

United States District Court  
For the Northern District of California

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E-FILED on 3/8/10

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ROGER M. LEVIN,  
  
Plaintiff,  
  
v.  
  
UNUM LIFE INSURANCE COMPANY OF  
AMERICA; et al.  
  
Defendants.

No. C-09-2869 RMW

ORDER DENYING WITHOUT PREJUDICE  
PLAINTIFF'S MOTION TO COMPEL  
MEDIATION AND DEFENDANT'S CROSS-  
MOTION FOR SUMMARY JUDGMENT

[Re Docket No. 30]

Plaintiff Roger M. Levin ("Levin") moves to compel contractual mediation. Defendant UNUM Life Insurance Company of America ("UNUM") opposes the motion and seeks summary judgment on the basis that plaintiff has waived his right to mediate. The motions came on for hearing before the court on March 5, 2010. Having considered the papers submitted by the parties and the arguments at the hearing, and for good cause appearing for the reasons set forth below, the court denies both motions without prejudice.

Through this action, plaintiff seeks specific performance of a contract, specifically, an agreement to mediate an underlying dispute arising out of defendant's denial of plaintiff's 1996 claim for disability benefits. Plaintiff had filed a state court lawsuit over the denial of benefits, and the


1 parties settled that suit in 2000 by agreeing to mediate. It took until 2002 before the agreement was  
2 reduced to writing and executed by the parties. Plaintiff thereafter waited until late 2008 before  
3 seeking to take the deposition of defendant's person most knowledgeable regarding the handling of  
4 the disability claim, an event that both parties appear to agree was to be noticed by plaintiff before  
5 mediation would occur. When defendant asserted that no such witness remained available, plaintiff  
6 filed the present action, seeking to compel specific performance of the mediation agreement.  
7 Plaintiff now brings the present motion to compel mediation and defendant opposes the motion, and  
8 seeks summary judgment, on the ground that plaintiff's delay in seeking to enforce the agreement  
9 caused it prejudice and constitutes a waiver.

10 The court is not willing to compel mediation on the present record. Defendant has asserted  
11 various defenses, including invalidity and unenforceability of the agreement primarily related to  
12 what appears to be unreasonable delay in seeking mediation. Defendant, however, has put forth  
13 only very conclusory evidence in an attempt to establish that it has been prejudiced as a result of the  
14 delay. Without a stronger factual showing to establish what harm, if any, has resulted from the  
15 delay, the court is not prepared to grant summary judgment in defendant's favor. On the other hand,  
16 the court is not prepared to order mediation given the lengthy delay and the lack of a satisfactory  
17 explanation for the delay. Accordingly, both motions are denied without prejudice at this time.

18 The parties are hereby ordered to meet and confer within 15 days regarding case  
19 management and to submit to the court no later than March 26, 2010 a proposed case schedule,  
20 including a date for a hearing at which it will be determined whether the agreement should be  
21 specifically enforced or whether the delay has been such that plaintiff has waived his right to  
22 mediation or is otherwise estopped from now asserting a right to mediate.

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DATED: 3/8/10

  
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RONALD M. WHYTE  
United States District Judge

