

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CV-2016-30

HEIDI J. WEST, PERSONAL)
REPRESENTATIVE OF THE ESTATE)
OF JESSE PURVES, et al.,)

Plaintiffs,)

v.)

SEAN HUSSEY,)

Defendant.

ORDER ON PLAINTIFFS’ MOTION
TO ENLARGE DISCOVERY
DEADLINES AND TO RECONSIDER
ORDER STRIKING EXPERT
WITNESS

This matter is before the Court on Plaintiffs’ motion to enlarge discovery deadlines and motion to reconsider order striking expert witness. Defendant Sean Hussey (“Hussey”) opposed the motion, and Plaintiffs timely replied. The Court heard oral argument on February 16, 2018. Counsel for both parties were present and were heard.

PROCEDURAL HISTORY

This case seeks recovery against Hussey for his alleged breach of a Noncompete and Non-Solicitation Agreement (“NSA”) that was allegedly entered into between Hussey and his former employer, Plaintiff Jesse Purves & Associates Wealth Management. Jesse Purves was initially another Plaintiff in this action. Mr. Purves died unexpectedly on August 1, 2017. Heidi J. West as personal representative of the estate of Jesse Purves was substituted as Plaintiff on January 30, 2018.

This action was filed in Superior Court on September 15, 2016, and accepted by the Business and Consumer Court on October 25, 2016. Harborview Investments initially was a

named Defendant. They subsequently were dismissed from this case by the Court's Order dated January 13, 2017 granting in part Plaintiffs' Rule 12(b)(6) motion.

On February 23, 2017, the Court entered Case Management Scheduling Order No. 1. All deadlines in the scheduling order were set by agreement of the parties. The scheduling order set forth a deadline of May 22, 2017 for Plaintiffs to designate experts and provide "a complete statement of the information and reports required by M.R. Civ. P. 26(b)(4)(A)(i)." It set a discovery deadline of August 22, 2017.

On May 25, 2017, three days after the expert deadline had passed, Plaintiffs filed a motion to extend that deadline by two weeks. The motion was granted without objection, making the new expert deadline June 9, 2017. Plaintiffs missed this deadline as well, as they did not retain an expert until June 14, 2017 and did not inform Hussey that they had retained an expert until June 16, 2017. Hussey moved to strike the expert designation on June 28, 2017 as untimely and on the substantive ground that the disclosure was inadequate under the requirements of M.R. Civ. P. 26(b)(4)(A)(i). The Court agreed with Hussey and granted his motion to strike in its order entered August 11, 2017.

Concurrent with their opposition to Hussey's motion to strike, Plaintiffs filed a motion to extend time to provide expert report and extend the discovery deadline. The Court granted that motion in part and denied it in part. In recognition of Mr. Purves's passing, the Court agreed to extend the discovery deadline to September 22, 2017. However, the Court did not grant the motion to extend time to provide expert report. Notwithstanding the one-month extension of the discovery deadline, Plaintiffs never conducted any discovery in this case, either before or after Mr. Purves passed away.

Plaintiffs filed a suggestion of death of Mr. Purves on August 7, 2017. Plaintiffs' former counsel, Attorney Anthony Sineni III, moved to withdraw on January 18, 2018, and the motion was granted on January 29, 2018. Plaintiffs' current counsel, Attorney Susan B. Driscoll, entered her appearance the following day, on January 30, 2018.

STANDARD OF REVIEW

“When a party moves for enlargement of time after the time for filing a pleading has expired, Rule 6(b) of the Maine Rules of Civil Procedure requires a showing of excusable neglect for that party to obtain the enlargement of time. ‘Determinations of excusable neglect are reviewed for errors of law or an abuse of discretion.’” *Camden Nat'l Bank v. Peterson*, 2008 ME 85, ¶ 16, 948 A.2d 1251 (quoting *Dyer Goodall & Federle, LLC v. Proctor*, 2007 ME 145, ¶ 18, 935 A.2d 1123).

Under M.R. Civ. P. 7(b)(5), a motion for reconsideration “shall not be filed unless required to bring to the court’s attention an error, omission, or new material that could not previously have been presented.” “Rule 7(b)(5) is intended to deter disappointed litigants from seeking ‘to reargue points that were or could have been presented to the court on the underlying motion.’” *Shaw v. Shaw*, 2003 ME 153, ¶ 8, 839 A.2d 714 (quoting M.R. Civ. P. 7(b)(5) advisory committee's notes to 2000 amend., 3A Harvey & Merritt, *Maine Civil Practice* 270 (3d, 2011 ed.)). “A motion for reconsideration of the judgment shall be treated as a motion to alter or amend the judgment.” M.R. Civ. P. 59(e). A trial court’s ruling on a motion for reconsideration is reviewable for an abuse of discretion. *Shaw*, 2003 ME 153, ¶ 12, 839 A.2d 714.

DISCUSSION

This Court enjoys substantial discretion in deciding motions for enlargement of time. *Camden Nat'l Bank*, 2008 ME 85, ¶ 18, 948 A.2d 1251. However, M.R. Civ. P. 6(b)(2) requires a showing of excusable neglect when the motion is brought after the expiration of the period prescribed by order.

Plaintiffs' motion argues that this is an important case that should be decided on the merits,¹ and that both sides would benefit from Plaintiffs being allowed the opportunity to obtain discovery. (Pl's Mot. 4-9.) Plaintiffs' summarize the substance of their complaint and why they should ultimately prevail (Pl's Mot. 5-7), and argue that the harm they will suffer if the discovery deadlines are not enlarged greatly outweighs the prejudice to Hussey if they are enlarged. (Pl's Mot. 8-9.) However, none of this is relevant to the issue before the Court on the instant motion; specifically, whether Plaintiffs' failure to comply with the agreed-to discovery deadline in this case was the result of excusable neglect.

Implicit in Plaintiffs' motion are two grounds on which the Court could find that Plaintiffs' failure to conduct discovery was the result of excusable neglect. First, Plaintiffs suggest that the discovery deadline of August 22, 2017 "allow[ed] just six months for discovery" and that "[f]or some reason, this fact intensive case. . . was placed on such a short track." (Pl's Mot. 2.) (*See also* Pl's Mot. 4 ("It is not clear why this case was fast tracked from the start."))

The Court disagrees with Plaintiffs' implication that the scheduling order in this case represented a "fast track." As is general practice in this Court, the deadlines in the scheduling order were by agreement of the parties. A six-month discovery period was proposed by counsel. There was nothing expedited about the scheduling order entered by the Court, and the discovery period

¹ The Court notes that Plaintiffs' decision not to pursue discovery within the court-ordered period—and this Court's decision to enforce that period—does not preclude a judgment on the merits. *Cf. State v. Poulin*, 2016 ME 110, ¶¶ 28-29, 144 A.3d 574.

was entirely sufficient **if prior Plaintiffs' prior counsel had diligently pursued discovery, which was not done here.** To the extent that Plaintiffs now question why the Court imposed what they characterize as a “fast track” schedule, the answer is that it is what they agreed to.² Regardless, Plaintiffs' failure to conduct any discovery during that six-month window belies any argument that it was an insufficient amount of time.

Plaintiffs also imply that Mr. Purves's passing justifies their failure to conduct discovery within the deadline. (Pl's Mot. 4, 9.) However, Mr. Purves did not pass away until August 1, 2017—less than three weeks prior to the August 22 deadline. Over five months had passed since the Court entered its scheduling order of February 23, 2017, memorializing the agreed-to discovery deadline. During that time, no discovery requests at all were served by Plaintiffs. Nonetheless, in recognition of Mr. Purves's passing, the Court did grant Plaintiffs a one-month extension of the discovery deadline and set a new deadline of September 22, 2017 in its order on Hussey's motion to strike, which was entered August 11, 2017. Plaintiffs failed to utilize this extension and did not serve any discovery requests before the extended deadline. In sum, Plaintiffs do not show how Mr. Purves's passing weeks before the close of discovery excuses their neglect in failing to conduct discovery over those previous five months, or during the one-month extension granted by the Court thereafter.

Under these circumstances, the Court cannot find that the Plaintiffs' failure to conduct discovery within the period prescribed in the scheduling order was the result of excusable neglect. M.R. Evid. 6(b)(2). Rather, it was the result of prior Plaintiffs' counsel failure to diligently and

² The Court makes clear that while it addresses the Plaintiffs as a unitary entity, as noted above, Mr. Purves passed away on August 1, 2017, and his former counsel withdrew on January 18, 2018, effective January 29. Attorney Driscoll did not enter her appearance until January 30, 2018. The failings identified here are entirely those of prior Plaintiffs' counsel and not of Attorney Driscoll.

appropriately prosecute this case. Plaintiffs' motion to enlarge discovery deadlines is therefore DENIED.

Plaintiffs' motion to reconsider order striking expert witness is premised on essentially the same grounds as the motion to enlarge discovery deadlines. (Pl's Mot. 9.) Although it is brought untimely under M.R. 59(e) (14 days to bring motion to alter or amend judgment), as Plaintiffs point out, in this case the 14-day deadline would have fallen during a period in which Mr. Purves had died but no personal representative had been named. The Court thus finds that Plaintiffs are excused from their late filing of the motion to reconsider and proceeds to consider the motion on its merits.

The Court DENIES the motion to reconsider its order granting Hussey's motion to strike. Plaintiffs offer three possible reasons why the expert designation was both untimely and inadequate under M.R. Civ. P. 26(b)(4)(A)(i): the "accelerated track," issues with prior counsel, or issues with Mr. Purves. (Pl's Mot. 9.) None of these possibilities represents an error, omission, or new material that could not previously have been presented. M.R. Civ. P. 7(b)(5). Nor do they explain why the expert designation was totally inadequate under the requirements of M.R. Civ. P. 26(b)(4)(A)(i). The Court understands Plaintiffs' new counsel's urge to reargue the motion to strike on which Hussey prevailed in July 2017. However, M.R. Civ. P. 7(b)(5) and the advisory notes thereto explicitly disallow reargument. M.R. Civ. P. 7(b)(5) advisory committee's notes to 2000 amend., 3A Harvey & Merritt, *Maine Civil Practice* 270 (3d, 2011 ed.).

CONCLUSION

Based on the foregoing it is hereby ORDERED:

That Plaintiffs' motion to enlarge discovery deadlines is DENIED.

That Plaintiffs' motion to reconsider order striking expert witness is DENIED.

The case will be scheduled for a telephonic status conference with counsel.

The Clerk is requested to enter this on the docket for this case, incorporating it by reference pursuant to M.R. Civ. P. 79(a).

Dated: March 7, 2018

_____/s_____
Richard Mulhern
Judge, Business and Consumer Court