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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BRIAN REED, B.R., a minor, by her guardian ad litem, Roxanne Sayer,

Plaintiffs,

v.

CITY OF MODESTO, a municipal corporation, Chief of Police HARDEN, in his individual capacity; Police Officer RON ZIYA, Police Officer CAELI KOEHLER, in their individual and official capacities,

Defendants.

Case No. 1:11-cv-01083-AWI-GSA

ORDER DENYING DEFENDANTS' MOTION TO MODIFY THE SCHEDULING ORDER

(Doc. 65)

Trial Date: December 9, 2014

INTRODUCTION

On October 16, 2014, Defendants City of Modesto, Chief of Police Michael Harden, and Officers Ron Ziya and Caelli Koehler (collectively, "Defendants") filed a motion to modify the scheduling order. Doc. 65. Plaintiffs Brian Reed and B. R. (collectively, "Plaintiffs") filed an opposition and Defendants filed a reply. Docs. 78, 94. The matter was heard on November 17, 2014. Steven Yourke appeared on behalf of Plaintiffs and Nathan Oyster on behalf of Defendants.

1 Having considered the pleadings as well as the arguments presented at the hearing, the
2 Court finds that Defendants have not demonstrated good cause to support a modification of the
3 scheduling order. Accordingly, Defendants' motion to modify the scheduling order is DENIED.
4

5 DISCUSSION

6 A. The Parties' Positions

7 In the instant motion to modify the scheduling order, Defendants seek to (1) re-open fact
8 discovery to allow Defendants to conduct additional written discovery regarding Plaintiff's
9 ongoing medical treatment, a deposition of Plaintiff Brian Reed ("Plaintiff"), and an Independent
10 Medical Examination of Plaintiff by a neurologist; (2) re-open expert discovery to allow
11 Defendants to designate additional medical experts and Plaintiffs to designate rebuttal experts,
12 and to allow for depositions of the nine experts previously designated by the parties as well as of
13 any new experts the parties are permitted to designate pursuant to the instant motion; (3) extend
14 the dispositive motion filing deadline to allow Defendants to file a comprehensive dispositive
15 motion; and (4) continue the trial date to May 19, 2015. Doc. 65, Defendants' Mtn. to Modify
16 Sched. Order.
17

18 Plaintiffs filed an opposition to Defendants' motion in which they strongly oppose any
19 modification of the scheduling order. Plaintiffs argue (1) that Defendants have failed to show that
20 they diligently attempted to comply with the scheduling order; and (2) that Defendants have, in
21 turn, not made the "good cause" showing required to modify a scheduling order. Plaintiffs sum
22 up their position as follows:
23

24 This Court modified the Scheduling Order and continued the trial date back on
25 March 15, 2013 in order to permit the parties extra time to evaluate Plaintiff's
26 injuries, to disclose medical experts relevant to those injuries and to conduct expert
27 discovery relevant to his medical condition. But Defendants never did conduct
28 any additional discovery into Plaintiff's medical condition. They never bothered
to conduct an IME of Plaintiff. They never disclosed any medical experts to
testify at trial or any rebuttal experts to testify against Plaintiffs' disclosed experts.
Now, having completely neglected to prepare the damages aspect of the case for

1 trial, Defendants have the unmitigated gall to once again demand that this Court
2 modify the scheduling order and continue the trial date so that they may do the
3 discovery they should have done nearly two years ago.

4 Doc. 78, Plaintiffs' Opp. Br., at 10.

5 In their reply brief, Defendants argue that even if "Defendants' original counsel had
6 conducted an independent medical examination and deposed Plaintiff's expert witnesses, good
7 cause would still exist to conduct additional discovery because of the substantial time gap
8 between the fact and expert discovery cutoffs and the current trial date." Doc. 94, Defendants'
9 Reply Br., at 4.

10 At the hearing on the motion to modify the scheduling order, the parties met and conferred
11 in person, outside the presence of the Court. The parties agreed that, regardless of the disposition
12 of the instant motion, Plaintiffs' counsel would turn over all of Plaintiff Brian Reed's medical
13 records that were in his possession, furnish Defendants' counsel with a medical release signed by
14 Plaintiff Brian Reed that would enable Defendants' counsel to directly obtain records from
15 Plaintiff's medical providers, and produce Plaintiffs' experts for deposition by Defendant. The
16 parties represented to the Court that they would be able to conduct this mutually agreed-upon
17 discovery without the intervention of the Court.

18
19 **B. Procedural History**

20 This case was filed on June 29, 2011. Doc. 1. Trial in the matter was initially set for May
21 13, 2013. Doc. 22. Pursuant to the parties' stipulations, trial was continued to August 6, 2013;
22 then to May 14, 2014; and finally to December 9, 2014. Docs. 32, 41, 60. The last continuance
23 of the trial date was granted on April 14, 2014, in order to allow Defendants to retain new lead
24 counsel, which was accomplished on April 25, 2014. Docs. 60, 61. Trial is currently set for
25 December 9, 2014.
26

27 As to discovery deadlines, the initial fact discovery deadline was September 7, 2012.
28

1 Doc. 22. However, on September 25, 2012, the Court extended the fact discovery cut-off to
2 November 7, 2012. Doc. 32. The initial expert discovery cut-off was October 5, 2012. Doc. 22.
3 This was extended to December 7, 2012; then to February 1, 2013; then to November 1, 2013.
4 Docs. 28, 32, 41. The operative cut-off dates for fact and expert discovery thus are November 7,
5 2012 and November 1, 2013, respectively.
6

7 Finally, regarding motion filing deadlines, the initial nondispositive and dispositive
8 motion filing deadlines were November 30, 2012 and December 28, 2012, respectively. Doc. 22.
9 These were continued to February 1, 2013 and March 1, 2013 respectively, and, again, to
10 November 4, 2013 and November 29, 2013, respectively. Docs. 32, 41. The operative deadlines
11 for filing nondispositive and dispositive motions are thus November 4, 2013 and November 29,
12 2013.
13

14 **C. Legal Standard**

15 Pursuant to Federal Rule of Civil Procedure 16(b)(4), a court may modify a scheduling
16 order “only for good cause and with the judge’s consent.” Rule 16(b)’s good cause inquiry
17 focuses primarily on the movant’s diligence. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294-
18 95 (9th Cir. 2000) (Rule 16(b)’s good cause standard “primarily considers the diligence of the
19 party” seeking modification); *see also Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609
20 (9th Cir. 1992) (“good cause” means scheduling deadlines cannot be met despite the moving
21 party’s diligence).
22

23 Courts may also consider prejudice to the opposing party in ruling on a motion to modify
24 the scheduling order. *Coleman*, 232 F.3d. at 1295; *Mammoth Recreations, Inc.*, 975 F.2d at 609.
25 The focus of the inquiry, however, is on the moving party's actions; if the “[moving] party was
26 not diligent, the inquiry should end.” *Mammoth Recreations, Inc.*, 975 F.2d at 609; *also see*
27 *Zivkovic v. S. Cal. Edison Co.*, 302 F. 3d 1080, 1087 (9th Cir. 2002) (“If the party seeking the
28

1 modification was not diligent, the inquiry should end and the motion to modify should not be
2 granted.”) (internal quotation marks omitted).

3 Finally, the court has “broad discretion in supervising the pretrial phase of litigation, and
4 its decisions regarding the preclusive effect of a pretrial order ... will not be disturbed unless they
5 evidence a clear abuse of discretion.” *Zivkovic*, 302 F. 3d at 1087 (ellipses in original) (citation
6 omitted).
7

8 **D. Analysis**

9 Here Defendants seek to modify the scheduling order so as to re-open fact and expert
10 discovery and to file a dispositive motion, and to continue the trial to enable them to accomplish
11 these objectives. Defendants, however, have not established that the modification is warranted
12 despite their own diligence. Although, the Court previously granted extensions of discovery
13 deadlines, the dispositive motion filing deadline, and the trial date to allow the parties to complete
14 discovery regarding the nature and extent of Plaintiff’s injuries and medical treatment and to file
15 all appropriate motions, Defendants failed to do so or to request additional extensions of time
16 within a reasonable period.
17

18 The Court notes that Defendants substituted in new counsel in April 2014. However,
19 although the applicable discovery and motion-filing deadlines had passed well before the
20 substitution of counsel occurred,¹ new counsel waited almost six months and until one week
21 before the final pretrial conference to request that long-expired deadlines be extended.² *See*
22

23
24 ¹ Defendants filed the instant motion to modify the scheduling order on October 16, 2014, when the fact discovery
25 cut-off was November 7, 2012, the expert discovery cut-off was November 1, 2013, the non-dispositive motion filing
26 deadline was November 4, 2013, and the dispositive motion filing deadline was November 29, 2013.

27 ² In its April 17, 2014 order continuing the trial date from May 14, 2014 to December 9, 2014, the District Court set a
28 further pretrial conference and hearing on any motions in limine for October 22, 2014. Doc. 60. On October 2,
2014, the Court continued the pre-trial conference/motion in limine hearing to November 13, 2014, to accommodate
the Court’s schedule. Doc. 63. Defendants’ filed the instant motion to modify the scheduling order on October 16,
2014, less than a week before the pretrial conference as originally scheduled. Moreover, since the motion to modify

1 *Mammoth Recreations, Inc.*, 975 F.2d at 610 (affirming denial of motion to modify scheduling
2 order to allow amendment of the pleadings when the motion was made four months after the cut-
3 off date for amendment specified in the scheduling order). Given this delay, the Court is forced
4 to conclude that Defendants have not established “good cause” for modifying the pretrial
5 scheduling order. The procedural posture of the case and the previous extensions granted in this
6 matter underscore the court’s conclusion that there simply lacks good cause for modifying the
7 scheduling order at this juncture. Accordingly, Defendants’ motion to modify the scheduling
8 order is DENIED.
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10 The Court notes that the pretrial conference/hearing on motions in limine and the trial are
11 set before District Judge Anthony W. Ishii on November 24, 2014 and December 9, 2014
12 respectively. To the extent the parties’ in limine motions or other trial-related briefing implicate
13 any of issues raised by the parties here, the parties will have the opportunity to bring those issues
14 to Judge Ishii’s attention at the upcoming November 24, 2014 hearing.
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17 IT IS SO ORDERED.

18 Dated: November 19, 2014

/s/ Gary S. Austin
19 UNITED STATES MAGISTRATE JUDGE
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the scheduling order was set for hearing on November 17, 2014, the Court further continued the pretrial
conference/motion in limine hearing to November 24, 2014.