

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DIANE BROZYNA and ZYGMONT BROZYNA,

Plaintiffs,

v.

NIAGARA GORGE JETBOATING, LTD.,

Defendant.

DECISION AND ORDER

10-CV-00602(A)(M)

This action has been referred to me by Hon. Richard J. Arcara for supervision of pretrial proceedings [6].¹ Before me are plaintiffs' motions to compel discovery [15] and to extend the discovery deadline [16]. For the following reasons, the motions are denied.

BACKGROUND

This is an action for personal injuries allegedly sustained by plaintiff Diane Brozyna on August 5, 2009, while a passenger on a vessel owned and operated by defendant. Complaint [1-2]. Following a Rule 16 conference with counsel on August 30, 2010, I entered a Case Management Order ("CMO") [9] requiring all fact depositions to be completed by November 10, 2010, and all discovery to be completed by February 1, 2011. *Id.*, ¶¶7, 9. The CMO further provided that "no extension of the above cutoff dates will be granted except upon written application, filed prior to the cutoff date, showing good cause for the extension".

Plaintiffs served a Notice to Produce dated August 13, 2010, requesting a variety of documents. However, the parties' current dispute centers on plaintiffs' request for "any

¹ Bracketed references are to CM-ECF docket entries.

notices of claim/lawsuits involving all jet boats operated by the Defendant for a period of the past five . . . years to date.” Jasen Affirmation [15-1], Ex. A, ¶4. On or about August 18, 2010, defendant objected to this request, except agreed to produce records limited to the vessel upon which plaintiff was injured dating back three years from the alleged accident. Muller Affidavit [26], Ex. C, ¶4.

Plaintiffs served a Second Notice to Produce, dated August 24, 2010, slightly modifying their earlier request by demanding any notices of claim or lawsuits “for five . . . years up to and including August 5, 2009, for claims for personal injuries arising out of the use or operation of all jet boats.” Id., Ex. E, ¶1. On or about September 15, 2010, defendant repeated its earlier objection to this request, but responded that there were no notices of claim or lawsuits involving the subject vessel during the three-year period prior to the alleged accident. Id., Ex. D, ¶4.

On January 26, 2011, plaintiffs served a Third Notice to Produce (incorrectly captioned as the Second Notice to Produce), repeating their earlier requests for all notices of claim and lawsuits for the five-year period preceding the alleged accident, and also requesting any “incident report, Police Report, [and] government report” for the same five-year period. Id., Ex. F, ¶¶1 and 2. Defendant served a response dated January 28, 2011, reiterating its earlier objections, and also noting that the request was untimely under the CMO. Id., Ex. G.

By letter dated February 3, 2011 (two days after the CMO’s deadline for completion of all discovery), plaintiff requested a discovery conference with the court and noticed the deposition of John Wark, a witness and employee of defendant. Id., Ex. H. Since the discovery deadline had by that time expired, my chambers advised plaintiffs’ counsel by e-mail

that the issue would need to be addressed by motion rather than informally. These motions ensued.²

ANALYSIS

A. Motion to Extend the Discovery Deadline

Plaintiff “requests an extension of the discovery deadline to complete all discovery 45 days following . . . resolution of the Plaintiffs’ Motion to Compel.” Jasen Affirmation [16-1], ¶5. Defendant objects to this motion on timeliness grounds. Muller Affidavit [26], p. 3.

The CMO clearly required motions for extension of its deadlines to be filed prior to expiration of the deadlines, and to show good cause for the extension. Plaintiffs have done neither. Therefore, the motion is denied.

B. Motion to Compel

Plaintiffs challenge the validity of defendant’s objections to their discovery demands, and seek to compel the deposition of Mr. Wark. Jasen Affirmation [15-1], ¶¶10-11.

² On February 11, 2011, defendant filed a timely motion for summary judgment [18]. A briefing schedule on that motion has been deferred pending resolution of these motions [28].

Defendant objects to plaintiffs' motion as being untimely. Muller Affidavit [26], p. 3.³ Again, I agree with defendant.

Plaintiffs' motion was not filed prior to the February 1, 2011 discovery cut-off. Plaintiffs' offer no explanation for their failure to timely move, despite being aware of defendant's objection to the request for approximately six months, nor do they argue that they only recently became aware of the need to depose Mr. Wark. Therefore, plaintiffs' motion is denied. "The Court will not compel discovery after such a deadline, particularly where, as here, plaintiff's counsel knew of the witnesses and the arguable need for their testimony well in advance of the deadline." Slomiak v. Bear Stearns & Co., 1985 WL 410, *1 (S.D.N.Y. 1985).

CONCLUSION

For these reasons, plaintiffs' motions to compel additional discovery [15] and for an extension of the CMO deadlines [16] are denied.

SO ORDERED.

Dated: March 30, 2011

/s/ Jeremiah J. McCarthy
JEREMIAH J. MCCARTHY
United States Magistrate Judge

³ Alternatively, defendant argues that no additional discovery is necessary because it is undisputed that plaintiff signed a Participation Agreement, which acts as a valid and enforceable waiver and release under federal maritime law as set forth in its motion for summary judgment. Muller Affidavit [26], p. 2. I need not reach this argument, and express no opinion at this time as to its merit, which will be addressed in connection with defendant's summary judgment motion.