UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DONALD M. WANLAND, JR., Defendant.	No. 2:13-cv-2343-KJM-KJN PS ORDER

Presently pending before the court is defendant Donald M. Wanland, Jr.'s August 19, 2015 motion to modify the pretrial scheduling order. (ECF No. 38.)[1] On September 2, 2015, the United States filed a response to defendant's motion, whereupon the motion was submitted on the record and written briefing without oral argument. (ECF Nos. 39, 40.)[2] For the reasons discussed below, the court DENIES the motion.

[1] This action proceeds before the undersigned pursuant to E.D. Cal. L.R. 302(c)(21). Defendant, who proceeds without counsel, is a licensed California attorney, but is not presently entitled to practice law in California as a result of an interim suspension after his criminal conviction. See http://www.calbar.ca.gov, under "Attorney Search."

[2] In his motion, defendant requested that he be granted a minimum of 3-4 weeks to file a reply brief from the time that the United States' opposition brief is filed. However, because the court resolves defendant's motion based solely on the arguments contained therein, and such resolution does not necessitate consideration of the United States' response brief, no reply to the United States' response brief is necessary.

By way of this action, the United States seeks a determination that, under 11 U.S.C. § 523(a)(1)(C), assessments for defendant's federal tax liabilities for the tax years 1996-2003 were not discharged in bankruptcy, and seeks to reduce those assessments to judgment. Defendant denies liability and contends that the action is barred on various legal grounds.

The court issued its initial pretrial scheduling order in the case on November 24, 2014. (ECF No. 32.) After a July 7, 2015 modification to the scheduling order, made upon a showing of good cause, the case is currently scheduled so that discovery must be completed by September 30, 2015; law and motion must be completed by November 19, 2015; a final pretrial conference is set for March 3, 2016; and a bench trial is set for April 4, 2016. (ECF No. 34.)[3] In the instant motion, defendant seeks to extend each of these deadlines by approximately nine months, if not longer.

Federal Rule of Civil Procedure 16 provides, in part, that a scheduling order "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). As the Ninth Circuit Court of Appeals has observed:

> Rule 16(b)'s good cause standard primarily considers the diligence of the party seeking the amendment. The district court may modify the pretrial schedule if it cannot reasonably be met despite the diligence of the party seeking the extension. Moreover, carelessness is not compatible with a finding of diligence and offers no reasons for a grant of relief. Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end.

Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992) (internal citations and quotation marks omitted).

After carefully reviewing defendant's motion to modify the pretrial scheduling order, and his reasons for seeking such relief, the court concludes that defendant has not demonstrated the requisite good cause required by Rule 16(b)(4).

[3] For the exact terms and details regarding these deadlines, and other case deadlines, the parties shall consult the November 24, 2014 initial pretrial scheduling order and the court's July 7, 2015 minute order modifying the initial pretrial scheduling order. (See ECF Nos. 32, 34.)

Contrary to defendant's contention, a party's incarceration does not *per se* render a party unable to fairly litigate an action. Even though the court is not unsympathetic to the difficulties faced by prisoner litigants, the court notes that a substantial part of its docket is comprised of cases brought by or against prisoners, who most often proceed without counsel and have to litigate their entire cases from prison. Moreover, unlike defendant here, most such prisoner litigants have no legal training whatsoever. Although defendant is imprisoned, his presence at trial (or other necessary hearings/conferences) can be, and would be, secured by the court through an appropriate order. Furthermore, nothing prevented defendant, upon issuance of the scheduling order, from serving discovery requests on the United States or other appropriate persons (or seeking a court order authorizing a particular discovery request if required under the Federal Rules of Civil Procedure), or from filing any appropriate motions.

The court's November 24, 2014 scheduling order specifically acknowledged defendant's status as a prisoner litigant, noting that "[e]specially in light of defendant's incarcerated status, the court expects the parties to cooperate in good faith with respect to scheduling matters, and to work diligently to comply with deadlines and move this case forward towards resolution." (ECF No. 32 at 6.) Notably, defendant's motion to modify the scheduling order contains no discussion of the discovery he has conducted to date; it only suggests that he still needs to do a significant amount of discovery. To the extent that defendant has done little or no discovery in the over 9 months since the issuance of the scheduling order, as the motion appears to suggest, it strongly undermines any showing of diligence required to support modification of the scheduling order.

Defendant further argues that case deadlines should be extended, or the case stayed, until the Ninth Circuit decides the appeal of his related criminal convictions. Defendant contends that such an extension would conserve judicial/party resources and would preserve his constitutional right against self-incrimination. However, those arguments, in addition to defendant's arguments that the United States impermissibly delayed bringing this action or should have properly asserted its claims in defendant's earlier bankruptcy case, have already been addressed and rejected in the context of defendant's prior motion to dismiss or stay the action. (See June 6, 2014 Findings and Recommendations recommending denial of defendant's motion to dismiss or stay the action, ECF

No. 22, adopted by the district judge's August 6, 2014 order, ECF No. 27.) As such, those arguments do not support an extension of the case deadlines.

Finally, defendant contends that he should be permitted to demand a jury trial at this juncture. Defendant concedes that his jury demand is untimely, because he did not serve and file a jury demand within fourteen (14) days of service of the answer (i.e., by September 5, 2014, which is 14 days after the service and filing of defendant's August 22, 2014 answer). See Fed. R. Civ. P. 38(b). However, defendant argues that he was incarcerated and unaware of the requirements of Rule 38(b), and notes that he informed the United States of his desire for a jury trial in a letter dated September 30, 2014, which was incorporated into the status report filed with the court on November 4, 2014. (ECF No. 31-1.)

Federal Rule of Civil Procedure 39 provides, in part, that "[i]ssues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded." Fed. R. Civ. P. 39(b). Nevertheless, as the Ninth Circuit has explained:

> [T]he district court's discretion under Rule 39(b) is narrow and does not permit a court to grant relief when the failure to make a timely demand results from an oversight or inadvertence such as a good faith mistake of law with respect to the deadline for demanding a jury trial. Zivkovic argues that his untimely demand for a jury trial should be excused because he filed his complaint *pro se* and was unaware of the requirements of Rule 38(b). However, Zivkovic's good faith mistake as to the deadline for demanding a jury trial establishes no more than inadvertence, which is not a sufficient basis to grant relief from an untimely jury demand.

Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1086-87 (9th Cir. 2002).

Even assuming, without deciding, that the issues for which defendant presently demands a jury trial may be tried to a jury, defendant's inadvertence here likewise does not constitute a sufficient basis to grant relief from an untimely jury demand. Indeed, defendant's claim of inadvertence is even less compelling than Zivkovic, because defendant has legal training. Defendant's reliance on Massok v. Keller Industries, Inc., 147 Fed. App'x 651 (9th Cir. 2005), and Palmer v. Valdez, 560 F.3d 965 (9th Cir. 2009), is misplaced, because those cases involved the propriety of waivers of jury demands that were initially properly asserted.

Furthermore, even if inadvertence were conceivably a sufficient basis to grant relief from an untimely jury demand, the court finds that defendant here was not diligent in seeking such relief. In the November 4, 2014 status report, which was served on defendant, the United States made clear its position that neither party had made a jury demand, and that a bench trial should be scheduled. (ECF No. 31.) Subsequently, in the November 24, 2014 scheduling order, which was served on defendant, the court again noted that neither party had properly demanded a jury trial and thus scheduled a bench trial. (ECF No. 32.) Because defendant then waited almost nine months to bring the instant motion requesting a jury trial, he was plainly not diligent.

In sum, the court finds that defendant has not demonstrated the requisite good cause to modify the scheduling order.

Accordingly, IT IS HEREBY ORDERED that:

1. Defendant's motion to modify the scheduling order (ECF No. 38) is DENIED.
2. The United States and defendant are advised that the deadlines set in the court's November 24, 2014 scheduling order, as modified by the July 7, 2015 minute order, are confirmed and will be strictly enforced.

IT IS SO ORDERED.

Dated: September 4, 2015

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE