

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED BY *JF* D.C.
04 DEC 21 PM 1:26

ROBERT R. DI TROLIO
CLERK, U.S. DIST. CT.
W.D. OF TN, MEMPHIS

ABDISITAR JAMA,)	
)	
Plaintiff,)	
)	
vs.)	No. 03-2965 MaP
)	
CITY OF MEMPHIS, et al.,)	
)	
Defendants.)	
)	

ORDER DENYING DEFENDANT'S MOTION TO STRIKE,
GRANTING IN PART DEFENDANT'S MOTION FOR PROTECTIVE ORDER, AND
AWARDING ATTORNEY'S FEES AND COSTS TO CITY OF MEMPHIS AND
INDIVIDUAL OFFICER DEFENDANTS

Before the Court are Defendant City of Memphis's Motion to Strike Expert Witness Disclosure and to Exclude Testimony, filed October 5, 2004 (dkt #24)¹, and Motion for Protective Order, filed December 7, 2004 (dkt #31). Plaintiff Abdisitar Jama filed his response to the Motion to Strike on October 25, and the Court heard argument regarding both motions from all parties at a hearing held on December 10, 2004. For the reasons below, Defendant's motion to strike is DENIED. However, the Court orders that Plaintiff reimburse the City of Memphis for its reasonable attorney's fees

¹ The minutes incorrectly reflect that this motion was denied at a status conference before District Court Judge Mays on December 3, 2004. During a telephone conference held on December 9 with the magistrate judge, the parties agreed to have the magistrate judge rule on the motion to strike.

39

and costs associated with filing this motion, as well as the fees and costs to the City of Memphis and the individual officer defendants for appearing at the December 10 hearing. Furthermore, the Court will amend the scheduling order to allow for the completion of expert discovery.

The motion for protective order is GRANTED with respect to the depositions of deponents Turnmire, Sweet and Hopkins, and is DENIED with respect to deponent Rosser.

I. BACKGROUND

The remaining counts in the complaint allege that the City of Memphis ("City") violated the Governmental Tort Liability Act and individual officers used excessive force against Plaintiff. The original scheduling order requires Plaintiff to disclose his expert reports, if any, by September 3, 2004. Plaintiff claims that the City granted a two-week extension for disclosing his expert information, although the City does not recall granting this extension. In any event, even assuming that the City granted a two-week extension, Plaintiff failed to produce his expert disclosures by September 17. In fact, Plaintiff did not submit any information regarding his expert until October 1.² The information

²Plaintiff's counsel states that she provided the limited expert information on October 1 because the two-week extension was not properly calendared in her office for September 17. The Court notes that this is not the first time Plaintiff's counsel has experienced a calendaring problem. After failing to file a timely response to the Defendant's motion to dismiss, the Court entered an order for Plaintiff to show cause why the motion to

that was provided on October 1 did not comply with Federal Rule of Civil Procedure 26(a)(2) because it did not include, among other things, an expert report. Instead, Plaintiff merely provided a brief and vague statement of the expert's opinion and the expert's curriculum vitae - but nothing else.

Plaintiff admits that the expert information produced on October 1 did not comply with Rule 26(a)(2) and that, as of the date of the hearing, he has not fully satisfied that rule's requirements. He claims that the expert could not provide a report because certain depositions had not yet been taken. Those witnesses were deposed in November, and Plaintiff now states that his expert's report will be provided by no later than December 17.

The original scheduling order also set November 4, 2004, as the deadline for fact discovery. On the eve of the deadline, the parties submitted a joint motion to extend the deadline to December 10. The parties agreed to continue discovery until the motion was addressed by the Court. The motion was granted on December 3, and on that same day, Plaintiff sent a notice to Defendants setting depositions for Lt. Anthony Rosser, Sgt. W.C. Sweet, Major Ray Hopkins, and Officer Turnmire on December 8 and 10. Additionally, Plaintiff requested the production of certain documents by these

dismiss should not be granted. In response to the show cause order, Plaintiff's counsel stated that she did not timely file a response to the motion to dismiss because the deadline for filing a response was not properly marked in her calendar.

witnesses. The City argues that Plaintiff did not give reasonable notice of deposition under Federal Rule of Civil Procedure 30(b)(1) or reasonable notice for the production of documents under Rule 34.

II. MOTION TO STRIKE

The City contends that the Plaintiff violated the Court's scheduling order and should be sanctioned under Fed. R. Civ. P. 37, which states:

A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.

Federal Rule of Civil Procedure 37(c)(1).

Violations of the disclosure requirements may be sanctioned by the Court. Generally, a party who violates the disclosure requirements of Rule 26(a)(2) shall not be permitted to use as evidence at trial any witness or information not so disclosed unless the failure to disclose was harmless or substantially justified. Fed. R. Civ. P. 37(c)(1); see *Bowe v. Consolidated Rail Corp.*, No. 99-4091, 2000 U.S. App. LEXIS 24866, at *6-7 (6th Cir. Sept. 19, 2000) (unpublished); *Vance v. United States*, No. 98-5488, 1999 WL 455435, at *6 (6th Cir. June 25, 1999) (unpublished).

In this case, Plaintiff's failure to timely comply with the scheduling order and the requirements of Rule 26(a)(2) is not substantially justified. Plaintiff filed his complaint on December

22, 2003. On March 3, 2004, the Court entered a scheduling order with dates and deadlines agreed upon by the parties. Thus, Plaintiff had several months to timely complete his expert report, but failed to do so. Although Plaintiff claims that the expert was waiting on certain depositions to be completed before preparing his report, Plaintiff has failed to sufficiently demonstrate to the Court that these depositions could not have been completed in time for his expert to meet the September 3 deadline. At the December 10 hearing, Plaintiff stated that these depositions had to be rescheduled on several occasions at the request of both Plaintiff's counsel and counsel for the defendants. However, at some point Plaintiff must have realized that the depositions were not going to be finished in time for his expert to complete his report, at which point Plaintiff should have filed a motion to modify the scheduling order.

Nevertheless, Plaintiff claims that the untimely disclosure is harmless. To a limited extent, the Court agrees. On the one hand, Plaintiff knew about the deadline (even assuming a two-week extension), knew that depositions could not be completed in time to meet that deadline, and missed the deadline without obtaining prior relief from the Court, all of which has caused delays in the case and required the City to take action by filing the present motion. On the other hand, sometime around September 3, Plaintiff asked the City for an extension of time to disclose Plaintiff's expert, and

thus the defendant was aware at that time that Plaintiff intended to use an expert, who Plaintiff claims is critical to his case. Moreover, other than requiring defendants to now retain their own expert, the Court is unaware of any prejudice to the defendants that would result from the Court allowing Plaintiff to disclose his expert report at this time.

In sum, although Plaintiff has violated this Court's scheduling order, the relief sought by the defendant is not warranted. Rule 37(c)(1) provides that "in lieu of this sanction, the court . . . may impose other appropriate sanctions." Fed. R. Civ. P. 37(c)(1). The rule allows for a payment of attorney's fees and expenses as an alternative sanction to striking the expert, and under the facts of this case, the Court finds that an award of attorney's fees and expenses is a more appropriate sanction for the violation at issue. Therefore, the Court DENIES the request to strike Plaintiff's expert. The Plaintiff is hereby ordered to pay attorney's fees and expenses, as described in Section IV below.

III. MOTION FOR PROTECTIVE ORDER

On November 3, 2004, the parties filed a joint motion to extend discovery until December 10. Judge Mays held a status conference on December 3, at which time he granted the motion. Plaintiff served notices of deposition on Lieutenant Anthony Rosser, Sergeant W.C. Sweet, Major Ray Hopkins, and Officer Turnmire via fax on Friday, December 3 at 6:12 p.m. Counsel for

the City did not receive the fax until the following Monday. The depositions were to take place on December 8 and 10. The City then filed a motion for protective order, claiming that the Plaintiff did not give reasonable notice of the depositions as required by Federal Rule of Civil Procedure 30(b)(1) or reasonable notice for the production of documents under Rule 34.

A court may enter a protective order to limit or preclude discovery for good cause shown. Fed. R. Civ. P. 26(c). The four deposition notices did not give the witnesses or defendants sufficient time to respond under the federal rules, and any motion that could have been filed by Plaintiff to compel this discovery would have been considered untimely. See Overnite Transportation Co. v. International Brotherhood of Teamsters, No. 99-2747, 2001 WL 1910054, *1 (W.D. Tenn. Oct. 26, 2001); Medtronic Sofamor Danek, Inc. v. Osteotech, Inc., No. 99-2656, 2001 WL 1910058 (W.D. Tenn. Sept. 21, 2001); see also Banks v. CBOCS West, Inc., No. 01 C 0795, 2004 WL 723767, *2 (N.D. Ill. April 1, 2004); Willis v. New World Van Lines, Inc., 123 F.Supp.2d 380, 401 (E.D. Mich. 2000) (citing Ginett v. Federal Express Corp., 166 F.3d 1213 (6th Cir. 1998)); Gault v. Nabisco Biscuit Co., 184 F.R.D. 620, 622 (D. Nev. 1999).

Moreover, all of these witnesses could have and should have been deposed months earlier, including during the month of November when the joint motion for extension of time was pending. Three of the individuals - Turnmire, Sweet and Hopkins - were identified in

the City's initial disclosures on March 23, 2004. Rosser was identified as the City's expert on October 1, 2004 (in compliance with the scheduling order), and the deadline for deposing experts was November 4, 2004. Plaintiff has not provided the Court with any explanation as to why Turnmire, Sweet and Hopkins were not timely deposed.³ Thus, with respect to these three individuals, the motion for protective order is GRANTED.

With respect to Rosser, given the issues surrounding the expert disclosures discussed in Section II and the fact that this particular disclosure was made much more recently, the Court will allow Plaintiff to depose this witness, assuming that Rosser remains the expert witness for the City. The Court hereby amends the scheduling order as follows:

Plaintiff's expert disclosures: December 22, 2004

Defendants' expert disclosures: January 31, 2005

Expert depositions: March 1, 2005

Medical proof discovery: March 10, 2005

Dispositive motions: April 1, 2005

The District Judge will notify the parties as to the new trial date.

IV. CONCLUSION

For the reasons above, the Motion to Strike is DENIED.

³Plaintiff apparently made no mention of these four depositions at the December 3 status conference before the District Judge.

Counsel for the City of Memphis and for the individual officer defendants shall submit an affidavit within seven (7) days from the date of this order setting forth in detail: (1) the City's attorney's fees and expenses associated with the filing of the motion to strike, and (2) the City's and the individual officer defendants' attorney's fees and expenses associated with their appearance at the December 10 hearing.⁴

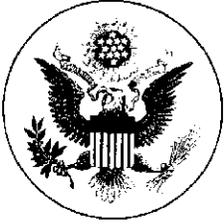
The motion for protective order is GRANTED with respect to the depositions of Turnmire, Sweet and Hopkins, and is DENIED with respect to Rosser.

IT IS SO ORDERED.


TU M. PHAM
United States Magistrate Judge

12/21/04
Date

⁴Although only the City filed the motion to strike, an award of attorney's fees and expenses to the individual officer defendants is an appropriate sanction given the fact that the Plaintiff's violation of the scheduling order resulted in the Court holding the December 10 hearing, at which time counsel for the City and individuals officers were present and heard.



Notice of Distribution

This notice confirms a copy of the document docketed as number 39 in case 2:03-CV-02965 was distributed by fax, mail, or direct printing on December 21, 2004 to the parties listed.

Danese K. Banks
COCHRAN CHERRY GIVENS SMITH & BOLTON
One Commerce Square
Ste. 2600
Memphis, TN 38103

Amber Isom-Thompson
KIESEWETTER WISE KAPLAN SCHWIMMER & PRATHER, PLC
3725 Champion Hills Drive
Ste. 3000
Memphis, TN 38125

Deborah A. Godwin
GODWIN MORRIS LAURENZI & BLOOMFIELD, P.C.
50 N. Front St.
Ste. 800
Memphis, TN 38103

Robert D. Meyers
KIESEWETTER WISE KAPLAN SCHWIMMER & PRATHER, PLC
3725 Champion Hills Drive
Ste. 3000
Memphis, TN 38125

Mary Elizabeth McKinney
GODWIN MORRIS LAURENZI & BLOOMFIELD, P.C.
50 N. Front St.
Ste. 800
Memphis, TN 38103

Honorable Samuel Mays
US DISTRICT COURT