

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

TIMOTHY SCOTT ACKERMANN,

Plaintiff,

v.

JOHN POWERS,

Defendant.

ORDER

04-C-845-C

On June 14, 2005, defendant served a combined motion to dismiss for failure to prosecute and motion for summary judgment. See Dkt. 12. Defendant complains that plaintiff has not met any of his discovery obligations; therefore, this court should dismiss his lawsuit or grant summary judgment in defendant's favor.

Defendant has taken the wrong approach. As stated in the March 10, 2005 Preliminary Pretrial Conference Order, when a party believes that his opponent has not met his discovery obligations, first the parties must attempt to resolve the dispute between themselves, then one side or the other must file a discovery motion. See Dkt. 9 at 9. Apparently, defendant has taken no steps to resolve the discovery dispute, instead waiting for deadlines to pass and then seeking dismissal or summary judgment instead of some

intermediate sanction available under Rule 37. It may well be that the court ends up dismissing plaintiff's lawsuit for failure to provide discovery, but the court will not start with such a harsh sanction.

Defendant may file motions to compel discovery, to accept defendant's requests for admission as proved, to forbid plaintiff from calling an expert witness, and any other motion that is appropriate under the circumstances. Plaintiff shall have the usual five days to respond to any such motions. If the outcome of these discovery disputes provides a more legitimate basis for dismissal or summary judgment, then defendant may file new dispositive motions at that time.

ORDER

It is ORDERED that defendant's motion to dismiss or for summary judgment is DENIED WITHOUT PREJUDICE.

Entered this 16th day of June, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge