IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

VERMEER MANUFACTURING COMPANY, Plaintiff, vs. THE TORO COMPANY, Defendant.	4:17-cv-00076-CRW-HCA ORDER GRANTING EMERGENCY MOTION TO QUASH SUBPOENAS

I. INTRODUCTION

Before the Court is Plaintiff Vermeer Manufacturing Company's ("Vermeer") Motion to Quash Subpoenas, filed on April 13, 2020 [216]. Defendant The Toro Company ("Toro") filed a resistance on April 16, 2020 [218]. Vermeer filed a reply on April 17, 2020 [219]. The Court considers the Motion fully submitted on the written briefs.

II. FACTUAL AND PROCEDURAL HISTORY

Fact discovery in this case was to be completed by March 31, 2020 [170]. Shortly before this deadline passed, the Court received an email from Vermeer's counsel on March 17, 2020. (Sealed Correspondence [201] at 3-4). Vermeer requested that the Court hold a status conference to discuss the impact of COVID-19 on the remaining depositions the parties already had scheduled. (*Id.* at 3). Vermeer asked that the fact discovery deadline with respect to depositions be moved to June 19, 2020. (*Id.*) Toro's counsel agreed that a status conference was necessary. Toro, however,

sought a stay of the case until the parties presented a joint proposed amended scheduling order. (*Id.* at 2).

The Court held a status conference on March 20, 2020 [204]. The Court discussed the issues with counsel, who indicated that the requested extensions sought were for the limited purpose of completing outstanding discovery requests and rescheduling depositions, made necessary because of the emerging complications resulting from COVID-19. Accordingly, the Court entered an Order granting the requested extensions later that same date. That Order states quite explicitly:

> Fact discovery shall be completed by June 19, 2020. This deadline is an extension for the parties to complete outstanding written discovery and reschedule needed depositions. This deadline extension does not confer the ability to serve new written discovery, which should have already been served to be compliant with the previous fact discovery deadline of March 31, 2020.

(Order [206] at 1). The Court also required the parties to:

> [F]ile a proposal detailing how they intend to complete outstanding discovery by March 30, 2020 in light of their concerns expressed in their emails to the Court as well as at today's status conference. The parties shall outline each outstanding deposition, when they are scheduled to be taken, and how they will be taken.

(*Id.*)

Consistent with the foregoing, the parties filed their joint proposal for completing discovery on March 30, 2020 [208]. Among other things, the proposal indicated that the following depositions would occur: "Brad Thomas, Vermeer 30(b)(6), Toro 30(b)(6), Third party depositions (Ditch Witch, Bobcat, Morbark, Ramrod)." (Notice [208] at 3).

The Court held another status conference on April 10, 2020 [215]. At that status conference, it was brought to the Court's attention that on April 9, 2020, Toro had served two new non-party subpoenas for depositions to take place in late April 2020. Vermeer's counsel asserted that these new non-party depositions were of individuals who were never disclosed in initial

disclosures, and were in direct contravention of the Court's March 20, 2020 Order extending the discovery deadline only for the limited purposed of completing outstanding discovery and rescheduling depositions. Furthermore, these non-party depositions had not been included in the parties' joint proposed filing on March 30, 2020 [208].

Toro's counsel asserted that the Court's March 20, 2020 Order generally extended the fact discovery deadline to June 19, 2020, and only limited new *written* discovery from being served. Toro's counsel also indicated that the two new individuals they sought to depose were disclosed in supplemental initial disclosures. Apparently Toro had included the two witnesses in its "second supplemental Rule 26(a)(1) initial disclosures," which were sent to Vermeer's counsel on April 10, 2020, and identified the subpoenaed individuals as having "discoverable information regarding the use of compact utility loaders in lawn and landscaping applications, purchasing decisions and the factors that drive customer demand." (Def. Exhibit [218-2] at 6-7). Toro's counsel indicated that they planned to call these individuals as witnesses at trial, and explained that the individuals were subpoenaed for depositions only to allow Vermeer an opportunity to depose them prior to trial. Accordingly, Toro's counsel indicated that they would withdraw the subpoenas if Vermeer did not want to take the depositions.

Despite the foregoing representations to the Court, Toro did not withdraw the subpoenas. Not only did Toro not withdraw the subpoenas for the two individuals already served, but Toro went the additional step of serving a third subpoena on another non-party on the evening of April 10, 2020, to depose that individual in late April 2020. In a letter sent between counsel, Toro's counsel indicated that they would not withdraw any of the subpoenas unless "Vermeer will stipulate that vertical lift is not a significant factor in customer demand[.]" (Pl. Exhibit D [216-5] at 2). In the same letter, Toro's counsel also indicates the following:

> In addition, Toro requests that Vermeer stipulate to the authenticity and prior art status of the following references for purposes of admissibility [five references identified]. If Vermeer is unwilling to enter into such a stipulation, it will be necessary for Toro to take depositions to establish these undisputed facts. Please let us know which you prefer.

(*Id.* at 2-3).

III. LEGAL STANDARD AND ANALYSIS

Vermeer argues that Toro's subpoenas of the three witnesses referenced above should be quashed because they amount to an effort to engage in untimely discovery after the March 31, 2020 deadline. *See generally* (Pl. Mot. [216]). Toro now concedes that the applicable discovery deadline was March 31, 2020, and the limited extension of that deadline to June 19, 2020 for discovery already served or scheduled is inapplicable to the instant subpoenas. *See* (Def. Brief [218] at 6) ("[T]he Court's March 20th Order did make clear that the extension was limited to completing outstanding written discovery and rescheduling needed depositions.").

Accordingly, Toro seeks to take discovery after the March 31, 2020 Scheduling Order deadline for completion of discovery by serving the subpoenas at issue. *See Ferreira v. Penzone*, No. CV-15-01845-PHX-JAT, 2018 WL 1706212, at *1 (D. Ariz. Apr. 9, 2018) ("Rule 45 subpoenas sought after the discovery cut-off are improper attempts to obtain discovery beyond the discovery period." (omitting internal quotations)). In substance, Toro is seeking to amend the Scheduling Order to allow additional discovery past the March 31, 2020 deadline. As a result, Toro must show good cause to extend the discovery deadline to allow the untimely depositions. *Petrone v. Werner Enterprises, Inc.*, 940 F.3d 425, 434 (8th Cir. 2019). "To establish good cause, a party must show its diligence in attempting to meet the progression order." *Id.*

The district court need not, and indeed may not, consider the degree of the prejudice to the party opposing modification until the party seeking it makes this "requisite showing." *Bradford v.*

DANA Corp., 249 F.3d 807, 809 (8th Cir. 2001); *Petrone*, 940 F.3d at 434 ("[T]he 'good-cause standard is not optional.'" (quoting *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 716 (8th Cir. 2008))). Once the noncompliant party makes the requisite showing of diligence, the Court may still deny the modification if the opposing party would be prejudiced by the requested modification. *See Marmo v. Tyson Fresh Meats, Inc*., 457 F.3d 748, 760 (8th Cir. 2006) (denying amendment sought within two months of trial because the district court would have to essentially start the case anew); *Afshar v. WMG, L.C.*, 310 F.R.D. 408, 411 (N.D. Iowa 2015) (denying amendment sought near the close of discovery because of the expense the opposing party would incur).

Toro mostly fails to even argue good cause for the Scheduling Order amendment. Instead, the bulk of Toro's brief focuses on the absence of prejudice to Vermeer in allowing the additional depositions. Toro does so by citing to *Morfeld v. Kehm*, 803 F.2d 1452 (8th Cir. 1986), which lays out the "four factors to be considered when ruling on a party's request to call a witness not included on a pretrial witness list." The *Morfeld* factors require the court to analyze (1) the prejudice to the opposing party in allowing witnesses to testify; (2) to the extent there is prejudice, the ability to cure it; (3) the impact that allowing the witnesses to testify would have on the orderly and efficient trial of the case; and (4) bad faith on the party seeking to have the witnesses testify. *Id.* at 1455.

Toro's reliance on *Morfeld* and its four factors misses the mark. This Order is only a determination as to whether the additional depositions will be permitted. Substantively, it determines whether the depositions will be treated as timely, so as to insulate Toro from later Rule 37 and related challenges. This Order does not determine whether any of the individuals that Toro

seeks to depose will be excluded from testifying at trial. Such a determination is reserved for Judge Wolle at a later date[1].

Toro all but concedes that it cannot make a showing of diligence in attempting to meet the Scheduling Order with respect to the additional depositions. Toro simply argues without explanation that it "promptly advised Vermeer that these witnesses were just recently identified during ongoing discovery and their testimony was needed to support Toro's defenses at trial." (Def. Brief [218] at 6). Toro also identifies that "Toro's current counsel were retained in the case in late December 2019, and have worked diligently since that time to review and comprehend the vast amounts of discovery that has taken place over the past seventeen (17) months." (*Id.* at 8). Toro then argues that Vermeer will not be prejudiced at trial by the depositions taking place as scheduled.

The Court finds that Toro fails to make the requisite showing of diligence[2]. Toro seeks to depose the three individuals at issue in an effort to "obtain customer testimony that the vertical lift design is not a significant factor in customer demand[.]" Toro fails to explain why it could not have obtained this type of testimony prior to the discovery deadline. The witnesses do not have unique insights about particular facts of the case, so the fact that they were "just recently identified" is of no moment. Toro also fails to explain why it could not have identified these witnesses at an earlier date. *See Ferreira*, 2018 WL 1706212, at *2 ("[C]ourts generally require a party to actually explain why it was unaware of the subpoenaed material before excusing a subpoena issued after

[1] A hurdle that Toro must overcome is to convince Judge Wolle that there is a valid and legitimate explanation as to why these third-party witnesses were not disclosed or even hinted to before the March 31 discovery deadline.

[2] Because Toro failed to meet the good cause showing, the Court need not evaluate any potential prejudice to Vermeer.

the discovery deadline, and a single statement—absent any explanatory facts—does not satisfy this standard.").

Likewise, under the circumstances of this case, Toro's decision to substitute counsel in and of itself is not probative of a showing of diligence in meeting the discovery deadline. *See Hagen v. Siouxland Obstetrics & Gynecology, P.C.*, 286 F.R.D. 423, 425 (N.D. Iowa 2012) ("[T]he addition of a new lawyer to this case does not, by itself, establish good cause . . . the defendants have had the benefit of experienced counsel throughout this case. They have failed to show that their team of attorneys justifiably neglected to conduct necessary discovery before the deadline.").

The Court notes that it is increasingly concerned by Toro's cavalier attitude toward this case and discovery deadlines. As correctly noted in Vermeer's moving brief, Toro's counsel has been granted numerous deadline extensions and accommodations precisely because Toro made the choice to substitute counsel in December of 2019. (Pl. Brief [216] at 5 n.3). Toro's behavior with respect to the non-party subpoenas at issue is alarming. Toro's service of the non-party subpoenas was in blatant disregard of the March 20, 2020 Order. Toro subsequently represented to the Court at the April 10, 2020 status conference that it would withdraw the depositions. Yet, hours later, Toro made an about-face and issued an ultimatum to Vermeer that it would not withdraw the depositions unless Vermeer stipulated that vertical lift does not drive customer demand. Not only that, Toro also served a third non-party subpoena for a deposition to elicit the same type of testimony. In the letter sent by Toro's counsel about these issues, Toro made overtures which appear to threaten that it would flout the discovery deadline by seeking additional untimely depositions unless Vermeer stipulated to a number of other facts.

If the Court were to amend the Scheduling Order to allow the three depositions at issue to take place, the Court would effectively authorize this concerning behavior. This would be especially prejudicial to Vermeer given Toro's statements about possibly engaging in untimely depositions. Vermeer should not be thrust into the position of participating in endless discovery because Toro's current counsel disapproves of what prior counsel did in this case. Substitution of counsel does not grant carte blanche to start the case anew.

Based on the foregoing, Vermeer's motion to quash the depositions [216] is **granted.** The subpoenas of Ryan J. McCarthy; Mark Jenkins; and Mark Detrick are quashed. These depositions will not take place. The Court also indicates that, absent extremely compelling circumstances, it will not allow any depositions not mentioned in the parties' joint proposal for completing discovery to go forward.

IT IS SO ORDERED.

Dated April 20, 2020.

Helen C. Adams
Chief U.S. Magistrate Judge