UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA, Plaintiff, v. MARK ELLIOT ZUCKERBERG and FACEBOOK, INC., Defendants.	:	Civil Action No. 1:10-cv-00569-RJA

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO EXTEND THE TIME FOR FILING A REPLY MEMORANDUM

Ceglia's response to Defendants' motion for an extension is baseless and untimely. The arguments in his Opposition, Doc. No. 534 ("Opp."), long on bluster and short on substance, should be rejected. Ceglia does nothing to refute the multiple reasons Defendants provided for why a short extension of time here would be both fair and appropriate, not the least of which is that there remain significant live discovery disputes over missing information that bears directly on the motion to dismiss. *See* Doc. No. 525 ("Mot.") at 6-11. Nor does Ceglia address the fact that Defendants' proposed deadline would still fall virtually a full month before the close of briefing contemplated by the Court's April 4, 2012 Order (as amended by the August 6, 2012 Text Order). *See* Doc. Nos. 348, 471. As described in Defendants' opening brief, ample good cause exists for the requested extension because of, *inter alia*, the pendency of outstanding discovery obligations that Ceglia has shirked, the fact that one of his experts cannot be deposed until September 24, and the sheer volume of material that must be analyzed and organized for presentation to the Court.

Astoundingly, despite his refrain that the Court should demand "adherence" to its schedule—repeated no less than three times in his opposition brief, *see* Opp. at 1, 2, 9—Ceglia flouted the Court's directive and filed his response late. The Court ordered a response from Ceglia by 4:00 p.m. on September 12, 2012. Doc. No. 528. But Ceglia, offering neither apology nor explanation, filed his opposition brief at 10:03 p.m. on September 12: more than six hours past the deadline and late the night before Defendants' reply was due. Defendants respectfully submit that Ceglia's failure to respond in a timely manner should be treated as a concession of the arguments raised—and the relief sought—in their motion for an extension. *See, e.g.*, *Moore v. Conway*, No. 08-CV-6390, 2009 WL 3764129, at *1-2 (W.D.N.Y. Nov. 10, 2009) (granting motion for extension of time to file reply where non-movant failed to oppose motion); *Risler v. Sol Spitz Co., Inc.*, No. 04-CV-1323, 2006 WL 3050885 (E.D.N.Y. Oct. 23, 2006) (affirming default judgment where opposing party failed to comply with 4:00 p.m. expedited deadline and noting that "law office failure in the face of clearly established . . . deadlines, as is the case here, rarely constitutes excusable neglect"); *see also Barclay v. Poland*, No. 03-CV-6585, 2011 WL 4747337, at *1 (W.D.N.Y. Sept. 16, 2011) (granting leave to amend complaint, in part, because defendant "failed to oppose the motion to amend"); *Witorsch v. Notaris*, No. 95 Civ. 9163, 1997 WL 529016, at *8 (S.D.N.Y. Aug. 25, 1997) (plaintiff's failure to oppose motion to dismiss within Court-ordered deadline indicated that he "implicitly consented to the relief sought" therein).

As Ceglia has no reasonable basis for opposing this motion, Defendants respectfully request that this Court extend the deadline and permit them to file a Reply on the later of October 18, 2012, or two weeks after Ceglia's full compliance with his discovery obligations.

1. Defendants' Outstanding Eighth and Ninth Motions to Compel.

Defendants' eighth and ninth motions to compel concern missing information that is highly relevant to further demonstrating that the Work for Hire document is a forgery, which—as Ceglia admits—is the crux of what this "expedited discovery . . . was intended to specifically address," Opp. at 10. As an initial matter, this Court has repeatedly determined that there has been a general subject-matter waiver on the subject of the Kasowitz firm's withdrawal. *See* Doc. Nos. 361 at 4; 480 at 5. It is, therefore, immaterial whether the three (or perhaps more) communications Defendants seek in the eighth motion to compel are attached to, or contained "within," Item 379, Opp. at 4-5. The fact that these communications exist at all—which is indisputably revealed by the April 13 Kasowitz Letter—means that they must be produced to Defendants. Doc. No. 512 at 7-11. They fall squarely within the scope of this Court's discovery orders, *id.* at 7-8, and Ceglia is—and has been for many months—obligated to turn them over.[1] *See* Mot. at 7-9.

Ceglia's roundabout effort to avoid the implication of the Court's prior finding of subject-matter waiver—by asserting that Defendants do not "know" the documents' contents, Opp. at 5—should be dismissed outright. Of course, the Court can consider the three withheld documents personally, as we invited the Court to request to inspect them *in camera* while considering Defendants' eighth motion to compel. *See* Doc. No. 512 at 2. Moreover, based just on the disclosed April 13 Kasowitz Letter, Defendants understand enough about the timeframe and general tenor of these communications to know that they directly relate to the basis for the Kasowitz firm's withdrawal from this case and the authenticity of the Work for Hire Document. *See* Doc. No. 512 at 7-9. Specifically, the communications consist of: REDACTED

[1] Ceglia's complaint that Defendants have not refuted, via expert evidence, his charge that the description of Item 379 is false, *see* Opp. at 4-5, completely sidesteps this critical point.

REDACTED

Indeed, even the little that Defendants know about those communications belies Ceglia's assertion that the missing documents "will not impact Defendants' ability to challenge the authenticity" of the Work for Hire document, Opp. at 5. The REDACTED email is highly relevant because it is from a REDACTED (hardly "non-expert," Opp. at 5) regarding the genuine contract; and the other communications are from REDACTED

Doc. No. 512 at 7-9.[2]

As for the materials sought in Defendants' ninth motion to compel, it is beyond dispute that "all copies of the purported contract in hard-copy form, created on or before June 30, 2010," (a) should have been produced pursuant to Court order months ago, *see* Doc. No. 83 at 1, and (b) are fundamental to resolving the genuineness of the Work for Hire document attached to the Complaint. *See* Mot. at 7-8. Ceglia's accusation that Defendants acted in "bad faith" by requesting such materials, Opp. at 6, is inexplicable. The first time Defendants learned about four hard-copies of the Work for Hire document that had never been produced or described was on August 21, 2012—when Ceglia's attorney Paul Argentieri swore to their existence. *See* Mot. at 7-8; Doc. No. 522 at 2-3. Defendants promptly demanded those four hard-copies. Doc. No. 523-1. The fact that Ceglia responded "by email on September 6, 2012 that no such copies"

[2] Therefore, it is of no moment that the three documents do "not contain any expert reports or discussion about expert's opinions," Opp. at 5. They stand to reveal facts about the authenticity of the Work for Hire Document that are critical to Defendants' contentions.

existed, Opp. at 6, was—of course—insufficient to assuage Defendants' concerns, given the bald contradiction with his attorney's sworn declaration days earlier. *See* Doc. No. 484. Hence, a request for judicial intervention became imperative. If Ceglia has now put in declarations admitting that he and his attorney destroyed key documents during the pendency of the lawsuit (or just before it was filed)—as is apparently the case, *see* Opp. at 6—that may constitute a full response to Defendants' motion to compel. However, the declarations now submitted by Ceglia and Argentieri contain numerous false statements of fact and are inconsistent with Argentieri's prior sworn August 21, 2012 Declaration. And in any event, it took Defendants' filing to wring those admissions from Ceglia, which means that the ninth motion to compel certainly was not submitted "for the sole purpose of attempting to justify a delay in replying to the motion to dismiss," Opp. at 6.

It bears mentioning that the Court set briefing schedules for Defendants' eighth and ninth motions to compel that, respectively, extend up to and beyond the currently-scheduled deadline for filing a Reply brief in support of the Motion to Dismiss. *See* Doc Nos. 532, 533. The fact that these important discovery disputes—caused by Ceglia's own obstructionism, rather than "manufactured," *see* Opp. at 6—remain outstanding for the most part, and will not be resolved until after the current Reply due date, is reason alone to warrant a short extension here.[3]

2. The Remaining Deposition of Plaintiff's Expert Erich Speckin.

Ceglia's insistence that Mr. Speckin "is a consulting expert" "not covered by this [C]ourt's order" because he "has not prepared or filed a report in this case," Opp. at 7, is utterly disingenuous. Ceglia points to nothing in the transcript of the April 4 status conference or the

[3] Ceglia also fails to respond to Defendants' argument that the deposition of his expert Larry Stewart remains incomplete because of serious deficiencies in Mr. Stewart's document productions that have only recently come to light. *See* Mot. at 8 n.5.

April 4 Order indicating that the parties were permitted only "to depose experts who had submitted reports in the case," *id.* Thus, Defendants subpoenaed and, with Ceglia's full knowledge and participation, took the depositions of Hany Farid, John Paul Osborn, and Valery Aginsky: all experts who did not submit reports, but upon whom Ceglia has relied, and who have performed forensic testing in this case. *See* Supplemental Declaration of Alexander H. Southwell ("Southwell Supp. Dec.") ¶¶ 2-5. Ceglia did not move to quash any of their subpoenas as being outside the scope of discovery.

Moreover, Ceglia's assertion that "Defendants did not even identify Mr. Speckin as someone they wished to depose until well into the deposition period," Opp. at 7, is flatly wrong. Defendants noticed the deposition of Mr. Speckin on July 10, 2012, the same day they noticed the depositions of Dr. Farid, Mr. Osborn, Dr. Aginsky—more than one month before the end of the two-month deposition period. *See* Southwell Supp. Decl. ¶ 3. Ceglia conveniently omits to mention that the only reason Mr. Speckin must be deposed outside the discovery period is because Ceglia's counsel refused to accept service of the notice for Mr. Speckin's deposition. *See* Mot. at 9 & n.6. It is galling to suggest that Defendants' attempt to follow through with their duly-submitted notice is a "last minute desire to freelance a deposition," Opp. at 7, when Ceglia himself precipitated the delay in Mr. Speckin's deposition until late-September. *See* Mot. at 9.

Indeed, Ceglia's pronouncement that Mr. Speckin "has never conducted even one scientific test on the contract," Opp. at 7, means that either his counsel Dean Boland is lying—or his expert Larry Stewart is. That statement is contradicted by Mr. Stewart's sworn deposition testimony, where he stated under oath that Mr. Speckin "t[ook] samples of ink" from the Work for Hire document at the Court-ordered Hard-Copy Inspection and "test[ed] the ink" he extracted. *See* Southwell Decl., Ex. A at 54:4–55:12; *see also* Mot. at 9. Thus, Ceglia's

suggestions to the contrary notwithstanding, Mr. Speckin's deposition has the potential to provide information that is both vital to Defendants' arguments—particularly the dispute regarding Mr. Stewart's purported sampling of the hard-copy documents—and consistent with the goals of this Court's expedited discovery order, which is to fully air expert opinions about the authenticity of the Work for Hire document. Mot. at 9.

3. The Volume of Material Generated During Discovery.

Ceglia does not dispute that a large volume of material was generated during the expert discovery this summer. Instead, he contends that Defendants' request for a reasonable timeframe within which to synthesize and organize for presentation this sizeable quantity of data is "insincere[]" because they always knew they would have only "30 days to reply to Plaintiff's" opposition. Opp. at 7-8. Not so. As set forth in the Motion, the April 4 Scheduling Order was entered after a comprehensive status conference where both sides were given an opportunity to be heard, and it reflected the settled expectations of the parties. *See* Mot. at 2-3. Based on explicit representations made to the Court—in particular, Ceglia's counsel's repeated representation that he required 60 days after completion of expert depositions to compose an opposition brief—the April 4 Order established calibrated deadlines that gave Ceglia two months after the close of the expert deposition period to file his responsive brief. *Id.*; *see also* Doc No. 350 at 200:23-201:1 ("[P]laintiff shall file his opposition to defendants' motion to dismiss" "two months after the close of expert depositions."). Defendants had no reason to expect that Ceglia would jump the gun seven weeks early—in the face of his 60-day representation to the Court—and foist upon them a five-week turnaround for digesting all of the complicated information and testimony produced during discovery. If anyone can be accused of being "insincere[]" about timeframes, Opp. at 8, and of "disrupt[ing] this [C]ourt's carefully crafted discovery schedule,"

id. at 2, it is Ceglia, who has forced the conclusion of all briefing almost two months before the contemplated deadline. *See* Mot. at 2-3, 9-11.

As Defendants' Motion made clear, it is no answer that Ceglia "and his two sole practitioner lawyers had sufficient time to assimilate the facts," Opp. 8. *See* Mot. at 10. Far from it. Ceglia's opposition brief is riddled with the sorts of distortions and half-truths that require only a superficial dabbling in the record; it is a far cry from the cogent and considered presentation to the Court that Defendants think this matter deserves (and that takes time to put together). *See id.* Furthermore, Ceglia tellingly fails to respond to the fact that he canceled 11 depositions at the last minute, many with less than 48 hours' notice. *See id.* at 10-11. Defendants' wasted time preparing for those depositions cut significantly into the supposed "fifteen weeks" they had to review discovery, Opp. at 8.[4]

Finally, Ceglia's refrain that Defendants' need for more information and time somehow proves they will be unable to meet the "clear and convincing" standard applicable to the motion to dismiss, *see* Opp. at 2, 7, 10, is nonsensical and should be rejected outright. It also is irrelevant to the motion for an extension. Whatever legal standard is ultimately used, Defendants deserve to have a complete record from the expedited discovery period—containing all of the information to which they are entitled under the Court's (repeated) discovery orders—before making a final submission on their motion to dismiss. Likewise, given that Defendants'

[4] Ceglia's argument that Defendants opposed his extension motion and should be subjected to reciprocal scheduling rigidity, Opp. at 9—apart from laying bare the tit-for-tat gamesmanship he is engaged in—rings hollow. As explained in the opening brief, Ceglia's motion was made at the very end of a 60-day period he, himself, requested, whereas here Defendants moved for more time ten days before the scheduled deadline and more than seven weeks before the contemplated deadline for the close of all briefing. *See* Mot. at 5 n.3.

arguments, if successful, would dispose of this lawsuit altogether, the Court deserves careful and cogent analysis, in briefing, of the substantial record that has been developed. *See* Mot. at 11.[5]

4. The Unavailability of Defendants' Lead Counsel.

Ceglia never disputes that Orin Snyder is the lead counsel in both this case and a substantial case that is scheduled to begin trial on September 19, 2012. Nor does he dispute that that other trial, expected to last four weeks, will consume substantially all of Mr. Snyder's time at least until the date the Reply is currently due. He claims, however, that Mr. Snyder knew since May 15, 2012 of this impending clash and "had months to make this motion," Opp. at 10-11. That is wrong. Based on the representations made by Ceglia's counsel at the April 4 status conference, it was Defendants' settled expectation that their briefing would continue into November 2012. *See supra* p. 7; Mot. at 2-3, 12. It was Ceglia's premature filing that precipitated the conflict in dates for Mr. Snyder. Defendants had no reason to alert the Court any earlier to what was a non-existent problem until Ceglia filed his opposition seven weeks early.[6]

5. The Lack of Prejudice to Ceglia.

Tellingly, Ceglia provides no explanation of how this brief, discrete extension would prejudice his case in any way. Nor can he. Under the April 4 Order, which was calibrated based on a representation from Ceglia's counsel that 60-day timeframes were necessary for the expert reports and opposition memorandum, respectively, the parties expected briefing on the motion to

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[5] The assertion that "there cannot possibly be a full record presented at this stage," Opp. at 9, merits little discussion. As Ceglia admits, the expedited discovery was "intended to specifically address [the] narrow point of . . . the authenticity" of the Work for Hire Document. Opp. at 10 (emphasis added).

[6] Contrary to Ceglia's intimations, Opp. at 10-11, the attorney teams on this matter are small, as is evinced by Defendant's Request for Attorney Fees (Doc. Nos. 285, 299, 519), and Mr. Snyder's absence would substantially harm Defendants' ability to frame an effective Reply memorandum.

dismiss to extend as far as November 4, 2012. *See* Mot. at 2-3, 12. The deadline proposed here, October 2012, falls before that date.

Moreover, the Court should put to rest Ceglia's fanciful notion that Defendants have somehow engineered "an endlessly mobile deadline," Opp. at 12. If that were true, any time period calibrated to a party's compliance with some Court directive would be hopelessly open-ended. That, of course, is not the case. It is typical for deadlines to be triggered by parties' compliance with court orders, *see, e.g.*, Doc. No. 83. Defendants respectfully submit that the Court knows how to police its own discovery orders and will determine when Ceglia is in compliance therein without "await[ing] Defendants' consent," Opp. at 12.[7]

CONCLUSION

For the reasons set forth herein, and in Defendants' Motion to Extend the Time For Filing A Reply In Support of their Motion to Dismiss (Doc. No. 525), Defendants respectfully request that the deadline for filing their Reply brief be extended to the later of October 18, 2012, or two weeks after Ceglia's full compliance with the outstanding discovery disputes described in their papers.

[7] Ceglia's pronouncement that, thus far, he has been adjudged "in compliance" with the expedited discovery order, Opp. at 12, is absurd. Of the seven decided motions to compel, the Court has ruled in favor of Defendants on all seven.

Dated: New York, New York
September 13, 2012

Respectfully submitted,

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