

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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| BRUCE & KATHY BOUDREAUX | * | CIVIL ACTION NO. 09-0549 |
| | * | |
| | * | JUDGE CARL J. BARBIER |
| VERSUS | * | |
| | * | SECTION "J" |
| STATE FARM FIRE AND | * | |
| CASUALTY COMPANY | * | MAGISTRATE 3 |
| | * | |

DEFENDANT’S MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE
ALL EXPERT TESTIMONY AND EXPERT REPORTS
WHICH MAY BE INTRODUCED BY PLAINTIFFS AT TRIAL

MAY IT PLEASE THE COURT:

In support of its motion to exclude all expert testimony and expert reports which may be introduced by Plaintiffs, Bruce and Kathy Boudreaux, (“Plaintiffs”) Defendant, State Farm Fire and Casualty Company, (“State Farm”) respectfully avers as follows:

I. FACTUAL BACKGROUND

This is a “wind versus water” dispute involving property owner claims for insurance benefits due to alleged Hurricane Katrina wind/rain damage. To date, despite propounding

discovery and otherwise acting diligently to develop its defense, State Farm knows little or nothing about the Plaintiffs' theories or the evidence they intend to present at trial.

On June 9, 2009, the Court issued a Scheduling Order¹ (the "June 9, 2009 Order"). The June 9, 2009 Order required Plaintiffs to produce a Rule 26 compliant expert report by September 22, 2009. The Federal Rules of Civil Procedure lists specific requirements for an expert's written report.² Specifically, the rules require in part that the written expert report contains as follows:

...a complete statement of all opinions the witness will express and the basis and reasons for them,...³ the data or other information considered by the witness in forming them...⁴ the witness's qualifications, including a list of all publications authored in the previous 10 years,...⁵ a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition,...⁶ and a statement of the compensation to be paid for the study and testimony in the case.⁷

In Plaintiffs' initial disclosures, Plaintiffs failed to properly designate any expert witnesses or submit a Rule 26 compliant expert report. Instead, Plaintiffs state that "at the time of disclosure of expert witnesses plaintiff(s) expects to nominate expert witnesses regarding (1) costs of repairs (2) defendants handling of this claim."⁸ On October 15, 2009, nearly three weeks after Plaintiffs were required to supply State Farm with their expert reports, Plaintiffs produced their responses to State Farm's written discovery. Specifically, State Farm requested as follows:

...

¹ See Rec. Doc. No. 9

² See Fed. R. Civ. P. 26 (a)(2)(B).

³ See Fed. R. Civ. P. 26 (a)(2)(B)(i).

⁴ See Fed. R. Civ. P. 26 (a)(2)(B)(ii).

⁵ See Fed. R. Civ. P. 26 (a)(2)(B)(iv).

⁶ See Fed. R. Civ. P. 26 (a)(2)(B)(v).

⁷ See Fed. R. Civ. P. 26 (a)(2)(B)(vi).

⁸ See Plaintiffs' Rule 26(a)(1) Initial Disclosures, attached hereto as Exhibit "A," in globo.

INTERROGATORY NO. 4:

Please identify all expert witnesses whom you anticipate may be called by you as witnesses at the trial of the captioned matter and state the qualifications of the expert and substance of the expert opinion.

ANSWER TO INTERROGATORY NO. 4:

Plaintiffs are not aware of any experts at this time.⁹

Indeed, according to the above response, Plaintiffs concede that they either (1) did not meet the Court's September 22, 2009 deadline in which to submit their expert reports and/or (2) do not intend to introduce any expert reports and/or expert testimony at trial.

Currently, a three jury trial is scheduled to take place on January 19, 2009. The deadlines are such that State Farm is required to file its pre-trial motions on or before December 1, 2009.¹⁰ Plaintiffs supplied State Farm with an estimate of repairs prepared by Steve Hitchcock ("Hitchcock") on Wednesday, November 25, 2009, a mere six days ago and more than three months after the June 5, 2009 Order required Plaintiffs to provide any such documentation to State Farm.¹¹ Furthermore, Hitchcock's estimate does not satisfy Rule 26 disclosure requirements.¹² Due to the Plaintiffs' failure to timely submit Rule 26 compliant expert reports pursuant to this Honorable Court's Scheduling Order, State Farm does not know anything about the Plaintiffs' expert opinions and conclusions, which they may introduce at trial.

Consequently, Plaintiffs should not be allowed to ignore Court deadline and untimely submit expert reports introducing for the first time new expert opinions and conclusions on the eve of critical court deadlines and less than two months before trial. To allow Plaintiffs to

⁹ See Plaintiffs' Responses to Interrogatories, attached hereto as Exhibit "B," in globo.

¹⁰ See Rec. Doc. 28, Order granting Defendant's Motion to Extend the Deadline for Filing Pre-Trial Motions.

¹¹ See Estimate of Steve Hitchcock, dba Crescent City Adjusters dated November 11, 2009, attached hereto as Exhibit "C."

¹² *Id.*

submit their expert reports mere days before this Honorable Court's deadline for dispositive motions would result in an unfair prejudice to State Farm's defense of the instant matter. Plaintiffs are attempting "trial by ambush", and this strategy should not be allowed or rewarded by this Honorable Court. Therefore, State Farm moves to exclude Plaintiffs from offering any expert reports and/or expert opinions at trial.

II. LAW AND ARGUMENT

A. Plaintiffs Failed To Timely File Their Experts' Written Reports, Witness And Exhibit List, And Have Not Demonstrated Good Cause.

1. The Scheduling Order Preemptively Prescribes the Consequence Of Failure To Timely File A Witness and Exhibit List

Under the case management rules set forth in the June 5, 2009 Order, a party's witnesses shall not testify, nor shall its exhibits be introduced, unless the same were disclosed on a timely filed witness and exhibit list. A party who fails to comply with the witness/exhibit list deadline set forth in the Order must file a motion for leave and show **good cause exists** to excuse the party's late-filing. The Order specifically provides, in pertinent part, as follows:

Written reports of experts, as defined by Federal Rules of Civil Procedure 26(a)(2)(B), who may be witnesses for plaintiffs shall be obtained and delivered to counsel for defendant as soon as possible, but in any event not later than September 22, 2009.

....

Counsel for the parties shall file in the record and serve upon their opponents a list of all witnesses who may or will be called to testified on trial, and all exhibits that may or will be used, not later than October 22, 2009.

The court will not permit any witness, expert or fact, to testify or exhibits to be used unless there has been compliance with this order as it pertains to the witness.¹³

2. Plaintiffs Are Precluded From Calling Any Expert Witness or Introducing Any Expert Reports.

As noted above, the Court clearly and prospectively announced the consequence for failure to comply with the deadline for filing a witness and exhibit list – i.e., that the Court “will not permit” any such witness to testify nor will it permit any such exhibit be introduced. Thus, the Court’s discretion, as granted under Fed. R. Civ. P. 16(f) and 37(b)(2)(B), to determine appropriate sanctions for the failure of a party to satisfy Scheduling Order deadlines, was exercised preemptively. Despite the Court’s clear admonition, Plaintiffs failed to satisfy the Court’s deadline for filing their witness and exhibit list. As such, as the matter currently stands, Plaintiffs are precluded from calling any witness or introducing any exhibit as they failed to timely file a witness and exhibit list. See, *Innes v. City of New Orleans*, 2003 WL 2004431, * 3 (E.D.La. 2003)(Fallon, J.)(applying court’s rule that failure of “complete compliance” with requirement to timely file witness and exhibit list resulted in preclusion of evidence (unless failure excused by showing of good cause); evidence stricken); *Dutton v. University Healthcare System, L.L.C.*, 2004 WL 1078929, * 3 (E.D.La. 2003)(McNamara, J.)(striking witnesses and exhibits filed on an untimely witness and exhibit list where good cause not shown for failure to timely identify the same).

3. Plaintiffs Cannot Meet Their Burden of Demonstrating Good Cause Exists Excusing Their Failure To Comply With The Court’s Scheduling Order

Plaintiffs did not request from Defendant an extension to produce a Rule 26 compliant expert report or to file their witness and exhibit list. Plaintiffs have not filed a Motion to extend

¹³ See Rec. Doc. No. 9, p. 2.

the deadline to file their expert witness list or expert reports or to file their witness and exhibit list. Thus, they clearly have not offered any explanation for failing to comply with the Order. Therefore, the Court is well within its discretion to exclude the testimony of any expert that Plaintiffs intend to call as a witness and to exclude any expert report that Plaintiffs intend to introduce into evidence.

B. The Court Should Enforce The Terms Of The Scheduling Order.

The Fifth Circuit has held that the trial court should consider the following four factors when deciding whether to exclude evidence to enforce a pretrial order: (1) the explanation, if any, for the party's failure to comply with the scheduling order; (2) the prejudice to the opposing party; (3) the possibility of curing such prejudice by granting a continuance; and (4) the importance of the witnesses and exhibits. *Vastar Offshore*, 2005 WL at *1, citing *Barrett v. Atlantic Richfield, Co.*, 95 F.3d 375, 380 (5th Cir.1996); *Geiserman v. MacDonald*, 893 F.2d 787, 791 (5th Cir.1990).

As set forth above, the Court preemptively announced the consequence to Plaintiffs for their failure to timely file expert reports and witness and exhibit list – the exclusion of any such evidence listed thereon. The Court is well within its authority to issue such rule, as the Federal Rules of Civil Procedure commit to the court's discretion the decision of whether to exclude evidence because of a party's noncompliance with a pretrial scheduling order. Fed. R. Civ. P. 16(f), 37(b)(2)(B). *Gray v. Vastar Offshore*, 2005 WL 399396, *1 (E.D.La. 2005). As such, State Farm suggests the Court need not consider the four factors set forth above, as by preemptively announcing the consequence of failing to timely file a witness and exhibit list (without good cause for the failure), the Court rendered the issue moot. Nonetheless, out of an abundance of caution, State Farm suggests that, as set forth below, the result remains the same:

Plaintiffs' experts' testimony and reports should be excluded from trial in accordance with the June 5, 2009 Order.

1. Plaintiffs Failed to Give An Explanation For Failing To Comply With The Scheduling Order, Thus, Plaintiffs Have Not Shown Good Cause For Failing To Comply With The Scheduling Order.

Under the first of the four factors set forth above, the Court must consider the Plaintiffs' excuse for failing to satisfy the pre-trial deadline in question. This is particularly significant in that the initial question of "did the late filer have good cause to excuse the late filing" is a threshold issue. See, e.g., *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.1992)(motion seeking modification of scheduling order to allow late filing of pleading denied where mover could not show good cause (couched in terms of due diligence) existed). The initial and indeed main focus of the inquiry is upon the moving party's reasons for seeking relief. If the party cannot demonstrate good cause for a late filing (i.e., that he was diligent in his efforts to make timely compliance), the inquiry should end. *Id.*

In the instant matter, Plaintiffs have never sought to extend the deadline or given any reason why they have not complied with the June 5, 2009 Order. Consequently, there can be no argument but that Plaintiffs have failed to offer the Court any "good grounds" for their late filing of a non-compliant expert report and failure to file a witness and exhibit list. As such, the Court is well within its prerogative to exclude the expert report and expert witnesses based on this issue alone.

2. Plaintiffs' Late Filing Has Caused State Farm Prejudice That Cannot Be Meaningfully Cured By Granting A Continuance

State Farm has on multiple grounds suffered prejudice from Plaintiffs' late filing. As an initial matter, Plaintiffs have had the benefit of State Farm's timely filed witness and exhibit list, while State Farm has been left to wonder as to the manner of evidence and identity of witnesses

Plaintiffs intend to present to prove their case. The inequity created by such one-sided production is compounded by the fact that Plaintiffs' expert report (which was not produced until November 25, 2009) does not give any type of narrative opinions or conclusions by the expert. The expert report is only an estimate of costs which is of little use to State Farm in preparing its defense in this case. *See, Kimbrough v. City of Cocoa*, 2006 WL 3445562 (M.D.Fla. 2006)(litigant's untimely filed witness and exhibit list failed to specifically identify documents but offered only "sweeping compilations of documents"). Plaintiffs' expert report, which can be characterized as a perfunctory effort at best, fails to meaningfully satisfy the purpose of the exchange of an expert report; i.e., to prevent trial by surprise. Hitchcock's estimate is merely a calculation of numbers generated by estimating software. It does not indicate whether it is for wind damage, flood damage, hurricane damage or any other type of damage. It does not contain substantive written discussions, conclusions or opinions.

It is of course true that continuing the trial would in nearly all instances "cure" prejudice caused by a litigant's failure to timely file a witness and exhibit list or to submit a Rule 26 compliant expert report. State Farm respectfully suggests, however, that courts, particularly those managing burgeoning Hurricane Katrina dockets, have little interest in continuing a trial every time a litigant fails to comply with a scheduling order.

Further, even assuming, *arguendo*, that State Farm suffered no prejudice from Plaintiffs' late filing, such would not constitute "good cause" to excuse the same. *Jones-Bey v. Wright*, 1996 WL 441786 (N.D.Ind. 1996)("A party cannot show 'good cause' merely by demonstrating that an opposing party would not be prejudiced by the modification of a deadline or the avoidance of a scheduling order"), *citing, Txchantz v. McCann*, 160 F.R.D. 568, 572 (N.D.Ind. 1995); *see also, Kimbrough v. City of Cocoa*, 2006 WL 3445562 (M.D.Fla. 2006)("Whether or

not opposing counsel were prejudiced does not provide good cause for failure to comply with a court order[ed] [deadline to file a witness and exhibit list]"). In sum, "[a]lthough 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 modification." *Johnson v. Mammoth Recreations*, 975 F.2d at 609 (citing *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D.Me.1985)); *St. Paul Mercury Inc. Co. v. Capitol Sprinkler Inspection, Inc.*, 2007 WL 1589495 (D.D.C. 2007)(same).

3. The Importance of Plaintiffs' Expert Report and Witness and Exhibit List Does Not Provide Sufficient Cause to Excuse Plaintiffs' Late Filing and Production

The significance of Plaintiffs' witnesses and exhibits does not provide the Court any meaningful information as to why the plaintiffs' late production and failure to file in this case should be excused. As noted above, federal courts have ruled in favor of enforcing the terms of the scheduling order even when the violation was made by a *pro se* plaintiff. Here, Plaintiffs are represented by experienced counsel and have been represented by said counsel in this case for over two years.

The most salient issue is that each of the factors discussed above, regardless of whether the Court is obliged to give them due consideration, all weigh heavily if not inescapably toward the conclusion that the Court should enforce the terms of its Scheduling Order and exclude any and all expert testimony provided by Plaintiffs.

C. Plaintiffs' Expert Report and Testimony Should Be Excluded For Non-Compliance with Rule 26.

As previously mentioned, Plaintiffs did produce an expert report, but it was not produced at a time in accordance with the June 5, 2009 Order. Thus, the Court is well within its authority to exclude the expert report because of the party's noncompliance with a pretrial scheduling

order. Fed. R. Civ. P. 16(f), 37(b)(2)(B). *Gray v. Vastar Offshore*, 2005 WL 399396, *1 (E.D.La. 2005). As such, State Farm suggests that the court need not consider whether the experts reports are compliant with Fed R. Civ. P. 26(a)(2)(B). However, out of an abundance of caution, State Farm suggests that, as set forth below, Plaintiffs' expert report does not comply with Rule 26, and therefore, any and all expert testimony should be excluded.

The Federal Rules of Civil Procedure list specific requirements for an expert's written report.¹⁴ Specifically, the rules require in part that the written expert report have "a complete statement of all opinions the witness will express and the basis and reasons for them,...¹⁵ a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition,...¹⁶ and a statement of the compensation to be paid for the study and testimony in the case."¹⁷ In the instant case, Plaintiffs have failed to meet all three of the previously mentioned requirements.

Federal Rule 26(a)(2)(B)(i) requires the report be written in a manner that reflects the "testimony" to be given by the expert. The expert report (which is really only an estimate and not even signed by Hitchcock) fails to give any type of narrative discussion or opinion. The report consists of only numbers produced by estimating software presumably showing estimated costs for repairs accompanied by a letter from Hitchcock listing the various documentation he purports to have reviewed in preparing his estimate/report. This information is of little use to State Farm in its preparation for this case and fails to meet Rule 26 requirements. Additionally, the expert report fails to give a fee schedule for either of the purported expert, as is required by Federal Rule 26(a)(2)(B)(vi). Last, Hitchcock did not even sign the report. Thus, due to the

¹⁴ Fed. R. Civ. P. 26 (a)(2)(B).

¹⁵ Fed R. Civ. P. 26 (a)(2)(B)(i).

¹⁶ Fed R. Civ. P. 26 (a)(2)(B)(v).

¹⁷ Fed R. Civ. P. 26 (a)(2)(B)(vi).

Plaintiffs failure to follow Rule 26 disclosure requirements for an expert report, any and all reports and testimony from Hitchcock and any other proffered expert witness on behalf of Plaintiffs should be excluded.

III. CONCLUSION

For the foregoing reasons Defendant prays that its Motion be granted.

Respectfully submitted,

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2009, I electronically filed the foregoing with the Clerk of court by using the CM/ECF system which will send a notice of electronic filing to counsel of record.

/s/ Lindsay A. Larson, III
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