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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM A. SMITH,

Plaintiff,

No. 2:10-cv-0359-JAM-JFM

vs.

NAT'L CITY MORTGAGE, *et al.*,

Defendants.

ORDER

_____/

On July 12, 2012, the court held a hearing on defendant's motion to preclude expert testimony. Michael Maloney appeared for plaintiff. Kimberly Paese appeared for defendant. On review of the motion, following discussion of counsel and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

RELEVANT PROCEDURAL BACKGROUND

On June 30, 2011, the Honorable John A. Mendez issued a scheduling order setting April 13, 2012 as the deadline by which to make initial expert disclosures, and April 27, 2012 for supplemental expert disclosures. Doc. No. 49. On April 16, 2012, Judge Mendez signed the parties' stipulation extending the initial expert deadline to May 14, 2012 and the supplemental disclosures deadline to May 28, 2012. Doc. No. 59. Discovery concluded on June 8, 2012, and trial is scheduled to commence on November 5, 2012.

1 by the supplemental deadline); (d) depose the proffered experts (and/or do so before the close of
2 discovery); (e) prepare any dispositive motion by the deadline¹; (f) prepare for trial; and/or (g)
3 evaluate early settlement potential. Defendant also cites to Judge Mendez’s scheduling order,
4 which provides that the “[f]ailure of a party to comply with the disclosure schedule as set forth
5 above in all likelihood will preclude that party from calling the expert witness at the time of trial
6 absent a showing that the necessity for the witness could not have been reasonably anticipated at
7 the time the disclosures were ordered and that the failure to make timely disclosure did not
8 prejudice any other party.” Doc. No. 46.

9 2. Plaintiff

10 In the Joint Discovery Statement, plaintiff admits his error. He also withdraws
11 Barry Cleverdon and Jessica Dutra as experts, leaving David Pereira and Doug Minor. In an
12 Opposition filed after the Joint Discovery Statement was filed², plaintiff’s counsel claims any
13 error regarding expert discovery is his and requests that his client not be punished for his error.
14 Counsel asserts that he is primarily a state court attorney, and his initial expert filings complied
15 with state rules of civil procedure, not the federal rules of civil procedure. Plaintiff also
16 withdraws Doug Minor as an expert, leaving only David Pereira as an expert. Finally, plaintiff
17 submits Pereira’s expert report with his Opposition.

18 Plaintiff argues against granting defendant’s motion on the grounds that: (a)
19 defendant will not be prejudiced because trial is four months from the date of the hearing on this
20 motion; (b) Pereira’s testimony is critical to plaintiff’s case; and (c) plaintiff has now provided
21 Pereira’s expert report.

23 ¹ The court notes that defendant filed a motion for summary judgment on July 11, 2012.
24 Doc. No. 79.

25 ² Defendant objects to any arguments raised in and documents attached to this
26 Opposition. Since a joint discovery statement had already been filed, defendant urges the court
to strike this Opposition as being in violation of Local Rule 251, which requires discovery
motions to be briefed by way of a joint discovery statement.

1 B. Analysis

2 Under Fed. R. Civ. P. 26(a)(2), a party must disclose and provide reports for “any
3 person who may be used at trial to present” expert testimony. Federal Rule of Civil Procedure
4 37(c)(1) prescribes “[a] party that without substantial justification fails to disclose information
5 required by Rule 26(a) ... is not, unless such failure is harmless, permitted to use as evidence at a
6 trial ... information not so disclosed.”

7 “Rule 37 (c)(1) gives teeth to [the Rule 26(a)(2)(B) disclosure] requirements by
8 forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not
9 properly disclosed.” Yeti by Molly v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir.
10 2001). “Two express exceptions ameliorate the harshness of Rule 37(c)(1): The information may
11 be introduced if the parties’ failure to disclose the required information is substantially justified
12 or harmless.” Id. “Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to
13 prove harmlessness.” Id. at 1106-07.

14 Here, it is evident that plaintiff violated Rule 26(a)(2) by failing to include an
15 expert report with either Plaintiff’s Disclosure Document or the Supporting Declaration.
16 Counsel’s unfamiliarity with the federal rules of civil procedure does not qualify as substantial
17 justification to warrant an exception to Rule 26(a)(2)(B). Thus, the only available relief for
18 plaintiff is if his error is harmless. Plaintiff argues there is no harm because trial is four months
19 away and he has now provided Pereira’s report. However, the prejudice to defendant is
20 indisputable: the discovery deadline has passed, the date to file dispositive motions has passed,
21 defendant has been unable to depose plaintiff’s expert, and defendant has not had an opportunity
22 to evaluate the need for and/or retain rebuttal experts.

23 Furthermore, although plaintiff has now provided the expert report, it is over one
24 month late. See Quevedo v. Trans-Pac. Shipping, Inc., 143 F.3d 1255, 1258 (9th Cir. 1998)
25 (refusing to consider expert’s report because it was filed one-and-a-half months late and plaintiff
26 could have asked for an extension of time).

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Accordingly, IT IS HEREBY ORDERED that:

1. Defendant's request to strike is denied; and
2. Defendant's motion to preclude expert testimony is granted.

DATED: July 17, 2012.


UNITED STATES MAGISTRATE JUDGE

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