IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-01177-LTB-NYW

DAKOTA TYLER MCGRATH,

Plaintiff,

v.

FORT COLLINS POLICE SERVICES OFFICER NICK RODGERS, in his individual capacity,

Defendant.

RESPONSE TO PLAINTIFF'S MOTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 36(b) TO PERMIT ADMISSIONS TO BE WITHDRAWN OR AMENDED FROM DEFENDANT

Defendant Fort Collins Police Services Officer Nick Rogers,[1] through his counsel, Thomas J. Lyons and Matthew J. Hegarty of Hall & Evans, L.L.C., respectfully submits this Response to Plaintiff's "Motion Pursuant to Federal Rule of Civil Procedure 36(b) to Permit Admissions to Be Withdrawn or Amended" ("Motion"), stating as follows:

I. INTRODUCTION

Plaintiff's Motion seeks relief from operation of Fed.R.Civ.P. 36(a)(3), which directs untimely requests for admissions to be deemed admitted under the circumstances of this case, which involve submission of an untimely response to requests propounded under Rule 36 even after an informal extension was granted. For the reasons set forth below, however, the justifications Plaintiff offers are insufficient to grant his Motion and insufficient to prevent the normal operation of Fed.R.Civ.P. 36(a)(3).

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[1] Incorrectly identified in the Complaint as "Nick Rodgers."

II. RESPONSE TO PLAINTIFF'S STATEMENT OF FACTUAL BACKGROUND

1. Defendant agrees this case involves a baton strike by Defendant that had the effect of causing a fracture to Plaintiff's lower right tibia, but states this case is also about Plaintiff's refusal to comply with the reasonable requests and directives of Defendant.

2. Defendant agrees the Requests for Admission at issue were submitted to Plaintiff through counsel on November 17, 2017, and agrees the text of those Requests for Admission ("RFAs") is set forth accurately on page 2 of the Motion. Even so, Defendant denies the wholly conclusory assertion in paragraph 2 of the Factual Background section that all of these nine RFAs went directly to the merits of this case.

3. Defendant agrees Plaintiff's responses to those RFAs were due no later than December 17, 2017, by operation of Fed.R.Civ.P. 36(a)(3).

4. Defendant agrees on December 15, 2017, the office of Plaintiff's counsel sought an extension of time to respond to those RFAs until December 29, 2017.

5. Defendant agrees on December 18, 2017, his counsel informally acquiesced in the requested extension of time to respond to those RFAs until December 29, 2017.

6. Defendant does not know the reasons why Plaintiff did not respond to those RFAs by December 29, 2017, and thus is not in a position to agree with Plaintiff's stated justifications in paragraph 6 of the Factual Background section, but states Plaintiff did not communicate any request for an additional extension of time on or before December 29, 2017. Defendant agrees no service of any response to those RFAs occurred until January 9, 2018.

7. Defendant states Attachment 4 to Plaintiff's Motion speaks for itself and denies any inconsistent characterization in paragraph 7 of the Factual Background section.

8. Defendant agrees Plaintiff's deposition has not yet occurred but states that due to what Plaintiff has represented to be his multiple physical issues, mental health issues, and personal issues, it currently is unknown whether that deposition will provide sufficient occasion for defense counsel to question Plaintiff on the matters those RFAs reference.

9. Defendant agrees Plaintiff filed an unopposed motion requesting extension of the discovery cutoff and dispositive motions deadline, which request was granted.

III. ARGUMENT

A. Governing Law on Requests for Admissions and Fed.R.Civ.P. 36

A matter is admitted unless, within 30 days after service, the party to whom the request is directed serves on the requesting party a signed written answer or objection addressed to the matter. *See* Fed.R.Civ.P. 36(a)(3); *see* ***Bernard v. Group Publ'g, Inc.***, 970 F. Supp. 2d 1206 (D. Colo. 2013) (deeming admitted). In the context of requests to admit, no litigant should ignore deadlines set by the rules, and sanctions may well be appropriate for any such inaction. *See* ***Raiser v. Utah Cnty.***, 409 F.3d 1243, 1247 (10th Cir. 2005); ***Chalepah v. Canon City & Royal Gorge Route***, 2015 U.S. Dist. LEXIS 115459, at *9-10 (D. Colo. Aug. 31, 2015) (deeming admitted). Also, facilitation of the expeditious resolution of factual issues is an important consideration in the equitable and efficient administration of justice, particularly for backlogged federal civil courts. ***Branch Banking & Trust Co. v. Deutz-Allis Corp.***, 120 F.R.D. 655, 657 (E.D.N.C. 1988).

Withdrawal of admissions is not permitted unless both (1) it would promote the presentation of the merits and (2) the court is not persuaded it would prejudice the requesting party in defending the action. Fed.R.Civ.P. 36(b). The Court must focus on the effect on the litigation and prejudice to the requesting party, not on the answering party's

asserted justifications for an erroneous admission. *See* ***Kirtley v. Sovereign Life Ins. Co. (In re Durability Inc.)***, 212 F.3d 551, 556 (10th Cir. 2000).

The first prong as to promoting presentation of the merits relates to whether upholding the admissions would "practically eliminate" such presentation. ***Raiser***, 409 F.3d at 1246. Stated differently, only where a "complete concession" of all elements of a party's claim or defense would thereby be obtained is it proper to permit withdrawal of an admission. ***Branch Banking***, 120 F.R.D. at 659. In contrast, where the admissions do not go to all of the elements of the claim at issue, it is not appropriate to afford a party relief from deemed admissions. *See* ***Baker v. Potter***, 212 F.R.D. 8, 13-14 (D.D.C. 2002). If a specific admission does not concede a core element of the answering party's case, no permission to withdraw it should be granted. *See* ***Raiser***, 409 F.3d at 1246. To this end, a litigant wishing to withdraw any deemed admission must specifically show that withdrawing that admission would advance the presentation of the merits of its case. *See* ***Frane v. JP Morgan Chase Bank, N.A.***, 639 F. App'x 577, 578 (10th Cir. 2016). And the second prong of prejudice relates to the difficulty the requesting party may have in proving its case, including without limitation unavailability of key witnesses because of a sudden need to obtain evidence on matters earlier deemed admitted. ***Raiser***, 409 F.3d at 1246.

B. Both Prongs of the Test for Seeking Relief from "Deemed Admissions" Favor Defendant in This Matter

As to the first prong, an elemental analysis of Plaintiff's sole claim for the alleged excessive force of Defendant reveals Defendant still has much to prove even if the matters currently "deemed admitted" stay deemed admitted. The core of Plaintiff's Fourth Amendment excessive force claim is as follows: "the severity of the crime at issue,

whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." ***Graham v. Connor***, 490 U.S. 386, 396 (1989). In the interest of candor, Defendant acknowledges the sole RFA that could be construed to admit a core element is RFA 6 because it asks Plaintiff to admit he resisted attempts to place him in handcuffs. However, because there exists in this case video evidence that Plaintiff was not passive as FCPS officers tried to put him in handcuffs, Defendant did not reasonably anticipate this RFA would be disputed. And with regard to the other eight RFAs, even if they are deemed admitted Plaintiff still is free to argue other facts and factors that in his view show he allegedly did not pose an immediate threat to the safety of Defendant or others and allegedly was not attempting to evade arrest by flight. To this end, Defendant studiously avoided seeking any admission relative to the baton strike to Plaintiff's right tibia. The law requires much more than that the RFAs "bear upon" a party's claim, but rather that the party's presentation of his claim is "practically eliminated." Plaintiff did not show this to be the case. Hence, Plaintiff's claim that the eight denied RFAs concede all elements of his claim is pure applesauce.[2]

And as to the second prong, the Court is well aware of Defendant's attempts to secure Plaintiff's deposition and, thus far, his being denied opportunity to question Plaintiff at deposition due entirely to circumstances outside Defendant's control. The prejudice prong might be less evenly balanced had Defendant already been able to depose Plaintiff, but that has not occurred. In addition, Defendant is prejudiced by the delay due to not being able to serve any follow-up discovery requests after the deposition of Plaintiff,

[2] "'[P]ure applesauce' is commonly interpreted to mean nonsense." ***In re Experient Corp.***, 535 B.R. 386, 413 n.123 (Bankr. D. Colo. 2015).

whenever that happens [*see* ECF No. 20], whereas the intended sequencing was to take Plaintiff's deposition with enough time left prior to the close of discovery that follow-up discovery requests could be served. Regardless, only one prong need be disproven, and Defendant conclusively disproved the first prong, rendering the second prong irrelevant.

Plaintiff's reliance on ***Pittman v. Wakefield & Assocs., Inc.***, 2017 U.S. Dist. LEXIS 192506 (D. Colo. Nov. 21, 2017), is misplaced because the defendant requested the admission of at least one matter of ultimate fact (asking the plaintiff to admit "she had suffered no damages from [the defendant]'s conduct"), because another admission would "conclusively establish" one of the defendant's defenses, and because the defendant could not contend it did not expect a dispute on that particular issue. *See id.* at *9-11. In contrast: no RFA here seeks the admission of any ultimate fact except the one that Defendant identified in the interest of candor (RFA 6); as shown above, no admission of any RFA at issue either conclusively establishes Defendant's defenses or conclusively disproves Plaintiff's entire claim; and based on the video evidence both parties disclosed, Defendant did not expect a dispute on, at a minimum, RFAs 4-6.

Also, Plaintiff's reliance on ***Dedmon v. Cont'l Airlines, Inc.***, 2015 U.S. Dist. LEXIS 103340 (D. Colo., Aug. 5, 2015), is misplaced because the plaintiff admitted more than half of the RFAs at issue and because the defendants already had an opportunity to question the plaintiff at her deposition. *See id.* at *15. In contrast: Plaintiff admitted only one of the nine RFAs, and thus far Defendant has been denied the chance to question Plaintiff at any deposition due entirely to circumstances outside the control of Defendant.

Further, Plaintiff's reliance on ***Jesusdaughter v. Scoleri***, 2007 U.S. Dist. LEXIS 16275 (D. Colo. Mar. 5, 2007), is misplaced because the RFAs at issue asked the party

seeking relief to admit matters of ultimate fact ("admit you were never justified in exerting force") and because the party seeking relief filed his responses to the RFAs only two days late. In contrast, no RFA at issue in this matter seeks to have Plaintiff admit a matter of ultimate fact, and Plaintiff filed his responses eleven days late.

Moreover, Plaintiff's reliance on ***Lee Browning Belize Trust v. Aspen Mtn. Condo. Ass'n***, 2017 U.S. Dist. LEXIS 21360 (D. Colo. Fed. 15, 2017), is misplaced because while in ***Lee Browning*** the defendant had opportunity to question the plaintiff's representatives at deposition as to information sought in the RFAs at issue, *see id.* at *11-12, thus far Defendant has been denied the chance to question Plaintiff at any deposition due entirely to circumstances outside the control of Defendant.

IV. CONCLUSION

In conclusion, for the foregoing reasons, Defendant Fort Collins Police Services Officer Nick Rogers respectfully requests that this Court deny Plaintiff's Motion and hold that all requests for admission set forth in Defendant's First Set of Interrogatories, First Set of Requests for Production of Documents, and First Set of Requests for Admissions are deemed admitted for all purposes in the above-captioned case.

Respectfully submitted this 23rd day of February, 2018.

s/ Matthew J. Hegarty
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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that, on this 23rd day of February, 2018, I electronically filed the foregoing **RESPONSE TO PLAINTIFF'S MOTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 36(b) TO PERMIT ADMISSIONS TO BE WITHDRAWN OR AMENDED FROM DEFENDANT** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following email address:

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