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15 UNITED STATES DISTRICT COURT
16
17 EASTERN DISTRICT OF CALIFORNIA
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19 DEVRA BOMMARITO, an individual,) Case No. 2:15-cv-01187-WBS-DB
20)
Plaintiff and Counterdefendant,) **JOINT STIPULATION AND REQUEST**
21) **TO MODIFY THE PREVIOUS**
v.) **PRETRIAL SCHEDULING ORDERS;**
22) **[PROPOSED] ORDER**
THE NORTHWESTERN MUTUAL LIFE)
23 INSURANCE COMPANY and MARK)
MAJEWSKI,) Complaint Filed: June 1, 2015
24) Current Trial Date: July 17, 2018
Defendant and Counterclaimant.) Judge: Hon. William B. Shubb
25)
26 _____)
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28)

1 Plaintiff and Counterdefendant DEVRA BOMMARITO and Defendant and Counterclaimant
2 THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, through their undersigned
3 counsel hereby request that the Court adopt the stipulated modifications to the Scheduling Order in this
4 matter set forth below based on the following:

5 **A. Current Status**

6 WHEREAS, Plaintiff filed the complaint in this matter on June 1, 2015. She alleges claims for
7 relief for breach of contract and breach of the covenant of good faith and fair dealing (“bad faith”)
8 based on the alleged wrongful denial of her claim for disability benefits by Defendant.

9 WHEREAS, on October 7, 2015, the Honorable William B. Shubb issued a Pretrial Scheduling
10 Order setting forth the discovery deadlines, motion hearing schedule, final Pretrial Conference, and
11 trial date in this matter. Due to the Plaintiff’s substitution of counsel, and difficulties created by a
12 criminal investigation, the Court in a May 27, 2016 order modified the scheduling order concluding
13 with a Jury Trial date: October 24, 2017 at 9:00 a.m. On December 28, 2016, due to Plaintiff’s
14 counsel’s diagnosis with and treatment for cancer, this Court granted a joint stipulation, with
15 modification, extending the pre-trial schedule concluding with a Jury Trial date: February 6, 2018 at
16 9:00 a.m. (Docket 31.) The Court further modified the pre-trial scheduling order in its order of May
17 17, 2017 (Dkt. 33) and of December 18, 2017 continuing pre-trial dates, concluding with a trial date of
18 July 17, 2018.

19 WHEREAS, due to the unforeseen circumstances and delays set forth below, and in order for
20 the Motion for Summary Judgment to be heard after the deposition of a new witness appearing as a
21 declarant in support of Defendant’s Motion for Summary Judgment in the matter, and in order for the
22 parties to have an opportunity to discuss a mediated resolution of the matter after the criminal trial and
23 before the trial in this action, the parties request the modifications set forth at the end of this
24 stipulation.

25 **B. The Status of and Trial in the Criminal Action**

26 WHEREAS, on February 22, 2016, Plaintiff was charged with making a fraudulent claim for
27 insurance payment, insurance fraud, grand theft of personal property, and making false entries in
28 records by the San Joaquin County District Attorney’s Office. Plaintiff is charged with felony

1 insurance fraud with regard to the claim for disability benefits submitted to Defendant, the same claim
2 for disability benefits that is the subject of Plaintiff's claims for relief for breach of contract and bad
3 faith in this action. After a preliminary hearing in September 5, 2017, Bommarito was held for trial
4 which was then scheduled for April 10, 2018.

5 WHEREAS, at the trial readiness hearing in February 2018 the criminal trial was continued to
6 September 4, 2018.

7 The Parties agree that the criminal trial significantly impacts the prosecution of this matter,
8 whether by jury trial or mediated settlement. Although Plaintiff maintains and reserves to right to
9 move that a criminal indictment should be excluded from the evidence in her civil trial, the criminal
10 verdict could have an impact on her claims for breach of contract and bad faith. The claim for relief for
11 bad faith will be presented to the Court in an entirely different fashion depending on whether she is
12 convicted or acquitted.

13 The determination of the criminal action plays a significant role on how the claims for relief for
14 breach of contract and bad faith will be presented to this Court. Finally, the criminal verdict may
15 enable resolution of this matter through mediated settlement. The parties would endeavor to maximize
16 opportunity for settlement presented after a criminal resolution and before trial before this Court.

17 **C. Discovery Regarding Defendant's Motion for Summary Judgment and/or**
18 **Adjudication**

19 WHEREAS, Defendant filed its Motion for Summary Judgment on February 26, 2018 on 1) the
20 issue of bad faith and punitive damages and 2) contending that Plaintiff's entire action against
21 Defendant is governed by ERISA (Dkt 36). Defendant's motion relies upon, in part, the declaration of
22 Donald Seebach regarding the application and underwriting process for Plaintiff, her business partner
23 and certain individuals identified as employees of XCEL Physical Therapy for disability coverage
24 issued by Defendant (Dkt 36-8). The Seebach declaration regarding the purported XCEL employees'
25 application for and/or enrollment in a disability benefits policy issued by Defendant forms the basis for
26 Defendant's claim that the matter is not governed by state insurance laws, but rather is preempted by
27 ERISA.
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1 Mr. Seebach does not appear in any of Defendant's four initial and supplemental disclosures
2 nor was he identified as or by any witness previously deposed in this matter, nor in any discovery
3 response. Discovery is closed. Upon receipt of the Motion for Summary Judgment, Plaintiff
4 immediately noticed the deposition of Mr. Seebach. The deposition will likely take place in
5 Milwaukee in early or mid-April and will require cross-country travel for all counsel.

6 WHEREAS, Defendant contends that its FRCP Rule 36(b)(6) witness previously testified on
7 the matters set forth in the Seebach declaration.

8 WHEREAS, Plaintiff requires the deposition of Mr. Seebach in order to respond to Defendant's
9 motion for ERISA preemption of this matter. The Seebach declaration is the lynchpin of the ERISA
10 preemption argument. It sets forth the factual predicate upon which Defendant relies to contend that
11 the individual policies purchased by XCEL's two owners were part of an ERISA benefit plan which
12 also provided disability benefits to non-owning XCEL staff. The Seebach declaration purports to
13 establish that Plaintiff's business "sponsored" the "disability coverage" which is a necessary factor to
14 demonstrate possible ERISA preemption. The facts set forth in Mr. Seebach's declaration are disputed
15 by Plaintiff, who is entitled to cross-examine this previously unknown witness to address the
16 contentions therein.

17 Plaintiff is entitled to this discovery, and the brief continuance enabling it under FRCP 56(d),
18 which provides that "if a nonmovant shows by affidavit or declaration that, for specified reasons, it
19 cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion
20 or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other
21 appropriate order."

22 The parties agree the continuance to complete this discovery is necessary, as it avoids the
23 potential longer delay which would be necessitated by a FRCP 56(d) continuance ruling after the
24 primary briefing on the matter. After meeting and conferring, Defendant's counsel stated that Mr.
25 Seebach was not available on April 9, 2018, the date for which the deposition was noticed, but he
26 would endeavor to find a time in early to mid-April to make him available.

27 **D. The Motion to Disqualify**

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1 As this Court is aware, the filing of Summary Judgment alerted Plaintiff's counsel to the fact
2 that the paralegal for her law-firm who had worked on the Bommarito matter had subsequently been
3 hired by the Ogletree firm, counsel for Defendant. In a flurry of *ex parte* briefings on shortened time,
4 Plaintiff moved for an order to disqualify counsel for Defendant. Defendant filed two oppositions,
5 Plaintiff filed a reply and there was a hearing on the matter on March 2, 2018. The Court issued its
6 order denying the motion later the same day. During that hearing, counsel for both parties expressed
7 the need for a continuance of the pre-trial and trial dates due to both 1) the interruption occasioned by
8 the interim motion which was made during the short period Plaintiff was allotted to draft and file her
9 opposition and 2) Plaintiff's deposition of Mr. Seebach, the previously undisclosed Northwestern
10 employee who filed an important declaration in support of Defendant's dispositive motion. The Court
11 stated that it would consider any such requests after the ruling on the disqualification motion. Since
12 that hearing (one week ago), counsel for the parties have been meeting and conferring regarding the
13 appropriate scheduling for the deposition, the continuation of the MSJ briefing and the pre-trial
14 deadlines.

15 **E. Plaintiff's Counsel's Battle with Cancer**

16 Previous continuances have been ordered as a result of Plaintiff's counsel's cancer diagnosis in
17 October of 2016. For much of the fall, winter and spring of 2016-2017, counsel for Plaintiff was
18 undergoing treatment for cancer. She has completed treatment and recovered. Due to Plaintiff's
19 battle with cancer, the Parties stopped prosecuting this matter altogether for much of the winter of
20 2016 and 2017. Plaintiff's counsel has recovered fully and the Parties have completed most discovery.
21 The parties acknowledge this circumstance was the basis for previous continuances necessitated by
22 counsel's diagnosis, treatment and recovery.

23 **F. Requested Modifications to the Scheduling Order**

24 Therefore, based on the need for further discovery before the filing of Plaintiff's opposition to
25 Defendant's dispositive motion, the status of the criminal action, the interruption necessitated by the
26 briefing and hearing for Plaintiff's motion to disqualify, and the opportunity for settlement after the
27 criminal trial's resolution; and mindful of the previous continuances necessitated by counsel for
28 Plaintiff's substitution of counsel after the Complaint was filed, Plaintiff's counsel's battle with cancer,

1 the Parties to this matter, through their counsel of record, hereby stipulate to the following
2 modifications to the Scheduling Order in this matter and respectfully request that the Court issue an
3 order modifying the Scheduling order as requested. At the same time the schedule compels the Parties
4 to complete discovery and prepare for trial.

- 5 • Proposed date for Plaintiff's Opposition to the Motion for Summary Judgment to be
6 filed: May 29, 2018
- 7 • Proposed date for Defendant's Reply to be filed: June 11, 2018
- 8 • Proposed date for hearing Defendant's Motion for Summary Judgment: July 9, 1018.
- 9 • Proposed Final Pretrial Conference: October 9, 2018.
- 10 • Proposed trial date: December 4, 2018.

11
12 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

13 Dated: March 21, 2018

THE GREY LAW FIRM, P.C.

14 By: /s/ Rebecca Grey

15 Rebecca Grey
16 Attorney for Plaintiff and Counterdefendant
DEVRA BOMMARITO

17 Dated: March 21, 2018

OGLETREE, DEAKINS, NASH, SMOAK &
18 STEWART, P.C.

19 By: /s/ Sean P. Nalty

20 Sean P. Nalty
21 Attorney for Defendant and Counterclaimant
THE NORTHWESTERN MUTUAL LIFE
22 INSURANCE COMPANY


23 PURSUANT TO STIPULATION, IT IS SO ORDERED.

- 24
- 25 • Plaintiff's Opposition to the Motion for Summary Judgment to be filed: May 29, 2018
- 26 • Defendant's Reply to be filed: June 11, 2018
- 27 • Hearing on Defendant's Motion for Summary Judgment: July 9, 1018 at 1:30 p.m.
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- Final Pretrial Conference: October 9, 2018 at 1:30 p.m.
- Trial date: December 4, 2018 at 9:00 a.m.

Dated: March 22, 2018



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE