

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

KIMBERLY A. HIVELY, )  
 )  
 Plaintiff, )  
 )  
 v. ) CAUSE NO. 3:14-CV-1791-JD-MGG  
 )  
 IVY TECH COMMUNITY COLLEGE, )  
 )  
 Defendant. )

ORDER

More than a year ago on June 28, 2017, when Plaintiff was not yet represented by counsel, this Court entered its initial Rule 16(b) Scheduling Order requiring the parties to complete mediation by February 26, 2018. [\[DE 29 at 2\]](#). In August 2017, Plaintiff secured counsel. Since then, the Court has modified its original Scheduling Order five times [\[DE 44, 47, 50, 56, 58\]](#), including two extensions of the mediation deadline [\[DE 50 & 58\]](#). In its last scheduling order dated March 26, 2018, the Court extended the mediation deadline until July 11, 2018, and explicitly “**ADMONISHED** . . . that absent extraordinary circumstances, there will be no further extensions.” [\[DE 58 at 1\]](#).

In the meantime, on November 17, 2017, the parties agreed to former United States Magistrate Judge Christopher Nuechterlein as the mediator in this matter. [\[DE 48\]](#). On January 16, 2018, Attorney Dan Pfeifer entered his appearance as local counsel on behalf of Plaintiff. [\[DE 51\]](#). After discovery closed and with the mediation deadline looming, Defendant filed a Notice to Court of Efforts to Comply with Mediation Deadline and Request for Relief on July 3, 2018. Defendant reported that in April and

May 2018, the parties began working to schedule mediation in June in order to meet the mediation deadline. Yet Defendant noted that scheduling efforts essentially stalled on May 25, 2018, when Plaintiff's local counsel stated his opinion that "Mediator Nuechterlein is incapable of settling this case." [DE 65 at 4]. Defendant further efforts through June 2018 to schedule mediation thus failed. [*Id.* at 5-7].

Accordingly, Defendant now asks the Court to (1) extend the mediation deadline for a third time; (2) require Plaintiff to provide dates that she is available to conduct the mediation with Mediator Nuechterlein; and (3) require Plaintiff to provide an initial settlement demand promptly. Plaintiff filed a response to Defendant's instant Notice in which she, through her local counsel, attempts to justify the refusal to proceed with mediation with the parties' agreed mediator before the July 11th deadline. Plaintiff's arguments are misplaced.

This Court has already warned the parties that further delays of this action will not be tolerated absent extraordinary circumstances. Defendant was forced to seek a third extension of the mediation deadline despite the Court's warning because of Plaintiff's undue and potentially intentional delay in scheduling mediation such that the deadline could not be met. Plaintiff has not demonstrated extraordinary circumstances to justify her delay. An attorney entering a case in the middle is presumed to be fully aware of the procedural posture of the case as of the date of his appearance. Therefore, local counsel's contention that he first learned the identity of the agreed mediator on May 3, 2018 – almost five months after entering his appearance – is

specious because Plaintiff's counsel had agreed on the mediator and Plaintiff's local counsel should have been aware of the status of this case when he entered his appearance in January of 2018.

Additionally, local counsel's objections to the agreed mediator are unfounded. While the agreed mediator was the assigned Magistrate Judge on this case before his retirement in August 2016, his two rulings in this case merely involved extensions of time [DE 7 & 10] before Defendant's motion to dismiss was resolved by this Court. Furthermore, it is not uncommon for a Magistrate Judge, who is assigned to address nondispositive pretrial proceedings, to also conduct a settlement conference in the same matter. Therefore, nothing in the record suggests the agreed mediator – even though he is a former Magistrate Judge – could not mediate this case from a neutral perspective.

Accordingly, the Court **GRANTS IN PART** Defendant's request. [DE 65]. The mediation deadline is **EXTENDED** until **July 31, 2018**, and the parties shall use Christopher Nuechterlein as their mediator. Plaintiff is **ORDERED** to provide available mediation dates to Defendant *instanter*. The Court **DEFERS** to the preferences of Mediator Nuechterlein as to the timing, scope, and format of any settlement demand. The Court **ORDERS** the parties to file a report of the results of their mediation within **seven** days of the mediation or **August 7, 2018**, whichever is earlier.

Lastly, the Court **ADVISES** the parties that failure to complete mediation by July 31, 2018, will likely result in sanctions against both parties.

**SO ORDERED.**

Dated this 13th day of July 2018.

s/Michael G. Gotsch, Sr.  
Michael G. Gotsch, Sr.  
United States Magistrate Judge