

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANGELO L. DiLUZIO,

Plaintiff,

vs.

Civil Action 2:11-cv-1102
Judge Watson
Magistrate Judge King

THE VILLAGE OF YORKVILLE,
OHIO, et al.,

Defendants.

OPINION AND ORDER

This is a civil rights action under 42 U.S.C. § 1983 based, in part, on events related to a fire at, and the subsequent demolition of, the southernmost building in a three-building structure owned by plaintiff in Yorkville, Ohio. This matter is now before the Court on defendants' motions to depose plaintiff's expert. *Motion of Defendants the Village of Yorkville, Ohio, Mayor John "Jake" DeFilippo and Fire Chief Kevin Klubert for Leave to Depose Plaintiff's Expert, Eric R. Drozdowski, P.E.*, Doc. No. 138; *Motion of Defendant Greg Nemeth for Leave to Depose Eric R. Drozdowski, P.E.*, Doc. No. 139 ("Motions for Leave to Depose").

The Court issued a scheduling order in this action requiring the production of primary expert reports by January 23, 2013 and of rebuttal expert reports by February 25, 2013, and the completion of all discovery by March 20, 2013. *Preliminary Pretrial Order*, Doc. No. 15; *Order*, Doc. No. 32. Plaintiff produced the rebuttal expert report of Eric Drozdowski on March 12, 2013, i.e., 15 days after the deadline established by the Court. Defendant Nemeth moved to strike the report,

Doc. No. 45, and plaintiff filed a motion for leave to disclose the report, Doc. No. 53. The Court granted plaintiff's motion and denied defendant's motion to strike on July 3, 2013, concluding that the expert was in fact a rebuttal expert, that plaintiff had established good cause for the late production, and that defendant would not be unduly prejudiced by the late production. *Opinion and Order*, Doc. No. 117. See also *Opinion and Order*, Doc. No. 137 (overruling defendant's objections). Defendants thereafter filed the *Motions for Leave to Depose*.

Plaintiff opposes the *Motions for Leave to Depose*, arguing that any such deposition should await resolution of the pending motions for summary judgment (and any related appeals therefrom); to permit the deposition now, plaintiff argues, would merely serve to unnecessarily delay the case. *Plaintiff's Memorandum in Opposition to Motion of Defendants for Leave to Depose Plaintiff's Expert Eric R. Drozdowski ("Plaintiff's Response")*, Doc. No. 140. According to plaintiff, the costs associated with the requested deposition and the resulting delay in this action will unfairly prejudice plaintiff, considering that "[t]he future course of this litigation may render the deposition of Mr. Drozdowski completely unnecessary." *Id.* at pp. 2-3.

Rule 16(b) of the Federal Rules of Civil Procedure requires that the Court, in each civil action not exempt from the operation of the rule, enter a scheduling order that, *inter alia*, limits the time to complete discovery. Fed. R. Civ. P. 16(b)(3)(A). The rule further provides that "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). See also S.D.

Ohio Civ. R. 16.2 (“[T]he Magistrate Judge is empowered to . . . modify scheduling orders upon a showing of good cause.”). “The primary measure of Rule 16’s ‘good cause’ standard is the moving party’s diligence in attempting to meet the case management order’s requirements.” *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 625 (6th Cir. 2002) (quoting *Bradford v. DANA Corp.*, 249 F.3d 807, 809 (8th Cir. 2001)). “A district court should also consider possible prejudice to the party opposing the modification.” *Andretti v. Borla Performance Indus., Inc.*, 426 F.3d 824, 830 (6th Cir. 2005) (citing *Inge*, 281 F.3d at 625). The focus is, however, “primarily upon the diligence of the movant; the absence of prejudice to the opposing party is not equivalent to a showing of good cause.” *Ortiz v. Karnes*, 2:06-cv-562, 2010 WL 2991501, at *1 (S.D. Ohio July 26, 2010) (citing *Tschantz v. McCann*, 160 F.R.D. 568, 571 (N.D. Ind. 1995)). Whether to grant leave under Rule 16(b) falls within the district court’s discretion. *Leary v. Daeschner*, 349 F.3d 888, 909 (6th Cir. 2003).

In the case presently before the Court, defendants seek to depose plaintiff’s rebuttal expert Eric Drozdowski beyond the date established in the Court’s scheduling order. As noted *supra*, plaintiff was late in disclosing Drozdowski’s report and defendant Nemeth filed a motion to strike the report on this basis. Defendants The Village of Yorkville, Ohio, Mayor John DeFilippo, and Fire Chief Klubert (collectively the “Village defendants”) sought Drozdowski’s deposition the day after the report was produced. See Doc. No. 138-1 (March 13, 2013 email from the Village defendants’ counsel: “I agree with [defendant Nemeth’s counsel] that the Drozdowski report is untimely and not a ‘rebuttal’ report, but a primary report. Nevertheless, in the event the report and Drozdowski are not excluded

by the Court, please advise as to when we can depose him."). See also Doc. No. 138-3 (March 26, 2013 email from the Village defendants' counsel regarding deposing Drozdowski). However, plaintiff's counsel rejected the request, reasoning that it "would not be reasonable or appropriate" to depose Drozdowski at that time, in light of defendant's motion to strike and "the significant expense involved in paying Mr. Drozdowski's firm for his time, and the cost of a court reporter, as well as the time involved for four attorneys to prepare for and attend a deposition of an expert witness." See Doc. No. 138-4 (March 29, 2013 email from plaintiff's counsel).

As noted *supra*, plaintiff was granted leave to produce the Drozdowski report on July 3, 2013. *Opinion and Order*, Doc. No. 117. Defendant Nemeth's objections to that decision, Doc. No. 119, were overruled on December 19, 2013. *Opinion and Order*, Doc. No. 137. Four days later, on December 23, 2013, defendants again requested Drozdowski's deposition, Doc. No. 138-5 (December 23, 2013 email from the Village defendants' counsel regarding deposing Drozdowski); Doc. No. 138-6 (December 26, 2013 email from the Village defendants' counsel regarding deposing Drozdowski), and filed the *Motions for Leave to Depose* on December 30 and December 31, 2013.

This history demonstrates that defendants have been diligent in their attempts to depose Drozdowski.

Having determined that defendants were diligent in seeking to depose Drozdowski, the Court must now consider the issue of prejudice to plaintiff. See *Andretti*, 426 F.3d at 830. As noted *supra*, plaintiff argues that the cost of deposing Drozdowski and the resulting delay in this action will unfairly prejudice plaintiff, considering that "[t]he future course of this litigation may render

the deposition of Mr. Drozdowski completely unnecessary." *Plaintiff's Response*, pp. 2-3. Plaintiff's arguments are not well taken.

Plaintiff will not be unduly prejudiced by the costs associated with a deposition of his expert. Had the report been timely produced, plaintiff should certainly have expected to bear those costs prior to the discovery completion date. More significant is the fact that plaintiff relies on Drozdowski's report and affidavit in support of his motion for partial summary judgment. *See Plaintiff's Reply Memorandum in Support of Motion for Partial Summary Judgment - the Procedural Due Process Claim*, Doc. No. 109. Any delay resulting from the requested deposition is substantially outweighed by the prejudice to defendants should the Court consider plaintiff's motion for partial summary judgment without affording defendants the opportunity to depose the expert upon whom plaintiff relies in connection with that motion.

Nevertheless, the Court is not unsympathetic to plaintiff's concerns about cost and delay. Accordingly, the Court will afford plaintiff a choice: the Court will not permit the deposition of Drozdowski at this juncture should plaintiff agree to withdraw his reliance on Drozdowski's report in connection with plaintiff's motion for partial summary judgment. Otherwise, the Court will grant defendants leave to depose Drozdowski and will consider the circumstances under which defendants will be permitted to address Drozdowski's report in connection with plaintiff's motion for partial summary judgment on his procedural due process claim.

Plaintiff may have until March 13, 2014, in which to advise the Court and defendants whether he agrees to withdraw his reliance on Drozdowski's report in connection with plaintiff's motion for partial

summary judgment.

March 6, 2014

s/Norah McCann King
Norah M^cCann King
United States Magistrate Judge