UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

RUTHELLE FRANK, et al., on behalf of themselves and all others similarly situated, Plaintiffs, v. SCOTT WALKER, in his official capacity as Governor of the State of Wisconsin, et al., Defendants.	Civil Action No. 2:11-cv-01128 (LA)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' CIVIL L.R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION TO COMPEL DEPOSITION TESTIMONY OF RUTHELLE FRANK

Last year, the Court imposed a discovery deadline of August 1, 2012. (Dkt. # 74.) Fourteen months after this deadline expired, Defendants now seek to compel the deposition of Ruthelle Frank (Dkt. # 140), a named plaintiff known to Defendants since the outset of the case in December 2011. Defendants' motion can only be construed as a post-expiration motion to extend the discovery deadline. But as explained below, Fed. R. Civ. P. 6(b)(1) governs such motions, and because Defendants do not demonstrate "excusable neglect" for their failure to depose her before the August 2012 deadline, their motion should be denied.

As a preliminary matter, what is most odd about Defendants' motion is the fact that counsel for Defendants already conducted a thorough deposition of Ms. Frank in connection with a similar action under state law, *Milwaukee Branch of the NAACP, et al. v. Scott Walker, et al.*, Case No. 11-CV-5492 (Dane County Circuit Court) ("*NAACP*"). That deposition was taken on April 12, 2012—during the pendency of this case, during the discovery period, and after Ms. Frank had served her written responses to Defendants' First Set of Interrogatories in this case. And she was examined at length—including nearly 30 pages of cross-examination by Defendants' counsel (*see* Decl. of Sean J. Young Ex. A at 14:5-43:21)—concerning the unreasonable obstacles that she faced in attempting to get an ID (the same issue that is central to the constitutional claims in this case), as well as about her interrogatory responses (*see id.* at 17:18-18:13) and her reactions to a declaration prepared by Defendants in connection with this case (*see id.* at 26:6-15). Had Defendants disclosed an intent to depose Ms. Frank in this case at that time, Plaintiffs would have insisted that the two depositions be conducted simultaneously—a standard courtesy for any witness, and a particularly appropriate protection for a woman in her 80's. Counsel for Defendants do not explain why they need to depose her again. Nor do they

identify new issues that they were not similarly motivated to explore in the first deposition (and they cannot, since both cases involve the unreasonable burdens faced by Ms. Frank in trying to exercise her fundamental right to vote).[1] And the fact that Ms. Frank is unlikely to be available for trial also does not justify a second deposition. *See Walker ex rel. Brown v. Irvin*, No. 08 CV 2637, 2011 WL 3876952, at *5 (N.D. Ill. Aug. 30, 2011) (already-deposed witness's "purported unavailability for trial does not establish a reason for reopening discovery in order to redepose him," because the Rules do not "distinguish[] between discovery and evidentiary depositions").

Rather than seriously disputing that Ms. Frank was already deposed about the matters central to the constitutional claims in this case, Defendants argue that certain of the Defendants were not parties to the state court lawsuit and so deserve a chance to depose Ms. Frank now (notwithstanding the fact that the individual lawyers from the Wisconsin Department of Justice ("DOJ") in both cases are virtually identical). But even under Defendants' fiction, the "different" Defendants in this case *did* have a chance to depose Ms. Frank—they had the entire period from, at latest, the filing of the parties' joint Rule 26(f) report in February 2012 (Dkt. # 29) until August 2012 to do so. Absent any justifiable explanation for why these "different" Defendants (through the same DOJ) did not depose her during the entirety of that six-month period, Rule 6(b)(1) requires that their post-expiration motion to extend the deadline be denied.

Federal Rule of Civil Procedure 6(b)(1) provides: "When an act may or must be done within a specified time, the court may, for good cause, extend the time: . . . on motion made after the time has expired if the party failed to act because of excusable neglect." *See, e.g.*, *Brosted v.*

[1] Defendants are not claiming—either in their motion or in the e-mail correspondence leading up to this motion (*see* Young Decl. Ex. B)—to need an update to any of Ms. Frank's deposition answers. Nor could they. After being subjected to multiple, unreasonable barriers to obtaining an ID in late 2011 and early 2012, events which were thoroughly explored at her April 2012 deposition, Ms. Frank has not made any further attempts to obtain an ID.

Unum Life Ins. Co. of Am., 421 F.3d 459, 464 (7th Cir. 2005) (applying Rule 6(b) to request to conduct deposition after the discovery deadline had passed). "In evaluating whether excusable neglect exists, [the court] hold[s] a party responsible for the acts and omissions of its attorneys, and . . . consider[s] 'the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.'" *Whitetail Woods, LLC v. CIBM*, No. 2:12-CV-00654-LA, 2012 WL 4796139, at *1 (E.D. Wis. Oct. 9, 2012) (citation omitted); *see also Raymond v. Ameritech Corp.*, 442 F.3d 600, 606 (7th Cir. 2006). Here, Defendants have failed to provide *any* reason for their delay in deposing Ms. Frank in the entire discovery period. *See, e.g.*, *Whitetail*, 2012 WL 4796139, at *1-*2; *Keeton v. Morningstar, Inc.*, 667 F.3d 877, 883 (7th Cir. 2012); *In re Kmart Corp.*, 381 F.3d 709, 715 (7th Cir. 2004). They do not even *attempt* to give an explanation. *See, e.g.*, *Brosted*, 421 F.3d at 464 (affirming denial of post-expiration motion to extend deadline where party failed to even argue excusable neglect). They also do not explain why they did not seek to extend the discovery deadline for purposes of deposing Ms. Frank *before* the August 1, 2012 deadline had passed. *See, e.g.*, *Keeton*, 667 F.3d at 883. And harassing Ms. Frank with a second deposition concerning the exact same events (when the first deposition was conducted well over a year ago) would clearly present a "danger of prejudice" to Plaintiffs, *Raymond*, 442 F.3d at 606, not to mention an undue burden on Ms. Frank, who is now 86 years old.

Because Defendants' motion fails to demonstrate "excusable neglect" for their failure to depose Ms. Frank in this case before the August 1, 2012 deadline, Rule 6(b)(1) of the Federal Rules of Civil Procedure requires that their motion be denied.

Dated this 1st day of October, 2013.

Respectfully submitted,

/s/ Sean J. Young

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