

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BOBBY McCURDY	:	
Plaintiff,	:	
	:	CIVIL ACTION
	:	
v.	:	
KIRK DODD,	:	NO: 99-CV-5742
CHRISTOPHER DIPASQUALE,	:	
JOHN MOUZON,	:	
DAVE THOMAS,	:	
SCOTT WALLACE,	:	
THE CITY OF PHILADELPHIA,	:	
Defendants.	:	

GREEN, S.J.

MARCH _____, 2001

MEMORANDUM/ORDER

Presently before the Court is Plaintiff's Motion to Compel Answer to Interrogatories and Production of Documents, the Response and Counter Motion to Object *nunc pro tunc* of Defendants City of Philadelphia, Scott Wallace, Dave Thomas and John Mouzon, and Plaintiff's Response to Defendants' Counter Motion.¹ Plaintiff also moves, pursuant to Rule 37(a)(4) of the Federal Rules of Civil Procedure, for reasonable expenses incurred in bringing this motion to compel. For the following reasons, Defendants' motion to object will be granted, Plaintiff's motion to compel will be granted, Defendants' objections will be overruled, Defendants will be ordered to comply with Plaintiff's discovery requests, and Plaintiff's motion for expenses will be denied.

¹ There was no response to Plaintiff's motion by either Defendant Dodd or Defendant DiPasquale. Defendant Dodd is represented by the same counsel who represents the answering Defendants, though Defendant DiPasquale is represented by other counsel. Plaintiff's filings do contain the appropriate "Certificate of Service" indicating that counsel for all Defendants were served. Because I conclude that the disputed discovery requests are relevant, Plaintiff's motion will be granted and enforceable as to all Defendants.

I. Factual and Procedural Background

The general facts of this case have been recited in an earlier order of this Court, and need not be repeated. See McCurdy v. Dodd, No. CIV. A. 99-CV-5742, 2000 WL 250223 (E.D. Pa. Feb 28, 2000). The earlier order of this Court granted, in part, Defendants' motion to dismiss Plaintiff's Complaint, and left at issue only Plaintiff's § 1983 claim for the loss of his son. See McCurdy, 2000 WL 250223 at *3. The instant motions revolve around Plaintiff's attempts to obtain Defendants' responses to certain interrogatories and requests for production of documents. Plaintiff avers that he has attempted, without success, to obtain Defendants' compliance with Section 4:01 of Chapter IV of the Civil Expense and Delay Reduction Plan, which governs disclosure of self executing documents. See Affidavit in Support of Pltf.'s Motion ¶¶ 4-5.² Plaintiff indicates that on December 13, 2000, after several attempts to informally obtain compliance, Defendants were served with written interrogatories and requests for production of documents. See Affidavit in Support of Pltf.'s Motion ¶¶ 5-8. On January 30, 2001, after

² Neither parties' memorandum specifies the exact nature of the disputed discovery, though, from a careful review of the submittals, a theme is apparent. Plaintiff contends that the "answers to the interrogatories and documents to request for productions is readily available and were or should have been supplied to similar discovery requests in the identical companion case, Cynthia Dawson v. City of Philadelphia, No. 99-2644, which was settled on or about August 1999." See Affidavit in Support of Pltf.'s Motion ¶13. Defendants' "Exhibit A" to their Memorandum of Law has more specific information regarding Plaintiff's requests. An example of their response is as follows:

[A]ny issue concerning the City's policies regarding the use of deadly force, arrests, supervision and discipline are only relevant to Counts I, II and III of Plaintiff's Complaint. Any background information concerning the individual Defendants, including but not limited to their training, prior employment and other incidents of alleged misconduct are not relevant to the claims that will be presented to the jury.

See Dfdts.' Mem of Law, Exhibit A, *Defendants' Answer to Plaintiff's Interrogatories*, Answers 1.-29. Reviewing all of the information, it appears Plaintiff is attempting to obtain information necessary to prove liability against the individual Defendants for their actions, and against the City for their policies.

again attempting, and failing, to obtain Defendants' response, Plaintiff filed the instant motion.

Defendants have two responses to Plaintiff's motion. First, because they have failed to file a timely response to Plaintiff's motion, Defendants ask the Court to permit the Defendants to object to Plaintiff's discovery requests *nunc pro tunc*. See Dfdts.' Motion at 4. Second, assuming that their first request is granted, Defendants object to Plaintiff's discovery requests on the grounds that the requests are irrelevant to the sole remaining count remaining in this case, and that the interrogatories are excessive in number. See Dfdts.' Motion at 5-6.

II. Discussion

In its discretion, a court may permit a responding party to file a late response to a pending motion, "where the failure to act was the result of excusable neglect." Fed. R. Civ. P. 6(b)(2).

Federal Rule of Civil Procedure 26(b)(1) reads as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

A. Defendants' request to file a response and objections *nunc pro tunc*.

Defendants' counsel requests that this Court exercise its discretion, and, for excusable neglect, permit Defendants to file a response and objections to Plaintiff's motion to compel. See Dfdts.' Motion at 4-5. Counsel indicates that he inadvertently failed to file a timely response because of a recent spate of scheduled trials, which required considerable and detailed attention. See Dfdts.' Motion at 4-5. Having reviewed counsel's explanation and request, the Court finds

that counsel's failure to respond is "excusable neglect," and I will therefore permit Defendants to file their response and objections.

B. Defendants' objection on the grounds of relevancy.

Defendants primary objection to Plaintiff's discovery requests is that they are irrelevant. See Dfdts.' Motion at 5. Defendants argue that, since Plaintiff's other causes of action were dismissed, Plaintiff can only obtain discovery related to his remaining cause of action, which concerns Plaintiff's constitutional right to recover damages under 42 U.S.C. § 1983. See Dfdts.' Motion at 5. Defendants feel that, according to this Court's previous Order dismissing Plaintiff's other claims, discovery was required to focus on Plaintiff's right to recover for the deprivation of liberty associated with the death of his son. See Dfdts.' Motion at 5. Plaintiff argues that, in order to establish a Section 1983 claim against the Defendants, Plaintiff must prove liability against the answering Defendants; simply showing a relationship with the deceased is not enough. See Pltf.'s Mem. of Law Contra at 3-4.

I conclude that Plaintiff's discovery requests are relevant and should be permitted. In order for the Plaintiff to be successful against the Defendants, he must prove all elements of his case by a preponderance of the evidence. Clearly, a critical issue in the case will be liability, unless Defendants are willing, at this time, to stipulate that they are not going to litigate that issue. If, for example, Plaintiff proved that he had a relationship with his son, and proved that he has been detrimentally affected by his son's departure, Plaintiff would not prevail, unless he also proved that Defendants were responsible for the damages.³ Defendants' interpretation of the

³ These elements are being used for illustrative purposes only, and are not intended to be either exclusive or suggested elements necessary for Plaintiff's claims.

earlier Order is incorrect. It would be a waste of time to permit only limited discovery, using a time-table normally prescribed by the Court for an entire case, only to have more extensive discovery later if certain elements were proven by Plaintiff. Though there may be some instances when this approach is desirable and feasible, in the instant case it is clear that Plaintiff's case depends on evidence regarding the police's actions against the decedent, and, therefore, discovery must be permitted.

C. Defendants' objection to the number of interrogatories.

Defendants' other objection is to the number of interrogatories submitted by Plaintiff. See Dfdts.' Motion at 5-6.⁴ Federal Rule of Civil Procedure 33(a) states that the number of interrogatories is not to exceed 25, unless the issuing party receives permission from the court to exceed that number. "Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2)." Fed. R. Civ. P. 33(a). Plaintiff requests the Court to allow the seven additional interrogatories, and argues that Defendants' failure to comply with the self-executing discovery requirements has necessitated the use of additional interrogatories. See Pltf.'s Mem. of Law Contra at 5. Having found that Plaintiff's requests are relevant, I will allow the Plaintiff to exceed the prescribed number of interrogatories to facilitate the speed of discovery.

D. Plaintiff's request for expenses.

Finally, Plaintiff's request for expenses and counsel fees does not contain an affidavit

⁴ Defendants' request for a strict application of the rules in regards to Plaintiff's interrogatories is in stark contrast to their request for laxity when the rules are applied to their request to file late objections. However, regardless of the apparent incongruity, the request will be considered, along with Plaintiff's response.

detailing the expenses, the amount of time spent on the motion to compel, or the desired hourly rate. However, even though this information was not provided, I conclude that such a sanction is unwarranted. Though Defendants' interpretation of the earlier Order was incorrect, I do not believe it was in bad faith or intentionally dilatory. Therefore, Plaintiff's motion for attorney fees will be denied.

III. Conclusion

The discovery being sought by Plaintiff is relevant to issues before the Court, and is reasonably calculated to lead to admissible evidence. As such, Plaintiff's motion to compel will be granted. Having found that Plaintiff's discovery requests are relevant, I will overrule Defendants' objections to those requests. Because Defendants did file a response to Plaintiff's motion, and because Defendants' objections were based in law and made in good faith, I will deny Plaintiff's request for expenses. An appropriate order follows.