IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICK PEREIRA Plaintiff	:	CIVIL ACTION NO. No. 04-791
v.	:	
DISKIN MOTORS, INC. d/b/a CAROUSEL HYUNDAI Defendant	:	
and	:	
JAMES E. DISKIN, JR. Defendant	:	

MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFF'S MOTION TO QUASH DEPOSITIONS
AND FOR SANCTIONS PURSUANT TO RULE 26(g)

Plaintiff Patrick Pereira ("plaintiff") has moved to quash three Deposition Subpoenas improperly served after the close of discovery and for an order pursuant to Fed. R. Civ. P. 26(g) sanctioning defendants for serving these Notices. For the reasons set forth below, Plaintiff's Motion should be granted.

INTRODUCTION

This action for defamation and discrimination was commenced by Plaintiff on February 24, 2004. Defendant Diskin Motors, Inc. d/b/a Carousel Hyundai is Plaintiff's former employer and Defendant James E. Diskin, Jr. is the President of Diskin Motors, Inc.

Defendants' served no written discovery in this matter. Pursuant to the Court's November 17, 2004 Scheduling Order, all fact discovery in this matter was to be completed by December 13, 2004. Summary judgment motions are due on December 27,

2004 and pretrial memorandums are due on January 19, 2005. The case is scheduled for trial on March 2, 2006.

On December 17, 2004, Defendants prepared Depositions subpoenas of three of Plaintiff's former employers, (1) Marty Sussman Acura, (2) Hyundai of Turnersville and (3) Prestige Mitsubishi Volkswagen. The Depositions are scheduled to take place on December 30, 2004.

The identity of Plaintiff's former employers was easily obtainable through written discovery that was never pursued during the discovery period. Indeed, Plaintiff offered this information during his deposition on October 26, 2004. The parties have not entered into any written stipulations concerning the taking of these depositions nor have Defendants' obtained any court orders regarding them. Never during the Court's repeated conferences in this matter have Defendants brought up the issue of taking this discovery.

DISCUSSION

There is no substantial justification for Defendants' failure to notice the depositions of Plaintiff's former employers during the eleven months of discovery period in this case. Indeed, given their timing and Defendants' flagrant disregard of the Court's Third Scheduling Order, they appear designed to unnecessarily drag out and multiply the issues involved as well as cause undue expense.

Rule 45 subpoenas "are encompassed within the definition of 'discovery,' as enunciated in Rule 26(a)(5) and, therefore, are subject to the same time constraints that apply to all of the other methods of formal discovery." Marvin Lumber and Cedar Co. v. PPG Indus., Inc., 177 F.R.D. 443, 445 (D.Minn. 1997). Therefore, where a party is aware

of the existence of information before the cutoff of discovery but fails to request such information until after the discovery deadline has passed, the discovery and subpoenas should be denied. Puritan Inv. Corp. v. ASLL Corp., 1997 U.S. Dist. LEXIS 19559, 1997 WL 793569 (E.D. Pa. 1997) (where party could not show information sought was unknown during discovery**,** party could not use trial subpoena to secure production of documents at trial); see Spencer v. Milton Steinman, 1998 U.S. Dist. LEXIS 16773, 42 Fed. R. Serv.3d 124 (E.D. Pa. 1998)(excluding two witnesses who were disclosed seven months after the close of discovery and one week after counsel has represented to the court that no additional discovery was necessary). When parties attempt to use subpoenas to obtain information just before trial, courts routinely find that "subpoenas [may not be used] improperly as a discovery device." Puritan Inv. Corp. v. ASLL Corp., 1997 U.S. Dist. LEXIS 19559, *5, 1997 WL 793569, *2 (E.D.Pa. Dec. 9, 1997) (documents should have been requested through formal discovery procedure).

Counsel has a duty to plan discovery so that it may be completed in a timely manner and to "inform the court *promptly* if unforeseen circumstances make compliance with the original deadline impossible." GLS, 1989 WL 144056*,* at *2 (emphasis added). To ignore discovery deadlines renders them meaningless and deprives the Court of the discretion needed to ensure "fair and orderly discovery." Clarke v. Mellon Bank, 1993 U.S. Dist. LEXIS 6680, *18, 1993 WL 170950*,* *5 (E.D.Pa. May 11, 1993). All fact discovery was to be complete by December 13, 2004. No motion was made to extend this deadline.

In Gantt v. Kenzade, Inc., 155 F.R.D. 102 (E.D. Pa. 1994), the court excluded twelve new fact witnesses who were disclosed for the first time in Plaintiff's pretrial

order, one month after the close of discovery. Id. at 103. Just as in this case, counsel in Gantt provided no "credible reason" as to why this information was not obtained and disclosed earlier. The Court held that the Defendants would be prejudiced because they would have to "take the time to depose these twelve witnesses, investigate any claims that they may make and prepare a defense to their testimony, while at the same time being prepared to go to trial shortly upon the completion of this additional discovery." Id. at 103. The Court determined that delaying the trial was not sufficient remedy to cure the prejudice and would further disrupt the other cases on the court's docket.

Likewise, in Spencer v. Milton Steinman, 1998 U.S. Dist. LEXIS 16773, 42 Fed. R. Serv.3d 124 (E.D. Pa. 1998), the court excluded two witnesses who were disclosed seven months after the close of discovery and a week after counsel had represented to the court that no further discovery was necessary. The court, relying upon Federal Rule of Civil Procedure 26, held that even though it subsequently delayed the trial date, this did not permit counsel to re-open the disclosure of additional witnesses. Id. at *4. The court stated that the "twin objectives promoted by the Rule, fairness to litigants and order in the litigation process, would be undermined" if litigants were permitted to reopen the designation of witnesses anytime the court rescheduled trial for a later date. Id. at *4-5. In addition, the court, citing the Third Circuit's Meyers factors, found that the disruptive effect of allowing the additional witnesses would be great and that if the court were to allow the additional witnesses, "fairness would necessitate" affording the parties an opportunity to depose the newly designated witnesses, to name additional witnesses themselves and to conduct additional discovery. Since, "this would result in the resetting of the specially listed trial date which was established with the consent of the parties" and

because the delinquent party failed to articulate a good reason why the parties were not designated earlier, the court denied the untimely addition of witnesses. Id. at *7.

Federal courts have inherent powers to manage their proceedings and to control the conduct of those who practice before them. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). "District judges have an arsenal of sanctions they can impose for unethical behavior. These sanctions include monetary sanctions, contempt, and the disqualification of counsel." Erickson v. Newmar Corp., 87 F.3d 298, 303 (9th Cir. 1996). In Chambers, the Supreme Court discussed the broad scope of a court's "ability to fashion an appropriate sanction for conduct which abuses the judicial process." Chambers, 501 U.S. at 44-45. Sanctions may be imposed for abuse of the judicial process when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Id. at 45-46 (emphasis added); accord Rogal v. American Broadcasting Co., Inc., 74 F.3d 40, 46 (3d Cir. 1996).

In this case, Defendants cannot offer any explanation for why they did not comply with the Court's Scheduling Orders. Plaintiff respectfully requests reasonable costs in preparing this motion to quash as a result of Defendants' flagrant disregard of the Court's Order.

Respectfully submitted,

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