

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 13, 2020 at 11:00 a.m.

1.	<u>18-25001</u> -E-7 <u>18-2187</u> BLACK V. AKINS	JOSEPH AKINS NBL-1 Sheila Nelson	MOTION TO MODIFY SCHEDULING ORDER 7-2-20 [<u>87</u>]
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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant-Debtor on July 2, 2020. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion to Modify Scheduling Order has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Modify Scheduling Order is granted.
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Dominique Black ("Plaintiff") commenced this action on November 13, 2018 by filing an adversary complaint objecting to the discharge of Debtor and Defendant Joseph H. Akins ("Defendant") pursuant to 11 U.S.C. § 727 as well as seeking a determination of the dischargeability of debts pursuant to 11 U.S.C. § 523.

Plaintiff respectfully requests this Court issue an order modifying the Scheduling Order filed in the above-captioned adversary proceeding on October 29, 2019 by continuing the close of non-expert discovery for (90) days following hearing on this motion.

REVIEW OF THE MOTION AND DECLARATION

Plaintiff's request is based on his ability to meaningfully participate in this case, including assisting in preparation of discovery due to business responsibilities and being personally affected by COVID-19.

Plaintiff testifies that he was unable to assist in the preparation of discovery requests and taking the deposition of Defendant due to increase of responsibility in the operations of his business (with a reduced workforce due to stay at home orders) which provides staffing and support for biopharmaceutical companies working to provide virus and disease prevention vaccines, medications, and treatments; the death of Plaintiff's mother due to the COVID-19 virus; and lastly, Plaintiff's office was closed due to the state's and county's shelter in place orders between mid-March 2020 and May 2020 blocking Plaintiff's access to this case's litigation files. Declaration, Dckt. 89.

Plaintiff argues that he has been diligently prosecuting this case. During the present COVID-19 period, Plaintiff provided responses to Defendant's discovery requests; and was preparing supplemental responses to requests before the passing of his mother due to COVID-19 (for whom he was the primary caregiver). *Id.*, at ¶¶ 17-25. Plaintiff further argues that he believed he had sufficient time to propound discovery and take Defendant's deposition in person prior to the May 2020 deadline but that the COVID-19 pandemic was unforeseeable. *Id.*, at ¶ 30. The closure of offices and the increase in operations for his business prevented Plaintiff from committing his resources at the level he anticipated including conducting discovery between mid-March and deadline of May 30. *Id.*, at ¶ 13.

Plaintiff seeks the requested extensions in order to propound paper discovery, conduct third-party discovery, and conduct an in-person deposition of Defendant. The only discovery completed so far in this case is Defendant's propounded paper discovery requests in 2019.

Plaintiff asserts that the modification of the scheduling order will not prejudice Defendant or impact the court's calendar on the basis that no trial date has been set in this matter and the pre-trial conference is not scheduled until October 29, 2020.

DEFENDANT'S OPPOSITION

Defendant filed an Opposition on July 29, 2020 opposing the modification of the Scheduling Order on the basis that Plaintiff's Motion is untimely and fails to show good cause for such change and the facts as presented by Plaintiff show an absence of diligence. Dckt. 93.

First, the dates were previously agreed to by all the parties and the order was set back in October 2019. Defendant cannot show good cause neither on his declaration or the Motion as to why no discovery was propounded between October 2019 and February 2020, well before the March 21, 2020 stay-at-home order.

Moreover, Plaintiff with knowledge of the impediments listed above, did not seek to modify the time line before the cutoff date of May 30, 2020. Defendant argues that, as shown by Plaintiff's motion, the failure to propound discovery and seek timely modification of the order was an intentional and deliberate tactic. Defendant contends that a review of the court dockets, including those for appellate courts, identify that Plaintiff was actively participating as a pro per appellant during the

relevant time period and that delay is a persistent pattern he repeats over and over again.

Defendant further contends that regardless of Plaintiff's issues nothing interfered with counsel's ability, in those five months, to have propounded discovery or to seek a modification of the discovery deadline cutoff date.

Defendant notes that despite knowledge of the impediments identified by Plaintiff, nothing shows why the instant motion to modify the scheduling order was not sought before July 2, 2020 or before the May 30, 2020 cutoff date. Defendant contends that the instant motion is an abuse of court resources and is not justified as it should have been filed before the deadline expiration.

PLAINTIFF'S REPLY

Plaintiff filed a Reply on August 6, 2020. Dckt. 95. Plaintiff asserts that Defendant passed on January 1, 2020, and yet Defendant's Counsel failed to notify and actively concealed this information from Plaintiff. Plaintiff notes that a Notice of Death was filed in the bankruptcy case on June 23, 2020 disclosing that Defendant had passed away "within the last 60 days" of the Notice, or on or after April 24, 2020. Further noting that the Proof of Service for the Notice was served on Special Notice party Erin McCartney and Chapter 7 Trustee Sheri Carrello but not served upon Plaintiff or Plaintiff's Counsel, and that no such notice was filed in the present adversary proceedings.

On May 28, 2020, counsel for Plaintiff sent an email to Defendant's Counsel asking if Defendant would stipulate to a modification of the Court's October 29, 2019 Scheduling Order and inquiring as to taking Defendant's deposition. In her Response, Defendant's Counsel opposed the modification and failed to inform Plaintiff about Defendant's passing having had knowledge of it since at least April 24, 2020.

On June 3, 2020, counsel for Plaintiff received Defendant's responses to Plaintiff's paper discovery which included a notation that Defendant was "(deceased)" but no other statement regarding his death. *Id.*, Exhibit 3, at p. 16.

On July 21, 2020, after Defendant's Counsel failed to reply to an email inquiring as to Defendant, Plaintiff's counsel again emailed Defendant's Counsel to which she replies "Nick that information was provide [sic] months ago." *Id.*, Exhibit 4, at p. 21. Through a series of properly authenticated emails, Plaintiff documents his efforts to obtain additional information such as date that Counsel was informed of her client's passing, who was the estate's representative, and whether probate proceedings had initiated. See, *Id.*, at pp. 21-36. According to Plaintiff, the emails show Defendant's Counsel's lack of answers and delays in providing information. *Id.*

At the time Plaintiff filed his Motion, Plaintiff was requesting additional time to complete paper discovery and conduct Defendant's deposition. However, in light of Defendant's passing, Plaintiff requires additional time to investigate any other witnesses that may be called by Plaintiff or Defendant as witnesses or rebuttal witnesses now that Defendant is unavailable to testify; investigate whether Defendant made any statements, sworn or unsworn, to any other person at or before the time of his death back on January 1, 2020; and investigate Defendant's estate and any proposed or completed transfers of property since Defendant's death.

As to Defendant's argument that Plaintiff has not shown good cause to warrant a

modification of the order, Plaintiff argues that Plaintiff has been diligent in prosecuting this case by assisting the court in creating said scheduling order taking into account the time needed for the limited discovery sought without foreseeing the occurrence of the present health crisis. Moreover, Plaintiff has been diligently prosecuting the case on the basis that between November 2019 and December 2019 Plaintiff was working on responses to Defendant's discovery. Also, in addition to this litigation matter, Plaintiff has been working in a separate but related litigation matter that was on appeal in the First District Court of Appeals, Case No. A155428, that required spending significant time preparing appellate briefs due on January 31, 2020.

Thus, Plaintiff requests the court modify the scheduling order and continue non-expert discovery for ninety (90) days following hearing on this Motion or ninety (90) days following hearing on Plaintiff's Motion to Substitute, presently scheduled for September 24, 2020, so Plaintiff may conduct additional investigation and discovery into Defendant's affairs since his passing. Plaintiff further requests the corresponding dates for dispositive motions and the pre-trial conference in this action be continued as determined by the Court.

DECISION

Though Defendant's counsel was aware that sometime during the period of April 2020 and June 23, 2020, (18-25001; Notice of Death, Dckt. 47), counsel has taken no action in this case to get a "replacement client." Federal Rule of Civil Procedure 25, which is incorporated into Federal Rule of Bankruptcy Procedure 7025, provides that if a party dies during the litigation, then the court may order the substitution of the proper party. Fed. R. Civ. P. 25(a). Any party or the decedent's successor in interest may seek such substitution, but the deadline to do so does not begin to run until a statement noting the death is served within the adversary proceeding. *Id.*

Here, the death of the Defendant was not disclosed to the Plaintiff nor to the court in this Adversary Proceeding. When Defendant's counsel filed and served the Notice of Death in the bankruptcy case in June 2020, Defendant's counsel states that she served it on Erin McCartney, Esq., who requested special notice, and the Trustee.

A copy of the Death Certificate is attached to the Notice of Death in the Bankruptcy Case. The Death Certificate states that the Defendant died on January 1, 2020. 18-25001; Exhibit A, Dckt. 48. The Notice of Death was not filed until June 23, 2020.

Defendant's counsel did not disclose in this Adversary Proceeding that the Defendant had died. Defendant's death has left counsel without a client for whom she could prosecute the defense. This left the Plaintiff in limbo.

While an attorney named Sheila Gropper Nelson is reported as licensed to practice law on the State Bar website,^{FN. 1} the District Court website does not list a Sheila Nelson or a Sheila Gropper as an attorney admitted to practice in the Eastern District of California.^{FN. 2}

FN. 1. <http://members.calbar.ca.gov/fal/Licensee/Detail/85031>.

FN. 2. <https://ecf.caed.uscourts.gov/cgi-bin/iquery.pl>.

This court could not find any orders authorizing attorney Sheila Gropper Nelson to appear *pro hac vice*. It may be that Ms. Nelson was admitted to practice under a maiden or other name which the court does not have at this time. However, based on the information provided, it appears that Ms. Nelson is not admitted or authorized to appear in the Federal Courts for the Eastern District of California as an attorney for another person. In checking PACER for the Northern District of California Bankruptcy Court files, the court identifies many cases in which Ms. Nelson has appeared in that Federal Court District. In checking the attorney admissions at the United States District Court for the Northern District of California, no Sheila Nelson was reported as being admitted to practice in the Northern District of California.^{FN. 3.}

FN. 3. http://apps.cand.uscourts.gov/CAND_Ver2010/ECFRegGetBarStatus.aspx

Interestingly, the Deceased Defendant's counsel has continued filing pleadings in this Adversary Proceeding for someone who no longer exists and is not a real party in interest. These pleadings include:

Dckt. 91 - Separate Statement in Opposition by Joseph Akins (the decedent) to the Motion to Modify.

Dckt. 92 - Request for Judicial Notice by Joseph Akins (the decedent)

Dckt. 93 - The decedent's Request for a Hearing and Points and Authorities

Dckt. 103 - Addendum to Opposition of Joseph Akins (the decedent)

Counsel Sheila Nelson, without a client who is a party in interest, purports to be litigating issues to bind any possible successor appointed by the court.

The late Defendant's counsel has not come forward with a successor to be appointed, it appears that it will be up to the Plaintiff to bring that motion and the court to pick a successor (the court notes that such a motion has been filed, Dckt. 100). It appears that the successor will have to obtain counsel who is admitted in the Eastern District of California and then address what has occurred during this case when the late Defendant was represented by an attorney not admitted to practice in this District.

Based on the evidence presented and the facts of this Adversary Proceeding, it is both necessary and appropriate to reopen and extend the deadlines for discovery. The Defendant had been dead since January 1, 2020, and that information has not been provided to the court by the decedent's counsel, but has only been brought to the court's attention by the present Motion.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Modify Scheduling Order filed by Dominique Black ("Plaintiff") having been presented to the court, and upon review of the

pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Modify Scheduling Order is granted, the below specified discovery deadlines and dates in this court's prior Scheduling Order vacated, and the following new dates set (which will be subject to possible change when the successor to the late Joseph Akins, the Defendant, is appointed and when the successor obtains counsel who is admitted to practice in this Federal District), as follows:

Non-Expert Close of Discovery [including hearing all discovery motions
- to be set on the court's regular law and motion calendar]

..... **XXXXXXXXXX**

Expert Close of Discovery [including hearing all discovery motions - to
be set on the court's regular law and motion
calendar]..... **XXXXXXXXXX**

Dispositive motions heard by [to be set on the court's regular law and
motion calendar]..... **XXXXXXXXXX**

Pretrial Conference **XXXXXXXXXX**

FINAL RULINGS

2. [17-26125](#)-E-7 FIRST CAPITAL RETAIL, CONTINUED STATUS CONFERENCE
[19-2115](#) LLC RE: AMENDED COMPLAINT
2 thru 3 3-20-20 [[19](#)]

HUSTED V. ESBF CALIFORNIA, LLC

Final Ruling: No appearance at the August 13, 2020 Status Conference is required.

Plaintiff's Atty: Aaron A. Avery
Defendant's Atty: Michael W. Davis; Thomas R. Phinney

Adv. Filed: 9/11/19
Answer: none

Amd. Cmplt. Filed: 3/20/20
Answer: none

Nature of Action:
Recovery of money/property - preference
Recovery of money/property - other
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:

Joint Status Report filed 7/29/20 [Dckt 47]

The Status Conference for this Adversary Proceeding is continued to 11:00 a.m. on September 3, 2020, (Specially set time) to allow the Parties time to document the reported settlement of the issues in this Adversary Proceeding.

3. [17-26125-E-7](#) **FIRST CAPITAL RETAIL,** **CONTINUED MOTION TO DISMISS**
[19-2115](#) **LLC PP-1 Gabriel Liberman** **CAUSE(S) OF ACTION FROM**
HUSTED V. ESBF CALIFORNIA, LLC **AMENDED COMPLAINT**
AND/OR MOTION FOR
MORE DEFINITE STATEMENT
4-3-20 [22]

Final Ruling: No appearance at the August 13, 2020 Hearing is required.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Attorney for Plaintiff-Trustee on April 3, 2020. By the court’s calculation, 132 days’ notice was provided. 28 days’ notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The hearing on the Motion to Dismiss Cause(s) of Action from Amended Complaint and/or Motion for a More Definite Statement is continued to 11:00 a.m. on September 3, 2020, to allow the Parties time to document the reported settlement of the issues in this Adversary Proceeding.

ESBF California, LLC (“Defendant”) moves for the court to dismiss the First, Third, Fourth, and Fifth Claims for Relief against it in Kimberly J. Husted’s (“Plaintiff-Trustee”) Complaint according to Federal Rule of Civil Procedure 12(b)(6).

On July 29, 2020, the parties filed a Joint Status Report requesting the court continue the hearing on the Motion to Dismiss to September 3, 2020 at 11:00 a.m. on the basis that a draft of their settlement agreement has been prepared and has been circulated for revisions and the parties anticipate that the settlement agreement will be finalized within the next two (2) weeks, with a compromise motion to be filed shortly thereafter. Dckt. 47.