



SO ORDERED.

SIGNED this 12 day of October, 2005.

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.**

A handwritten signature in black ink, appearing to read "Richard Stair Jr.", written over a horizontal line.

**Richard Stair Jr.
UNITED STATES BANKRUPTCY JUDGE**

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 05-31363

KEITH RYAN HUMBARD

Debtor

KEITH RYAN HUMBARD

Plaintiff

v.

Adv. Proc. No. 05-3046

CAROLEE HUMBARD

Defendant

**MEMORANDUM AND ORDER ON OBJECTION
TO DEFENDANT'S IDENTIFICATION OF EXPERT WITNESS**

The matters before the court are (1) the Objection to Defendant's Identification of

Expert Witness (Objection) filed by the Plaintiff on October 4, 2005; (2) the Defendant's Response to Plaintiff's Objection (Response) filed on October 11, 2005; and (3) the Reply to Defendant's Response to Objection to Defendant's Identification of Expert Witness (Reply) filed by the Plaintiff on October 11, 2005.

The Plaintiff filed the Objection following his receipt of the Defendant's Supplemental Response to Interrogatories, dated September 29, 2005, stating as follows:

17. Identify by full name, present business address, business telephone number, and occupation or profession each person you intend to call as an expert to testify at the trial of this Adversary Proceeding and state the substance of the testimony you expect each such expert witness to provide.

ANSWER: Jim Willis, an expert insurance adjustor c/o Appalachian Claims Services, 301 E. First North Street, Morristown, Tennessee 37814, Phone Number is (432) 587-2916.

He asks the court to enter an order prohibiting the Defendant from calling Mr. Willis or any expert witnesses at the trial scheduled for October 17, 2005, arguing that (1) the Defendant did not timely identify any experts by the July 15, 2005 deadline imposed in the Report of Parties' Planning Meeting Pursuant to Fed. R. Civ. P. 26(f) (Report), incorporated into the Pretrial Order entered on June 6, 2005 (Pretrial Order), setting forth the results of the scheduling conference held on May 26, 2005; (2) the Defendant's disclosure does not comply with Rule 26(a)(2), requiring a written report concerning the expert; (3) the manner in which the Defendant made the disclosure was improper; and (4) the Plaintiff does not have ample time to prepare for examination of the expert, nor does he have time to find a rebuttal expert.

In her Response, the Defendant argues that she first learned that the roof contractor hired by the Plaintiff was his good friend at the Plaintiff's September 13, 2005 deposition. In her defense, the Defendant states that she requested the roofing contractor's telephone number and address from the Plaintiff but did not receive it, so she asked Mr. Willis to review the labor costs charged for the roofing work. With respect to his credentials, the Defendant argues that Mr. Willis has testified as an expert estimating roofing costs many times, and she would have provided that information to the Plaintiff had he simply requested it. Finally, the Defendant argues that the tight discovery scheduling and the Plaintiff's failure to provide the requested information led to the tardily identified expert.

In his Reply, the Plaintiff argues that the Pretrial Order, agreed to by the parties, required disclosure of experts by July 15, 2005. Furthermore, the Plaintiff avers that the Defendant could have deposed the Plaintiff prior to September 13, 2005, or she could have requested the identity of the roofing contractor in written discovery requests to the Plaintiff or through other appropriate discovery in compliance with the discovery plan.

The Pretrial Order provides that "[t]he discovery plan as provided in the parties' Report of Parties Planning Meeting is incorporated as part of this Pretrial Order except to the extent the dates provided therein conflict with this Pretrial Order." Through the Report, the parties agreed to provide all Rule 26(a)(1) disclosures by June 15, 2005, to disclose any expert witnesses in accordance with Rule 26(a)(2) on or before July 15, 2005, to provide any remaining Rule 26(a)(3) disclosures thirty days prior to trial, and to complete all discovery

on or before September 1, 2005. On August 3, 2005, the court entered an Agreed Order of Continuance, moving the trial date to its present setting and stating that “[e]xcept as modified herein, the Pretrial Order entered on June 6, 2005, shall continue to govern the trial of this adversary proceeding.”¹ With the exception of the Agreed Order of Continuance, the court has not entered any orders modifying the terms of the Pretrial Order, nor has either of the parties filed any pleadings seeking to modify the Pretrial Order or the dates set forth therein.

The Pretrial Order was entered pursuant to Rule 16 of the Federal Rules of Civil Procedure, applicable to adversary proceedings by virtue of Rule 7016 of the Federal Rules of Bankruptcy Procedure, which provides, in material part:

(b) Scheduling and Planning. . . . [T]he district judge . . . shall, after receiving the report from the parties under Rule 26(f) [²] or consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, . . . enter a scheduling order that limits the time

. . . .

(3) to complete discovery.

The scheduling order may also include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted[.]

. . . .

¹ The Agreed Order was entered following the Motion for Continuance filed by the Defendant on August 2, 2005.

² Rule 26 of the Federal Rules of Civil Procedure, which applies to adversary proceedings through Federal Rule of Bankruptcy Procedure 7026, governs basic pretrial discovery and disclosures. Rule 26(f) directs the parties to meet prior to a scheduling conference and “develop a proposed discovery plan that indicates the parties’ views and proposals[.]” and to prepare and file a written report with the court, outlining the plan. FED. R. CIV. P. 26(f).

. . . . A schedule shall not be modified except upon a showing of good cause and by leave of the district judge[.]

. . . .

(f) Sanctions. If a party or party's attorney fails to obey a scheduling . . . order, . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B)³

FED. R. CIV. P. 16(b).

Rule 16 was “designed to ensure that ‘at some point both the parties and the pleadings will be fixed.’” *Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir. 2003) (quoting FED. R. CIV. P. 16 Advisory Comm. notes (1983)). Nevertheless, the judge may allow a scheduling order to be modified for good cause. FED. R. CIV. P. 16(b). The primary factor in assessing good cause under Rule 16(b) is the diligence of the moving party to meet the scheduling order requirements; however, the court may consider other factors, such as whether the opposing party will suffer any prejudice by allowing the modification. *Inge v. Rick Fin. Corp.*, 281 F.3d 613, 625 (6th Cir. 2002). “A party demonstrates good cause for the modification of a scheduling order by showing that, even with the exercise of due diligence, he or she was unable to meet the timetable set forth in the order.” *Matrix Motor Co. v. Toyota Jidosha Kabushiki Kaisha*, 218 F.R.D. 667, 671 (C.D. Cal. 2003). “Carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief.” *Dilmar Oil Co. v. Federated*

³ Rule 37 sets forth the potential consequences and sanctions for failure to comply with discovery, including the court's entry of “[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence[.]” FED. R. CIV. P. 37(b)(2)(B).

Mut. Ins. Co., 986 F. Supp. 959, 980 (D.S.C. 1997).

Pursuant to the Pretrial Order, the deadline to disclose expert witnesses was July 15, 2005. On September 29, 2005, the Defendant disclosed to the Plaintiff, for the first time, her intention to call Mr. Willis as an expert witness. This disclosure, made seventy-six days after the deadline, is clearly untimely. Rule 16(b) clearly states that a Pretrial Order may be modified only for good cause and with leave of the court, and yet, the Defendant did not file a motion to modify the Pretrial Order to allow for the untimely disclosure of an expert witness. The Defendant's failure to comply with this requirement evidences a lack of diligence.

Moreover, the Defendant did not comply with Rule 26(a)(2)(B), which requires, along with disclosure of the identity of expert witnesses, a written report "contain[ing] a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." FED. R. CIV. P. 26 (applicable to bankruptcy proceedings by virtue of FED. R. BANKR. P. 7026). The Defendant has not provided this written report to the Plaintiff, and in fact, in her Response, seemingly discounted this requirement as permissive rather than mandatory. Once again, the

Defendant's failure to comply with the Federal Rules of Civil Procedure evidence a lack of diligence.

This lack of diligence convinces the court that good cause does not exist to modify the Scheduling Order to allow designation of Mr. Willis as an expert witness. Additionally, the court believes that the Plaintiff would likely be prejudiced if Mr. Willis is allowed to testify. The Plaintiff has, since July 15, 2005, prepared for trial under the presumption that the Defendant would not be calling any expert witnesses. If the court allows Mr. Willis to testify, the Plaintiff might possibly be required to hire a rebuttal expert witness on a limited timeline, considering that the trial is scheduled for next week. The Defendant has not established that good cause exists to modify the Scheduling Order to extend the deadline for disclosing expert witnesses, and, therefore, the Defendant may not call Mr. Willis or any other expert witnesses at the trial.

For the reasons set forth above, the court directs the following:

1. The Objection to Defendant's Identification of Expert Witness filed by the Plaintiff on October 4, 2005, is SUSTAINED.
2. The Defendant is prohibited from calling Jim Willis or any other expert witnesses at the trial of this adversary proceeding on October 17, 2005.

###