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

SEAN McCLENDON,	)	
	)	
Plaintiff,	)	
	)	**No. 22 C 5472**
v.	)	
	)	**Magistrate Judge**
CITY OF CHICAGO; MILOT CADICHON; BRYANT McDERMOTT; ROBERT McHALE; and DONALD SMITH,	)	**Maria Valdez**
	)	
Defendants.	)	

ORDER

This matter is before the Court on Defendants' Opposed Motion for Extension of Time to Complete Fact Discovery [Doc. No. 78].

BACKGROUND

On November 17, 2023, the Court granted Defendants' second unopposed motion to extend discovery, and the deadline was extended from November 30, 2023 to January 31, 2024. Defendants sought the extension to pursue discovery of certain jail calls, medical records, and COPA complaints, as well as to schedule depositions of three defendants, and several third-party witnesses, two to three of which were noted as contested.[1] The order granting the motion stated: "There will be no further extensions absent extraordinary circumstances. The parties are reminded that the

[1] The motion did not name the contested third-party witnesses.

Court does not consider delays caused by holiday schedules to be extraordinary." (11/17/23 Minute Order) [Doc. No. 64].

The parties' December 29, 2023 status report listed the remaining discovery as depositions of two defendants, one other non-defendant officer, and damages witnesses Latoya McClendon and Lori Wesson, as well as the opposed depositions of Brittany Hill and Moneka Curtis. They advised they would continue to confer about the disputed Hill and Curtis depositions to avoid the need for Court resolution.

Plaintiff subsequently filed motions to quash Defendants' subpoenas related to jail calls as well as the anticipated subpoenas directed to Hill and Curtis. The motions were granted in part and denied in part on January 19, 2024. The subpoenas for jail calls were quashed in large part, and the motion to quash the deposition subpoenas was denied.

On January 31, 2024, the discovery deadline, Defendants filed the present opposed motion to extend discovery to February 28, 2024.[2] The motion contends that the additional time is necessary to (1) depose Hill, Curtis, Peter Limperis, and to complete the deposition of Plaintiff's wife LaToya McClendon; (2) subpoena the IDOC call logs and telephone calls relevant to the Court's January 19 ruling denying in part Plaintiff's motion to quash; and (3) submit the Ken Ross and Emmanuel Poe calls (if the Poe call is located) *in camera* as directed in the January 19 order.

[2] A separate joint motion to take the depositions of two third-party witnesses after the deadline was granted. (*See* 1/31/24 Minute Order) [Doc. No. 77].

DISCUSSION

A discovery schedule may be modified "only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4); *see* Fed. R. Civ. P. 6(b)(1). Unlike the relatively lenient "good cause" standard under Rule 6, "when used in Rule 16(b)(4), case law establishes that the term 'good cause' imposes a much heavier burden. In fact, Rule 16(b)(4)'s 'good cause' requirement, which focuses on diligence, is more onerous than Rule 6(b)(1)(B)'s 'excusable neglect.'" *McCann v. Cullinan*, No. 11 CV 50125, 2015 WL 4254226, at *10-11 (N.D. Ill. July 14, 2015) ("In the Seventh Circuit, the court's primary inquiry is the diligence of the party seeking the extension.") (citing *Alioto v. Town of Lisbon*, 651 F.3d 715, 720 (7th Cir. 2011)). Any prejudice to Plaintiff is only a secondary consideration. *See id.* *11. As the moving party, Defendants "bear[ ] the burden to establish its diligence." *Id.*

A. Additional Depositions

In denying Plaintiff's motion to quash the Hill and Curtis depositions, the Court concluded their testimony would be relevant to damages, and the timing of the potential depositions was not a concern, as they had been noticed in time to be completed by the deadline. The Court further stated that "[i]f due to the deponents' unavoidable scheduling conflicts, a short extension may be necessary, the parties will not be prejudiced."[3] (1/19/24 Order at 10.)

[3] Plaintiff points out that Defendants did not in fact notice the Hill and Curtis depositions, and it is true that formal Notices of Deposition were not issued. However, the parties had been engaged in negotiations about the depositions for some time, which is how Plaintiff knew to file his motion to quash. Defendants' desire for the depositions was not abruptly sprung on Plaintiff right before the close of discovery.

Defendants seek an extension of time for these depositions because the parties have not yet finalized dates for them, but the motion does not indicate Defendants have served, or even attempted to serve, subpoenas on Hill or Curtis. The Court thus concludes that Defendants have failed to demonstrate diligence in securing the testimony of Hill and Curtis. Once Plaintiff's motion to quash was denied on January 19, Defendants could have served the subpoenas immediately but apparently did not do so at any time before they filed the motion to extend on January 31. The January 19 order acknowledged that the deponents' own schedules could justify a short discovery extension, but that justification falls away when the testimony is not even sought before the deadline date.[4]

Similarly, Defendants have not diligently pursued the testimony of Plaintiff's former criminal attorney Peter Limperis. Defendants wanted to subpoena phone calls between Limperis and Plaintiff's friend Emmanuel Poe, but Plaintiff's motion to quash was granted, in part because the information could have been obtained through less intrusive means, namely from Limperis himself. The order did not discuss the propriety of a subpoena of Limperis, as that issue was not before the Court. Defendants, however, seem to have taken the order as an invitation to subpoena Limperis, and they now want additional time to do so. The Court need not determine whether Limperis's deposition was authorized by the January 19 order, because as with Hill and Curtis – who at least were identified as potential

[4] In the February 2, 2024 status report, Defendants state that Curtis has indicated her willingness to schedule a deposition. Although Defendants are barred from issuing subpoenas, nothing in this order prevents a witness from voluntarily testifying without a subpoena. Any such deposition must occur before March 8, 2024.

witnesses prior to that date – Defendants have not demonstrated they have made any substantial efforts to secure his testimony before the deadline.

Witness LaToya McClendon poses a different question. Her deposition proceeded as scheduled but ended after Defendants tried to ask her about a 2023 arrest of Plaintiff that is not at issue in this litigation. Plaintiff's counsel objected to the line of questioning, and the parties agreed to postpone those questions until they received guidance from the Court on the matter. (*See* Pl.'s 2/8/24 Filing, Ex. 1) [Doc. No. 88]. Plaintiff argues that Defendants are trying to misuse this civil litigation to obtain discovery for an unrelated criminal case. Defendants do not explain how Ms. McClendon's thoughts about an unrelated criminal matter are relevant or would lead to the discovery of information relevant to this case. The parties agree that all other matters were adequately addressed during her initial deposition, so it will not be reopened.

B. Phone Logs and Calls

Defendants next seek to extend discovery to obtain call logs and phone calls from the Illinois Department of Corrections and to submit any calls described in the January 19 order to the Court *in camera*. The order gave Defendants leave to obtain IDOC call logs identifying calls between Plaintiff and third party Ken Ross while Plaintiff was incarcerated between October 2014 and February 2015, then to submit *in camera* the first call between them, whether that call occurred while Plaintiff

was in IDOC or Cook County Jail custody.[5] Defendants were also allowed to obtain logs listing any calls between Plaintiff and a number affiliated with Emmanuel Poe.

It is unclear from the motion and February 2, 2024 status report what if any efforts Defendants have made to obtain the Emmanuel Poe call logs. If Defendants served subpoenas on IDOC before the close of discovery, they may continue reasonable follow-up to obtain the information as necessary after the deadline. If, however, they did not serve any subpoenas and were not diligent in their efforts to obtain the call log information, then the deadline will not be extended.

With respect to the Ken Ross phone call, the request for an extension appears to be moot, as defense counsel has already submitted *in camera* a thumb drive containing a March 27, 2015 call between Plaintiff and Ross while Plaintiff was in the CCJ, which presumably is the first phone call between the two men described in the order.

The question now is whether the call must be produced to Defendants. The alleged relevance of the call relates to Plaintiff's statement, made for the first time after his criminal trial, that the gun forming the basis of his arrest actually belonged to Ross. Ross echoed this claim during his own deposition in this case. Defendants contend this is a theory made up for the civil case and wish to challenge it. During the January 17 motion hearing, defense counsel argued the Ross call would be relevant because "[i]f [Plaintiff] said something that supports his

[5] Due to an error on the part of the CCJ, Defendants are already in possession of the calls Plaintiff made to Ken Ross while in that facility. Defense counsel denies having listened to those calls.

statement, it's relevant. If he says something that supports our theory, it's relevant. And if they don't talk about the issue at all, that's relevant by omission." (1/17/24 Mot. Hr'g Tr. at 12) [Doc. No. 75].

The Court has listened to the phone call *in camera* and can confirm that Plaintiff did not support his statement or Defendants' theory, eliminating two of the three potential bases for finding the call relevant. The third basis – that the call is "relevant by omission" – is entirely unpersuasive. First, counsel's conclusory argument that if Plaintiff had in fact been arrested for possessing a gun belonging to Ross, "[t]here's no way they could talk to each other" without raising the issue, (*id.* at 10-11), is not as evident as Defendants contend. While common sense may lead Defendants to conclude that Plaintiff and Ross would have talked about the gun at the first opportunity to do so, it could also be common sense not to talk about such matters with a close friend on a monitored jail line. In other words, the lack of a discussion is not the proverbial "dog that did not bark" and is not definitively inconsistent.

Furthermore, as the January 19 order noted, "Defendants have not explained why the ownership of the gun is relevant to any claims or defenses in the case, specifically the question of whether Plaintiff threw the gun behind the couch or it was already there," (1/19/24 Order at 6), and thus the gun's ownership is merely a collateral matter. The collateral evidence rule provides that "if a matter is collateral (that is, if it could not be introduced into evidence as substantive proof) then it cannot be proven simply to contradict the witness' testimony for impeachment

purposes." *United States v. Chaparro*, 956 F.3d 462, 480 n.11 (7th Cir. 2020) ("To put it another way, one may not contradict for the sake of contradiction; the evidence must have an independent purpose and *an independent ground for admission*.") (citations and internal quotations omitted) (emphasis in original). Here Defendants are not even trying to impeach Plaintiff on this collateral matter with a contradiction, but rather a prior "non-statement," which is unquestionably a bridge too far.

CONCLUSION

For the foregoing reasons, Defendants' Opposed Motion for Extension of Time to Complete Fact Discovery [Doc. No. 78] is denied.

SO ORDERED.

ENTERED:

DATE: February 16, 2024

HON. MARIA VALDEZ
United States Magistrate Judge