

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG,
FACEBOOK, INC.,

Defendants.

**DECISION
and
ORDER**

10-CV-569A(F)

APPEARANCES:

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By letter filed October 16, 2012 (Doc. No. 569), Defendants request the court amend its prior schedule requiring Defendants' reply to Plaintiff's response to Defendants' motion to dismiss based on fraud (Doc. No. 319), be filed by October 18, 2012 or two weeks following Plaintiff's full compliance with the court's determination of

Defendants' Eighth and Ninth Motions to Compel (Doc. Nos. 511 and 521) ("Defendants' motions") (Doc. No. 542 at 3) ("Defendants' request"). Defendants' motions, filed, respectively, September 5, and September 7, 2012, are both presently under advisement by the court. Specifically, Defendants' requested clarification that in the event the court should deny both of Defendants' motions, Defendants' reply should be filed not later than one week following such denial (Doc. No. 569 at 2). By letter dated October 16, 2012 (Doc. No. 570) ("Plaintiff's letter"), Plaintiff objects to Defendants' request. Plaintiff asserts that Defendants' request is a mere delaying tactic because neither of Defendants' motions seek any forensic evidence relevant to the merits of Defendants' motion to dismiss based on Defendants' assertion that the contract at issue, as alleged by Plaintiff, constitutes a fraud on the court, Plaintiff's letter at 1, and Defendants have lately adopted a strategy of delay. Plaintiff's letter at 2.

Although the briefing schedule at issue did address the contingency that the court have acted on Defendants' motions prior to October 18, 2012 by granting Defendants' motions, the schedule did not specify a filing date addressing the alternative possibility that the court may deny Defendants' motions after the October 18, 2012 date as established by the court (Doc. No. 542). If this possibility had been considered (as it should have been) a schedule similar to the amendment now proposed by Defendants would certainly have been included in the original order. The court is sensitive to Plaintiff's contention that Defendants may attempt to further delay filing of the reply by falsely asserting Plaintiff's lack of full compliance with any favorable ruling of the court on Defendants' motion. Plaintiff's letter at 1. However, should such a dispute arise, Plaintiff will undoubtedly bring the issue to the court's attention, and the

court will make every effort to promptly resolve such dispute.¹

The court also understands Plaintiff's position that the documents at issue in Defendants' motions may be of questionable relevance to Defendants' basic fraud claim, Plaintiff's letter at 1, however, the court cannot be expected to anticipate Defendants' litigation strategy as to Defendants' potential use of the disputed documents in further support of Defendants' motion to dismiss. Further, contrary to Plaintiff's assertions, the court perceives no improper motive to unnecessarily delay the court's addressing the merits of Defendants' motion to dismiss. Such notion is contra intuitive given Defendants' early and continuing insistence that the underlying contract is a fraud, and that the action should be dismissed as early as possible on that basis.

As discussed, the lack of an alternative schedule in Doc. No. 542 for filing Defendants' reply should the court deny Defendants' motions was inadvertent and, like Defendants, Plaintiff also failed to bring the issue to the court's attention immediately after the schedule was filed until Defendants' request of October 11, 2012. Indeed, it could be said that if Plaintiff is as confident that the requested documents have no relevance, *viz* potential harm to Plaintiff's case, as Plaintiff now contends, and Plaintiff genuinely wished to expedite the court's consideration of the merits of Defendants' motion to dismiss, opposed by Plaintiff's experts, by compelling Defendants' earlier filing of Defendants' reply, Plaintiff could simply have provided the requested documents thereby avoiding, as Plaintiff argues, Defendants' unnecessary motions and any concomitant delay that could arise in reaching the merits to which Plaintiff now

¹ Any delay in resolving Defendants' Eighth and Ninth Motions to Compel is attributable to the court's calendar requiring the court's attention to numerous other important matters.

“strenuous[ly] . . . objects.” Plaintiff’s letter at 1. Accordingly, based on the foregoing, Defendants’ request is GRANTED. The schedule for the filing of Defendants’ reply as set forth in Doc. No. 542 at 3, is amended as follows:

Defendants’ reply shall be filed two weeks following Plaintiff’s full compliance with the court’s determination of Defendants’ Eighth and Ninth Motions to Compel (“Defendants’ motions”) in the event the court should grant Defendants’ motions, or one week from the denial of Defendants’ motions.

SO ORDERED.

/s/ Leslie G. Foschio

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

Dated: October 16, 2012
Buffalo, New York