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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JUAN BONIFACIO ULIN,
Plaintiff,

No. C-09-03160 EDL

v.

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
RE-OPEN DISCOVERY FOR LIMITED
PURPOSE**

LOVELL’S ANTIQUE GALLERY,
et al.,
Defendants.

Introduction

Before the Court is Plaintiff’s Motion to Re-Open Discovery for the limited purpose of conducting two depositions, where Plaintiff failed to provide witness fees with deposition subpoenas and so the depositions did not occur before the discovery cutoff. The Court finds this Motion appropriate for resolution on the papers without the need for oral argument. For the following reasons, the motion is GRANTED IN PART AND DENIED IN PART.

Background

Plaintiff Juan Bonefacio Ulin’s complaint against his former employer, ALEA-72 Inc. dba Lovell’s Antique Gallery, and its owner/manager, Abraham Magidish, makes claims for violation of state and federal overtime law, failure to provide meal and rest periods under California law, failure to pay wages due and penalties under California law, violation of California Business & Professions

1 Code § 17200, and violation of California Labor Code § 226 for failure to provide proper pay
2 statements. It is undisputed that Defendants paid Plaintiff a daily salary in cash for most of his
3 employment and did not keep records of these payments or record the actual hours plaintiff worked.
4 Therefore, much of the evidence regarding the hours and days Plaintiff worked and the amount he
5 was paid for work performed is in the form of conflicting testimony of Mr. Magidish and Plaintiff,
6 as well as the testimony of other employees.

7 In June, Plaintiff filed a motion to compel the deposition of employee Rafael Perez after Mr.
8 Perez failed to appear for a noticed deposition. The Court held that it had no authority to compel the
9 deposition of a non-party witness where Plaintiff had not served him with a deposition subpoena.
10 See Dkt. # 39. However, the Court agreed that Plaintiff had diligently tried to take the deposition in
11 a timely manner, and therefore “continue[d] the discovery cutoff to allow Plaintiff to serve a
12 subpoena on Mr. Perez and take his deposition.” The Order did not expressly specify a cutoff for
13 Mr. Perez’s deposition. However, concurrent with the motion to compel, the parties stipulated to
14 continue fact discovery from June 30 to July 31, 2010 and the Court granted this continuance in its
15 Order on the motion to compel. The December 13, 2010 trial date remains in place.

16 On July 15, 2010, Plaintiff served Mr. Perez and Pedro Hernandez, another employee, with
17 deposition subpoenas requiring attendance at a deposition on July 28, 2010. Pederson Decl. ¶ 2,
18 Exs. 2, 3. Plaintiff’s counsel sent the proofs of service to defense counsel on July 22, and defense
19 counsel responded that she had “been informed that the subpoenas were not served on the
20 deponents.” Pederson Reply Decl. Exs. 1-2. Neither Mr. Perez nor Mr. Hernandez appeared for
21 their deposition. Id. ¶¶ 10-12. Both counsel appeared for the depositions, and defense counsel
22 stated that she did not know where the deponents were and did not represent them. Pederson Reply
23 Decl. Ex. 5. Plaintiff then began preparing motions for enforcement of the subpoenas, and found
24 that witness fees had not been properly served with the subpoenas and the subpoenas are therefore
25 unenforceable. Id. ¶¶ 13-16. Plaintiff’s counsel, a relatively new attorney, believes this is the likely
26 reason for the deponents’ non-appearance and laments the oversight. Id. at ¶¶ 17-18. On August 17,
27 2010, Plaintiff filed the instant motion to re-open discovery for the limited purpose of conducting
28 the depositions of Rafael Perez and Pedro Hernandez.

1 **Analysis**

2 Pursuant to Rule 16(b), a scheduling order “may be modified only for good cause and with
3 the judge’s consent.” Rule 16(b)’ s “good cause” standard primarily considers the diligence of the
4 party seeking the amendment. Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir.
5 1992). The district court may modify the pretrial schedule “if it cannot reasonably be met despite
6 the diligence of the party seeking the extension.” Fed.R.Civ.P. 16 advisory committee’s notes (1983
7 amendment). “Although the existence or degree of prejudice to the party opposing the modification
8 might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving
9 party’s reasons for seeking modification.” Johnson, 975 F.2d at 609.

10 Plaintiff argues that there is good cause for re-opening discovery because, other than the
11 failure to provide witness fees, he has diligently pursued these depositions, especially that of Mr.
12 Perez whom he noticed in May and subpoenaed a week after the Court’s Order denying the motion
13 to compel but continuing the discovery cutoff. He contends that when he learned about the failure to
14 provide witness fees, on August 13 he asked Defendants to stipulate to extend the discovery cutoff
15 but Defendants refused. See Pederson Decl. Ex. 4 (email requesting stipulation sent 8/16 and refusal
16 sent on 8/17). The Court agrees that Plaintiff has been diligent in seeking to obtain the deposition of
17 Mr. Perez, but for the oversight in failing to provide him with the required witness fee. Plaintiff also
18 argues that there is good cause because the testimony of these individuals is crucial because other
19 deposition testimony is inconclusive. Specifically, he contends that Mr. Hernandez is the only
20 available witness who worked full-time with Plaintiff in the warehouse and is therefore “the most
21 valuable of any witness deposed to date.” The Court agrees that the testimony of another warehouse
22 worker would likely be useful in resolving the issues in this case, though it is unclear why Plaintiff
23 waited until after the initial discovery cutoff and two weeks before the extended cutoff to subpoena
24 him.

25 Finally, Plaintiff contends that Defendants will not suffer prejudice because there is over
26 three months until trial and they have been on notice of Plaintiff’s intent to depose Mr. Perez since
27 May. Plaintiff points out that the Court previously granted an extension of time to depose another
28 employee, Mr. Flores, but this was presented as a stipulation and is thus a different situation that has

1 no bearing on this motion. See Dkt. # 26. Defendants simply respond that “[a]dditional depositions
2 would subject Defendants to additional expense that is not justified at this point,” but do not
3 otherwise explain how they will be prejudiced.

4 Defendants do not address Plaintiff’s good cause or prejudice arguments head on, but
5 contend that the motion is untimely because the deadline to compel discovery was August 7, 2010,
6 seven days after the discovery cutoff as required by Local Rule 26-2. They argue that when the
7 witnesses did not appear at the deposition on July 28, he should have moved to compel at that time
8 and is now attempting to get around his failure to timely file a motion to compel by instead filing a
9 motion to re-open discovery. Defendants’ argument is essentially that Plaintiff should have filed an
10 improper motion to compel after learning of the witness fee issue, a suggestion with which the Court
11 cannot agree.

12 In light of the foregoing, the Court agrees that Plaintiff has shown good cause for allowing
13 some additional discovery, especially because of the value that additional deposition testimony may
14 have in resolving this case. However, the Court is sympathetic to the fact that Defendants’ counsel
15 has already appeared at two depositions which did not take place because of Plaintiff’s clerical error.
16 Therefore, the Court grants Plaintiff’s motion to re-open discovery for the limited purpose of taking
17 one additional deposition, of either Mr. Perez or Mr. Hernandez, but not both. Plaintiff may decide
18 which witness he wants to depose and shall properly subpoena that deponent and set the deposition
19 as soon as possible. To the extent that Defendants have any contact with or control over the
20 deponent in question, Defendants are encouraged to discuss with the deponent the potential
21 ramifications of failure to comply with a subpoena, including contempt.

22 For all of these reasons, the Motion is GRANTED IN PART AND DENIED IN PART.
23 **IT IS SO ORDERED.**

24
25 Dated: September 17, 2010

26 
27 ELIZABETH D. LAPORTE
28 United States Magistrate Judge