

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WAUSAU BENEFITS, INC.,

Plaintiff,

v.

MARK A. BALDINO

Defendant.

ORDER

05-C-007-C

On October 13, 2005 (at 6:28 p.m.), plaintiff filed a motion to extend the summary judgment motion deadline from October 14, 2005 to December 14, 2005. *See* dkt. 30. Plaintiff filed this motion in conjunction with its motion to compel discovery, dkt. 27. Defendant(s) did not respond.¹ I am granting the motion to compel and shifting its costs, but I am denying any extension of the summary judgment deadline.

Plaintiff filed this ERISA lawsuit on January 6, 2005, seeking repayment from defendant Baldino of about \$40,000 in plan costs arising out of an October 2003 auto accident for which Baldino received a settlement from the other party involved and his own car insurance company.

On July 22, 2005, plaintiff served its first set of written discovery demands on defendants, who on August 19, 2005 provided a written response peppered with objections. Telephone conversations between opposing counsel ensued, with a September 28, 2005 letter from plaintiff's attorney commemorating defendants' attorney's agreement to seek and provide

¹ Although there were three defendants when plaintiff filed its motion, now we are down to one because earlier today the court granted the Harris defendants' motion to dismiss. *See* dkt. 31.

any records that “track the history of the settlement proceeds . . .” Defendants, however, disclosed no additional information, nor did they respond to plaintiff’s subsequent proposed stipulation to extend the summary judgment deadline by 60 days. This led to an October 10, 2005 letter from plaintiff’s attorney warning that a motion to compel would follow shortly. And it did.

Pursuant to *Great-West Life v. Knudson*, 534 U.S. 204 (2002), plaintiff may attempt to determine if Baldino still possesses the disputed money in a form that would allow recovery, particularly since Baldino, in response to plaintiff’s hectoring, apparently agreed to look harder. Therefore, Baldino must provide more complete and specific answers to the contested discovery demands within ten days, namely by November 3, 2005. Failure timely to do so will lead to sanctions under Rule 37(b).

Plaintiff has asked for cost shifting on this motion. Cost-shifting is not a punishment, it is a make-whole proposition. Because I have granted plaintiff’s motion, I am ordering defendant to pay motion expenses reasonably incurred by plaintiff, absent some showing of substantial justification for not following up as agreed (which would be hard to establish in light of defendant’s failure to respond to the motion in the first place). *See* F.R.Civ. Pro.37(a)(4)(A). Plaintiff may have until October 28 within which to submit an itemized breakout of expenses incurred in filing its motion; defendant may have until November 4, 2005 within which to respond.

This may be a pyrrhic victory for plaintiff because I will not allow it any extra time to file a summary judgment motion. Plaintiff is in this bind because it failed to heed the clear warnings in the April 5, 2005 pretrial conference order:

Parties are to undertake discovery in a manner that allows them to make or respond to dispositive motions within the scheduled deadlines. The fact that the general discovery deadline cutoff, set forth below, occurs after the deadlines for filing and briefing dispositive motions is not a ground for requesting an extension of the motion and briefing deadlines.

Dkt. 18 at 4.

Plaintiff filed this lawsuit on January 6, 2005, and open discovery began in April following the pretrial conference. So why did plaintiff wait 3½ months to seek discovery of the information that forms the heart of this lawsuit? And once defendants provided their unsatisfactory responses, why did plaintiff let so much time slip away before seeking a motion to compel? The pretrial conference order warns against this as well:

This court also expects the parties to file discovery motions promptly if self-help fails. Parties who fail to do so may not seek to change the schedule on the ground that discovery proceeded too slowly to meet the deadlines set in this order.

Id. at 5.

The reasons for these warnings is that this court sets quick deadlines then sticks to them, practices that surprise some lawyers. Summary judgment motions always are due four months before trial because this leaves three months after briefing for the court actually to rule on such motions. It's not as if the court will spend three full months working on any particular motion, but with a court this fast and this busy, the motions often are stacked deeper than passenger jets

on the tarmac at Hartsfield-Jackson during Thanksgiving. If plaintiff didn't file its motion until December 14, then it would be talking to itself, because there is no way this court would have time to consider the motion before trial on February 13, 2006.² Therefore, a 60 day extension is out of the question. For plaintiff to wait until after close of regular business on the evening before its motion was due to broach its concerns to the court is too late. Plaintiff has failed to demonstrate any diligence or urgency that would cause this court to deviate from its well-advertised, virtually immutable scheduling practices.

In summary, it is ORDERED that plaintiff's motion to compel discovery and to shift costs is GRANTED, and its motion for a deadline extension is DENIED.

Entered this 24th day of October, 2005.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge

² By odd coincidence, under plaintiff's proposal, defendant's response time would straddle both Christmas and New Year's Day. Such an occurrence sometimes leads this court to otherwise uncharacteristic seasonal charity, which would slow down the briefing a bit more.