IP 04-1746-C Y/K Roach v Pedigo
Magistrate Tim A. Baker Signed on 09/09/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DANIEL ROACH,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:04-cv-01746-RLY-TAB
	)	
PEDIGO HOLDINGS, INC.,	)	
PEDIGO CHEVROLET,	)	
BOB PEDIGO,	)	
	)	
Defendants.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DANIEL ROACH,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:04-cv-1746-RLY-TAB
	)	
PEDIGO HOLDINGS, INC., et al.,	)	
	)	
Defendants.	)	

DISCOVERY ORDER

This case raises a discovery scenario and resulting issue that warrants more than a passing mention. By way of background, the Court-approved Case Management Plan ("CMP") required liability discovery to be completed by August 22, 2005 and dispositive motions to be filed by September 22, 2005. On September 7, 2005, the Court held a status conference with counsel at which time Plaintiff orally requested an enlargement of time to take two depositions. Defendants objected, having timely deposed the Plaintiff, completed liability discovery, and being poised to file their summary judgment motion by the September 22 deadline.

Plaintiff offered no compelling reason in support of the requested enlargement of time. Plaintiff's counsel explained that he had delayed taking depositions in part because he thought the Plaintiff would soon file for bankruptcy. But Plaintiff has contemplated bankruptcy for many months, so this was not an unexpected contingency. It certainly provides no basis for Plaintiff not requesting -- prior to the expiration of the discovery deadline -- additional time to complete the discovery. And in any event, this case has been pending since October 22, 2004, and to date Plaintiff has made no meaningful effort to take any depositions.

In this district, it is not uncommon for parties to request a bit more time than originally contemplated by the CMP to complete discovery and to file dispositive motions. The Court typically grants such requests, provided that they are not objected to, are made prior to the expiration of the deadlines at issue, are supported by cause, and do not jeopardize a trial date. Even an objection is, more often than not, insufficient to prevent a modest enlargement of time.

The situation now before the Court is different. As the Seventh Circuit Court of Appeals recently discussed in Brosted v. Unum Life Insurance Company of America, __ F.3d __, 2005 WL 2043820 (7th Cir. Aug. 26, 2005), a party requesting an extension of time after the deadline "is required to show **excusable neglect** for failing to comply with the discovery deadline." (Emphasis added.) See Fed. R. Civ. P. 6(b)(2). In Brosted, the plaintiff sought an extension of time to take three depositions after the discovery deadline passed, claiming that he needed to wait until after the district court ruled on a pending protective order before proceeding with these depositions. The district court denied the plaintiff's motion. The Seventh Circuit explained that the untimeliness of the motion subjected it to the excusable neglect standard, and found that the district court did not abuse its discretion in denying the motion. The plaintiff failed to argue, much less establish, excusable neglect, "nor did he claim that he could not have deposed those witnesses within the discovery time period because of the pending motion for the protective order." Id. at __, slip op. at 3. See also Campania Management Co., Inc. v. Rooks, Pitts & Poust, 290 F.3d 843, 850-51 (7th Cir. 2002) (district court did not abuse its discretion in denying a motion to extend discovery filed nine days after the close of discovery).

Likewise, the Plaintiff in the case at bar did not argue excusable neglect until prompted by the Court at the status conference that Brosted established this as the appropriate standard. Even then, Plaintiff's counsel candidly admitted that Plaintiff's possible bankruptcy did not

establish excusable neglect for failing to make any meaningful effort to take these depositions since filing this action on October 22, 2004. Having opted to wait until after discovery closed to inquire about taking these depositions, Plaintiff subjected himself to the excusable neglect standard. Plaintiff cannot meet this standard. Moreover, Defendants' sedulous adherence to the CMP deadlines, and the need to timely address the anticipated summary judgment motion and to preserve the May 22, 2006 trial date, further weigh in favor of denying Plaintiff's request to re-open the time for liability discovery.[1]

As the foregoing reveals, Brosted is a timely reminder that parties who belatedly seek to extend the discovery deadline run the otherwise avoidable risk that they will be unable to establish excusable neglect. The safer approach is to seek the extension within the deadline, which merely requires the moving party to establish cause. The excusable neglect standard is by no means unreachable, but in the present case Plaintiff has failed to meet this burden. Accordingly, Plaintiff's request for additional time to compete discovery is denied.

Dated:

[1]As explained at the September 7 status conference, the Court would be willing to reconsider its decision if the Defendants fail to file their summary judgment motion by the September 22 deadline. However, during the September 7 conference, Defendants confirmed their intention to comply with this CMP deadline, which further supports holding Plaintiff to the agreed upon and Court-approved deadline for completing liability discovery.

Copies to:

Gregory Edward Bekes
GROTKE & BEKES
gbpc@att.net

Stephen L. Due
BINGHAM MCHALE
sdue@binghammchale.com

Allen Edward Grotke
GROTKE & BEKES
gbpc@att.net

Scott R. Leisz
BINGHAM MCHALE, LLP
sleisz@binghammchale.com

Michael W. Padgett
BINGHAM MCHALE LLP
mpadgett@binghammchale.com

John Robert Panico
GROTKE & BEKES
jrpanico@att.net