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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SCOTT JOHNSON,  
  
                                Plaintiff,  
  
                                v.  
  
JAY C. MCILRATH, in his individual  
and representative capacity as  
Trustee—The Mcilrath Family 2002  
Trust,  
  
                                Defendant.

No. 2:15-cv-00180-MCE-DB

**ORDER**

Through the present action, Plaintiff Scott Johnson seeks damages and injunctive relief against Defendant Jay C. Mcilrath as Trustee of The Mcilrath Family 2002 Trust for violations of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101–12213, and California’s Unruh Civil Rights Act (“Unruh Act”), Cal. Civ. Code § 51. Plaintiff claims he encountered various physical barriers at Defendant’s store in Stockton, California. Plaintiff previously moved for summary judgment, ECF No. 29, in response to which Defendant argued that the Defendant trustee, Jay C. Mcilrath, had passed away and that the proper real party in interest is the Mcilrath Family Limited Partnership, ECF No. 31.

Given the foregoing, this Court issued an Order to Show Cause (“OSC”) directing Plaintiff to show cause in writing why this action should not be dismissed for failure to

1 name or substitute the proper party. ECF No. 36. Plaintiff responded to the OSC and  
2 Plaintiff filed a Motion for Leave to File a First Amended Complaint. ECF No. 39.

3 Based on the record before it, the Court was able to determine that, if nothing  
4 else, Mr. Mcilrath is not a proper Defendant. Accordingly, it discharged the OSC and  
5 denied both of Plaintiff's motions. The Court then directed that Defendant file a notice  
6 complying with Federal Rule of Civil Procedure 25 and Plaintiff file a renewed motion to  
7 amend the existing complaint. Both sides timely complied, and presently before the  
8 Court is Plaintiff's renewed Motion to Leave to File a First Amended Complaint (ECF  
9 No. 44). For the following reasons, that motion is DENIED.<sup>1</sup>

10 Once a district court has issued a Pretrial Scheduling Order ("PTSO") pursuant to  
11 Federal Rule of Civil Procedure 16, that Rule's standards control. Johnson v. Mammoth  
12 Recreations, Inc., 975 F.2d 604, 607-08 (9th Cir. 1992). Prior to the final pretrial  
13 conference in this matter, the Court can modify its PTSO upon a showing of "good  
14 cause." See Fed. R. Civ. P. 16(b).

15 "Unlike Rule 15(a)'s liberal amendment policy, which focuses on the bad faith of  
16 the party seeking to interpose an amendment and the prejudice to the opposing party,  
17 Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking  
18 the amendment." Johnson, 975 F.2d at 609. In explaining this standard, the Ninth  
19 Circuit has stated that:

20 [a] district court may modify the pretrial schedule "if it cannot  
21 reasonably be met despite the diligence of the party seeking  
22 the extension." Moreover, carelessness is not compatible with  
23 a finding of diligence and offers no reason for granting of relief.  
24 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 modifications. If that party was not  
diligent, the inquiry should end.

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27 <sup>1</sup> Given this Court's disproportionately high case load, and in the interest of conserving judicial  
28 resources and expediting a decision in this case, the Court will not recount details with which the parties  
are intimately familiar. To be clear, the Court has considered all evidence and arguments in the record,  
but it limits its written decision to only that which is necessary to resolve the parties' instant arguments.

1 Id. (citations omitted). Plaintiff has fallen well short of showing the requisite diligence  
2 necessary to justify an order granting leave to amend. Mr. Mcilrath passed away over  
3 three and one half years ago on January 18, 2016, and defense counsel notified  
4 Plaintiff's counsel of his death immediately thereafter. Decl. of Mark Thiel, Ex. B.  
5 Despite having knowledge of Defendant's death for over three years, Plaintiff still  
6 contends that he "has been diligent in seeking amendment after the filing of the  
7 Statement of Death." Pl.'s Mot. at 4. According to Plaintiff, he "should not be penalized  
8 for waiting until after a Statement of Death was served, as required under the rules, to  
9 pursue amendment." Id.

10 The Court would agree if Plaintiff could not also himself have filed a Statement of  
11 Death at any time. See Rule 25 (permitting any party to file the statement). The issue is  
12 thus not whether Plaintiff's motion timely followed the formal statement being lodged with  
13 the Court. Instead, the question for instant purposes is whether Plaintiff was diligent in  
14 seeking amendment. He was not. Not only did Plaintiff fail to take any steps to ensure  
15 the proper party was before the Court (e.g., file a Statement of Death, move to amend,  
16 etc.) within the last several years, but he also filed a motion for summary judgment  
17 against a party he knew was deceased. Nothing about this shows the diligence required  
18 by Rule 16.<sup>2</sup> Accordingly, for the reasons just stated, Plaintiff's Motion for Leave to File  
19 a First Amended Complaint (ECF No. 44) is DENIED.<sup>3</sup> Because this action cannot  
20 proceed against a deceased party, it is hereby DISMISSED, and the Clerk of the Court is  
21 directed to close this case.

22 IT IS SO ORDERED.

23 Dated: September 13, 2019

24   
25 MORRISON C. ENGLAND, JR.  
26 UNITED STATES DISTRICT JUDGE

26 <sup>2</sup> The Court has serious questions based on the additional arguments raised by defense counsel  
27 as to whether amendment would be futile in any event, but given the forgoing analysis, it need not resolve  
28 those questions here.

<sup>3</sup> Having determined that oral argument would not be of material assistance, the Court ordered the  
Motion submitted on the briefs pursuant to Local Rule 230(g).