2015 WL 3966434
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United States District Court,
W.D. Pennsylvania.

Rudolph A. KARLO, Mark K. Mclure, William S. Cunningham, Jeffrey Marietti, and David Meixelsberger, Plaintiffs,
v.
PITTSBURGH GLASS WORKS, LLC, Defendant.

No. 2:10–cv–1283.
|
Signed June 8, 2015.

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER OF COURT

TERRENCE F. McVERRY, Senior District Judge.

***1** Pending before the Court is a MOTION [FOR] LEAVE TO SUPPLEMENT OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT AND MOTIONS TO BAR EXPERT TESTIMONY (ECF No. 434) filed by Plaintiffs Rudolph A. Karlo, Mark K. McLure, William S. Cunningham, Jeffrey Marietti, and David Meixelsberger. Defendant Pittsburgh Glass Works, LCC ("PGW") has filed a response opposing the relief sought along with a MOTION TO STRIKE DECLARATION OF JOHN D. CLAUS (ECF No. 436). The motions are ripe for disposition.

I. Background

The parties, counsel, and the Court are familiar with the background of this case and, therefore, the Court will not recite the facts at length. The following is a brief recitation of those matters relevant to the issues presently before the Court.

Discovery in this nearly five-year-old case closed over two years ago, during which the parties deposed over sixty witnesses and produced tens of thousands of pages of documents. Motions practice has been equally as expansive.

After this then-conditionally certified collective action was reassigned to the undersigned in late-June 2013, the parties engaged in extensive briefing with regard to PGW's motion to decertify, its four motions to bar expert opinions, Plaintiffs' motion to strike those *Daubert* motions, and their motion for leave to file a Second Amended Complaint, all of which the Court ruled upon in its forty-four page Memorandum Opinion and Order on March 31, 2014. Several additional motions followed.

At present, three motions for summary judgment and four renewed motions to bar expert testimony are pending before this Court. Briefing on those motions occurred over the span of three months and closed nearly six months ago. The Court heard oral argument on January 13, 2015 and received supplemental briefing nearly one month later.

Plaintiffs now seek leave of Court to file the Declaration of John D. Claus, allegedly "a senior-level PGW executive, who fortuitously contacted Plaintiffs' counsel for advice regarding his termination by the company in March, 2015."[1] (ECF No. 434 at 1). In their discussions, counsel apparently became aware that Claus "possessed a wealth of knowledge about PGW's age-discriminatory practices relevant to the pending [m]otions" and that he would "break the 'code of silence' that PGW has used to obscure the illegal nature of its actions until now." *Id.* at 2. To that end, Claus provided Plaintiffs' counsel with a Declaration on April 8, 2015, which purportedly "lends factual confirmation to several key arguments [they] make in opposition to PGW's [m]otions" *id.* and "provides invaluable testimony that PGW's witnesses had previously concealed or obscured-revealing both PGW's discriminatory acts and its cover-up of the same," *id.* at 5. According to Plaintiffs, "[they] were previously unaware of Mr. Claus as he was never identified by PGW in its initial disclosures or elsewhere in discovery as a person having knowledge of relevant matters." *Id.*

***2** For its part, PGW opposes the motion and asks the Court to strike Claus' declaration. Among its arguments, PGW submits that Claus' declaration is demonstrably false in several instances and littered with hearsay; that Claus was in fact disclosed and discussed during discovery; that Claus offers no "new" first-hand knowledge germane to the issues before the Court; and that Plaintiffs' untimely filing is an effort to prejudice PGW and create issues of fact where none exist. PGW also accuses its opposing counsel as invading attorney-client privilege and work-product protections that are not Claus' to waive, having been fully aware of the ongoing obligations that Clause still maintained to PGW.

After careful consideration of the motion(s) and the filings in support of and in opposition thereto, the Court will deny Plaintiffs' motion for leave and will grant PGW's motion to strike.

II. Legal Standard

"A [district] court has discretion to grant leave to supplement the record of a case." *Saturn of Denville New Jersey, LP v. Gen. Motors Corp.,* No. 08–CV–5734(DMC), 2009 WL 953012, at *3 (D.N.J. Apr.7, 2009) (citing *Edwards v. Pa. Tpk. Comm' n,* 80 F. App'x 261, 265 (3d Cir.2003)). In the exercise of that discretion, district courts have, for example, rejected a motion to supplement "because the proposed supplementary information does not provide any new evidence or create any new questions of material fact that impact ruling on the pending Motion for Summary Judgment." *Jackson v. Ivens,* No. CIV.A. 01–559–JJF, 2010 WL 2802279, at *1 (D.Del. July 13, 2010) (citation omitted).

The United States Courts of Appeals has similarly "indicated that a motion to supplement the summary judgment record may be granted when the new material is not merely cumulative of evidence already in the record and if the new material creates a new question of material fact that may impact the ruling on the pending motion for summary judgment." *Leese v. Martin,* No. CIV. 11–5091 JBS/AMD, 2013 WL 5476415, at *12 (D.N.J. Sept.30, 2013) (citing *Edwards,* 80 F. App'x at 265). Our court of appeals has also found no abuse of discretion when a district court refused a litigant's request to supplement the record because it was untimely-*i.e.,* after the close of discovery and after the filing of dispositive motions. *See Garcia v. Newtown Twp.,* 483 F. App'x 697, 705 (3d Cir.2012) (citing *DeLong Corp. v. Raymond Int'l, Inc.,* 622 F.2d 1135, 1140 n. 5 (3d Cir.1980), *overruled on other grounds, Croker v. Boeing Co.,* 662 F.2d 975 (3d Cir.1981)); *see also Edwards,* 80 F. App'x at 265.

Federal Rule of Civil Procedure 12(f) also provides that a court may, on its own or on motion made by a party, "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous." However, Rule 12(f) appears to be an unlikely source of authority where, as here, a party moves to strike an affidavit as opposed to a pleading. *See* The Late CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, 5C Fed. FEDERAL PRACTICE AND PROCEDURE § 1380 (3d ed. 2004) ("Rule 12(f) motions only may be directed towards pleadings as defined by Rule 7(a); thus motions, affidavits, briefs, and other documents outside of the pleadings are not subject to Rule 12(f).").

***3** District courts nevertheless retain their inherent authority to control their docket, *see Eash v. Riggins Trucking Inc.,* 757 F.2d 557, 561 (3d Cir.1985), and in the exercise of that power, they may strike from the record an improperly filed document, *see Ready Transp., Inc. v. AAR Mfg., Inc.,* 627 F.3d 402, 404–05 (9th Cir.2010). *See also Zepeda v. PayPal, Inc.,* No. C 10–1668 SBA, 2013 WL 2147410, at *3 (N.D.Cal. May 15, 2013). Against this backdrop, the Court turns to the instant motion(s).

III. Discussion

As an initial matter, the Court finds that Plaintiffs' motion is untimely: more than two years after the close of discovery and many months after the record was closed and the motions were taken under advisement. To justify this late submission to the Court, Plaintiffs' cite a fortuitous event: that Claus contacted Plaintiffs' counsel after his termination by PGW and disclosed facts that confirmed their theory of the case, having never been aware that he possessed this so-called "wealth of knowledge" revealing/confirming PGW's discriminatory acts and its cover-up of same.

Plaintiffs' suggestion that Claus was never identified by PGW or elsewhere in discovery is misleading at best. As PGW correctly highlights, Claus was discussed during depositions, including in the **February 3, 2012** deposition of his immediate supervisor, William Jones, Vice President of Information Technology. *See* Dep. of Jones, ECF No. 436–1 ("Jack works for me. He's my head of infrastructure. So he's responsible for running my

computers."); *see also id.*, Ex. 4, ECF No. 436–3 (reproducing e-mails from Claus to Jones); March 22, 2012 Dep. of Bulger, Ex. 2 (reproducing e-mails from Claus to Peter Dishart). Plaintiffs thus had ample opportunity to depose Clause or seek relevant information during the extensive discovery phase of this litigation. But they elected not to do so and cannot identify any legitimate reason why this Court should (essentially) reopen fact discovery at this late juncture.

Plaintiffs' motion also adds nothing new to the record. This case is no longer a collective action, as the parties are well-aware. Even so, Plaintiffs (through Claus' declaration) continue their attempt to inject into the record irrelevant facts concerning PGW, the RIF, and non-party Kohlberg. Nowhere in Claus' declaration does he state, let alone suggest, that he has first-hand knowledge as to the employment situations of the five remaining named Plaintiffs. Nor does Claus' declaration suggest that he was involved in the decision-making process related to Plaintiffs. Claus' declaration instead contains (speculative) factual assertions regarding other employees who were allegedly targeted in the RIF. Worse yet, Claus' declaration includes "facts" that are demonstrably false-*i.e.*, he accuses Robert McCollough of "appear[ing] to agree with [Bill] Jones statement" at a meeting he attended regarding the March 2009 RIF, at which Jones characterized older employees eligible for PPG retirement as "low hanging fruit." McCullough was not, however, employed by PGW until Fall, 2009. Claus' declaration once again misleads the Court.

***4** And the Court does not disagree with PGW that allowing Plaintiffs' requested supplementation would prejudice it as the opposing party. The timing of this motion is well-documented. Additionally, the Court would have to reopen discovery, allow PGW to depose Claus and rebut his recollection of events that occurred six years ago and then permit the parties to supplement and (perhaps) resubmit the voluminous dispositive and related motions-all of which were presented to this Court by the parties after they made strategic and tactical litigation decisions based on the record after the close of fact and expert discovery. To permit Plaintiffs to supplement the record at this late stage would only cause further expense, waste the parties' (and the Court's) limited resources, and further delay an outcome in this five-year-old case-hardly a just, speedy, and inexpensive determination of this action.

The Court will, therefore, deny Plaintiffs' motion and strike Claus' declaration from the record. An appropriate Order follows.

ORDER OF COURT

AND NOW, this 8th day of June, 2015, in accordance with the foregoing Memorandum Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** as follows: (1) PLAINTIFFS' MOTION [FOR] LEAVE TO SUPPLEMENT OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT AND MOTIONS TO BAR EXPERT TESTIMONY (ECF No. 434) is **DENIED;** and (2) DEFENDANT'S MOTION TO STRIKE DECLARATION OF JOHN D. CLAUS (ECF No. 436) is **GRANTED,** and the declaration of John D. Claus (ECF No. 434–2) is hereby **STRICKEN** from the record.

All Citations

Not Reported in F.Supp.3d, 2015 WL 3966434

Footnotes

1 PGW characterizes Claus as a manager in its Information Technology department and a "junior IT manager, who was not involved in a single decision to terminate a single individual in any RIF, but was simply part of the team put in place to execute RIFs once they were decided upon and who "was simply a bit player asked to handle opening and closing employees' computer rights and to access certain electronic records." (ECF No. 436 at 3).

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