.
 - b. Defendants: 28 U.S.C. §1331.

B. BRIEF EXPLANATION OF THE CASE

1. *Plaintiff claims:* This case involves the arrest of Plaintiff Ernest Taylor and the confiscation of his lawfully held firearms for the purported infraction of possessing a weapon in the parking lot of an establishment that either sells or serves alcohol. Mr. Taylor asserts that the ordinance under which the Baton Rouge Police Department arrested him and confiscated his firearms violates the United States Constitution, and numerous provisions of Louisiana law. Mr. Taylor further asserts that the City of Baton Rouge and its individual actors were aware that enforcement of the ordinance would violate long-established legal principles regarding civil liberties and individual rights, but despite this knowledge actively utilized the ordinance's provisions to deprive citizens of their Constitutionally protected freedoms under the color of

state law. Plaintiff seeks injunctive and declaratory relief in addition to damages for physical and emotional injuries.

2. *Defendant claims:* The defendants deny that the plaintiffs' constitutional rights were violated by these defendants, and deny the specific factual allegations of the complaint against these defendants.

C. PENDING MOTIONS

List any pending motions, the date filed, and the basis of the motion(s).

1. **Plaintiff:** None at this time. Plaintiff anticipates filing a motion for preliminary injunction in the near future.
2. **Defendants:** None.

D. ISSUES

1. *Plaintiff's Statement of Issues:* The primary issue in this case is whether the City of Baton Rouge and its individual actors violated Plaintiff's civil rights through the enforcement of Section 13:95.3 of the Baton Rouge Code of Ordinances. At this point it is unknown which, if any, of Plaintiff's allegations will be disputed by the Defendants, and it is therefore unknown what issues will require resolution by the Court. Plaintiff anticipates that issues needing resolution may include: (1) a determination of whether §13:95.3 violates the U.S. Constitution, (2) whether Defendants should have been aware that enforcement of §13:95.3 was an unconstitutional exercise of power, and (3) the amount of Plaintiff's money damages.

2. *Defendants' Statement of Issues:*
 - a. Whether the plaintiff's constitutional and/or statutory rights were violated.
 - b. The damages, if any, suffered by the plaintiff.

- c. Whether defendant is entitled to attorney's fees under 42 U.S.C. § 1988.

E. DAMAGES

1. *Plaintiff's calculation of damages:* Initially, Plaintiff seeks injunctive and declaratory relief. The amount of Plaintiff's money damages will be established through discovery and at the trial of this matter.

2. *Defendant's calculation of offset and/or plaintiff's damages:* Defendants contest the plaintiffs' claims for damages.

F. SERVICE

1. *Plaintiff:* Service has been waived on behalf of the following defendants: (1) The City of Baton Rouge; (2) Carl Dabadie, Jr.; (3) Mary E. Roper; (4) Lisa Freeman; (5) Patrick Wennemann; and (6) James Thomas. Currently, service has not been made upon defendant D. Dewayne White or Officer Jane Doe. Plaintiff will continue his attempts to bring defendant White within the jurisdiction of the Court, and it is believed that preliminary discovery will allow plaintiff to identify the Jane Doe defendant and properly effectuate service.

2. *Defendants:* None.

G. DISCOVERY

1. Have the initial disclosures required under FRCP 26(a)(1) been completed?

[] YES [X] NO

- a. Do any parties object to initial disclosures?

[] YES [X] NO

- b. For any party who answered *yes*, please explain your reason for objecting.

2. Briefly describe any discovery that has been completed or is in progress:

a. *By plaintiff:* Preliminary discussions have been held regarding written discovery and the depositions of Officers Thomas and Wenneman, but no formal requests have yet been made.

b. *By defendants:* Interrogatories and Requests for Production Propounded will be served on Plaintiff.

3. Please describe any protective orders or other limitations on discovery that may be required/sought during the course of discovery.

a. *By plaintiff:* None anticipated at this time.

b. *By defendants:* Unknown at this time.

4. Discovery from experts:

Identify the subject matter(s) as to which expert testimony will be offered:

By plaintiff: Plaintiff expects to evaluate the need for expert testimony throughout the pendency of this case, and to disclose those experts retained to provide expert testimony in accordance with Fed. R. Civ. P. 26.

By defendants: Defendants reserve the right to call an expert depending upon whether the plaintiff names such an expert.

H. PROPOSED SCHEDULING ORDER

The following schedule is submitted in accordance with the form provided by the Court:

1. Deadline for amending the complaint, or adding new parties, claims, counterclaims, or cross claims: **April 28, 2014**
2. Deadline for completion of fact discovery: **July 31, 2014**
 - a. Exchanging initial disclosures required by FRCP 26(a)(1): **April 14, 2014**
 - b. Filing all discovery motions and completing all discovery except expert reports: **July 31, 2014**

3. Disclosure of identities and reports of expert witnesses as required by Fed. R. Civ. P. 26(a)(2):

a. Plaintiff: September 1, 2014

b. Defendants: October 1, 2014

4. Completion of discovery from experts: November 3, 2014

5. Filing dispositive and Daubert motions: December 1, 2014

I. TRIAL

1. Has a demand for a trial by jury been made?

YES NO

2. Estimate the number of days trial will require.

a. *Plaintiff*: Plaintiff estimates trial could be completed in five (5) days.

b. *Defendants*: Defendants estimate a trial lasting three (3) days.

J. OTHER MATTERS

Are there any specific problems the parties wish to address at the scheduling conference?

YES NO

1. If the answer is yes, please explain:

2. If the answer is no, do the parties want the court to cancel the scheduling conference and to enter a scheduling order based on the deadlines set out in this report?

YES NO

K. SETTLEMENT

1. Please set forth what efforts, if any, the parties have made to settle this case to date.

This case is just beginning, and no efforts at settlement have yet been made.

2. Do the parties wish to have a settlement conference?

YES NO

While the parties do not believe a settlement conference would be beneficial at this stage, they remain open to the possibility that one may be beneficial at some later time, such as after discovery has been completed.

L. CONSENT TO JURISDICTION BY A MAGISTRATE JUDGE

You have the right to waive your right to proceed before a United States District Judge and may instead consent to proceed before a U.S. Magistrate Judge.

Indicate whether, at this time, all parties will agree, pursuant to 28 U.S.C. § 636(c), to have a Magistrate Judge handle all the remaining pretrial aspects of this case and preside over a jury or bench trial, with appeal lying to the United States Court of Appeals for the Fifth Circuit.

All parties agree to jurisdiction by a Magistrate Judge of this court:

YES NO

Report dated: March 5, 2014.

Respectfully submitted,

s/ Terrence J. Donahue, Jr.

TERRENCE J. DONAHUE, JR.

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/s/ James L. Hilburn, Esq.

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Counsel for City of Baton Rouge and Parish
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been filed with the Court and served on counsel for Defendants through submission to the Court's CM/ECF system on this, the 5th day of March, 2014.

s/ Terrence J. Donahue, Jr.
Terrence J. Donahue, Jr.