

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

ANAKA HUNTER,)	
)	
Plaintiff,)	
)	
v.)	No. 4:12-CV-4 ERW
)	
BOARD OF TRUSTEES, SALEM PUBLIC)	
LIBRARY, et al.,)	
)	
Defendants.)	

MEMORANDUM IN OPPOSITION TO MOTION FOR EXTENSION OF TIME

I. Background.

On the evening of the dispositive motion deadline, after Plaintiff filed her motion for summary judgment, and eighty days after the deadline to disclose defense experts, Defendants moved for an extension of time to disclose experts and to file a dispositive motion. Plaintiff opposes the motion.

Defendants’ expert reports were due no later than December 7, 2012. Doc. # 44.¹ Discovery concluded on January 25, 2013. *Id.* Any “[m]otions to compel shall be pursued in a diligent and timely manner, but in no event filed more than eleven (11) days following the discovery deadline [.]” Doc. # 30 at p. 2. Thus, the deadline for a motion to compel was February 5, 2013.

Plaintiff pursued discovery diligently. When Defendants failed to respond to Plaintiff’s second request for production (served on October 8, 2012), Plaintiff’s interrogatories (served on

¹ Defendants attach to their motion a letter they sent to Plaintiff’s attorneys. Doc. # 58-1. The letter outlines the schedule Defendants desired and sought in their November 7, 2012, motion for extension of time. Doc. # 43. It is not, however, the schedule this Court ordered. Doc. # 44.

October 10, 2012), and Plaintiff's requests for admission (served on October 15, 2012), Plaintiff made a strategic decision to move forward with the uncontroverted information available to all parties rather than become mired in a discovery dispute. It appeared Defendants made the same calculation with the closing of discovery and the passage of time within which to file a motion to compel. In reliance on Defendants' decision not to pursue discovery or disclose experts, Plaintiff chose not to conduct additional depositions and filed a motion for summary judgment on February 25, 2013. Doc. # 54.

Although Defendants did not diligently pursue discovery or respond to Plaintiff's written discovery requests, they now seek to re-open discovery, including the time to disclose experts, and to extend by a month the deadline to file a dispositive motion. Because Defendants do not show good cause why this Court's scheduling orders should be modified and because modification at this point would prejudice Plaintiff, the motion should be denied.

II. Standard.

Defendants do not cite any rule in support of their motion. It appears to be a motion to modify the scheduling order. Fed. R. Civ. P. 16(b)(3)(A) requires this Court to "limit the time to ... complete discovery[] and file motions." "A schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The Eighth Circuit has explained that, "[a]s a vehicle designed to streamline the flow of litigation through our crowded dockets, we do not take case management orders lightly, and will enforce them." *Bradford v. DANA Corp.*, 249 F.3d 807, 809 (8th Cir. 2001).

In *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709 (8th Cir. 2008), the Eighth Circuit reviewed the good-cause standard. "The primary measure of good cause is the movant's diligence in attempting to meet the order's requirements." *Id.* at 716-17 (quoting *Rahn v.*

Hawkins, 464 F.3d 813, 822 (8th Cir.2006)). Where the moving party has shown diligence, “[t]he existence or degree of prejudice to the party opposing the modification and other factors may also affect the decision.” *Bradford*, 249 F.3d at 809.

III. Defendants have failed to show diligence.

After extensions agreed to by the parties, all discovery in this case was to be completed by January 25, 2013. Prior to that—by no later than December 7, 2012—Defendants were required to disclose any rebuttal experts to the experts Plaintiff disclosed in September. Defendants provide no excuse for waiting until the evening of February 25, 2013, to request a modification to the schedule.

Defendants (while neglecting to inform this Court that they ignored Plaintiff’s written discovery requests) suggest that their lack of diligence was caused by Plaintiff. In fact, Defendants’ counsel never called Plaintiff’s counsel to discuss any dissatisfaction with written discovery, nor did Defendants ever re-schedule Plaintiff’s deposition after the original setting was canceled, by agreement, after Plaintiff filed a motion to quash.² If Defendants wanted to pursue a motion to compel, then they were required to file such a motion promptly and in no event later than February 5, 2013.³

In *Monsanto Co. v. E.I. Dupont de Nemours & Co.*, 4:09CV00686 ERW, 2012 WL 3765059 (E.D. Mo. Aug. 30, 2012), this Court found a lack of “good cause” where claims “could have been asserted months ago[, but] [f]or whatever tactical reason, [the party] opted not to do

² After Defendants agreed to cancel the deposition, this Court denied Plaintiff’s motion to quash as moot. Doc. # 42.

³ Prior to filing a motion to compel, Defendants would have been required to “ha[ve] conferred in person or by telephone with opposing counsel in good faith or ha[ve] made reasonable efforts to do so, but that after sincere efforts to resolve their dispute, counsel are unable to reach an accord.” E.D.Mo. L.R. 3.04(A). Defendants’ failure to meet even this prerequisite further demonstrates their lack of diligence.

so. [Its] tactical choice does not demonstrate good cause or diligence.” *Id.* at *3. Defendants now complain that they have not deposed Plaintiff, but this Court gave Defendants until November 30, 2012, to complete Plaintiff’s deposition and Defendants never re-scheduled the deposition. For whatever tactical reason (probably related to their own non-compliance with discovery requests) Defendants also opted not to compel Plaintiff to appear for a deposition, either by noticing up her deposition or otherwise moving to compel her to appear. This choice is not good cause.

Defendants did not decide seek additional time to disclose experts or file a dispositive motion until after Plaintiff filed her motion for summary judgment. “Good cause is not established when, after the deadline [established by the scheduling order], a party simply rethinks its position[.] This is especially true where, as here, there have been no intervening factual discoveries or legal developments that have changed the nature of the case.” *SmithCo Mfg. Inc. v. Haldex Brake Products Corp.*, 267 F.R.D. 250, 254 (N.D. Iowa 2010). Aside from Plaintiff filing a motion for summary judgment, *nothing* has changed in this case since early November 2012. At that point, Plaintiff had conducted some depositions and disclosed two experts while Defendants had not rescheduled Plaintiff’s deposition nor responded to Plaintiff’s written discovery requests. Nothing changed between then and the *instant* motion four months later, except that Plaintiff filed a motion for summary judgment. Any motions could have been filed in accord with the scheduling order.

Defendants were not diligent in complying with the discovery deadlines in this case. Defendants have “failed to show that their team of attorneys justifiably neglected to conduct necessary discovery before the deadline.” *Hagen v. Siouxland Obstetrics & Gynecology, P.C.*, 286 F.R.D. 423, 425 (N.D. Iowa 2012). Perhaps recognizing this, Defendants explicitly request

additional time to disclose experts and to file a dispositive motion and only implicitly seek to re-open discovery to depose Plaintiff. However, because Defendants have not shown good cause to extend any of the scheduling order deadlines, their motion should be denied its entirety.

IV. Plaintiff will be prejudiced.

In reliance on the Scheduling Order, Plaintiff has: (a) diligently pursued discovery, (b) made a strategic decision not to seek court intervention to require Defendants to comply with the three sets of written discovery they ignored, (c) decided not to conduct additional depositions, and (d) filed a motion for summary judgment. Allowing Defendants to now modify the schedule that they ignored would prejudice Plaintiff.

Plaintiff reasonably relied on Defendants' failure to reschedule her deposition and disclose experts within the time permitted to make her own strategic decisions in this case. Certainly, Plaintiff could have moved to compel Defendants to respond to her written discovery. She also would have conducted additional depositions. Instead, her attorneys concluded that sufficient evidence existed to proceed with a summary judgment motion. While it is not surprising the Defendants might want to re-visit their earlier strategic decisions, allowing them to do so would be severely prejudicial to Plaintiff. In addition to undermining the basis for the decisions about how this case has been conducted on Plaintiff's side, re-opening discovery would require additional expense to Plaintiff, including deposing Defendants' yet-unidentified experts and other witnesses. What is more, allowing discovery to be re-opened would undoubtedly require a delay in the scheduled trial-date for this case. Finally, it is unfair to Plaintiff to allow Defendants a fresh start at discovery and securing expert witness after Plaintiff has laid out her factual and legal case in a comprehensive motion for summary judgment. Defendants not only

waited until long after the discovery deadline to file their motion, but they also waited until after Plaintiff filed her motion for summary judgment.

V. Conclusion.

Defendants have failed to make diligent efforts to comply the scheduling orders in this case. As a result, they cannot show the good cause required to modify the scheduling order as they request. In addition, allowing Defendant to modify the scheduling order that they ignored will prejudice Plaintiff. For these reasons, Defendants' motion for extension of time to disclose experts and to file a dispositive motion should be denied.

Respectfully submitted,

/s/ Anthony E. Rothert
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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and a copy was made available electronically to all electronic filing participants.

/s/ Anthony E. Rothert