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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHN BAKER,
Plaintiff,
v.
COTTRELL, INC.,
Defendant.

Case No. 1:16-cv-00840-DAD-SAB
ORDER DENYING PLAINTIFF’S
APPLICATION TO REOPEN DISCOVERY
(ECF Nos. 73, 76)

Plaintiff filed the complaint in this action on June 16, 2016. (ECF No. 1.) On October 24, 2016, the scheduling order issued setting the pretrial deadlines. (ECF No. 15.) On June 23, 2017, an amended scheduling order was issued and the deadline to conduct Plaintiff’s deposition and the supplemental expert disclosure deadlines were extended. (ECF No. 24.) Pursuant to the scheduling order all nonexpert discovery in this matter was to be completed by September 11, 2017, and all expert discovery was to be completed by September 1, 2017.

On January 19, 2018, Plaintiff filed an application to reopen discovery. (ECF No. 73.) On February 2, 2018, an order issued requiring Defendant to file a responsive pleading on or before February 14, 2018, at which time the matter would be deemed submitted. (ECF No. 74.) On February 13, 2018, Defendant filed a response to Plaintiff’s request to reopen discovery. (ECF No. 76.)

Amendments of the scheduling order are governed by Rule 16 of the Federal Rules of

1 Civil Procedure which provides that a scheduling order “may be modified only for good cause
2 and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). The district court has broad discretion
3 in supervision of the pretrial phase of litigation. Zivkovic v. Southern California Edison Co.,
4 302 F.3d 1080, 1087 (9th Cir. 2002). Rule 16’s good cause standard considers the diligence of
5 the party seeking amendment and the pretrial schedule may be modified if it cannot reasonably
6 be met despite the diligence of the party seeking the amendment. Johnson v. Mammoth
7 Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). While prejudice to the opposing party
8 could “supply additional reasons to deny a motion, the focus of the inquiry is upon the moving
9 party’s reasons for seeking modification.” Johnson, 975 F.2d at 609; see also Coleman v.
10 Quaker Oats Co., 232 F.3d 1271, 1295 (9th Cir. 2000) (the need to reopen discovery and delay
11 the proceedings supports a finding of prejudice to the opposing party). Therefore, if the party
12 moving for amendment of the scheduling order has not demonstrated diligence, the inquiry
13 should end and the motion should be denied. Johnson, 975 F.2d at 609.

14 Plaintiff asserts that despite his diligence Defendant has refused to tender any witness for
15 deposition and seeks to reopen discovery to take the deposition of Defendant’s witnesses.
16 Plaintiff contends that he requested that Defendant tender its corporate representative for
17 deposition on September 4, 2017.¹ (Pl.’s Appl. to Reopen Discovery 2, ECF No. 73.)
18 Defendant’s counsel requested that the parties confer regarding scheduling the depositions. (Id.)
19 On September 5, 2017, Plaintiff’s counsel attempted to contact defense counsel by telephone in
20 an attempt to resolve the ongoing dispute but did not receive an answer. (Id.) On September 14,
21 2017, Defendant agreed to provide witnesses for deposition on September 27, 2017. (Id. at 3.)
22 Neither of Plaintiff’s counsel was available on that date and new dates were requested by
23 Plaintiff’s counsel. (Id.) Plaintiff contends that Defendant has failed to produce a witness for
24 deposition despite originally agreeing to produce a witness outside the discovery period.

25 Defendant opposes the request arguing that Plaintiff “botched” his burden to complete
26 discovery and cannot simply request a second chance. Defendant contends that Plaintiff sets

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28 ¹ Plaintiff’s motion references exhibits; however, there were no exhibits attached to the motion. Defendant does not
dispute the dates set forth so the Court shall accept that the dates asserted by Plaintiff in support of the motion.

1 forth the same arguments that Defendant attempted to use to justify a second summary judgment
2 and just as the district judge denied Defendant's request for a second chance at summary
3 judgment, the request to reopen discovery should be denied. Defendant points out that the prior
4 order amending the scheduling order found that the parties had not shown good cause to amend
5 the dates in the scheduling order in light of the fact that little had been done in this case in the
6 eight months since the scheduling order had issued. Defendant argues that Plaintiff is now
7 seeking a second bite of the apple for the discovery that he failed to conduct in compliance with
8 the scheduling order. Finally, Defendant contends that Plaintiff waited five months after the
9 close of discovery to raise the issue with the Court. Defendant requests that the Court deny the
10 request to reopen discovery.

11 "[T]he advisory comment to the 1983 amendments to Rule 16 and the decisions in
12 Johnson and Coleman suggest that, at the very least, the court should consider pre-deadline
13 diligence or the lack thereof" in considering whether to amend the scheduling order. Aldan v.
14 World Corp., 267 F.R.D. 346, 356 (D. N. Mar. I. 2010). Here, with the discovery deadline of
15 September 11, 2017, Plaintiff did not attempt to arrange the deposition of the corporate
16 representative until September 4, 2017. Plaintiff has set forth no reason for the delay in waiting
17 until the eve of the discovery deadline to set the deposition of the corporate representative.

18 Further, when it became apparent that the parties were not going to be able to complete
19 the deposition within the deadline set by the scheduling order, Plaintiff did not seek amendment
20 of the scheduling order. Although the parties agreed to depose the corporate representative after
21 the close of discovery on September 27, 2017, Plaintiff waited almost four months until January
22 19, 2018, to file the current request to reopen discovery. Plaintiff does not demonstrate that any
23 efforts were taken to address the dispute after new dates were requested in September 2017 until
24 the current motion was filed in January 2018. "[C]arelessness is not compatible with a finding of
25 diligence and offers no reason for a grant of relief." Johnson, 975 F.2d at 609. The Court finds
26 that Plaintiff has not demonstrated due diligence in either seeking the deposition of the corporate
27 representative within the discovery deadline or in bringing the current discovery dispute before
28 the Court. The Court finds that Plaintiff has not exercised diligence in conducting the requested

1 discovery or in seeking to amend the scheduling order.

2 Finally, the deadline to file dispositive motions in this action has passed and decision on
3 Defendant's summary judgment and motion for reconsideration has been entered. The Court
4 notes that Defendant filed the motion for summary judgment on September 18, 2017, and this
5 discovery dispute could have been resolved without delay of the trial had Plaintiff raised it while
6 the motion was pending. However, the matter is now ready to be set for trial and granting
7 Plaintiff's request would further delay the proceedings which would be prejudicial to the
8 defendant.

9 Accordingly, Plaintiff's request to reopen discovery is HEREBY DENIED.

10 IT IS SO ORDERED.

11 Dated: February 14, 2018

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14 UNITED STATES MAGISTRATE JUDGE

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