

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

MALCOM SMITH

Plaintiff,

v.

PATIENCE AJUZIE,

Defendant.

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CIVIL ACTION FILE
NO. 2012CV223874

**PLAINTIFF'S RESPONSE TO DEFENDANT PATIENCE AJUZIE'S
MOTION FOR CONTINUANCE FROM MAY, 2014 JURY TRIAL CALENDAR**

I. INTRODUCTION

Defendant's motion is frivolous.

II. THIS CASE IS READY FOR TRIAL.

This trial will be simple—it is a road-wreck trial about who made an illegal left turn. Plaintiffs filed the case on November 15, 2012, and there has been ample time for discovery. Both parties know which witnesses will say what. All that remains is to put them before a jury.

Defendant has received abundant notice of an upcoming trial. On at least three occasions, Defendant has received notice from the Court that this case was scheduled for trial in April or May, 2014. On July 2, 2013, the Court put the parties on schedule for a trial in April 2014. *See* 07/02/13 Amended Scheduling Order. Plaintiff reminded defense counsel of that fact on three separate occasions.¹ On March 26, 2014, the Court officially placed this case on the

¹ On February 25, 2014, after Defendant sought interlocutory appeal, Plaintiff reminded Defendant that “this case is set to appear on the April 2014 trial calendar.” *See* Pl.’s Objection to Immediate Appellate Review at 1. On March 4, 2014, after Defendant filed the previous motion to extend discovery, Plaintiff wrote that “Plaintiff hopes to try this long-pending case during the

Court's May 5, 2014 trial calendar. *See* 03/26/14 Notice of Trial. On April 4, 2014, the Court graciously informed the parties of a specific date upon which the trial would likely begin (i.e., May 13, 2014), and Plaintiff immediately communicated that information to Defendant. *See* 04/04/14, 1:07 pm Butler email (Ex. 2). Further, on April 24, 2014, Plaintiff emailed Ms. Willingham, and cc'ed Defendants, asking whether the Court preferred to receive the pretrial order, motions in limine, voir dire questions, and proposed jury charges by April 26 (i.e., ten days before "the call of the calendar" as specified in the Court's "Notice of Trial") or by May 3, "ten days before the probable trial date of May 13." *See* 04/24/14 Butler email (Ex. 3).

In sum, the trial date for this case has been well-announced. Defendant has received multiple notices that it would occur around this time. Plaintiff's lay witnesses have been informed of the May 13 date and subpoenaed. Plaintiff's expert witnesses have cleared their schedules for a May 13 trial. Plaintiff himself is eager for this long-awaited trial and recognizes that, in the event that he makes any recovery, the proceeds will provide more medical benefits if they arrive sooner rather than later. There has been ample time for discovery and offers of settlement. This case should proceed.

Given the simplicity of this trial, the length of time for which the case has been pending, the ample notice of the trial date, and the preparations already undertaken by Plaintiff's witnesses to attend trial on May 13, there is no excuse for a continuance.

Court's May 2014 trial calendar." *See* Pl.'s Resp. to Def.'s Motion to Extend Time. On March 17, 2014, in response to Defendant's filings in the Court of Appeals, Plaintiff stated that "Plaintiff reasonably hopes to try the case on trial court's three-week trial calendar in May 2014." *See* Pl.'s Resp. to Application at 18 (Ex. 1).

III. DEFENDANT'S REASONS ARE NOT VALID.

A. Officer Williams

Defendant claims to need a continuance because Defendant “has been diligently attempting to obtain the deposition of the investigation officer, J.L. Williams,” but has failed to secure that deposition. Def.’s Mot. at 2. Plaintiff has limited knowledge of whatever efforts Defendant has taken to secure the deposition, but Plaintiff’s counsel has found Officer Williams—whose wreck report is adverse to Plaintiff—nothing but cooperative. Plaintiff’s counsel personally met with Officer Williams on January 24, 2014 and again on March 20, 2014. On March 20, the undersigned’s office obtained an affidavit from Officer Williams. *See Williams Aff. (Ex. 4)*. Because of the difficulty that Defendant claimed to be having in locating Officer Williams, Plaintiff produced that affidavit to Defendant on March 26, 2014 to show that (1) Officer Williams was not attempting to avoid the lawyers in this case, and (2) Officer Williams did not remember enough to be an important witness anyway.² *See 03/26/14 Butler email (Ex. 5)*.

Immediately after obtaining that affidavit, Plaintiff sought to ensure that this case would not be delayed because of Officer Williams. Plaintiff expressly urged Defendant to take Officer Williams’s deposition quickly so to avoid any delay of the trial. *04/02/14, 6:51 pm Butler email (Ex. 6)*. On April 2, 2014, Plaintiff asked whether Defendant intended to depose Officer Williams. *Plaintiff expressly explained that Plaintiff was trying to avoid a continuance:*

² Because such an affidavit constitutes nondiscoverable work product, Plaintiff would not normally produce it. Here, however, Plaintiff was attempting to demonstrate to Defendant that it would be inappropriate to delay the trial on the basis of a Williams deposition.

From: Jeb Butler
Sent: Wednesday, April 02, 2014 6:51 PM
To: 'Trevor Hiestand'; 'Rakhi McNeill'
Cc: Betht Telgenhoff; Kate Dondero
Subject: RE: Smith v Ajuzie: Affidavit

Trevor and Rakhi, does Defendant intend to depose Officer Williams? If yes, we should schedule that deposition on an accelerated basis.

What I'm trying to avoid is getting down the road near trial and having someone ask the Court for a continuance because Officer Williams has not been deposed.

04/02/14 Butler email (emphasis added) (Ex. 6). Defendant did not respond.

Two days later, on April 4, 2014, Plaintiff asked again if Defendant was going to insist on deposing Officer Williams. Since Plaintiff had been able to easily establish contact with Officer Williams, Plaintiff *offered to help secure the deposition if it would be "necessary in order to move this case along."* 04/04/14, 2:14 pm Butler email (Ex. 7). Plaintiff wrote:

From: Jeb Butler
Sent: Friday, April 04, 2014 2:14 PM
To: 'Trevor Hiestand'; 'Rakhi McNeill'
Cc: Betht Telgenhoff; Kate Dondero
Subject: RE: Smith v Ajuzie: Affidavit

Does Defendant intend to seek any continuance or otherwise delay the trial on the grounds that Officer Williams has not been deposed? If so, please let me know as soon as possible. If it is necessary in order to move this case along, my office can assist in getting Officer Williams deposed.

Id. (emphasis added). Defendant ignored the email and Plaintiff's offer to help secure the deposition. Then, three weeks later, Defendant sought a continuance.

In sum, Plaintiff has (1) met with Officer Williams multiple times, (2) urged Defendant to depose Officer Williams on a timely basis, (3) acquired and produced an affidavit from Officer Williams, (4) twice asked whether Defendant intended to seek a continuance because Officer Williams had not been deposed, and (5) offered to assist Defendant in getting Officer Williams deposed. Defendant ignored each of Plaintiff's entreaties. Even though Plaintiff warned

Defendant three weeks ago that “[w]hat I’m trying to avoid is getting down the road near trial and having someone ask the Court for a continuance because Officer Williams has not been deposed,” Defendant has now done just that—ignored Plaintiff’s warnings and offers of assistance, waited three weeks, then asked for a continuance. That is not proper.

Further, Officer Williams is not likely to be an important witness. He testified by affidavit that he “did not do an accident reconstruction and ha[s] no training in accident reconstruction,” that he does not remember “what [the witnesses] said,” that he “ha[s] no memory of tire marks on the scene,” that he does not recall the precise orientation of the vehicles after the wreck, and that he does not recall anything about the debris on the scene except that it was “generally around the vehicles.” Williams Aff. at ¶ 4, 6-9 (Ex. 4). In sum, Officer Williams has no basis upon which to testify about what happened in this wreck. Further, he testified by affidavit that he recalled no uninvolved eyewitnesses except Bruce Guillory, Kevin Radcliffe, and Keisha Neal—but *each of those eyewitnesses has testified in deposition that Officer Williams’s wreck report is incorrect.* *Id.* at ¶ 5; see Pl.’s First Mot. in Limine (describing deposition testimony of Guillory, Radcliffe, and Neal) (Ex. 8). For that reason among others, Officer Williams’s wreck report is inadmissible at trial. *See* Pl.’s First Mot. in Limine (wreck report is inadmissible) (Ex. 8); O.C.G.A. § 24-8-803(8)(C) (reports inadmissible where “the sources of information or other circumstances indicate lack of trustworthiness”). That does not leave much for Officer Williams to say—as he testified by affidavit, “aside from [the wreck report], I don’t remember many details.” Williams Aff. at ¶ 3 (Ex. 4).

In sum, Officer Williams has been available. Defendant has ignored Plaintiff’s questions as to whether Defendant wanted to depose Officer Williams and ignored Plaintiff’s offer to help obtain the deposition. Defendant also declined to provide the Court with the affidavit obtained

by Plaintiff which proves that Officer Williams is unlikely to be an important witness anyway. Defendant is not now entitled to a continuance to take the deposition that Plaintiff offered to help Defendant take three weeks ago.

B. Mediation

Defendant claims to need a continuance because “mediation was not scheduled.” Def.’s Br. At 1. The reason a mediation “was not scheduled” is that Defendant ignored Plaintiff’s repeated requests to schedule one before the Court’s previous mediation deadline. *See* 10/21/13 Order (setting mediation deadline of February 28, 2014). Plaintiff began asking about the mediation on February 6, 2014:

From: Jeb Butler [<mailto:Jeb@butlerwooten.com>]
Sent: Thursday, February 06, 2014 5:24 PM
To: Trevor Hiestand
Cc: Leigh May; Kate Dondero
Subject: Smith v Ajuzie: court-ordered mediation

Trevor, I meant to mention the court-ordered mediation with you today at the deposition but I forgot. Plaintiff is open to going ahead and getting the mediation done. What is Defendant’s position?

02/06/14 Butler email (emphasis added) (Ex. 9). Defendant declined to mediate at that time.

Plaintiff raised the issue again on February 9:

From: Jeb Butler
Sent: Sunday, February 09, 2014 3:40 PM
To: Trevor Hiestand
Cc: Beth Telgenhoff
Subject: Re: Smith v Ajuzie: court-ordered mediation

Plaintiff suggests that we go ahead and set a date so that we don't miss the Court's deadline. If Defendant wants to move for an extension of the deadline, Plaintiff will not oppose that motion.

02/09/14 Butler email (emphasis added) (Ex. 10). Defendant did not respond. Plaintiff followed up by offering a specific mediation date on February 17. 02/17/14 Butler email (Ex. 11). Defendant ignored that email. On February 20, Plaintiff left a voicemail for defense counsel and confirmed with an email. 02/20/14, 3:41 pm Butler email (Ex. 12). The parties spoke on the phone, Defendant again refused to mediate the case, and Plaintiff confirmed the conversation with an email:

From: Jeb Butler
Sent: Thursday, February 20, 2014 4:17 PM
To: 'Rakhi McNeill'; 'Trevor Hiestand'
Cc: Betht Telgenhoff
Subject: RE: Smith v Ajuzie: court-ordered mediation

Rakhi, please allow this email to confirm our phone conversation of a few minutes ago.

1. You indicated that Defendant intends to seek immediate appellate review of the Court's recent order on Defendant's motion to enforce a settlement. Plaintiff does not agree that immediate appellate review is warranted but I do appreciate the heads-up.
2. You indicated that Officer Williams was still not working full time for the City of Atlanta, which complicated your efforts to serve him with a deposition subpoena, but indicated that he was expected to start there at the end of February. I said that if he did not come back to work with the City at the end of this month as expected, so you might need to serve him by other means so that the deposition could go forward.
3. You indicated that no mediation would occur on Monday, February 24. I said that if Defendant sought an extension of the mediation deadline (but not an extension on our trial calendar), Plaintiff would not oppose it.
4. You indicated that Defendant would want to depose Erica Malone, for whom Plaintiff served an updated address on 02/11/14. As I indicated on that date, Plaintiff has no objection to Defendant taking that deposition.
5. You indicated that Defendant was considering seeking a teleconference or status conference with the Court, and I said that sounded like a good idea to me.

Thank you for your call. I do not remember if I expressly made this point over the phone, but Plaintiff would oppose any continuance of our trial.

From: Jeb Butler
Sent: Thursday, February 20, 2014 3:41 PM
To: 'Rakhi McNeill'; Trevor Hiestand
Cc: Betht Telgenhoff
Subject: RE: Smith v Ajuzie: court-ordered mediation

Please allow this email to confirm that I just left Trevor a voicemail essentially reiterating the below.

From: Jeb Butler
Sent: Monday, February 17, 2014 9:51 AM
To: Trevor Hiestand
Cc: Betht Telgenhoff
Subject: RE: Smith v Ajuzie: court-ordered mediation

Plaintiff is available for mediation on Monday, February 24.

02/20/14, 4:17 pm Butler Email (emphasis added) (Ex. 13). (As noted above in orange, Plaintiff expressly opposed any continuance.)

In sum, Plaintiff offered to mediate this case in compliance with the Court's previous Order on four occasions, and Defendant repeatedly refused. Now Defendant seeks a continuance to do what Defendant previously refused to do—asserting that Defendant should “be allowed the opportunity.” Def.'s Br. At 2. **That opportunity has come and gone.**

If Defendant wants to settle this case, Defendant can send Plaintiff an offer. As the Court can well imagine, the law firm representing Plaintiff has settled hundreds if not thousands, of cases—we know how to do it. (Mediation has helped in but a small fraction of those settlements.) Plaintiff requests that Defendant make the offer in writing and send it by post, fax, or email at any time that is convenient for Defendant. Plaintiff is willing to listen. With experienced counsel such as Mr. Trevor Hiestand and the undersigned James E. Butler Jr., mediation is normally unnecessary anyway—both attorneys are more than capable of valuing a case and swapping numbers the old-fashioned way without the time, expense, and delay associated with mediation. Defendant is not now entitled to a continuance on the basis of wanting a mediation that Defendant has repeatedly refused. That is nothing but a pure delaying tactic.

C. Leave of Absence

Defendant seeks a continuance because Ms. Rakhi McNeill is “currently” filing a leave of absence that will last until July 14, 2014. Def.'s Br. at 3. Plaintiff offers best wishes to Ms. McNeill. However, this leave of absence should not result in a continuance of the trial for two reasons.

First, the lead attorney for the defense is Mr. Hiestand, not Ms. McNeill (although she is talented and capable). Mr. Hiestand is the partner on the case, has taken most of the depositions

in the case, and gave oral argument at the only hearing in the case to date. He is more than capable of handling this simple trial and, if necessary, bringing another associate up to speed.

Second, the nature of Ms. McNeill's leave is one that could have been predicted, and planned for, much more than two weeks in advance. Delaying the formal request for leave until two weeks before the trial is not grounds for a continuance.

IV. CONCLUSION

Plaintiff respectfully requests that the Court deny Defendant's request for a continuance and proceed with the May 13 trial as scheduled.