Not Reported in F.Supp.2d, 2004 WL 1765519 (E.D.Mich.)
(Cite as: 2004 WL 1765519 (E.D.Mich.))

United States District Court,
E.D. Michigan,
Northern Division.
Timothy MICHALIK, Plaintiff,
v.
HURON AND EASTERN RAILROAD COMPANY, Defendant.

No. 02–10105–BC.
July 30, 2004.

Dennis M. O'Bryan, O'Bryan, Baun, Birmingham, MI, for Plaintiff.

Phillip B. Maxwell, Phillip B. Maxwell & Assoc., PLLC, Oxford, MI, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR PERMISSION TO BE HEARD CONTRARY TO SCHEDULING ORDER AND DISMISSING MOTION FOR SUMMARY JUDGMENT

DAVID M. LAWSON, District Judge.

***1** The plaintiff, Timothy Michalik, commenced an action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51–60, to recover damages for injuries he claims he sustained while employed as an engineer for the defendant, Huron and Eastern Railroad Company. The plaintiff's claims are based on violations of the Safe Place to Work Doctrine; the Locomotive Inspection Act, 49 U.S.C. § 20701–3; and the Safety Appliance Act, 49 U.S.C. § 20301–6. On August 22, 2002, the Court entered a Case Management and Scheduling Order and later extended the deadlines established therein to accommodate the parties. Trial is now scheduled for August 3, 2004 and the final pretrial conference has been held. The defendant now seeks to file a motion for summary judgment out of time to argue that the complaint was not filed within the period of limitations found in 45 U.S.C. § 56. The Court has reviewed the defendant's submissions and finds that the relevant law and facts have been set forth in the motion papers and that oral argument will not aid in the disposition of the motion. Accordingly, it is **ORDERED** that the motion be decided on the papers submitted. *See* E.D. Mich. LR 7.1(e)(2). The motion is out of time and, as explained below, good cause has not been shown to relax the deadline. The Court therefore will dismiss the motion as untimely.

I.

The plaintiff filed his complaint on April 17, 2002. After the defendant answered, the Court conducted a scheduling conference with the parties present and on August 22, 2002 entered a Case Management and Scheduling Order. The case was subsequently dismissed without prejudice by agreement of the parties because of uncertainty about the plaintiff's medical condition and prospects for improvement. By stipulation, the Court reopened the case on June 30, 2003 and conducted another scheduling conference to establish new management dates.

On August, 18, 2003, a Revised Case Management and Scheduling Order was entered that required discovery to be completed by February 18, 2004 and dispositive motions to be filed by March 3, 2004. Subsequently, the Court granted in part the plaintiff's motion to amend the revised scheduling order, but the deadlines for discovery and for filing dispositive motions remained unchanged. The parties have been unable to resolve the matter without trial, so the Court held a final pretrial conference on July 1, 2004 and confirmed the trial date that previously had been established of August 3, 2004.

Apparently, the plaintiff's deposition had been commenced some time ago but never completed. The parties then presumably agreed to complete the plaintiff's deposition on July 8, 2004, well beyond the discovery and dispositive motion deadlines. The defendant claims it learned of evidence at this deposition that supports its request for summary judgement, and it filed its motion on July 13, 2004. Trial is scheduled to start on August 3, 2004.

II.

The Revised Case Management and Scheduling Order in this case was entered pursuant to Rule 16(b) of the Federal Rules of Civil Procedure, which requires the court to "enter a scheduling order that limits the time ... to file motions[ ] and ... to complete discovery." Fed.R.Civ.P. 16(b)(2), (3). Once entered, "[a] schedule shall not be modified except upon a showing of good cause and by leave of the district judge." Fed.R.Civ.P. 16(b); *see also Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir.2003). Moreover, a court may change a schedule "only 'if it cannot reasonably be met despite the diligence of the party seeking the extension.' " *Ibid.* (quoting Fed.R.Civ.P. 16, 1983 advisory committee's notes). Stated another way, "the primary measure of Rule 16's 'good cause' standard is the moving party's diligence in attempting to meet the case management order's requirements." *Inge v. Rock Financial Corp.*, 281 F.3d 613, 625 (6th Cir.2002) (quoting *Bradford v. DANA Corp.*, 249 F.3d 807, 809 (8th Cir.2001); citing *see also Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir.2000) (joining the Eighth, Ninth, and Eleventh Circuits)), *cited in Leary*, 349 F.3d at 906.

***2** The defendant contends that "new evidence" warrants an amendment to the dispositive motion deadline in this case. Indeed, after a party discovers new evidence, courts may grant the party's motion to amend a scheduling order when good cause is found as required by Rule 16. *See* 3 James Wm. Moore et al., *supra*, § 16.14[1][b] (3d ed.2003). The defendant's theory that supports its statute of limitations motion is that the vertebragenic injury claimed by the plaintiff is in truth an aggravation of an earlier, work-related injury that occurred more than three years before the complaint was filed. However, the defendant points to medical reports from January 14, 2004 and July 16, 1997 previously in its possession to support its argument, suggesting to the Court that the defendant was aware of the "underlying facts" that form the basis for motion before the scheduling order deadlines. *See Leary*, 349 F.3d at 907 (citations omitted); Def. Mot. Summ. J. Ex. C, G. Perhaps the plaintiff's testimony at the continued deposition rounded out the facts for the defendant's motion; but that deposition itself was completed out of time and cannot provide good cause for the failure to bring the motion within the time frame established by the revised scheduling order.

The Court notes in passing that the issue undergirding the defendant's statute of limitations defense (which was raised in its timely-filed affirmative defenses and mentioned as a legal issue in the proposed joint final pretrial order) is whether the injury alleged in the complaint was discrete, or merely an aggravation. The resolution of that issue appears to require medical testimony and is so fact-bound as likely not to be amenable to resolution on summary judgment in all events.

III.

The Court finds that the defendant has not demonstrated good cause to amend the revised scheduling order or to file its motion for summary judgment out of time.

Accordingly, it is **ORDERED** that the defendant's motion for leave to file an untimely motion for summary judgment [dkt # 40] is **DENIED.**

It is further **ORDERED** that the defendant's motion for summary judgment [dkt # 40] is **DISMISSED.**

E.D.Mich.,2004.
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