IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

THOMAS M. SMITH,	: NO. 17 - 0688 : NO. 18 - 1541
Plaintiff,	:
vs.	: CIVIL ACTION
CHRISTOPHER W. BARTO,	:
Defendant.	:
	: *Motion for Reconsideration*

OPINION & ORDER

On June 16, 2017, in the original action,[1] Plaintiff Thomas M. Smith ("Plaintiff") filed his first amended complaint alleging easement by necessity, easement by prescription, trespass, and ejectment. On July 18, 2017, Defendant Christopher W. Barto ("Defendant") filed an Answer, New Matter and Counterclaim. Defendant's counterclaim requested the Court to enter a declaratory judgment that Plaintiff could claim neither easement by necessity nor easement by prescription. On July 31, 2017, the Court issued a scheduling order that set the discovery deadline for May 14, 2018 and the trial term for August 6 – September 14, 2018.

On October 4, 2017, Defendant served his first set of interrogatories on Plaintiff. Question six requested: "[a]s to non-expert (lay) witnesses you expect to call at trial, state the name, address, telephone number and substance of their expected testimony." Question eight requested that Plaintiff "[i]dentify every person whom you [sic] believe has personal knowledge of any facts asserted in your First Amended Complaint and state in detail the nature of the information you believe each [sic] person has regarding those facts." On November 3, 2017, Plaintiff served his answers to Defendant's first set

of interrogatories on Defendant. In response to question six, Plaintiff stated, "The witnesses have not been identified other than the Plaintiff." On December 21, 2017, Plaintiff served his supplemental answers to Defendant's first set of interrogatories on Defendant. In his supplemental response, Plaintiff indicated in response to question eight that Myron Smith, David Smith, Chris Green, and Jeremy Green were people with personal knowledge of the facts underlying the case. On February 27, 2018, Plaintiff served his second supplemental answers to Defendant's first set of interrogatories on Defendant. Plaintiff identified the follow lay witnesses in response to question six: (1) Neil Barto, (2) Dorothy Barto, (3) Edward D. Frantz, and (4) Irvine and Scott Kepner. Plaintiff did not indicate the "substance of their expected testimony." On May 11, 2018, Plaintiff served its third supplemental answers to Defendant's first set of interrogatories on Defendant. Plaintiff identified the follow lay witnesses: (1) Clarence L. Barto, (2) Bruce L. Barto, and (3) Holly Barto. Plaintiff noted next to the first two witnesses that they were "born and raised on the property and know[] how they got in to the fields."

On June 29, 2018, nearly seven weeks after the discovery deadline on May 14, 2018, Plaintiff's counsel emailed defense counsel inquiring into whether defense counsel would be opposed to "audio/video conferencing [deposition]" with two additional witnesses living in Oregon.[2] On July 2, 2018, defense counsel indicated that the discovery deadline had passed and requested that Plaintiff's counsel sign a stipulation limiting lay witness testimony to those witnesses previously identified during discovery.[3] Plaintiff's counsel did not respond. Instead, Plaintiff filed a pretrial statement on the

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[1] Case number CV-17-0688.
[2] Defendant's Motion in Limine to Preclude Expert Testimony, Ex. F (July 6, 2018) (hereinafter "Defendant's Motion").
[3] Defendant's Motion, Ex. G.

same day that included four lay witnesses who were not identified as witnesses during discovery: (1) Myron Smith, (2) David Smith, (3) Chris Green, and (4) Jeremy Green. Plaintiff defined the "scope of testimony" that would be provided by these witnesses as concerning "liability." Also on July 2, 2018, Plaintiff filed a *Petition for Audio/Video Conferencing* with the Court requesting that Chris Green and Jeremy Green be allowed to participate in trial by alternative methods as they resided in Oregon and were unable to appear in person.

On July 6, 2018, Defendant filed a *Motion in Limine* to exclude these additional witnesses and their testimony. Also, on July 6, 2018, Plaintiff's counsel requested a continuance of the pretrial conference scheduled for July 9th because Plaintiff had suffered multiple brain bleeds on July 4th and was flown to Geisinger Medical Center in Danville, Pennsylvania for brain surgery. The Court granted the request, rescheduled the pretrial conference to August 28, 2018, and placed the case on the October-November trial list. On July 17, 2018, Plaintiff's counsel filed a *Motion to Extend the Time for Discovery until August 15, 2018*.[4] The basis of the request was that the trial term had been pushed back due to Plaintiff's hospitalization. Plaintiff's counsel indicated that the parties had informally agreed to extend the discovery deadline to July 31, 2018.

On July 18, 2018, Plaintiff filed his *Answer* to Defendant's motion in limine. Plaintiff's counsel asserted that he did not receive a request from Defendant regarding a stipulation as to witnesses, but in fact believed that the parties had "agreed to an

[4] On July 17, 2018, Plaintiff also served his fourth supplemental answers to Defendant's first set of interrogatories on Defendant.

extension of discovery to the end of July."[5] Defendant responded by filing his *Reply to Plaintiff's Answer to Motion in Limine and New Matter*. Defendant vehemently denied Plaintiff's assertion that the parties agreed to any extension of the discovery deadline.[6] In fact, Defendant asserted that he "specifically rejected" Plaintiff's request to extend the deadline to July 31st so the additional witnesses could be deposed.[7] At the July 18th hearing, the Court granted Defendant's motion to exclude these witnesses from testifying.

On July 26, 2018, Plaintiff filed a *Motion for Reconsideration*, which was scheduled to be heard on August 30, 2018. Plaintiff's main argument was that Defendant was placed on notice that these witnesses could be called to testify on December 21, 2017 when Plaintiff filed his supplemental answers to Defendant's first set of interrogatories and listed the witnesses as persons with knowledge under question eight. On July 31, 2018, prior to the Court having an opportunity to hold a hearing on Plaintiff's motion for reconsideration, Plaintiff filed a *Praecipe to Discontinue without Prejudice*. Plaintiff's letter to the Court indicated that there was "no other counterclaim or other claim" against him and so the matter could be withdrawn without prejudice. On August 3, 2018, the Court allowed the case to be withdrawn without prejudice. The pretrial conference and Motion for Reconsideration scheduled in August 2018 were canceled. On August 7, 2018, Plaintiff's counsel sent a letter to the Court's chambers reminding the Court that the August 30th hearing on his motion for

[5] Plaintiff's Answer to Motion in Limine 1, ¶11 (July 18, 2018). In paragraph nine, Plaintiff's counsel also asserts the agreement was to an extension "through August 15 or later." *Id.* at 1, ¶9.
[6] Defendant's Reply to Plaintiff's Answer to Motion in Limine and New Matter 1, ¶18 (July 19, 2018).
[7] *Id.*

reconsideration was not necessary since Plaintiff had discontinued the case "due to his health."

On August 13, 2018, the Court reinstated the pretrial conference as, contrary to Plaintiff's representation, Defendant had filed a counterclaim. On August 30, 2018, the Court ordered that Defendant's counterclaim would remain on the October – November 2018 trial list, but Plaintiff's claims would remain withdrawn without prejudice. On September 18, 2018, Plaintiff's counsel requested that the trial on Defendant's counterclaim be placed on a later trial term as Plaintiff's physician advised counsel that Plaintiff's recovery would require several months. The Court granted the unopposed request.

On October 22, 2018, Plaintiff refiled the identical complaint under case number CV-18-1541. On November 19, 2018, Defendant filed *Preliminary Objections* to Plaintiff's refiled complaint. On December 14, 2018, Plaintiff filed a *Motion to Consolidate* the two cases. Plaintiff requested that the trial term remain the same as Defendant's counterclaim's trial term in the original action, but that discovery be allowed in the second case. Plaintiff confirmed that he refiled the same complaint and the issues were identical. Plaintiff lamented that his medical issues should not prevent him the "opportunity to litigate [and] fully prepare" his claim. On January 22, 2019, this Court granted Defendant's preliminary objections in part as well as Plaintiff's motion for consolidation. The Court consolidated the cases, but did not reopen discovery. Thereafter, Plaintiff filed a *Motion for Reconsideration* arguing that discovery should be reopened.

On March 1, 2019, the Court heard argument on *Plaintiff's Motion for Reconsideration* of this Court's refusal to reopen discovery in its January 22nd Order. At argument, Plaintiff noted that he only desires to depose two of the four witnesses previously indicated: Mr. Robert Smith, Plaintiff's brother, and Mr. Myron Smith, Plaintiff's father. According to the Pennsylvania Superior Court,

> The trial court should consider the following factors when determining whether or not to preclude a witness from testifying for failure to comply with a discovery order:
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> > (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified,
> >
> > (2) the ability of that party to cure the prejudice,
> >
> > (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of cases in the court,
> >
> > (4) bad faith of [sic] willfulness in failing to comply with the court's order.
>
> Additionally,
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> > In the absence of bad faith or willful disobedience of the rules, the most significant considerations are the importance of the witness' testimony and the prejudice, if any, to the party against whom the witness will testify. [. . .][8]

During argument, Plaintiff's counsel was unable to provide specifics as to the witnesses' anticipated testimony, and only generally advised the Court that the nature of their testimony related to the prescriptive easement claim.[9] Further, Plaintiff's counsel admitted that such testimony was not particular to these witnesses, but would only

[8] *Jacobs v. Chatwani*, 922 A.2d 950, 961–62 (Pa. Super. Ct. 2007) (quoting *Smith v. Grab,* 705 A.2d 894, 902-03 (Pa. Super. Ct. 1997)) (internal citations omitted).
[9] *See Dunlap v. Larkin*, 493 A.2d 750, 756 (Pa. Super. Ct. 1985) ("an easement by prescription is established by showing an (1) adverse, (2) open, (3) notorious, and (4) continuous and uninterrupted use for twenty-one years").

corroborate other testimony presented. Based on counsel's own admissions, the Court sees no reason why discovery should be reopened.

Discovery deadlines set by the Court are to be respected,[10] and Plaintiff has failed to articulate a satisfactory reason why the deadlines in the original matter should be ignored. In the original action, Plaintiff identified the aforementioned individuals on December 21, 2017 as individuals with personal knowledge of the case; yet, Plaintiff did not identify them as potential witnesses until Plaintiff's July 2, 2018 pre-trial statement. The fact that Mr. Robert Smith and Mr. Myron Smith are closely related to Plaintiff further belies Plaintiff's position. Plaintiff clearly knew of these witnesses at the time he commenced this action. There is no reason Plaintiff could not have identified his father and brother as potential lay witnesses prior to the discovery deadline on May 14, 2018. Additionally, Plaintiff himself has admitted that these witnesses will not provide "critical" evidence,[11] as he acknowledges their testimony is cumulative to the nine witnesses previously identified in discovery. Thus, there is no prejudice to Plaintiff in the exclusion. Accordingly, Plaintiff's Motion for Reconsideration is **DENIED**.

[10] Pa.R.C.P. No. 4019(a)(1)(viii) (allowing the imposition of sanctions for failure to respect an order of the court regarding discovery).

[11] *Merisant Co. v. McNeil Nutritionals, LLC*, 242 F.R.D. 315, 326 (E.D. Pa. 2007) (quoting *Meyers v. Pennypack Woods Home Ownership Ass'n,* 559 F.2d 894, 905 (3d Cir.1977)) ("The exclusion of critical evidence is an 'extreme' sanction, not normally to be imposed absent a showing of [willful] deception or 'flagrant disregard' of a court order by the proponent of the evidence.").

IT IS SO ORDERED this 15th day of March 2019.

BY THE COURT:

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Eric R. Linhardt, Judge

cc: Daryl A. Yount, Esq., *McNerney, Page, Vanderlin & Hall*
Scott A. Williams, Esq., *Williams & Smay*
Marc S. Drier, Esq., *Drier & Dieter*
Gary Weber, Esq. (Lycoming Reporter)