

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

J.A.W.,)	
)	
Plaintiff,)	
)	
v.)	No. 3:18-cv-00037-TWP-MPB
)	
EVANSVILLE VANDERBURGH)	
SCHOOL CORPORATION,)	
)	
Defendant.)	

**PLAINTIFF’S RESPONSE IN PARTIAL OPPOSITION TO DEFENDANT’S
MOTION TO MODIFY CASE MANAGEMENT PLAN**

Introduction

Although captioned a Motion to Modify Case Management Plan (“Motion”) (Dkt. 116), the defendant’s Motion, in reality, seeks two things: (a) it seeks to re-open discovery nearly three months after the discovery period closed so that the defendant (“EVSC”) may conduct discovery that it did not even attempt to conduct while the discovery period was open; and (b) it seeks permission to belatedly file a final witness and exhibit list that includes two witnesses that it has not previously disclosed. Given that the discovery period closed long before the filing of the present Motion, EVSC must meet the heightened “excusable neglect” standard to justify re-opening discovery. *See, e.g., Flint v. City of Belvidere*, 791 F.3d 764, 768 (7th Cir. 2015) (citing, *inter alia*, Fed. R. Civ. P. 6(b)(1)(B)). It cannot and does not meet this standard. And, while the plaintiff has not

objected to EVSC filing a final witness and exhibit list that includes only those witnesses who were previously identified with specificity (as opposed to in a catch-all category) on EVSC's preliminary witness list, there is no reason to permit the addition of previously unidentified witnesses at this late date.

Procedural History

On May 10, 2018, this Court entered its Order on Case Management Plan (Dkt. 27), which set the following scheduling dates: expert witness discovery and discovery relating to damages was to be completed by May 22, 2019 (§ IV(C))¹; and final witness and exhibit lists were to be filed by April 22, 2019 (§ III(I)). By joint motion, the deadline to file final witness and exhibit lists was subsequently extended until thirty days "after the Court's last ruling on the [then-]pending motion to dismiss and dispositive motions." (Dkt. 101). The Court resolved those pending motions on June 7, 2019 (Dkt. 103), and final witness and exhibit lists were therefore to be filed no later than July 8, 2019. The plaintiff timely did so on July 5, 2019 (Dkt. 110).

On August 12, 2019—82 days after the close of discovery and 35 days after final witness and exhibit lists were due—EVSC filed the present Motion. In this Motion, EVSC seeks permission to conduct a second deposition of the plaintiff "for the limited purpose

¹ The Case Management Plan also set deadlines to complete "non-expert witness discovery and discovery relating to liability issues" for December 24, 2018 and to complete "[a]ll remaining discovery" for June 22, 2019. Because EVSC desires to take damages-related discovery, the May 22nd deadline is the one presently at issue.

of inquiring into his updated damages” (Dkt. 116 at 5 [¶ 26]) as well as to conduct the depositions of Wyatt Squires (who is listed on the plaintiff’s final witness list as well as on his preliminary witness list) and Tammy Work (who is not listed on the plaintiff’s final witness list) (Dkt. 116 at 6 [¶ 27]). It also seeks permission to belatedly file a final witness and exhibit list, which appears to include at least one witness—Tammy Work—who was not identified on EVSC’s preliminary witness list. (*Compare* Dkt. 116-1 [final list] *with* Dkt. 43 [preliminary list]).²

Argument

I. EVSC has not demonstrated excusable neglect justifying the re-opening of discovery

As EVSC acknowledges, “[w]hen a party seeks an extension after a deadline has passed, a party must show that he failed to act because of excusable neglect.” (Dkt. 116 at 3 [citing Fed. R. Civ. P. 6(b)(1)]); *see also, e.g., Brosted v. Unum Life Ins. Co. of Am.*, 421 F.3d 459, 464 (7th Cir. 2005) (“But the primary problem with his motion [to re-open discovery] is that he did not seek an extension until a month after the discovery deadline had passed. Thus [he] was required to show excusable neglect for failing to comply with the discovery deadline.”); *Flint*, 791 F.3d at 768 (“Only if a party has failed to act ‘because

² EVSC’s preliminary witness list has been sealed (*see* Dkt. 43), and a hard-copy of this list was never served on the plaintiff’s attorneys. Counsel is therefore unable to access EVSC’s preliminary witness and exhibit list. EVSC’s initial disclosures do not identify either Tammy Work or Katy Elmer—both of whom appear on EVSC’s proposed final witness list—as individuals with knowledge pertinent to these proceedings. Ms. Elmer was identified as a potential witness at the preliminary-injunction hearing in this cause (*see* Dkt. 45) but was not called to testify at that hearing.

of excusable neglect' do the Federal Rules permit a post-deadline extension."); *Anton Realty, LLC v. Guardian Brokers Ltd., Inc.*, No. 1:13-cv-01915-JMS-TAB, 2015 WL 3649379, at *1 (S.D. Ind. June 11, 2015) ("[A] motion that is made after the deadline has expired may only be granted if the moving party failed to act because of excusable neglect."). "Neglect is generally not excusable when a party should have acted before the deadline or when a party's lack of diligence is to blame for its failure to secure discoverable information." *Flint*, 791 F.3d at 768 (internal citations omitted).

EVSC offers a single excuse for its failure to conduct discovery (or to seek an extension for conducting discovery) within the time-frame permitted by this Court's orders: because dispositive motions were filed in this case, "it was EVSC's (apparently mistaken) understanding that the parties would not insist on strict adherence to the CMP discovery deadlines." (Dkt. 116 at 6 [¶ 28]). This, to say the least, is a curious excuse. Case management deadlines are not simply for the benefit of the parties: they also enable the Court to ensure the efficient and timely disposition of cases. This Court entered a deadline that was not extended; and the plaintiff offered no assurances, formal or informal, that the deadline would be ignored. As this Court is doubtless aware, in most lawsuits summary judgment will be sought by at least one party, and yet this Court's Uniform Case Management Plan (available through <https://www.insd.uscourts.gov/forms/uniform-case-management-plan>) still anticipates that damages discovery will be completed within three or four months of the filing of summary-judgment motions.

Indeed, the fact that the parties jointly (and timely) saw the need to request an extension of the deadline for filing final witness and exhibit lists—a request that was filed more than a month before the discovery deadline—is strong evidence that even EVSC was aware that it was required to abide by established deadlines.

“If the court allows litigants to continually ignore deadlines and seek neverending extensions without consequence, soon the court’s scheduling orders would become meaningless.” *Spears v. City of Indianapolis*, 74 F.3d 153, 158 (7th Cir. 1996) (quoting then-District Judge Tinder). “The Court’s deadlines have meaning—and consequences.” *Volvo Trucks N. Am. v. Andy Mohr Truck Ctr.*, No. 1:12-cv-00448-WTL-DKL, 2013 WL 12177048, at *2 (S.D. Ind. Sept. 30, 2013). EVSC cites no case law standing for the proposition that neglect is “excusable” simply because a party does not see the need to abide by established deadlines. Clearly such a proposition would turn the very purpose of establishing deadlines on its head. Even where a party’s delay does not cause prejudice, the lack of prejudice “will not suffice if no excuse at all is offered or if the excuse is so threadbare as to make the neglect inexplicable.” *United States v. McLaughlin*, 470 F.3d 698, 701 (7th Cir. 2006). This observation by the Seventh Circuit in *McLaughlin* precisely describes this case, and EVSC’s request to re-open discovery should be denied.³

³ On top of this, the re-opening of discovery—if permitted—*would* prejudice the plaintiff. On the basis of his (and his counsel’s) understanding that discovery had closed in May, the plaintiff finalized his final witness and exhibit list (Dkt. 110 [filed July 5, 2019]) and has begun to make arrangements with his expert witnesses to appear for trial. The reason that final witness and exhibit lists are not required until after the close of discovery is that evidence unearthed during the discovery process is likely to affect the witnesses and exhibits that parties will utilize at trial. Permitting the re-opening of discovery at this late

II. EVSC should be permitted to belatedly file a final witness and exhibit list that identifies only witnesses and exhibits that it has previously designated with specificity but that does not identify any additional witnesses or exhibits

It is not clear whether EVSC's request to file its final witness and exhibit list out of time is governed by the "excusable neglect" standard of Federal Rule 6(b)(1) or whether it is governed by the "substantially justified or harmless" standard of Federal Rule 37(c)(1). Compare, e.g., *Volvo Trucks*, 2013 WL 12177048, at *1 (applying the "excusable neglect" standard), and *Shell v. City of Kansas City*, No. 91-2306-O, 1992 WL 696526, at *1 (D. Kan. Apr. 1, 1992) (same), with, e.g., *Banerjee v. Univ. of Tenn.*, No. 3:17-CV-526-HSM-HBG, 2019 WL 1532865, at *2 (E.D. Tenn. Apr. 9, 2019) (applying the "substantially justified or harmless" standard). The difference in these standards might affect the resolution of EVSC's request to belatedly file a final witness and exhibit list if the plaintiff objected to the filing of a final witness and exhibit list *at all*—for EVSC's neglect is not "excusable" even though the belated disclosure of witnesses that were previously (and specifically) identified on its preliminary list is likely "harmless." But the plaintiff has no objection to allowing EVSC to file a final witness and exhibit list that identifies only those persons who were specifically identified on its preliminary list. However, EVSC's proposed final witness list (Dkt. 116-1) appears to include at least one witness (Tammy

date would not only require multiple depositions to be completed on an abbreviated time-frame while the parties are preparing for trial but would throw an unknown wrench into these preparations and might potentially require the supplementation of previously finalized witness and exhibit lists (even further after the due-date for these lists).

Work)—and possibly a second witness (Katy Elmer) (*see supra* note 2)—that it did not previously identify.

EVSC’s only explanation for its failure to timely file a final witness and exhibit list is, again, its “mistaken[] belie[f] the previously scheduled deadline . . . would no longer apply.” (Dkt. 116 at 4 [¶ 21]). This belief not only was mistaken but is unsupportable: a deadline for filing final witness and exhibit lists was entered before a trial date or settlement conference was even set in this case, and the parties’ *joint* motion to extend that deadline specifically requested that the deadline be extended until thirty days “after the Court’s last ruling on the [then-]pending motion to dismiss and dispositive motions.” (Dkt. 101). If this were not enough, the plaintiff’s filing of his final witness and exhibit list on July 5, 2019—not just timely but three days early—certainly should have ensured that EVSC was aware of the deadline.

But, even were none of this so, the addition of *new* witnesses at this late date cannot be justified by EVSC’s misunderstanding. After all, a party’s obligation to disclose witnesses that it intends to rely on at trial is an *ongoing* one. *See* Fed. R. Civ. P. 26(e)(1)(A) (“A party who has made a disclosure . . . must supplement or correct its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect.”); *see also, e.g., Neville v. Value City Dep’t Stores, LLC*, No. 07-cv-53-DRH, 2008 WL 2796659, at *3 (S.D. Ill. July 18, 2008). Thus, the addition of new witnesses at this late stage—not only after the deadline for filing final

witness lists but also after the discovery deadline—cannot be discounted as a mishap of relatively short duration; it is a failure to supplement EVSC’s disclosures that has, apparently, lasted throughout the course of this litigation.

Despite the flimsiness of EVSC’s excuse for its failure to timely file a final witness and exhibit list, the plaintiff has expressed no objection to permitting it to belatedly file a list that includes those witnesses and exhibits that were previously identified with specificity. But there is absolutely no justification for permitting EVSC to identify witnesses that were not previously disclosed. Under similar circumstances courts regularly refuse to permit a party to identify new witnesses or exhibits in the late stages of litigation. *See, e.g., Banerjee*, 2019 WL 1532865, at *2; *Sunflower Condominium Ass’n, Inc. v. Owners Ins. Co.*, No. 16-cv-2946-WJM-NYW, 2018 WL 4853341, at *1-2 (D. Colo. Oct. 5, 2018); *Commercial Law Corp., P.C. v. Fed. Deposit Ins. Co.*, No. 10-13275, 2015 WL 7450149, at *3 (E.D. Mich. Nov. 24, 2015); *Hansen v. Umtech Industriesservice Und Spedition*, No. 95-516 MMS, 1996 WL 732556, at *5 (D. Del. Dec. 9, 1996). Discovery has long-since closed and the prejudice from permitting this late disclosure is obvious; the Court should follow the lead of this jurisprudence and permit EVSC to belatedly file a final witness and exhibit lists that includes only those persons and exhibits that it previously identified with specificity.

Conclusion

Had EVSC timely sought a motion to extend the deadlines established by this Court's orders, the plaintiff almost certainly would have had no objection to such a request; undersigned counsel takes pride in working with opposing attorneys and their clients to ensure the disposition of litigation in a manner than accommodates everyone's scheduling needs. But deadlines exist for a reason. Under the circumstances of this case, where EVSC has simply slept on its rights and ignored court-imposed due-dates, there is no cause to re-open discovery months after it has closed nor is there cause to allow EVSC to identify trial witnesses and exhibits that it failed to previously identify throughout the course of this litigation.

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