

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:19-CV-00851-BJB-CHL**

CHELSEY NELSON PHOTOGRAPHY LLC , et al., **Plaintiffs,**

v.

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT , et al., **Defendants.**

ORDER

Before the Court is Plaintiffs' motion for extension of time to complete discovery. (DN 70.) Defendants filed a response (DN 71) to which Plaintiffs filed a reply (DN 72). Therefore, the motion is ripe for review.

I. BACKGROUND

On February 23, 2021, the Court held a telephonic status conference at the Parties' request to discuss ongoing discovery disputes. (DN 62.) During the call, the Parties reported that the disputes concerned several of Plaintiffs' interrogatories and requests for production. (*Id.*) The relevant requests for production sought documents relating to Defendants' past enforcement of the challenged ordinance, and the relevant interrogatories relate to alternatives to the ordinance considered by the government. (*Id.*) Based on the discussion during the call, the Court instructed the Parties to continue working with one another to resolve the disputes and granted leave for the Parties to proceed to motions practice to address any remaining issues. (*Id.*)

On March 5, 2021, Plaintiffs filed a motion to compel production of the discovery, and Defendants filed a motion for protective order over the same. (DN 63, 64.) The motions have been fully briefed as of March 12, 2021 and currently remain pending.

On March 29, 2021, Plaintiffs filed the instant motion. (DN 70.) In the motion, Plaintiffs request that the fact discovery deadline be extended from April 1, 2021 to May 31, 2021. (*Id.*, at PageID # 1862.) In support of their request, Plaintiffs state that the discovery subject to its motion to compel is necessary and that they cannot complete their witness depositions without having reviewed the discovery at issue. (*Id.*, at PageID # 1863-64.)

In response, Defendants dispute that the discovery at issue is necessary, but state that they do not oppose extending the fact discovery deadline. (DN 71, at PageID # 1896.) Additionally, Defendants argue that if the extension is granted, all other outstanding deadlines should be equally extended. (*Id.*) In support of their request, Defendants argue “that it is important to preserve the intended sequence of the original scheduling order, which was to complete fact discovery before expert reports are disclosed. This allows the parties to account for the results of fact discovery in any expert disclosures.” (*Id.*) Defendants further argue that Plaintiffs will not be prejudiced by the additional extensions because the Court has granted a preliminary injunction barring enforcement of the challenged ordinance (DN 47) and that no other factors exist that would cause the extensions to prejudice Plaintiffs. (*Id.*)

In reply, Plaintiffs argue that Defendants response was not timely filed and thus, should not be considered. (DN 72, at PageID # 1899.) Plaintiffs further argue that Defendants failed to make a showing of good cause required by Rule 16(b)(4) of the Federal Rules of Civil Procedure that the additional extensions are warranted. (*Id.*) First, Plaintiffs argue that the delay in completing fact discovery was solely due to Defendants’ objections, and thus Defendants should not receive the benefit of additional extensions. (*Id.*, at PageID # 1899-1900.) Second, Plaintiffs argue that Defendants’ desire to disclose its expert reports after fact discovery is complete is merely a matter of preference; Plaintiffs believe Defendants have everything they need to make

their expert disclosures and that they will have time after the proposed amended fact discovery deadline to supplement their expert disclosures before the expert discovery deadline. (*Id.*) Finally, Plaintiff disputes that they are not prejudiced by further delays in the litigation plan, because it “requires [the individual-Plaintiff] to continue to operate her business with uncertainty as she waits for her case to be resolved.” (*Id.*)

II. DISCUSSION

Below, the Court considers whether Defendants’ response (DN 71) ought to be considered in light of the timing of their filing before addressing whether good cause exists to grant the extensions respectively requested by Plaintiffs and Defendants.

a. Timeliness of Defendants’ Response

Under Local Rule 7.1(b), responses to motions for an extension of time “must be filed within 7 days of service of the motion.” LR 7.1(b). Here, Defendants were served with Plaintiffs’ motion on March 29, 2021, and they filed their response on April 8, 2021, nine days later. Because Defendants’ response was filed outside the deadline set by LR 7.1(b), Defendants believe that the response should not be considered. (DN 72, at PageID # 1899.) The Court disagrees.

Local Rule 7.1(b) sets a deadline for “[a] response *opposing* the motion [for extension of time]” LR 7.1(b). Here, “Defendants have no objection to an extension of the deadline to complete fact discovery.” (DN 71, at PageID # 1896.) To the extent that Defendants request additional extensions, the Court construes the requests as an initial motion to amend the scheduling order by Defendants. Therefore, it is proper for the Court to consider Defendants’ requests.

b. Good Cause Under Rule 16(b)(4)

The Court begins with Plaintiffs' request to extend the fact discovery deadline from April 1, 2021 to March 31, 2021. The current fact discovery has expired while extensive discovery remains outstanding due to the pending motion to compel (DN 63) and motion for protective order (DN 64). While a pending discovery motion is not necessarily grounds to extend the discovery deadline because the Court can order disclosure or nondisclosure of the discovery at issue after the fact discovery deadline, Plaintiff says that its ability to complete witness depositions without a resolution of the outstanding discovery issue has been impeded. Based on these facts, the relatively short length of the requested extension, and the fact that Defendants do not oppose the extension, the Court finds good cause under Rule 16(b)(4) of the Federal Rules of Civil Procedure to grant the requested extension.

The Court now turns to Defendants' request that "all other deadlines in the operative scheduling order should receive a commensurate extension." (DN 71, at PageID # 1896.) Defendants' main concern seems to be ensuring that its expert disclosures are not due until after the fact discovery deadline expires. (*See id.*) Defendants' current expert disclosure deadline is May 1, 2021, which is a month earlier than the new fact discovery deadline. Plaintiffs cite to *Todd v. Hyster-Yale Grp., Inc.*, 2019 WL 1938792, at *3 (E.D. Ky. May 1, 2019) in arguing that Defendants' preference to follow the original sequence of deadlines set forth in the scheduling order cannot support good cause. (DN 72, at PageID # 1900.) While the Court notes that an unreported case from a district court outside of the Western District of Kentucky is in no way binding on this Order, the Court will clarify some key differences between that case and this one that render it uninformative here.

In *Todd*, Plaintiff moved to amend all deadlines in the scheduling order, including past deadlines. The proposed amendments included extending deadlines by periods ranging from one

to seven months and changing the order of the deadlines to be “more convenient for [the plaintiff] and make more sense in the normal course of litigation.” *Todd*, 2019 WL 1938792, at *2-*3. The Court denied the motion, finding that the plaintiff’s preference to rework the scheduling order to follow a more logical sequence did not support good cause to amend the scheduling order because the plaintiff had not shown that she would be unable to meet the deadlines with due diligence. *Id.* at *3. The Court rejected plaintiff’s argument that the sequence of deadlines was unworkable because “*counsel for the Plaintiff admits that he agreed to these deadlines when the parties had their Rule 26(f) scheduling conference.*” *Id.* at *4 (emphasis in original).

Here, unlike in *Todd*, Defendants are only requesting to extend outstanding deadlines, and only by a length of time equal to the extension granted to Plaintiff to complete fact discovery. Additionally, unlike in *Todd*, this matter has not yet been set for trial, and the Parties reported that they will not be ready for trial until after the Court rules on dispositive motions. (DN 61.) Thus, the extensions Defendants request are far less likely to disrupt the course of litigation in this case.

Also unlike in *Todd*, Defendants are not seeking to rearrange the sequence of the deadlines previously agreed to based on a sudden realization that the litigation plan no longer makes sense. Rather, Defendants are trying to preserve the sequence of events set forth in the scheduling order by requesting extensions of subsequent deadlines proportional to the extension Plaintiffs requested.

Finally, unlike in *Todd*, Defendants are not reneging on a prior agreement during the Rule 26(f) conference that they would meet the agreed upon deadlines. If anything, it is Plaintiffs who are trying to change what was previously agreed upon. The Parties joint report of their Rule 26(f) scheduling meeting stated that Plaintiff proposed that Defendants expert disclosures be due on the same day as the proposed fact discovery deadline, and Defendants proposed that the same be due

one month after the proposed fact discovery deadline. (DN 54, at PageID # 1432.) During the November 4, 2020 scheduling conference, the Court discussed the issue with the Parties at length. At that time, Defendants stated that they oppose making expert disclosures prior to the end of fact discovery. Plaintiffs stated that the earlier expert disclosure date would allow for expediting dispositive motions briefing in the event that Defendants choose not to use expert testimony. Defendants then disclosed that they were unlikely to not retain expert witnesses, and that if Plaintiffs complete discovery ahead of schedule, they are free to file dispositive motions at any time before the deadline. The Court and the Parties agreed that Defendants' expert disclosures would be due one month after the fact discovery deadline. Defendants request for extensions merely seeks to uphold that agreement. Based on the foregoing, the Court finds good cause under Rule 16(b)(4) of the Federal Rules of Civil Procedure to grant the requested extensions.

The Court now briefly addresses Plaintiffs' assertion that they would be prejudiced if Defendants requested extensions were granted, which is essentially that dragging out litigation in this case will prolong the individual-Plaintiff's uncertainty in operating her business. First, Plaintiffs say that they will not be able to complete discovery and move to the next stage in resolving this case until there is a ruling on the outstanding discovery motions. Those motions will be ruled upon in due course, but there is no guarantee that it will be as swiftly as Plaintiffs may prefer. Additionally, review of any potential additional disclosures or early stages of expert discovery may lead to voluminous expert discovery requiring Plaintiffs to ironically move the Court for the same extension they now oppose.

Second, the Parties all believe that this case will be resolved on summary judgment, which may be initiated by either party at any time prior to the dispositive motion deadline. Finally, the nature of Plaintiffs' claims make briefly delaying their resolution unlikely to impact the operation

of Plaintiff Chelsey Nelson's business. Plaintiffs seek to engage in two activities prohibited by the challenged ordinance and allegedly protected under the First Amendment: (1) deny their services to same-sex couples; and (2) advertise to prospective clients that they do not provide their services to same sex couples. It is undisputed that no same-sex couple has ever sought Ms. Nelson's photography services. (DN 14-1, at PageID # 740.) Defendants are currently enjoined from enforcing the challenged ordinance to compel her to provide services to same sex couples or to prohibit her from advertising her refusal to provide such services. (DN 47.) Thus, Plaintiffs have much more confidence as to the state of their rights than the average litigant. In sum, the Court finds little risk of prejudice to Plaintiffs if Defendants requested extensions are granted.

III. ORDER

For the foregoing reasons, the Court will grant Plaintiffs' request to extend the fact discovery deadline (DN 70) and will grant Defendants request to extend the remaining deadlines in the scheduling order (DN 71.)

Accordingly,

IT IS HEREBY ORDERED that DN 70 and DN 71 are **GRANTED**. The Court's scheduling order (DN 57) shall be amended as follows:

1. All fact discovery shall be completed on or before **May 31, 2021**.
2. Defendants shall serve their expert witness disclosures on or before **June 30, 2021**.
3. All expert discovery shall be completed on or before **August 9, 2021**.
4. All dispositive motions shall be filed on or before **August 30, 2021**.
5. All other provisions of DN 57 shall remain in full force and effect.

cc: Counsel of record