IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

ALBERT SNYDER, Plaintiff v. FRED W. PHELPS, SR., JOHN DOEs, JANE DOEs, and WESTBORO BAPTIST CHURCH, INC. Defendants	Civil Action No. 06-CV-1389 RDB

REPLY BRIEF OF PLAINTIFF ALBERT SNYDER TO DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR EXTENSION OF TIME

I. PROCEDURAL BACKGROUND

On December 22, 2006, the plaintiff filed a motion to enlarge the time to amend the pleadings. Subsequently, the defendants filed a brief in opposition. This brief replies to the defendants' brief in opposition.

II. ARGUMENT

At this early stage of the discovery proceedings, the plaintiff is seeking time to conduct *some* discovery before the time period to amend the pleadings expires. The defendants argue that Federal Rule of Civil Procedure 15 and 16 preclude enlarging the time to amend the pleadings.

Although (as the defendants have identified) the United States Supreme Court and the Fourth Circuit have not addressed the interpretation of Rule 16 in conjunction with Rule 15's liberal amendment standard in a published opinion, most courts have equated the "good cause" standard in Rule 16 with the requirement that the party seeking amendment demonstrate *diligence*. See, e.g., Johnson v. Mammoth Recreations, Inc., 975 F. 2d 604 (9th Cir. 1992).

> Rule 16(b)' s "good cause" standard primarily considers the diligence of the party seeking the amendment. The district court may modify the pretrial schedule "if it cannot reasonably be met despite the diligence of the party seeking the extension." Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. Although 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. If that party was not diligent, the inquiry should end.

Id. at 609 (citations omitted).

In Johnson, the defendants responded to interrogatories and counsel exchanged letters stipulating to parties to the action – months had passed and discovery had been served and responded to. In our case, the defendants have been served with interrogatories. However, the responses to those interrogatories are due after the time period to file motions to amend the pleadings will expire. Put differently, plaintiff cannot reasonably meet the pretrial schedule. The Rules allow the defendants thirty days to respond to interrogatories and counsel are not available until after the period for moving to amend the pleadings will expire.

Under the facts of our case, any complaints concerning lack of diligence should fall on deaf ears. Lack of diligence could possibly be demonstrated if "counsel waited some four months before propounding written discovery and took no oral depositions until nearly three months after the deadline for amending the complaint." Sosa v. Airprint Systems, Inc., 133 F. 3d 1417, 1419 (11th Cir. 1998).

Shortly following the scheduling conference in the instant matter, counsel for plaintiff and defendants engaged in a dialogue concerning depositions. See Def's Br., Ex. A. The defendants were not available until January, but more than likely, not available until February. ("My January schedule is very full, and February is filling up

for me."). Therefore, the plaintiff could not depose the defendants within the cutoff period for motions to amend the pleadings. Without the ability to take a deposition, the plaintiff's only remaining discovery is written discovery. On December 22, 2006, interrogatories were sent to the defendants and responses are due on January 22, 2007 – 17 days beyond the date to file a motion to amend the pleadings.[1]

The defendants' fallback position is that the plaintiff acted in "bad faith." See Def's Br. at 5; id. ("Plaintiff's twenty-four day delay in serving discovery requests amounts to bad faith."). First, it is noteworthy that the defendants did not identify any case to support their argument that serving written discovery twenty-four days after discovery begins is tantamount to bad faith. Second, curiously, the defendants state: "Defendants are prejudiced by the fact that Plaintiff's Motion does not even name the parties he wishes to add to the Complaint." Def's Br. at 5. The plaintiff has *repeatedly* notified the defendants that the WBC members that participated in the disruption and protest of Lance Corporal Matthew Snyder's funeral will be added as defendants. Moreover, these defendants have already been identified as "John and Jane Doe." Defendant Phelps knows who these defendants are.

Regardless, the defendants' concerns regarding bad faith can be addressed in the actual Motion to Amend the Pleadings. Raising them at this stage of the proceedings is premature.

---

[1] It follows that the defendants are attempting to use the Rules as a shield to frustrate the plaintiff's ability to conduct discovery. Plaintiff's counsel will not engage in missives between counsel; however, counsels' schedule should not be allowed to prejudice the plaintiff's ability to conduct discovery. For example, the defense counsel is not available for depositions until late February or early March. See Def's Br., Ex. B.

III. CONCLUSION

Plaintiff Albert Snyder respectfully requests that this Honorable Court grant his Motion to Enlarge Time to Amend the Pleadings.

BARLEY SNYDER LLC

By: ____/s/ Sean E. Summers_____

Rees Griffiths
Sean E. Summers
Paul Minnich
100 East Market Street
P.O. Box 15012
York, PA 17405-7012
(717) 846-8888

Craig T. Trebilcock
Shumaker Williams PC
135 North George Street
York, PA 17401
(717) 848-5134

1777123