

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	CIVIL ACTION NO.: 2017-CP-10-05493
)	
Shem Creek Development Group, LLC,)	
)	ORDER GRANTING PLAINTIFF'S
Plaintiff,)	MOTION TO STRIKE DEFENDANT'S
)	EXPERT WITNESS
v.)	
)	
The Town of Mount Pleasant, South)	
Carolina,)	
)	
Defendant.)	
_____)	



On November 19, 2019, Plaintiff Shem Creek Development Group, LLC (“SCDG”) filed a Motion to Strike Defendant’s Expert Witness as Defendant’s (“the Town”) disclosure of this expert was untimely. On December 4, 2019, SCDG submitted a memorandum in support of its motion and the Town submitted a memorandum in opposition to SCDG’s motion. By consent, no hearing was held, and the arguments were considered based on the parties’ briefs and supporting materials. After considering the law, the briefs filed by the parties, the arguments of counsel, and all matters submitted, SCDG’s motion to strike is **GRANTED**.

I. FINDINGS OF FACT

This case, filed in October of 2017, involves a dispute over a parking license agreement concerning a parking garage near Shem Creek in the Town of Mount Pleasant. The Court’s initial scheduling order established deadlines for disclosing expert and rebuttal expert witnesses of October 1, 2018 and November 1, 2018, respectively.

In March of 2018, SCDG issued to the Town its first set of interrogatories and requests for productions. The interrogatories included a request that the Town identify its expert witnesses and provide a list of their education, experience, and documents related to their engagement, opinions,

and expected testimony. The requests for production also included a request for the experts' written reports and other documents related to their engagement, opinions, and expected testimony. The Town responded to SCDG's first sets of discovery requests in June of 2018, but it did not identify any expert witnesses or produce any documents related to expert witnesses.

In October of 2018, the Court issued an amended scheduling order that extended the deadlines for the disclosure of expert and rebuttal expert witnesses to December 31, 2018 and January 30, 2019. Later, SCDG identified Roy Strickland, CPA/CFF, CFE, MAFF of Dixon Hughes Goodman, LLP as an expert witness, and the Town identified Melissa Johnson, CPA, CVA, MAFF of Elliott Davis as its rebuttal expert.

In June of 2019, the Court issued a second amended scheduling order. This scheduling order did not include any deadlines for expert disclosures, as the previous deadlines had expired.

On July 23, 2019, SCDG withdrew Mr. Strickland as its expert witness and issued a subpoena duces tecum and deposition notice to Ms. Johnson. Two days later, the Town withdrew Ms. Johnson as its rebuttal expert and later requested that SCDG withdraw its subpoena and notice of deposition. SCDG agreed and withdrew the subpoena and deposition notice to Ms. Johnson.

In September of 2019, the Town filed a motion to amend the scheduling order with proposed deadlines for disclosing expert and rebuttal expert witnesses of October 15, 2019 and November 15, 2019, respectively, which the Court issued on September 30, 2019. Pursuant to the amended scheduling order, the deadline to complete discovery is December 15, 2019.

Neither SCDG nor the Town disclosed an expert witness prior to the expiration of the October 15, 2019 deadline for the disclosure of expert witnesses. However, on November 13, 2019, the Town disclosed Ms. Johnson as an expert witness. Shortly thereafter, SCDG filed the motion to strike Ms. Johnson as an expert and prevent her from testifying at trial.

To date, the Town has not answered the interrogatory requesting information about its expert or produced any documents responsive to the request for production of documents about its expert. As a result, the expected testimony of Ms. Johnson has not been disclosed, and no documents relating to her engagement, opinions, or testimony have been produced.

II. LEGAL STANDARD

Because scheduling orders set the expectations of the parties and the court, they “should not be ignored blithely nor trifled with, without some peril or consequence.” *U.S. v. Marder*, 318 F.R.D. 186, 190 (S.D. Fla. 2016).¹ As such, “litigants cannot be permitted to treat a scheduling order as a frivolous piece of paper idly entered, which can be cavalierly disregarded without peril.” *O’Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d 152, 155 (1st Cir. 2004). “Adherence to established deadlines is essential if all parties are to have a fair opportunity to present their positions.” *Hill v. Porter Mem. Hosp.*, 90 F.3d 220, 224 (7th Cir. 1996).

Under Rule 37(b)(2)(B), SCRCF, if “a party fails to obey an order to permit discovery or fails to obey a scheduling order, the trial court may make an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting him from introducing designated matters in evidence.” *Green v. Hoover*, Op. No. 2007-UP-116, 2007 S.C. App. LEXIS 139, *8 (S.C. Ct. App. Mar. 7, 2007) (summarizing Rule 37(b)(2)(B), SCRCF); *see also Bryson v. Bryson*, 378 S.C. 502, 507, 662 S.E.2d 611, 613 (Ct. App. 2008) (“it is within the trial court’s discretion to allow an appropriate sanction when a party fails to strictly comply with a scheduling order”); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511

¹ The authorities cited in this order include decisions from Federal courts and decided under the Federal Rules of Civil Procedure. Because the South Carolina Rules of Civil Procedure are based on the Federal rules, South Carolina courts look to the construction placed on the Federal rules where there is no South Carolina law on point. *Gardner v. Newsome Chevrolet-Buick*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

S.E.2d 716, 718 (Ct. App. 1999) (“[i]f a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment.”).

The party that fails to timely disclose information bears the burden of establishing that the nondisclosure was substantially justified or harmless. *Wilkins v. Montgomery*, 751 F.3d 214, 222 (4th Cir. 2014).

III. CONCLUSIONS OF LAW

The Court strikes Ms. Johnson as an expert witness and precludes her from testifying at trial because she was not timely disclosed and such untimely disclosure prejudices SCDG. The present action has been pending for over two years, and it is set for a date certain trial beginning February 3, 2020. Nevertheless, the Town did not identify Ms. Johnson as an expert witness until November 13, 2019, which was twenty-nine days after the October 15th deadline for disclosing affirmative experts and two days prior to the November 15th deadline for disclosing rebuttal experts. And despite being less than two months before trial, the Town has not produced any information or documentation relating to Ms. Johnson or her opinions.

In response to the motion to strike, the Town fails to explain why it could not have identified Ms. Johnson as an expert on or before the October 15th deadline. The Town suggests that its untimely disclosure of Ms. Johnson is based on the deposition testimony of Mr. Flesch on August 14, 2019 and 101 Coleman Partners’ subpoena objection dated August 26, 2019. Assuming that is true, the Town had no less than 50 days to identify its expert before the deadline. But instead of complying with the affirmative expert deadline—a deadline which the Town itself proposed—the Town waited until just two days prior to this Court’s deadline for the identification of rebuttal experts to disclose Ms. Johnson as its expert. Furthermore, the Town has not justified

its failure to respond to SCDG's discovery requests, which specifically sought information and documents relating to any experts proposed by the Town.

As result of the Town's untimely disclosure and failure to respond to expert discovery, SCDG will be prejudiced by being unable to adequately prepare for and counter Ms. Johnson's testimony at trial. *See Carr v. Deeds*, 453 F.3d 593, 604-05 (4th Cir. 2006), (affirming exclusion of plaintiff's expert witness who was identified but who did not produce information required by Rule 26 because it deprived the defendant of an opportunity to investigate the witness and defend against his opinions). To adequately respond to or rebut her testimony, SCDG would necessarily need to extend the deadline for naming rebuttal experts, engage a rebuttal expert, reopen discovery, and postpone trial in this action, which has already been pending for more than two years.

As a result, the Town cannot carry its burden of proving that its disregard of its own proposed deadline is harmless. The October 15th deadline for affirmative experts with a subsequent deadline for rebuttal experts was intended to provide the opposing party with sufficient time to conduct expert discovery, determine whether rebuttal experts should be engaged, and identify rebuttal experts. By waiting until well after the October 15th deadline for affirmative experts and just two days before the November 15th deadline for rebuttal experts—and by further failing to provide any information relating to Ms. Johnson's engagement and opinions—the Town has effectively precluded SCDG from engaging a rebuttal expert. To avoid this prejudice and ensure that the case is not prolonged any further, Ms. Johnson is struck as an expert based on the Town's untimely disclosure of her and its failure to produce related discovery responses. *See Marder*, 318 F.R.D. at 191 (ruling that reopening discovery at late stage of litigation to accommodate untimely disclosure of expert would reward disclosing party for its indolence and prejudice the opposing party's preparation for trial); *Newkirk v. Enzor*, Civ. Action No. 2:13-1634-RMG, 2017 U.S. Dist.

LEXIS 29333 (D.S.C. Mar. 2, 2017) (stating that court could not cure surprise of party's untimely disclosure of witnesses other than to delay trial, which would have been a substantial disruption to the case).

IV. ORDER

For the reasons stated above, it is therefore **ORDERED** that SCDG's Motion to Strike Defendant's Expert Witness is **GRANTED**.

AND IT IS SO ORDERED.

The Honorable Maite Murphy

Charleston, South Carolina

January __, 2019



Charleston Common Pleas

Case Caption: Shem Creek Development Group LLC VS Mount Pleasant South
Carolina Town of
Case Number: 2017CP1005493
Type: Order/Other

So Ordered

s/ Maite Murphy 2166