

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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|---------------------|-----------------------------|
| KATHERINE SZARMACH, | : |
| Plaintiff, | : |
| | : |
| -vs- | : Civil No. 3:01cv699 (PCD) |
| | : |
| SIKORSKY AIRCRAFT, | : |
| Defendant. | : |

RULING ON DEFENDANT’S MOTION TO PRECLUDE WITNESSES

Defendant moves to preclude plaintiff from calling witnesses not disclosed in her trial memorandum dated March 22, 2002. For the reasons set forth herein, defendant’s motion is **granted**.

I. BACKGROUND

In the order setting pretrial deadlines, the discovery cutoff was set for October 23, 2001, dispositive motions were due November 22, 2001 and amended pleadings were due June 23, 2001. In response to the report of parties’ planning meeting filed August 14, 2001 pursuant to FED. R. CIV. P. 26(f), the discovery deadline was extended to January 21, 2002 and the dispositive motion deadline was extended to February 20, 2002.

In this Court’s Trial Preparation Order dated March 11, 2002, parties were required to list “all witnesses expected to be called, with a brief summary of the testimony of each.” As to any expert witness expected to be called, the parties were to provide “a statement of the area of expertise, attaching a curriculum vitae, if available; and the opinion to be expressed with a brief summary of the

basis for the opinion.” The parties were required to provide these disclosures by March 22, 2002, for a trial date of April 22, 2002.

On March 22, 2002, plaintiff filed a trial memorandum listing fourteen witnesses she anticipated calling at trial. At jury selection on March 26, 2002, plaintiff’s counsel was ordered to provide defendant the opportunity to depose plaintiff before trial. On March 27, 2002, plaintiff provided a response to defendant’s production request of December 5, 2001, listing seven witnesses not identified in her trial memorandum.¹

II. STANDARD

Sanctions for violation of a pretrial order are made “upon motion or the judge’s own initiative” pursuant to FED. R. CIV. P. 16(f). The rule provides that “[i]f a party or party’s attorney fails to obey a . . . pretrial order, the judge . . . may make such orders with regard thereto as are just.” *Id.* FED. R. CIV. P. 16(f) incorporates the sanctions available under FED. R. CIV. P. 37. *Hernandez v. Conriv Realty Assoc.*, 116 F.3d 35, 40 (2d Cir. 1997). Thus, a party failing to produce documents which are the subject of a discovery order may be precluded from presenting the same at trial. *Smith v Rowe*, 761 F.2d 360, 366 (7th Cir. 1985); *Rabb v Amatex Corp.*, 769 F.2d 996 (4th Cir. 1985). Although preclusion is “strong medicine,” it is necessary under the appropriate circumstances to ensure compliance with the rules of discovery. *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1367 (2d Cir. 1991). “Modern instruments of discovery serve a useful purpose . . . together with pretrial procedures [to] make a trial less a game of blind man’s buff and more a fair contest with the basic

¹ Defendant states that it filed a motion to compel responses on November 19, 2001. A motion to compel was returned for failure to comply with this Court’s Supplemental Order and was not refiled. There was thus no motion to compel discovery filed.

issues and facts disclosed to the fullest practicable extent.” *United States v. Procter & Gamble*, 356 U.S. 677, 683, 78 S. Ct. 983, 987, 2 L. Ed. 2d 1077 (1958).

III. DISCUSSION

Defendant moves to preclude the testimony of witnesses not disclosed in plaintiff’s trial memorandum. Plaintiff responds that she served her responses to interrogatories and requests for production at jury selection and has made “best efforts to provide the defendant with all available information,” thus the motion should be denied.

The relevant question is whether plaintiff has violated the trial preparation order. Under the circumstances, the inescapable conclusion is that plaintiff has violated the order. Plaintiff does not dispute that she failed to disclose the seven witnesses by the date ordered,² nor does she account for the failure to disclose the witnesses until almost two months after the discovery deadline had lapsed.³ She argues, however, that defendant has not been prejudiced by the delay.⁴ Requiring defendant to depose seven witnesses days before a trial is prejudicial to defendant’s fashioning a defense against plaintiff’s claims, more so in light of the fact that it was first informed of the identities of fourteen other witnesses within four weeks of trial that are not a part of this motion to preclude. It would be unjust to

² It is of no moment whether plaintiff provided her interrogatory response on the date of jury selection, March 26, 2002, or on March 27, 2002, as indicated on the document itself. In either case, her response was untimely and violative of the Trial Preparation Order.

³ Much is made in the motion of plaintiff counsel’s misapprehension as to plaintiff’s physical condition and ability to be deposed by defendant. The delay in permitting her deposition does not account for the substantial delay in responding to defendant’s other discovery requests.

⁴ Specifically plaintiff responds that “[a]lthough this is inconvenient, it is no less inconvenient for the plaintiff who performs discovery and as well responds to defendants’ many motions while also prepares [sic] for trial.” Plaintiff fails to consider that the motions may be prompted by her failure to respond to legitimate discovery requests.

require defendant to accommodate plaintiff's failure to disclose witnesses in a timely manner, *see Hernandez*, 116 F.3d at 40, and the trial date will not be delayed for purposes of allowing defendant to depose those witnesses. Plaintiff is therefore precluded from offering the testimony of those witnesses at trial who are not included in her trial memorandum.

IV. CONCLUSION

Defendant's motion to preclude witnesses (Doc. 27) is **granted**.

SO ORDERED.

Dated at New Haven, Connecticut, April ____, 2002.

Peter C. Dorsey
United States District Judge