

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge Boyd N. Boland

Civil Action No. 09-cv-01006-MSK-BNB

JOHN STEPHEN HEANEY,

Plaintiff,

v.

DETECTIVE JAMES COSTIGAN,
DETECTIVE MICHAEL CORDOVA,
DETECTIVE NOEL IKEDA,
SERGEANT DANIEL STEELE, and
THE CITY AND COUNTY OF DENVER, COLORADO,

Defendants.

ORDER

This matter arises on the defendants' **Motion to Compel** [Doc. # 141, filed 4/10/2012], which is DENIED.

Trial of this matter is set to begin in less than one week, on April 23, 2012.

The Motion to Compel seeks an order requiring the plaintiff to produce a copy of his diary. The diary was requested through written discovery served on March 8, 2010. The plaintiff responded to the request on April 16, 2010, more than two years ago. In his response to the discovery request, the plaintiff asserted that the diary is protected from disclosure under the attorney-client privilege and the work product immunity. The defendants' counsel inquired about the diary on July 21, 2010, during the plaintiff's deposition. The Motion to Compel was not filed until March 10, 2012, on the eve of trial.

In the meantime, the district judge conducted a final pretrial conference and adopted the

parties' proposed Pretrial Order. See Pretrial Order [Doc. # 131]; Amended Courtroom Minutes [Doc. # 133, filed 11/30/2011] (adopting the parties' proposed Pretrial Order). No mention of the plaintiff's diary is contained in the Pretrial Order and, in particular, it is not listed as a trial exhibit. The Pretrial Order recites that it may be amended only to prevent manifest injustice. Pretrial Order [Doc. # 131] at Part 12.

The defendants fail to explain the two year delay in seeking production of the plaintiff's diary. It is difficult to imagine the purpose of compelling production of the diary at this late date, since it is not listed as a trial exhibit and the defendants fail to explain how they will demonstrate manifest injustice to amend the Pretrial Order to include the diary as an exhibit. Under these facts, the defendants simply waited too long to assert their rights to the production of the diary. Consequently, I do not reach the issues of privilege and immunity.

IT IS ORDERED:

- (1) The Motion to Compel [Doc. # 141] is DENIED; and
- (2) The hearing on the Motion to Compel set for April 19, 2012, at 8:30 a.m., is

VACATED.

Dated April 18, 2012.

BY THE COURT:

s/ Boyd N. Boland
United States Magistrate Judge