

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

LOUIS B. PROFFIT,)	CIVIL ACTION NO. 5:01CV00067
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
ANN VENEMAN, SECRETARY OF)	
UNITED STATES DEPARTMENT)	
OF AGRICULTURE,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

Before the court are the June 14, 2002 Objections to the Magistrate Judge's June 4, 2002 Order of defendant Veneman and the plaintiff's June 21, 2002 Response to the defendant's objections. For the reasons expressed herein, the court will overrule the defendant's objections and decline to modify or set aside the June 4, 2002 Order of the Magistrate Judge.¹

I.

Although not expressly identified in her moving papers, the defendant has filed her objections pursuant to Federal Rule of Civil Procedure 72(a). Under FED R. CIV. P. 72(a), a party may object to non-dispositive, pretrial orders of a United States Magistrate Judge. (West 2000). As the rule reads, in pertinent part:

The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

¹ Pursuant to 28 U.S.C. § 636(b)(1)(B), the court referred this case to the Honorable B. Waugh Crigler, United States Magistrate Judge, to preside over discovery matters. This court's review of the Magistrate Judge's orders on non-dispositive issues is governed by FED. R. CIV. P. 72(a).

Id.

Although the discovery period had expired when the defendant moved the court to enlarge discovery time, defendant Veneman objects to the Magistrate Judge's June 4, 2002 Order denying her motion to enlarge the discovery period. Specifically, the defendant characterizes as clearly erroneous and contrary to law the Magistrate's ruling excluding the defendant's expert rebuttal witness. The defendant characterizes the Magistrate Judge's ruling as a "sanction."

In an attempt to overcome the exacting burden set forth in the Rules, the defendant provides two separate arguments.² First, the defendant contends that she was not given a sufficient amount of time to adequately prepare a complete rebuttal expert disclosure. In her moving papers, defendant Veneman argues that the net effect of the modified discovery schedule was to give the "Plaintiff more than three months ... to make his expert disclosures," while the defendant was given only fourteen working days. Defendant's Objections, Page 2. The defendant argues that fourteen days were not enough time for her rebuttal expert to prepare even a preliminary report. To that end, defense counsel maintains that they were expecting to receive a computer disk containing the plaintiff's expert's findings. Because the plaintiff did not provide any computerized information, the argument goes, the defense expert could not properly evaluate the findings of the plaintiff's expert. In that regard, the defendant argues, the Magistrate Judge's order denying the motion to enlarge discovery time was "clearly erroneous, and should be reversed so that Defendant is not unduly prejudiced at trial." Defendant's Objections, Page

² Defense counsel, alternatively, argues that in lieu of denying its motion to enlarge discovery, the court could sanction counsel. The court, however, has not sanctioned an individual attorney in more than twenty years and sees no reason to begin now. Although defense counsel failed to comply with court ordered discovery deadlines, counsel's action in no way approaches what the court considers sanctionable misconduct.

3.

This court, in Cole v. Jenkins, 181 F.R.D. 569 (W.D. Va. 1998), was confronted with a similar factual situation. In Cole, the Magistrate Judge entered an order denying the defendant's motion to exclude the plaintiffs' expert witnesses and evidence. Specifically, this court held that the "magistrate judge's order ... was not clearly erroneous or contrary to law, where defendant cited no law in support of its objection to the magistrate judge's order, providing only a summary of the facts surrounding the decisions made in the order." Cole at 570.

Like the defendant in Cole, the defendant's first argument in this controversy is based almost entirely on her rendition of the facts surrounding the Magistrate Judge's ruling. Even assuming, *arguendo*, that the defendant's rendition of the record is accurate, this court, in Cole, held that a factual summary alone is inadequate to overturn a discretionary ruling on a pretrial issue by the magistrate. Id.

The defendant's second argument, that the Magistrate Judge's preclusion of her expert rebuttal witness constitutes an impermissible sanction, was asserted for the first time during oral argument. In support of her second contention, the defendant cites Tritchler v. Consolidation Coal Company, 91 F.3d 134, 1996 WL 379706 (4th Cir. 1996), for the proposition that the sanction of "preclusion is considered a drastic remedy, and it is not imposed unless the party's conduct is in bad faith or callous disregard of the discovery rules." Tritchler at 2.

In the same paragraph, however, the Tritchler court qualified the preceding passage by explaining that "[t]he rule is flexible in its nature and the [court] has broad discretion in its choice of the type and degree of the sanctions to be imposed. Id. (quoting Stillman v. Edmund

Scientific Co., 522 F.2d 798, 801 (4th Cir. 1975)). Applying the preceding standard, the Fourth Circuit held that the district court did not abuse its discretion when it “excluded a document that was not but should have been produced.” Id. This controversy involves a similar situation; the Magistrate Judge ultimately excluded a rebuttal expert report that was not but should have been produced. If there was not an abuse of discretion in Tritchler, then it follows that the Magistrate’s ruling in this case was not clearly erroneous or contrary to law.

Notwithstanding Tritchler, the thrust of the defendant’s second contention is that the Magistrate’s exclusion of her rebuttal expert witness constituted an impermissible sanction under FED. R. CIV. P. 37. A careful reading of Rule 37, however, shows us that the Magistrate Judge did not abuse his discretion when he denied the defendant’s motion. Rule 37(c)(1) provides, in pertinent part:

A party that without substantial justification fails to disclose information required by Rule 26(a) ... *is not*, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information that is not so disclosed.”

FED. R. CIV. P. 37(c)(1) (West 2001) (emphasis added). Put differently, because her expert disclosure did not comport with Rule 26(a)(2), Rule 37(c)(1) provides that the defendant “is not” permitted to use her expert rebuttal witness unless one of two conditions is present.

First, defendant Veneman contended that she had a substantial justification for missing the discovery deadlines. The Supreme Court has defined “substantially justified” as “justified in substance or in the main - that is, justified to a degree that could satisfy a reasonable person.” Pierce v. Underwood, 487 U.S. 552, 553 (1988). The defendant argued that the plaintiff failed to provide relevant discovery material, and that this lack of cooperation made it impossible for her to comply with the discovery schedule. This argument, however, does not give rise to a

substantial justification. There is not a single example on the record of the defendant seeking the court's intervention to assure that all discovery requests were satisfied. Given the definition of "substantially justified" and the defendant's failure to request the court's intervention, the defendant's inability to comply with a deadline that she herself agreed to set is not a "substantial justification" for failing to comply with the discovery schedule.

The defendant contends, alternatively, that her failure to comport with the discovery schedule was "harmless." In the notes following the text of Rule 37, the Advisory Committee lists three potential "harmless" situations: (1) the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness to all parties; (2) the failure to list as a trial witness a person so listed by another party; or (3) the lack of knowledge of a pro se litigant of the requirement to make disclosures. FED. R. CIV. P. 37 advisory committee's note. Defendant Veneman's failure to comply with the discovery schedule was not "inadvertent" nor did it result from the "lack of knowledge of a pro se litigant." Defendant Veneman is represented by competent counsel, counsel who simply failed to comply with a schedule that was set by joint motion. Such a failure is not of the "harmless" variety contemplated by the Rules.

Moreover, the language of Rule 26 leaves enforcement completely to the court's discretion, often prefacing its provisions with the phrase, "except to the extent otherwise stipulated or directed by the court." FED. R. CIV. P. 26 (West 2000). This court is unable to see how the Magistrate Judge's exercise of such broad discretion in enforcing the discovery rules can be characterized as clearly erroneous or contrary to law. This is especially true where, as here, the Magistrate was simply enforcing discovery deadlines set by joint motion of the parties.

The Magistrate's order denying the defendant's motion to enlarge discovery time and,

consequently, to exclude the rebuttal witness, survives review by this court under the relevant standard. Accordingly, the court will ratify the June 4, 2002 Order of the Magistrate Judge denying the defendant's June 14, 2002 motion to enlarge discovery. Because the Magistrate Judge's Order to this effect was not "clearly erroneous or contrary to law" as contemplated by Rule 72(a), the court will decline to modify or set aside the Order.

II.

Additionally, in her objections, the defendant alleges the inadequacy of the plaintiff's expert witness disclosure. This issue, however, was not argued before the Magistrate Judge at the time of Plaintiff's disclosures, nor was it argued during the May 31 hearing. It is improper, therefore, for the defendant to raise this issue for the first time as part of her Rule 72 motion. In the interest of completeness, however, the issue can be treated here.

The Initial Pretrial Order allowed either party to supplement expert witness disclosures within "thirty (30) days before the expiration of the discovery period fixed by this or any superceding Order." When plaintiff's counsel, therefore, faxed its expert report on March 20, and (due to volume) sent by overnight mail the list of publications and prior testimony for receipt by March 21, it was done in compliance with the Pretrial Order, which had been presented and approved by both parties.

Even assuming, *arguendo*, that the court were to consider the plaintiff's mailing of the list of publications and prior testimony the day after the initial disclosure as technically not in compliance with Rule 26(a), the defendant was in no way prejudiced by the less-than-one-day delay in receiving the material. This last supposition is evidenced by the fact that the defendant is now raising the issue for the first time nearly three months after the occurrence. For the

preceding reasons, the defendant's contention is unavailing.

III.

In his response to the defendant's objections, the plaintiff moves for an award of attorney's fees because "defense counsel has insisted on a hearing for such a straightforward Rule 72 Motion, and has failed to provide even a scintilla of factual evidence or legal authority upon which its Motion should be granted." Plaintiff's Response, page 6. Defending a Rule 72(a) motion, however, is just one of the costs of transacting business in the court. Accordingly, the plaintiff's motion for attorney's fees shall be denied.

An appropriate Order this day shall issue.

ENTERED:

Senior United States District Judge

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

LOUIS B. PROFFIT,)	CIVIL ACTION NO. 5:01CV00067
)	
Plaintiff,)	
)	
v.)	<u>ORDER</u>
)	
ANN VENEMAN, SECRETARY OF)	
UNITED STATES DEPARTMENT)	
OF AGRICULTURE,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying memorandum opinion, it is this day

ADJUDGED AND ORDERED

- (1) that the court will decline to modify or set aside the June 4, 2002 Order of the Magistrate Judge;
- (2) that the June 14, 2002 Objections of the defendant, Ann Veneman, Secretary of United States Department of Agriculture, shall be, and they hereby are, OVERRULED;
- (3) that plaintiff Proffit's motion for attorney's fees accrued in defending the defendant's Rule 72(a) motion shall be, and it hereby is, DENIED.

The Clerk of the Court hereby is directed to send a certified copy of this Order to all counsel of record and to Magistrate Judge Crigler.

ENTERED:

Senior United States District Judge

Date