IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: WATTS COORDINATED PRETRIAL PROCEEDINGS	)	Master Docket Case No. 19-cv-01717
	)	Judge Franklin U. Valderrama
	)	Magistrate Judge Sheila M. Finnegan

This filing relates to Baker v. City of Chicago, et al., Case No. 16-cv-8940

PLAINTIFF CLARISSA GLENN'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR RULE 35 EXAMINATION

Defendants once again seek to extend a court-ordered deadline—this time to conduct a Rule 35 examination of Plaintiff Clarissa Glenn and thereafter formally disclose Dr. Kristen Klipfel as an expert witness in this matter. To be clear, Defendants' time for expert disclosures has already passed, and allowing this exam, three weeks for a report, a subsequent deposition, and *Daubert* litigation related to this witness will, at bare minimum, complicate an already condensed pre-trial schedule in this matter.

Defendants cite two competing reasons to allow them to upend the court-ordered schedule for this purpose. Only one of these reasons can be true, and whichever one it is does not provide a basis to conduct the exam in these circumstances. First and primarily, Defendants point to Ms. Glenn's allegations from her September 2016 complaint—including a claim for Intentional Infliction of Emotional Distress ("IIED") and description of her damages—as putting Ms. Glenn's mental health in controversy and the basis for their Rule 35 request. If it were these allegations that sparked Defendants' interest in the Rule 35 exam, however, they offer absolutely no explanation why they waited nearly eight years to request the exam.

Separately, Defendants point to Ms. Glenn's more recent disclosure of records from Shairee Lackey, who diagnosed Ms. Glenn with Post-Traumatic Stress Disorder ("PTSD"), and her subsequent disclosure of Ms. Lackey as a Rule 26(a)(2)(C) expert witness. But if these disclosures were the true moment that sparked Defendants' Rule 35 request, then their motion would not be necessary. Ms. Glenn explicitly offered to withdraw Ms. Lackey and the document disclosure in exchange for Defendants rescinding the Rule 35 request, all so Ms. Glenn could avoid the trauma and burden of a fourth round of invasive questioning about an extraordinarily difficult time in her life. Defendants rejected this request.

Ms. Glenn's mental health is in controversy, but Defendants cannot establish good cause at this stage of the case to further upend the court-ordered schedule and force Ms. Glenn to yet again to relive her trauma. This Court should deny Defendants' motion.

ARGUMENT

Rule 35 examinations are appropriate if the party requesting such an examination shows that the opposing party's health is "in controversy" and establishes "good cause" for the examination. *See* Fed. R. Civ. P. 35(a); *Schlagenhauf v. Holder*, 379 U.S. 104, 110-11 (1964). The "in controversy" and "good cause" requirements are distinct tests and both must be met to allow a Rule 35 exam. *McDorman v. Smith*, No. 05 C 448, 2008 WL 2345005, at *2 (N.D. Ill. June 5, 2008). The good cause analysis does not become superfluous simply because the "in controversy" element is satisfied. *Id.* There is no good cause if the request comes too late. *Id.* at *3 ("A defendant's delay in seeking a Rule 35 examination, thus, supports a finding that no good cause has been shown.").

This Court should deny Defendants' Motion because they have not established good cause for a Rule 35 exam.

The Seventh Circuit has expressed that where it is clear that a party's mental health condition is in controversy "from day one," a Rule 35 exam should be requested and concluded within the fact discovery deadline. *See Miksis v. Howard*, 106 F.3d 754, 758-59 (7th Cir. 1997) (affirming the denial of a Rule 35 exam while noting "the [fact] discovery cut off was March 31, 1995. Defendants knew from day one plaintiff's medical condition was an issue, yet they failed to request the medical examination until August 11, 1995 [during expert discovery]."); *see also Balzer v. Am. Fam. Ins. Co.,* No. 2:08 CV 241, 2010 WL 1838431 at *1-2 (N.D. Ind. May 6, 2010) (applying *Miksis* and holding the same); *but see, Haymer v. Countrywide Bank, FSB*, No. 10 C 5910, 2013 WL 657662, at *1 (N.D. Ill. Feb. 22, 2013) (explaining that *Miksis* does not establish a bright line rule that Rule 35 exams must be completed during fact discovery).

As this Court is well-aware, this case has been pending for nearly eight years, as the complaint was filed in September 2016. The overwhelming majority of the bases the Defendants provide for seeking the Rule 35 exam were known from "day one." *See*, *e.g.,* Dkt. 725, at 1-5 (citing Plaintiff's IIED claim and the emotional damages she seeks in the complaint for her mental anguish). After multiple extensions, fact discovery closed on December 18, 2023. *See* Dkt. 314 (resetting the fact discovery deadline from May 31, 2022 to May 31, 2023); Dkt. 419 (extending the fact discovery deadline to December 18, 2023); Dkts. 614 & 658 in Case No. 19-cv-1717. Defendants provide no explanation as to why they did not seek Ms. Glenn's Rule 35 exam during the seven years prior if, as they contend, her Complaint and IIED claim placed her mental health at issue.

The only articulated rationale for Defendants' very belated request is their claim that Ms. Glenn's more recent disclosure of records from Shairee Lackey and of Ms. Lackey as a Rule

26(a)(2)(C) expert witness sparked their desire for a Rule 35 exam. But this argument is disingenuous. It is true that these disclosures may have reinforced that Ms. Glenn's mental health is at issue. But Defendants' own position in their motion is that Ms. Glenn's mental health was in controversy at the outset. *See* Dkt. 725 at 5 (Defendant stating: "Glenn's IIED claim, in and of itself, is sufficient for this court to find that Glenn has placed her mental health 'in controversy.'"). So it cannot be that Ms. Glenn's PTSD diagnosis and Lackey disclosure alone prompted Defendants' Rule 35 request.

Regardless, Defendants fare no better if they insist that the more recent disclosure was the trigger for pursuing a Rule 35 exam because Ms. Glenn offered to withdraw Ms. Lackey in exchange for Defendant's withdrawal of the Rule 35 request. This would also include withdrawal of the medical records as potential exhibits in the case. Defendants refused. *See* Pl.'s Exhibit A, Email Correspondence, April 26, 2024; Pl.'s Exhibit B, Email Correspondence, May 1, 2024. Thus, either Ms. Glenn's mental health was in controversy in September 2016 because the IIED and damages description claim placed it in controversy, in which case this request is way too late (particularly in the context of the other scheduling issues); or (2) disclosing Ms. Lackey's records and/or Ms. Lackey is what made her mental health in controversy, in which case it is no longer so because Ms. Glenn offered to withdraw Ms. Lackey and the records.

Defendants have had ample opportunity and notice that Ms. Glenn's mental condition was "in controversy." Thus, *Miksis* certainly would support this Court exercising its discretion and denying their very belated request.

And there are real reasons for this Court to do just that: Ms. Glenn has now been deposed three times, for a total of nearly 15 hours. Any individual who has attended these depositions would affirm that these were emotional and difficult experiences. Ms. Glenn broke down in tears

at every one of these depositions, often multiple times. She has discussed these same experiences with City agents, like COPA, in the hope of achieving real accountability against Defendants who dramatically impacted both her own and many other lives. She has answered and supplemented her discovery answers many times. She has done her part in this litigation and will continue to do so. But subjecting Ms. Glenn to another eight hours to discuss these experiences will take an immense toll, and this Court should carefully consider whether Defendants have fairly and timely done their part to move this litigation forward before ordering eight more hours of emotional trauma on Ms. Glenn. *See Fuller v. Wilkie*, No. 19 CV 1325, 2020 WL 11269899, at *2 (N.D. Ill. Dec. 7, 2020) ("Rule 35 is not to be used lightly because psychological and psychiatric examinations are intrusive.").

There are other practical reasons to deny the request as well. The deadline for Defendants' expert disclosures has passed. This is not academic; Defendants' inaction has real consequences. *Daubert* deadlines, at minimum, will be affected by extending the deadline. The parties are already on a condensed pre-trial schedule for a January 2025 trial date. Further delays create more complications on a case that has already been pending eight years. Any extension of a court-ordered deadline requires good cause, and Defendants have not shown it here. Fed. R. Civ. P. 16(b)(4). Courts do not have to routinely extend their scheduling orders because the parties failed to complete tasks that they may have wanted to complete within the schedule. *See, e.g.*, *Smith v. City of Chicago*, No. 21 C 1159, 2023 WL 5211667 (N.D. Ill. Aug. 14, 2023) (denying plaintiff's motion to extend expert discovery); *Velez v. City of Chicago*, 2021 WL 2915117, at *2 (N.D. Ill. 2021) (denying defendants' motion for a four-month extension where the court found defendants did not act diligently in completing discovery); *see also*, *Flint v. City of Belvidere*, 791 F.3d 764 (7th Cir. 2015); *Lake v. Fairview Nursing Home, Inc.*, 151 F.3d 1033

(7th Cir. 1998); *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157 (7th Cir. 1996) ("Shortcomings in counsel's work come to rest with the party represented…They do not justify extending the litigation, at potentially substantial expense to the adverse party."); *Pfeil v. Rogers*, 757 F.2d 850, 857 (7th Cir. 1985) ("When a party fails to secure discoverable evidence due to his own lack of diligence, it is not an abuse of discretion for the trial court to refuse to grant a continuance to obtain such information.").

For all of these stated reasons, this Court should deny Defendants' motion in its entirety. But if this Court is inclined otherwise, this Court should set some limits and guidelines. *See* Fed. R. Civ. P. 35(a)(2)(B); *J.H. v. Sch. Town of Munster*, 38 F. Supp. 3d 986, 988 (N.D. Ind. 2014). This includes significantly shortening the time for the exam from the proposed eight hours. *See, e.g., Klein v. Cnty. of Lake*, No. 2:18-CV-349-JTM-JEM, 2022 WL 2603557, at *2 (N.D. Ind. July 8, 2022) (allowing a four hour exam, not including breaks); *Does 1-5 v. City of Chicago*, No. 18-CV-03054, 2019 WL 2076260, at *3 (N.D. Ill. May 10, 2019) (noting that the defendants' request for a full-day examination of each plaintiff seemed "unnecessary and excessive."); *Rose v. Cahee,* No. 09-CV-142, 2009 WL 3756985 (E.D. Wis. Nov. 9, 2009) (allowing a four-hour exam); *Haymer*, No. 10 C 5910, 2013 WL 657662, at *5 (this Court calling two-to-three hours "eminently reasonable" for this type of exam).

Defendants assert that Dr. Klipfel needs eight hours for Ms. Glenn's exam but offer no case specific reasons for the requested time. For instance, Dr. Klipfel lists cognitive testing as one of three distinct parts that Ms. Glenn's assessment may include, which takes anywhere from four to six hours. But Dr. Klipfel does not describe why she would subject Ms. Glenn to cognitive testing. Ms. Glenn's mental acuity is not at issue in this case, so there is no obvious reason. A more limited duration is also warranted because Defendants provide no coherent

rationale for the extensive scope of the exam, particularly in regards to questioning about the December 11, 2005 events at issue in this case. As noted, Ms. Glenn has been deposed for 15 hours in this matter, all of which was video recorded. Dr. Klipfel can have access to these depositions as part of her assessment if this Court allows the exam. There is no good cause, in these circumstances, for Defendants to be able to engage in another lengthy and traumatic round of questioning around these events when the information is readily available to Dr. Klipfel.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Joint Motion for Rule 35 Examination of Plaintiff Clarissa Glenn and for a Limited Extension of Expert Discovery in its entirety, and any other relief this Court deems necessary.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on May 22, 2024, has caused the foregoing document to be served on all counsel of record by filing the same using the Court's CM/ECF system, which automatically effected service on all counsel of record.

Respectfully submitted,

*s/*Gianna Gizzi