

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE  
PREVENTION OF CRUELTY TO  
ANIMALS *et al.*,

Plaintiffs,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

Civil Action No. 03-2006 (EGS/JMF)

MEMORANDUM ORDER

A Stipulation between the parties, dated September 2, 2004, provided that:

The parties will make all disclosures required by Federal Rule of Civil Procedure 26(a)(2)(B), as modified or limited by this Stipulation, on the schedule set forth in the Second Stipulated Pre-Trial Schedule. In addition, the parties will supplement such disclosures, to the extent necessary, no later than ten (10) business days before an expert's deposition.

Stipulation Limiting the Scope of Expert Discovery ("Stip.") at 2

There is no dispute that plaintiffs served what they called a supplemental report, authored by Dr. Ros Clubb, ten calendar days in advance of her deposition, as opposed to the ten business days specified in the Stipulation. Plaintiffs' Opposition to Defendant's Motion to Strike the Supplemental Report of Dr. Ros Clubb at 7 n.2. In that same footnote, they note that defendant, Feld Entertainment, Inc., ("FEI"), has not claimed any prejudice from their "minor and unintentional deviation." Id.

Unfortunately for plaintiffs, prejudice is irrelevant. It is unequivocally the law of this Circuit that Rule 6(b) of the Federal Rules of Civil Procedure means what it says: an untimely submission must be accompanied by a motion that establishes excusable neglect for the failure to make a timely submission. Smith v. District of Columbia, 430 F.3d 450, 456 (D.C. Cir. 2005). Cf. Inst. for Policy Studies v. U.S. C.I.A., 246 F.R.D. 280 (D.D.C. 2007). Since no such motion was filed, and no showing of excusable neglect was made, the report to which FEI objects must be stricken.

I appreciate that trial in this case is roughly one week away. Because I know that Judge Sullivan will have many other matters to resolve, I will, at the risk of *obiter dicta*, explain to him why I would strike Clubb's supplemental report even if it had been timely submitted to the lawyers for FEI.

My order of December 18, 2007 required the parties to comply with the requirements of Rule 26(a)(2) as to all their intended experts by the dates specified in the order. That meant that that the plaintiffs were to file their expert reports by January 21, 2008 and the defendants were to comply with same rule by February 21, 2008. The deadlines set were extended on several occasions but it is notable that the order as issued did not contemplate any rebuttal reports by either party. To the contrary, the order indicated that on February 22, 2008, the date after FEI submitted its expert reports, a 60-day period of expert discovery would begin so that all discovery would end on April 22, 2008. As the author of that order, I can assure the parties that I never contemplated that there would be rebuttal reports by either side. Had I thought there were going to be such reports, I would have set deadlines for their submission and started the expert discovery period only after they had been submitted. I would have wanted each party to have all

reports, initial and any rebuttal, before they took the depositions of the experts. I certainly would not have started expert depositions if I knew that the parties, without saying a word in response to the order I issued, contemplated submitting rebuttal reports after the expert discovery period had begun.

Moreover, if one read my order of December 18, 2007 to incorporate by reference those portions of Rule 26 of the Federal Rules of Civil Procedure that pertain to expert witnesses, the result is the same. The rule contemplates that the parties submit their expert report pursuant to a controlling court order and, failing a stipulation or court order, that must be done at least 90 days before the date set for trial. Fed. R. Civ. P. 26(2)(C)(i). If a second report “is intended to contradict or rebut evidence on the same subject matter,” it must be filed within 30 days of the other party’s report. Fed. R. Civ. P. 26(2)(C)(ii).

That section of Dr. Clubb’s report which is new certainly meets the latter definition: it is unquestionably designed to contradict or rebut the evidence in the report and deposition testimony of Dr. Field, plaintiffs’ expert. Hence, even if my order contemplated rebuttal reports (and it did not), Dr. Clubb’s report was due 30 days after plaintiffs got Dr. Field’s report. Plaintiffs have not and cannot contend that they met that deadline.

Finally, it is no answer for plaintiffs to invoke the 2004 stipulation, quoted above, assuming for the sake of the argument, it survived my December, 2007 order, which spoke comprehensively to the issue of expert report disclosure and discovery and which was entered without objection and with the consent of the parties. The stipulation provided: “In addition, the parties will supplement such disclosures, to the extent

necessary, no later than ten (10) business days before an expert's deposition." Stip. at 2. The word "supplement" is not defined but the Federal Rules themselves define the circumstances under which a supplemental expert report must be filed. The party who has submitted an expert report must supplement it when it learns that "in some material respect the disclosure or response is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A). Thus, the Federal Rules contemplate only three kinds of expert reports: an initial report, a rebuttal report, and a supplemental report. Most importantly for our purposes, while a party may file a rebuttal report, it may only file a supplemental report when its other reports are incomplete or incorrect.

No one is pretending that Dr. Clubb's supplemental report is being submitted because she made some error that she must correct; to the contrary, she wants to impeach or rebut what Dr. Fields has said. Her report is certainly not a supplemental report as the Federal Rules define such a report. It is, if anything, a rebuttal report that was not permitted by the order I issued pertaining to expert discovery. Furthermore, it was late, even if my earlier order could be construed to permit rebuttal reports. It is therefore, hereby,

**ORDERED** that the Motion to Strike Dr. Clubb's Supplemental Report and Request for Expedited Consideration of Motion [#333] is **GRANTED**.

**SO ORDERED.**

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/S/  
JOHN M. FACCIOLA  
UNITED STATES MAGISTRATE JUDGE

Dated: October 10, 2008