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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KRIS ROBINSON,

Plaintiff,

v.

HD SUPPLY, INC., a
corporation,

Defendant.

No. 2:12-cv-00604-GEB-AC

ORDER

Defendant requests reconsideration of the Magistrate Judge's July 19, 2013 order (ECF No. 64), which denied Defendant's Federal Rule of Civil Procedure ("Rule") 35 motion to compel a mental examination of Plaintiff. Defendant argues the order "incorrectly determined that Plaintiff's PTSD was not 'in controversy[,]'" and "incorrectly determined that 'good cause' did not exist for the mental examination." (Def.'s Req. for Recons. 2:11-2:22, ECF No. 71.) Defendant also seeks, in its request for reconsideration of the Magistrate Judge's July 19, 2013 order, an "exten[sion of] the discovery cut-off to allow sufficient time for Dr. Brooker . . . to prepare a supplemental expert report." (Id. at 13:15-14:9.)

A. Reconsideration of July 19, 2013 Order

Defendant argues, *inter alia*, that "the July 19, 2013 order ["the Order"] incorrectly determined that 'good cause'

1 did not exist for the [desired] mental examination even though
2 there are no other means by which [Defendant] can obtain the
3 information needed to rebut Plaintiff's expert testimony relating
4 to Plaintiff's mental state without its own examination." (Id. at
5 2:19-22.) Defendant argues:

6 Plaintiff has designated five health care
7 providers as experts, all of whom have
8 purportedly treated Plaintiff for PTSD and
9 emotional distress. The [Order] potentially
10 allows Plaintiff to parade these individuals
11 and the medical/psychological records that
12 they prepared in front of a jury to explain
13 Plaintiff's PTSD and his emotional distress.
14 By [the Order], [Defendant] will have no
15 ammunition to defend itself against this
16 testimony and the medical records. A mental
17 examination is required to (1) allow
18 [Defendant] to evaluate whether Plaintiff's
19 exacerbation of PTSD and emotional distress
20 claims are valid and (2) allow [Defendant] to
21 refute the opinions of Plaintiff's experts.
22 The mental examination is the only way
23 [Defendant] can obtain this information.

24 (Id. at 10:2-12.)

25 Plaintiff counters that "'good cause' generally
26 requires a showing . . . [concerning] the need for the
27 information sought and a lack of means for obtaining it
28 elsewhere." (Pl.'s Opp'n 4:14-17, ECF No. 76.) Plaintiff argues:
"there is no indication that the information regarding
Plaintiff's claimed mental and emotional injuries is unavailable
elsewhere. To the contrary, Defendant has had an ample
opportunity to review Plaintiff's medical records and depose the
relevant witnesses." (Id. at 4:18-20 (internal quotation marks
and brackets omitted).)

"If a party objects to a nondispositive pretrial ruling
by a magistrate judge, the district court will review or

1 reconsider the ruling under the 'clearly erroneous or contrary to
2 law' standard." Mackey v. Frazier Park Public Utility Dist., No.
3 1:12-CV-00116-LJO-JLT, 2012 WL 5304758, at *2 (E.D. Cal. Oct. 25,
4 2012) (quoting Fed. R. Civ. P. 72(a)). "A magistrate judge's
5 factual findings are 'clearly erroneous' when the district court
6 is left with the definite and firm conviction that a mistake has
7 been committed." Id. (quoting Sec. Farms v. Int'l Bhd. of
8 Teamsters, 124 F.3d 999, 1014 (9th Cir. 1997)). "However, the
9 district court 'may not simply substitute its judgment for that
10 of the deciding court.'" Id. (quoting Grimes v. City of S.F., 951
11 F.2d 236, 241 (9th Cir. 1991)). "An order 'is contrary to law
12 when it fails to apply or misapplies relevant statutes, case law,
13 or rules of procedure.'" Id. (quoting Knutson v. Blue Cross &
14 Blue Shield of Minn., 254 F.R.D. 553, 556 (D. Minn. 2008)). "A
15 magistrate judge's pre-trial discovery orders are generally
16 considered nondispositive orders." Id. (citing Thomas E. Hoar,
17 Inc. v. Sara Lee Corp., 900 F.2d 522, 525 (2d Cir. 1990)).

18 Rule 35 governs the ordering of mental examinations. It
19 prescribes, in relevant part:

20 The court . . . may order a party whose
21 mental . . . condition . . . is in
22 controversy to submit to a . . . mental
23 examination by a suitably licensed or
24 certified examiner. . . . [Such an order] may
be made only on motion for good cause and on
notice to all parties and the person to be
examined

25 "The moving party bears the burden of establishing the 'in
26 controversy' and 'good cause' requirements." Mackey, 2012 WL
27 5304758, at * 3; see also Schlagenhauf v. Holder, 379 U.S. 104,
28 118-19 (1964) ("Rule 35 . . . requires discriminating application

1 by the trial judge, who must decide . . . whether the party
2 requesting a mental . . . examination . . . has adequately
3 demonstrated the existence of the Rule's requirements of 'in
4 controversy' and 'good cause'").

5 "Good cause" generally *requires a showing of*
6 *specific facts justifying discovery.* Factors
7 that courts have considered include, but are
8 not limited to, *the possibility of obtaining*
9 *desired information by other means,* whether
10 plaintiff plans to prove [his or] her claim
through testimony of expert witnesses,
whether the desired materials are relevant,
and whether plaintiff is claiming ongoing
emotional distress.

11 Franco v. Boston Scientific Corp., No. 05-CV-1774 RS, 2006 WL
12 3065580, at *1 (N.D. Cal. Oct. 27, 2006) (emphasis added).

13 Here, the Magistrate Judge held that Defendant did "not
14 demonstrate[] good cause to conduct an IME[,]"" essentially
15 stating that Defendant did not show the desired information was
16 unavailable from another source. (Order 9:17-10:10, ECF No. 64.)
17 Defendant has not shown the Magistrate Judge's ruling on the
18 "good cause" issue was clearly erroneous or contrary to law.¹

19 Defendant[] ha[s] obtained medical records
20 from each of [Plaintiff's] providers[, and]
21 ha[s] . . . deposed [a number of Plaintiff's
22 treating physicians], whom [Plaintiff] has
23 designated as her expert[s]. . . .
24 Defendant[] ha[s] failed to present any
evidence why an additional evaluation is
needed or how this additional evaluation
would contribute to an understanding of
[Plaintiff's] condition.

25 Mackey, 2012 WL 5304758, at *4 (denying the defendants' motion
26

27 ¹ Since Defendant has not shown that the Magistrate Judge's ruling on the
28 "good cause" issue was clearly erroneous or contrary to law, decision on
whether the Magistrate Judge erred in deciding Plaintiff's PTSD is not "in
controversy" is unnecessary.

1 for reconsideration of the magistrate judge's order denying
2 defendant's motion to compel a mental examination).

3 For the stated reasons, Defendant's request for
4 reconsideration is DENIED.

5 **B. Request to Modify the Status Order**

6 On July 19, 2013, the Magistrate Judge denied
7 Plaintiff's motion to exclude Defendant's rebuttal expert, Alan
8 E. Brooker, Ph.D. However, in the July 19, 2013 order, the
9 Magistrate Judge ordered Defendant to

10 submit to [P]laintiff signed copies of all of
11 Dr. Brooker's submissions, . . . identify
12 deposition or arbitration testimony from
13 other cases in which Dr. Brooker was
14 involved, . . . direct Dr. Brooker to specify
15 which of the many functions [P]laintiff could
16 continue to perform at HDS, and . . . specify
17 "the basis and reasons" for each of Dr.
18 Brooker's opinions [no later than July 26,
19 2013].

20 (Order 10:17-21, ECF No. 65.)

21 On July 25, 2013, Defendant filed an ex parte
22 application seeking an extension of "at least 60 days" to serve a
23 supplemental expert report by Dr. Brooker in response to the
24 referenced order. (Def.'s Ex Parte Appl. 7:15-21, ECF No. 68.)
25 The Magistrate Judge denied Defendant's ex parte application on
26 July 29, 2013, stating in relevant part:

27 the undersigned finds that [D]efendant's
28 request for a sixty-day extension of time to
supplement Dr. Brooker's report would
interfere substantially with Judge Burrell's
[status] order. Were [D]efendant to prevail
on its request, Dr. Brooker's supplemental
report would be due on or around the date for
filing dispositive motions. This, of course,
would leave hardly any time for [P]laintiff
to review the report before filing his own
dispositive motion, should he so wish.

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. . . .

Accordingly, IT IS HEREBY ORDERED that the court declines to modify its order to the extent it asks for a modification of Judge Burrell's [status] order. Any such requests shall be directed to Judge Burrell directly.

(Order 2:12-3:6, ECF No. 70.)

Defendant now requests the undersigned to modify the status order "to allow sufficient time for Dr. Brooker . . . to prepare a supplemental expert report." (Def.'s Req. for Recons. 13:13-14:9.) Defendant argues:

[T]he Court in its July 2, 2012 [status order] (ECF No. 17) set a July 23, 2013 discovery cut-off date. This date was extended, by stipulation, to August 30, 2013 for limited discovery[, including to take the deposition of Dr. Alan Brooker] (ECF No. 27). On July 19, 2013, the Magistrate Judge issued another order requiring a supplemental report by . . . Dr. Brooker . . . by July 26, 2013. Because [Defendant] intended to seek reconsideration of the Magistrate Judge's order [denying Defendant's Rule 35 motion to compel a mental examination], because Dr. Brooker was unavailable to prepare and sign an additional report by July 26th[,] and because Plaintiff produced several thousand pages of documents on July 22nd[,] . . . including additional medical records that had not been previously produced by Plaintiff, [Defendant] filed an ex parte application with the Magistrate Judge to extend the July 26th deadline. The Magistrate Judge denied this ex parte [application] as well, deferring to this Court. (ECF No. 70.) With the Court's current July 26th deadline for a supplemental report, [Defendant] expects that Dr. Brooker will prepare an additional report if [Defendant's] Request for Reconsideration is successful and Dr. Brooker is allowed to conduct the mental examination. [Defendant] requests that this Court modify the discovery cut-off date to allow [Defendant] sufficient time to evaluate the recent production of documents, to allow for a determination of [Defendant's] Request for Reconsideration . . . , and to allow for Dr. Brooker to conduct the mental examination of

1 Plaintiff, if this Court grants [Defendant's]
2 Request for Reconsideration.

3 (Id. at 13:13-14:4.)

4 Plaintiff opposes Defendant's request to modify the
5 status order, arguing "[t]here is no explanation for why Dr.
6 Brooker has been unavailable in the two intervening weeks to
7 provide the basic expert report information that should have been
8 provided more than four months ago[,] and "Defendant has now had
9 weeks to review Plaintiff's supplemental document production,
10 [but] has yet to identify a single page of medical records that
11 had not been previously produced." (Pl.'s Opp'n 6:20-7:2.)
12 Plaintiff further rejoins that under the circumstances,
13 "Defendant has not shown good cause for a modification of the
14 [status] order beyond what has already been stipulated to by the
15 parties." (Id. at 7:18-8:19.)

16 Defendant has not shown that whatever portions of the
17 status order it seeks to amend should be amended under Rule
18 16(b)'s "good cause" standard. Nor has Defendant indicated
19 precisely how the amendment he seeks would affect the prescribed
20 discovery completion date, the law and motion last hearing date,
21 or other currently scheduled dates.

22 The status order "controls the course of the action
23 unless the court modifies it." Fed. R. Civ. P. 16(d). A status
24 order "may be modified only for good cause and with the judge's
25 consent." Fed. R. Civ. P. 16(b)(4). "Rule 16(b)'s 'good cause'
26 standard primarily considers the diligence of the party seeking
27 the amendment." Johnson v. Mammoth Recreations, Inc., 975 F.2d
28 604, 609 (9th Cir. 1992). "Moreover, carelessness is not

1 compatible with a finding of diligence and offers no reason for a
2 grant of relief." Id. "If th[e] party [seeking amendment] was not
3 diligent, the inquiry should end." Id.

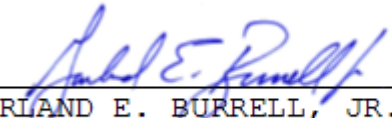
4 As the Magistrate Judge stated in response to
5 Defendant's diligence arguments:

6 the court rejects [D]efendant's argument that
7 it "is without fault in creating the current
8 situation because it has acted diligently."
9 Convinced of its diligence, [D]efendant
10 argues that it was "unexpected that the Court
11 would set a one-week deadline to prepare and
12 serve a supplemental expert report." ECF No.
13 68 at 6. But it was precisely because of its
14 failure to provide a complete expert report
15 in the first instance that [P]laintiff asked
16 the court to order supplementation, and
17 [D]efendant has been on notice since at least
18 April 2013 that the expert's report was
19 deficient. Moreover, the one-week deadline
20 was set because Judge Burrell, in the
[status] order, defined "completed" in the
context of discovery to mean that "any
disputes relative to discovery shall have
been resolved by appropriate orders, if
necessary, and, where discovery has been
ordered, the order has been complied with or,
alternatively, the time allowed for such
compliance shall have expired." ECF No. 17 at
2. Here, the parties' discovery motions were
set for hearing on July 17, 2013, with less
than one week's time to comply with any
discovery orders before the discovery
deadline. Therefore, the one-week deadline
should not have been unexpected.

21 (Order 2:18-3:3, ECF No. 70.)

22 For the stated reasons, Defendant's request to modify
23 the status order is DENIED.

24 Dated: August 28, 2013

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26 _____
27 GARLAND E. BURRELL, JR.
28 Senior United States District Judge