

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

THOMAS L. TAYLOR, III,  
Receiver,  
Plaintiff,

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v.

CIVIL ACTION NO. H-12-1491

DANIEL S. FRISHBERG, *et al.*,  
Defendants.

**ORDER**

The Court has received Defendants David Frishberg and Elisea Frishberg (collectively, the “Frishbergs”) counsel’s November 26, 2013<sup>1</sup> letter to the Court seeking the deposition of Plaintiff Thomas L. Taylor, III (“Taylor”), suing as receiver [Doc. # 40]. Specifically, the Frishbergs complain that Taylor has refused to “submit to deposition.” *Id.*, at 1. The Frishbergs have also raised this issue, citing Federal Rule of Civil Procedure 56(d), in their opposition [Doc. # 35] to the Taylor’s Motion for Partial Summary Judgment [Doc. # 26], which motion was filed October 15, 2013.

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<sup>1</sup>The Frishbergs’ letter was received by the Court in Chambers on December 3, 2013 via First Class U.S. Mail. The Court accordingly did not have notice of this discovery dispute at the time it held a telephone hearing on December 2, 2013 in the related matter, *SEC v. Kaleta*, No. 09-cv-3674, and did not address the issue.

*See* Defendants Daniel Frishberg and Elisea Frishberg’s Brief in Opposition to Plaintiff’s Motion for Summary Judgment [Doc. # 35], at 15-16.

The discovery period in this case closed on September 13, 2013. *See* Order on Receiver’s Motion for Relief from Scheduling Order and for Extension of Deadlines [Doc. # 23]. The Frishbergs belatedly seek the deposition of Receiver Taylor for the first time, more than two months after the close of discovery and six weeks after Plaintiff Taylor filed a motion for summary judgment on liability on each of the pending claims asserted in this case. The Frishbergs did not seek an extension of the discovery period in this case for this purpose. *See* FED. R. CIV. P. 16(b)(4) (“A schedule may be modified only for good cause and with the judge’s consent.”); *S & W Enterprises, L.L.C. v. South Trust Bank of Alabama, NA*, 315 F.3d 533, 535 (5th Cir. 2003) (stating that good cause is met when the party seeking relief demonstrates that “the deadlines cannot reasonably be met despite the diligence of the party needing the extension.”).<sup>2</sup> The Frishbergs, according to their counsel’s letter, have been aware

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<sup>2</sup>Mere inadvertence on the part of the movant and the absence of prejudice to the non-movant are insufficient to establish “good cause.” *See Ellipse Communications, Inc. v. Caven*, 2009 WL 734035, \*1 (N.D. Tex. Mar. 19, 2009). Instead, the movant must show that “despite his diligence, he could not have  
(continued...)

of their interest in taking Taylor's deposition for more than a year.<sup>3</sup> They nevertheless failed to bring the matter to the Court's attention pursuant to the Court's Procedures or any Federal Rule of Civil Procedure. The Frishbergs' state they did not raise the issue because they were trying to settle the case. This explanation is not a persuasive

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<sup>2</sup>(...continued)  
reasonably met the scheduling deadline." *Id.* District courts are afforded "a great deal of deference in determining whether to modify scheduling orders, especially where, as here, the record suggests that the movant repeatedly demonstrated a lack of diligence." *Bilbe v. Belsom*, 530 F.3d 314, 317 (5th Cir. 2008). To determine whether a movant has established "good cause," the Court may consider the following four factors: (1) the movant's explanation for the failure to complete discovery within the discovery deadline; (2) the importance of the proposed additional discovery; (3) potential prejudice in extending the discovery deadline; and (4) the availability of a continuance to cure such prejudice. *See Hernandez v. Mario's Auto Sales, Inc.*, 617 F. Supp. 2d 488, 496-97 (S.D. Tex. 2009).

<sup>3</sup>The Frishbergs seem to claim that they want Taylor's deposition to learn factual matters. Arguments or references in their November 26 letter to other discovery disputes or to the Court's comments early in the case on contention interrogatories are irrelevant.

reason for failure to *timely* seek court intervention before the discovery period ended or an extension of the discovery period. Extending the discovery period at this time would cause prejudice and unnecessary delay. Discovery was supposed to have closed two months ago. Taylor filed a comprehensive motion for summary judgment six weeks ago. The case has been pending a year and a half. The related receivership that would receive proceeds of any recovery from this litigation is more than four years old.

Most importantly, the Frishbergs have not shown the deposition of Taylor is important to the liability issues raised by the summary judgment motion. The issues of inquiry appear to be related to damages or mitigation issues, at best. The Frishbergs accordingly have not made the good cause showing necessary to justify the late request for discovery and the associated extension of the discovery period.

It is noted that the Frishbergs, citing Federal Rule of Civil Procedure 56(d), also have asserted the need for Taylor's deposition in their response ("Response") [Doc. # 35] to Taylor's summary judgment motion [Doc. # 26]. The Frishbergs' Rule 56(d) explanation (with a supporting declaration) is similar to their counsel's November 26 letter. Frishbergs' Response does not set forth grounds warranting Taylor's

deposition.<sup>4</sup> In the interests of justice, however, the Court will grant the Frishbergs a short time to supplement their Rule 56(d) request to add additional information, if any, regarding the topics and need for Taylor's deposition. The Frishbergs must file this Rule 56(d) Supplement with the Court by **December 18, 2013**. Taylor may file any response on or before **December 23, 2013**. The Court will address this issue in due course.

It is so **ORDERED**.

SIGNED at Houston, Texas this 11<sup>th</sup> day of **December, 2013**.

  
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Nancy F. Atlas  
United States District Judge

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<sup>4</sup>Moreover, Rule 56(d) does not supersede the law discussed above concerning scheduling deadlines.