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

John C. Ruiz-Bueno, III, et al.,

Plaintiffs,

v.

Zach Scott, et al.,

Defendants.

Case No. 2:12-cv-0809

JUDGE GREGORY L. FROST

Magistrate Judge Kemp

OPINION AND ORDER

This matter is before the Court to resolve an issue raised by Plaintiffs during a telephone conference held on February 6, 2014. At the Court's direction, each party filed a short memorandum about the issue on February 7, 2014. For the following reasons, the issue will be resolved in the Defendants' favor.

The issue can be stated simply: should Plaintiffs' expert witness be permitted to inspect relevant areas within the Franklin County jail? Other things being equal, the answer to that question would be yes - expert witnesses typically conduct site inspections when information relevant to their opinions can be uncovered in that manner, and in this case everyone agrees that the layout of the jail itself meets the appropriate relevance standard. The issue, however, is one of timing. Defendants say that because the fact discovery cutoff has passed, it is too late for Plaintiffs to make a Rule 34 site inspection request. Plaintiffs say, to the contrary, that this is expert discovery and their request is timely. They also make an equitable argument (which would be relevant only if their request is untimely) that they began discussing the issue well before the discovery cutoff, and that resolution of the issue was postponed

because it was not clear until the Court issued an order on January 30, 2014 that they would be allowed to use an expert witness. This latter argument raises a question about whether, if this is truly fact discovery, Plaintiffs have shown good cause to allow it to occur after the fact discovery cutoff, and also how the Court should resolve the factual underpinnings of the argument, given that three of the attorneys for the defendants deny that any such discussions ever took place.

One threshold question is whether a site inspection conducted by an expert (which, if not done by agreement, can occur only by way of a Rule 34 request) is "fact discovery" or "expert discovery." To some extent, because those terms are not precisely used or defined in the Federal Rules of Civil Procedure, the answer may depend on the specific court order or orders which have been issued in the case.

The original scheduling order in this case (Doc. 17) says only that "[a]ll fact discovery shall be completed by September 13, 2013, and all expert discovery by February 21, 2014." It did not attempt to explain the difference between the two. The more recent order (Doc. 157) extending the expert witness disclosure date says this: "expert discovery shall conclude on or before April 29, 2014." Although the Court knows what it intended by this language, that is not determinative; the question is what reasonable parties would have understood by it. There are at least two possible interpretations: first, that the use of the phrase "expert discovery" means discovery **from** experts - such as obtaining their documents and taking their depositions; and, second, that it means any discovery designed to aid experts in rendering their opinions. Defendants favor the first interpretation, while Plaintiffs advocate for the second.

The case law is relevant only to the extent that it establishes some common understanding of these terms. Plaintiffs

cite Bowe v. Consolidated Rail Corp., 230 F.3d 1357 (6th Cir. Sept. 19, 2000) as an example of a court's having treated an expert site inspection as expert discovery. The decision cited does not rule on that issue, but describes the procedural history of the case in the district court, which included granting a motion to compel a site inspection. The docket sheet in that case shows that the court established a discovery cutoff date of August 13, 1998 (Case No. 1:97-cv-2916, Doc. 8), and the motion to compel was filed on December 14, 1998. It was granted by marginal entry, so it is impossible to determine the rationale for the order, but the Court of Appeals decision states that the plaintiff had requested the site inspection in June of 1998, well within the fact discovery period, and that Conrail had refused permission because of a pending summary judgment motion. Id. at *1. Given the lack of explanation as to why the motion to compel was granted, the history of that case is not terribly helpful in determining how a reasonable person should construe an order which draws a distinction between fact and expert discovery.

Plaintiffs also rely on two out-of-circuit cases, Doran v. 7-Eleven, Inc., 524 F.3d 1034 (9th Cir. 2008) and Gottstein v. Flying J, Inc., 2001 WL 36102290 (N.D. Ala. Sept. 27, 2001). In Doran, the Court of Appeals, in ruling on standing issues in an ADA case, noted in passing that an expert had visited the premises in question pursuant to a court order; it did not mention whether the court had even established separate dates for completing fact and expert discovery. In Gottstein, there is a footnote at *3, n.3, mentioning that the deadline for disclosing expert reports was extended based on the need for a site inspection; that decision does not mention whether separate fact and expert discovery deadlines were established, but a review of the electronic case file for Case No. 00-BU-3252-S shows a scheduling order (Doc. 10) issued on December 13, 2000, setting a

single discovery cutoff date of May 11, 2001. There is no indication when the site inspection at issue occurred. Neither of these cases shed any light on the threshold question under consideration by the Court.

Both sides cite Sparton Corp. v. United States, 77 Fed.Cl. 10 (2007) on this issue. There, the court, quoting Shell Petroleum, Inc. v. United States, 46 Fed.Cl. 583, 584 (2000), noted that the reason to set separate deadlines for each type of discovery is "to allow the parties to investigate, completely, all 'facts' before the parties proceeded to expert discovery." Sparton Corp., at 14. It also quoted another Court of Claims decision, Arkansas Game & Fish Comm'n v. United States, 74 Fed.Cl. 426, 429–30 (2006), for the proposition that "**expert discovery** will be carried out through mandatory disclosure of the reports of experts expected to testify at trial, and through interrogatories or depositions ...." Based on these cases, the Sparton court held that discovery of facts which an expert might use to support his or her opinions is fact discovery and that a request for such information made after the fact discovery cutoff date was untimely. That case clearly supports Defendants' position, as does Henry v. Quicken Loans Inc., 2008 WL 4735228, *6 (E.D. Mich. Oct. 15, 2008), where, in language quoted in Defendants' brief, the court held that "[d]efendants cannot use an expert to develop facts after the close of discovery when those same facts could have been developed by attorneys during fact discovery." That same decision noted that a fact discovery cutoff had been established and that "[w]hile the parties could develop expert data after this date based on the facts developed as of [the discovery cutoff date], this order did not anticipate that additional facts would be sought" after that date had passed. Id. at *4.

There is additional authority supporting Defendants'

position. For example, in ParkerVision, Inc. v. Qualcomm Inc., 2013 WL 3771226 (M.D. Fla. July 17, 2013), the plaintiff requested, during the expert discovery phase of the case, certain information relating to prior testimony given or reports written by the defendant's expert witnesses. It argued that such information constituted "expert discovery" rather than fact discovery, but the court found otherwise, stating that "these discovery materials fall within the ambit of Rule 26(b)(1) for general fact discovery." Id. at *1. That court interpreted Rule 26(a)(2) and Rule 26(b)(4) to place limits on what constitutes expert discovery, and it held that an order setting a separate cutoff "does not provide an extended period of document discovery related to the disclosed experts; rather, it allows for an extended period of time to exchange expert reports pertaining to the current litigation and to complete expert depositions." Id. at *4.

There is some scant authority to the contrary, although the basis of the ruling made in the one case the Court's research located, Windsor Craft Sales, LLC v. VICEM Yat Sanayi ve Ticaret AS, 2011 WL 4625761 (D. Minn Oct. 3, 2011) is not entirely clear. The cited opinion upheld a Magistrate Judge's determination to allow an inspection of several yachts which were the subject of the lawsuit. The request was made during the expert discovery phase of the case, and the party opposing the request argued that it was untimely. The District Judge held that the Magistrate Judge had not abused her discretion or acted contrary to law by permitting the inspection, noting that in a case where discovery had been bifurcated between fact and expert discovery, "Rule 34 does not specify when discovery requests must be made during bifurcated discovery," and further concluding that there was good cause to extend the fact discovery cutoff because the parties had been diligent about pursuing discovery. Reading the transcript

of the hearing on the motion, which is found in Case No. 0:10-cv-00297-ADM-JJG (D. Minn.), it appears that the basis of the Magistrate Judge's ruling was not that such an inspection was expert rather than fact discovery, but that the fact discovery cutoff should be extended to allow the inspection to occur. See Doc. 83 (Transcript of Motions Hearing held on 9/6/2011 before Magistrate Judge Jeanne J. Graham), at 19 "I think, then, that there should be an extension"). The Court has not found a single case which holds either, as a general matter, that any discovery request designed to uncover facts for an expert witness to consider is "expert discovery," or, as a specific matter, that a site inspection which will be attended by an expert witness is "expert discovery."

The Court finds the cases supporting Defendants' position to be persuasive for several reasons. One is, as Defendants argue, that much of the information produced during "fact discovery" is used as a foundation for expert opinions. It would make little sense to have separate cutoff dates for fact and expert discovery if discovery of any information which might form the basis for expert opinions could be deferred to the "expert discovery" phase; that phase, which is usually much shorter than the fact discovery phase, would then turn out to be more extensive, and it would be very difficult to determine when discovery was really concluded.

A second reason, which ties into the first, is the time actually allotted for "expert discovery" in this case. Under the initial scheduling order, the Court allowed the parties roughly seven additional months to complete their fact discovery (which could have begun a month before the initial pretrial conference based on the date of the parties' Rule 26(f) meeting). By contrast, the "expert discovery" phase ran from September 13, 2013 to February 21, 2014, a period of about five months, and

included designation of experts on October 14, 2013 and December 6, 2013. Had the Court contemplated extensive discovery of facts which would be used to support the experts' opinions during this period, it would not likely have limited Plaintiffs to only one month to complete such discovery before being required to provide Defendants with a fully-supported report, especially when most discovery devices, including a Rule 34 request, have a 30-day turnaround time.

Third, this Court typically discourages parties from requesting separate cutoff dates for fact and expert discovery, essentially for the reason which has led to the current dispute. It is often the case that after experts either prepare their reports or are in the process of doing so, they identify additional factual inquiries they would like to make. If there is a single discovery cutoff date, which is usually thirty to sixty days after the last expert witness disclosure date, the schedule can accommodate that situation. If not, the Court will be faced either with a motion to extend the fact discovery cutoff date (which must be supported by a showing of good cause) or, as has happened here, a disagreement about whether the new request is "fact" or "expert" discovery. It is likely the Court expressed this concern during the initial pretrial conference, because it is not the usual practice of the Court to set separate discovery cutoffs, but the parties apparently persuaded the Court to deviate from its usual practice because they all wanted that structure to the case schedule. Having asked for such bifurcation of discovery, however, they are not in a strong position now to argue in favor of what would amount to a negation of that concept.

This Court knows exactly what it intended by setting separate dates for the completion of fact and expert discovery. The latter type of discovery is devoted to the exchange of expert

reports and information about those reports, including the required Rule 26(a)(2) disclosures and depositions of the experts. In the Court's view, site visits are fact discovery just as much as are document productions and depositions of fact witnesses, and must be requested during the fact discovery period. The Court's subjective intent is borne out by the case law, and Plaintiffs should reasonably have understood the order in that way. Therefore, they are not entitled to conduct a site visit under the guise of "expert discovery."

The remaining question is whether, if the site visit request is fact discovery, and should have been completed by September 13, 2013, is there any basis for relaxing that deadline to accommodate the request? Plaintiffs appear to argue that because they may have mentioned their intent to ask for an inspection of the jail at some time during the fact discovery period, good cause exists to extend the fact discovery cutoff date for this purpose.

The Court need not review extensively the principles governing modification of a date established in a Rule 16 scheduling order because it just did so in the Opinion and Order filed on January 30, 2014. As noted in that order (Doc. 157, at 4-5), the touchstone of any request to extend such a date is the diligence of the moving party.

The Court cannot find such diligence here. There is a vast difference between mentioning to an opposing party in litigation the intent to pursue some issue through discovery, and actually pursuing it. Any mention which might have been made - and, as noted, there is a dispute about whether the topic even came up - was, at best, a statement of future intent and not a proper discovery request. Nothing prevented Plaintiffs from pursuing, informally at first, and then formally, if that produced no results, a written request for inspection of the jail under Rule

34, and from doing so prior to September 13, 2013. Any belief that they could do so as part of the expert discovery period would have been, as discussed above, unreasonable. Further, it appears that the first time they ever reduced the request to writing was in January, 2014, and then only in an email. Nothing about this course of conduct demonstrates the type of diligence needed to obtain extension of the fact discovery cutoff date.

The Court has considered the potential prejudice to Plaintiffs from the denial of their request, and offers these observations. Presumably, Plaintiffs, through questioning Sheriff Scott and other witnesses, possess at least a basic understanding of the layout of the jail as that layout is relevant to this case. There are sources of information about that as well that do not depend on discovery, such as conversations with ex-inmates or others who are familiar with it. Further, Plaintiffs have represented that the Defendants' expert intends to conduct a site visit. If he does so and expresses opinions based on that visit, Defendants will be required to disclose not only his opinions but also "the facts or data" he considered in reaching those opinions and "any exhibits that will be used to summarize or support them." So, for example, if he videotapes the visit and intends to use that videotape to support his opinions, Plaintiffs will have to be given a copy of that document. If such information causes their expert to modify his opinions, they may timely supplement his report. So Plaintiffs will not likely be deprived of foundational information needed for their expert to express opinions even if he does not have the chance to conduct a site visit himself. Under all these circumstances, they have simply not made out a compelling case for the Court to permit them to engage in this discovery after the cutoff date.

For all of these reasons, the Court declines to grant

Plaintiffs any relief based on the matter raised in their brief of February 7, 2014, requesting an expert site inspection.

Motion for Reconsideration

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.3.

/s/ Terence P. Kemp
United States Magistrate Judge