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United States District Court, N.D. Texas, Dallas Division.

JMC CONSTRUCTION LP, Plaintiff,

v.

MODULAR SPACE  
CORPORATION, Defendant.

CIVIL ACTION NO. 3:07-CV-01925-B

Signed 10/28/2008

#### Attorneys and Law Firms

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Defendant.

#### MEMORANDUM ORDER

[JANE J. BOYLE](#), UNITED STATES DISTRICT JUDGE

**\*1** Before the Court is the “Motion of JMC Construction, L.P., to Strike the Modular Space Corporation's Summary Judgment Response and the Supporting Declarations of Paul Sly and Dan Sharer in Defense of Defendant Modular Space Corporation's Response to Motion for Summary Judgment” (doc. 37). After review of the motion and briefing, and the history of this case, the Motion is **GRANTED in part and DENIED in part**.

#### **I. PROCEDURAL BACKGROUND**

This declaratory judgment and breach of contract case was originally filed by JMC Construction, LP (“JMC”) against Modular Space Corporation (“ModSpace”) on October 16, 2007 in the 116th District Court of Dallas County, Texas. The dispute revolves around alleged damages to modular buildings which were the subject of various contracts between

the parties. The case was removed from state court on November 16, 2007. ModSpace filed its Original Answer on November 26, 2007. The parties filed a Joint Status Report on January 11, 2008 in which they estimated discovery would take six months from entry of a scheduling order. The parties proposed that “initial disclosures be served no later than 30 days after entry of the pretrial scheduling order by this Court.” The Court entered a Scheduling Order on January 14, 2008. According to the Scheduling Order, JMC's expert designation and report was due April 30, 2008, and ModSpace's expert designation and report was due May 30, 2008. Discovery was to be completed by July 31, 2008.

Following an unopposed motion, the Court granted ModSpace leave to file a Counterclaim, which was filed on April 8, 2008. After a series of motions and responses, the Court granted JMC leave to file its First Amended Original Complaint, which was filed on April 15, 2008. JMC filed an Answer to Defendant's Counterclaim on April 18, 2008. ModSpace admits that it did not file an Answer to Plaintiff's First Amended Original Complaint.

It is clear from the discovery documents provided by JMC that ModSpace has missed a series of deadlines in the discovery phase of this case. ModSpace did not provide the required Rule 26(a) initial disclosures within the proper deadline, or even within the time period for discovery, and did not designate any experts. On April 18, 2008, JMC served ModSpace with its First Request for Production of Documents and first Interrogatories. JMC filed its Designation of **Expert Witness** and served its **Expert** Report on ModSpace on April 29, 2008. On May 30, 2008, ModSpace served its Responses and Objections to JMC's discovery requests. ModSpace provided no documents in response to JMC's forty-four Requests for Production, but merely responded to each request that it would “produce any responsive documents that it can locate.” In response to an interrogatory asking ModSpace to identify “all persons having knowledge of any discoverable matters other than those used to support your claims or defenses[.]” ModSpace identified only Rodney Strasser. ModSpace identified no other potential parties to the lawsuit. In response to all other interrogatory requests, ModSpace provided no information other than “Defendant will supplement.” The deadline for the completion of discovery passed on July 31, 2008.

**\*2** JMC filed a Motion for Final Summary Judgment (doc. 29) on July 30, 2008 supported by the affidavit of its designated expert. ModSpace filed its response to JMC's

Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment (doc. 34) on August 21, 2008. In support of its Response, ModSpace provided declarations of Paul Sly and Dan Sharer, neither of whom had been disclosed by ModSpace as persons with knowledge, identified in ModSpace's discovery responses, or designated as experts. On August 27, 2008, ModSpace served JMC with its Initial Disclosures identifying fifteen individuals likely to have discoverable information, including Paul Sly and Dan Sharer. On the same day, ModSpace also served JMC with its First Amended Answers and Objections to Plaintiff's First Interrogatories and sent JMC various documents and photographs related to the dispute.

On August 28, 2008, JMC filed its Motion to Strike ModSpace's Response and the Supporting Declarations of Paul Sly and Dan Sharer (doc. 37). In this Motion, JMC provides documentation of ModSpace's conduct in discovery, including copies of the "initial disclosures" and amended discovery responses served nearly a month after the close of discovery. JMC argues that both ModSpace's Response to JMC's Motion for Final Summary Judgment and the Declarations of Paul Sly and Dan Sharer should be stricken based on ModSpace's (1) failure to provide timely initial disclosures, (2) failure to substantively answer interrogatories or produce requested documents within the discovery period, (3) failure to designate Paul Sly and Dan Sharer as **expert witnesses**, and (4) failure to answer JMC's amended complaint.<sup>1</sup> On September 5, 2008, JMC filed a Reply to ModSpace's Response to JMC's Motion for Final Summary Judgment (doc. 39).

In its Response in Opposition to Plaintiff's Motion to Strike Declarations (doc. 55), ModSpace states that "throughout litigation, both parties have attempted to put off most discovery to improve the chances of settlement." ModSpace argues the "Scheduling Order did not contain a deadline for providing Rule 26(a) disclosures," but admits that the disclosures were "due within fourteen days of the parties' Rule 16(f) conference, which was prior to the January 14, 2008 Scheduling Order." ModSpace states that it "failed to docket the deadline for original disclosures because the deadline was not included within the Scheduling Order." ModSpace also argues that "JMC's [April 28, 2008] disclosures identified Paul Sly as a person with knowledge of relevant facts." ModSpace admits that it did not designate an **expert witness** and did not provide **disclosure** responses identifying Paul Sly and Dan Sharer as individuals with knowledge until August 28, 2008. ModSpace also states that due to various

circumstances, it had "difficulty locating documents or individuals familiar with the project."

## II. APPLICABLE LAW

Under [Rule 26\(a\)\(1\) of the Federal Rules of Civil Procedure](#), a party must make certain initial disclosures within the early stages of litigation without awaiting a discovery request. [Fed. R. Civ. P. 26\(a\)](#). This includes a duty to disclose "each individual likely to have discoverable information—along with the subject of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." [Fed. R. Civ. P. 26\(a\)\(1\)\(A\)\(i\)](#). The rule provides that a "party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures." [Fed. R. Civ. P. 26\(a\)\(1\)\(E\)](#). Further, [Rule 26\(e\)](#) requires that a "party who has made a disclosure under [Rule 26\(a\)](#)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure response." [Fed. R. Civ. P. 26\(e\)](#); *Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 764 (5th Cir. 1989). Supplemental disclosures shall be made "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." [Fed. R. Civ. P. 26\(e\)](#).

**\*3** Under [Rule 37 of the Federal Rules of Civil Procedure](#), a party who fails to provide information or identify a witness through initial disclosures or proper supplementation of discovery responses, pursuant to [Rule 26\(a\) and \(e\)](#), "is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, *unless the failure was substantially justified or is harmless*." [Fed. R. Civ. P. 37\(c\)\(1\)](#) (emphasis added); *Tex. A & M. Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 401–02 (5th Cir. 2003); *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 563 (5th Cir. 2004). The "sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of [Rule 26\(a\)](#) was either justified or harmless." *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003).

In determining whether a violation of [Rule 26](#) is harmless or substantially justified, the district court's decision is to be guided by the consideration of four factors: "(1) the

importance of the evidence; (2) the prejudice to the opposing party of including the evidence; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation for the party's failure to disclose.” *Tex. A & M*, 338 F.3d at 402; *Paulsen v. State Farm Ins. Co.*, No. 06-9546, 2008 WL 449783, at \*2 (E.D. La. Feb. 15, 2008). A motion to compel is not a prerequisite to the granting of Rule 37 sanctions. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 572 (5th Cir. 1996). “If the party required to make the disclosure would need the material to support its own contentions, the more effective enforcement of the disclosure requirement will be to exclude the evidence not disclosed ...” *Id.* (quoting Fed. R. Civ. P. 37 advisory committee's notes).

### III. APPLICATION OF LAW TO FACTS

The Court finds that ModSpace has not complied with the mandatory Rule 26(a) initial disclosures, Rule 26(e) supplementation requirement, or with the deadline for completion of discovery set by the Court. ModSpace's Rule 26(a) “initial disclosures” were provided twenty-seven days after the discovery period had ended and more than six months after they were due. *See Fed. R. Civ. P. 26(a)*. During discovery, ModSpace did not provide any documents in response to requests for production and, in fact, its only response was a promise to “supplement.” *See Fed. R. Civ. P. 26(e)*. Then, after the close of discovery and after JMC had gone through the expense of filing a motion for final summary judgment, ModSpace responded with affidavits of two witnesses and exhibits that had never been provided to JMC. After filing its response, ModSpace served JMC with its “initial disclosures” and “supplemented” its discovery responses. The Court finds ModSpace's dubious conduct during discovery in this case in violation of Rule 26(a) and (e).

In deciding whether Rule 37 sanctions should be imposed, the Court first looks to whether the failure to provide timely initial disclosures and discovery supplementation was substantially justified. *See Fed. R. Civ. P. 37(c)(1)*. In attempting to justify its failure to meet deadlines under Rule 26, JMC admits that because the amount in controversy is “less than \$120,000[,]” it had “put off most discovery to improve the chances of a settlement.” JMC offers the Court an excuse of failing to calendar the initial disclosure deadline and explains that there had been “difficulty locating documents or individuals familiar with the project.” But the statements made by ModSpace's counsel in its Response in

Opposition to Plaintiff's Motion to Strike Declarations as justification of its failure to timely disclose and supplement its discovery responses are unsupported by documentation or sworn affidavits. More importantly, the Court does not find the litany of excuses that ModSpace provides to be “substantial justification” for such a lengthy failure to comply with mandatory disclosure deadlines and supplementation requirements.

\*4 Turning to the four factors in determining whether ModSpace's failure to comply with Rule 26(a) and (e) was “harmless,” the Court finds ModSpace's failure to timely disclose witnesses or supplement discovery was not harmless. *See Fed. R. Civ. P. 37(c)(1)*; *Tex. A & M*, 338 F.3d at 402. Under the first factor, the evidence is very important to ModSpace's case because it consists of eyewitness testimony and photographs regarding the condition of the modular buildings which are the subject of the dispute. *Cf. Sierra Club*, 73 F.3d at 573 (finding no abuse of discretion in excluding testimony that “ultimately proved to be relatively unimportant.”). However, the importance of the evidence is not the only factor to be considered.

Under the second factor, the Court notes that JMC would be highly prejudiced if the Court allowed the evidence because it cuts to the heart of the case. *See Paulsen*, 2008 WL 449783, at \*3. JMC had no opportunity to depose these undisclosed witnesses during discovery and had already moved for summary judgment based on ModSpace's lack of evidence to dispute JMC's expert testimony. In its attempt to show JMC was not prejudiced by the failure to disclose, ModSpace claims JMC itself had identified Paul Sly as an individual with knowledge and therefore, could not be prejudiced by ModSpace's failure to identify him. However, ModSpace has not provided the Court a copy of JMC's Initial Disclosures as proof of that claim. Regardless of JMC's alleged awareness that Paul Sly was an individual with knowledge, it was unaware that ModSpace intended to use Paul Sly as a fact witness to support its case since ModSpace had not provided timely initial disclosures or disclosed him as a witness in its interrogatory responses. *See id.* (noting that where a witness list was filed late, the opposing party's previous awareness of a witness's affidavit “does not translate into knowledge that [the witness] was going to be used [by the non-disclosing party] as a witness[ ]” at trial).

In regard to the third factor, the Court is reluctant to grant a continuance to cure the prejudice to JMC and allow ModSpace to benefit from its failure to follow the rules

governing discovery. A continuance “would neither punish [ModSpace] for its conduct nor deter similar behavior in the future.” See *Sierra Club*, 73 F.3d at 573 (quoting *Bradley v. United States*, 866 F.2d 120, 126 (5th Cir. 1989) ).

The fourth factor also weighs heavily against ModSpace, as its explanation for its failure to timely disclose or supplement discovery falls far short of its goal. ModSpace's position, as evidenced in filings before this Court, seemed to be that the “small” monetary amount in dispute did not warrant counsel's attention to discovery deadlines because the case would probably settle. This attitude toward mandatory disclosure rules and the discovery deadline set in the Court's Scheduling Order is viewed poorly by the courts and does not comport with the standard expected of lawyers practicing in federal court. See generally *Sierra Club*, 73 F.3d at 569–71; *Paulsen*, 2008 WL 449783, at \*3–\*5.

In sum, ModSpace's wholesale disregard for the discovery rules and discovery deadlines in this case provides ample justification for excluding the evidence ModSpace failed to bring forth until a month after discovery had closed. Therefore, pursuant to Rule 37, the Court prohibits ModSpace from using the testimony of Paul Sly and Dan Sharer at trial in this case. This evidentiary bar includes the declarations of Paul Sly and Dan Sharer, as well as the exhibits attached to those witnesses' declarations, in support of ModSpace's Response to JMC's Motion for Final Summary Judgment.

#### IV. CONCLUSION

\*5 For the foregoing reasons, the Court **GRANTS in part and DENIES in part** the Motion of JMC Construction, L.P., to Strike the Modular Space Corporation's Summary Judgment Response and the Supporting Declarations of Paul Sly and Dan Sharer (doc. 37). The Court denies the request to strike the Summary Judgment Response itself, but grants

the request to exclude the evidence offered in support of ModSpace's Summary Judgment Response. In accordance with Rule 37(c)(1) for failure to file initial disclosures within the proper deadlines and supplement discovery responses, the Court **STRIKES** the entire Appendix in Support of Defendant's Response to Plaintiff's Motion for Summary Judgment (doc. 35), including the declarations of Paul Sly and Dan Sharer and the exhibits attached to those declarations.

**IT IS FURTHER ORDERED**, for the same reasons state above and in accordance with Rule 37(c)(1), that all witnesses which ModSpace failed to disclose or identify in interrogatory responses prior to July 31, 2008 are **STRICKEN** from ModSpace's witness lists and their testimony is **EXCLUDED** from trial.

**IT IS FURTHER ORDERED**, for the same reasons state above and in accordance with Rule 37(c)(1), that all documents not disclosed and produced to JMC prior to July 31, 2008 are **STRICKEN** from ModSpace's exhibit list and may not be used at trial.

**IT IS FURTHER ORDERED** that, because Paul Sly and Dan Sharer are excluded from trial as witnesses for the reasons stated above, Defendant's Motion for Leave to File Expert Designations (doc. 57) is **DENIED**.

Based on the above disposition, Plaintiff's Second Motion to Strike the Declarations of Paul Sly and Dan Sharer (doc. 40) and Plaintiff's Motion for Leave to File Motion to Exclude Defendant Modular Space Corporation's **Expert Witnesses** at Trial (doc. 46) are **MOOT**.

**SO ORDERED.**

#### All Citations

Not Reported in Fed. Supp., 2008 WL 11425650

#### Footnotes

- 1 The Court notes that on September 5, 2008, JMC filed a Second Motion to Strike the Declarations of Paul Sly and Dan Sharer (doc. 40) on the alternative grounds that the affidavits were not made on personal knowledge and did not set forth facts that would be admissible evidence. Based on the ruling on JMC's first Motion to Strike, the Court need not consider this Motion and it is, therefore, moot.