

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SECURITY TECHNOLOGIES, INC, et al,

Plaintiffs,

v

BRMC EQUITIES, LLC, et al,

Defendants.

Case No. 2013-135199-CK  
Hon. Wendy Potts

Consolidated with  
Case No. 2013-134695-CK

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OPINION AND ORDER RE: PLAINTIFFS' MOTION TO STRIKE DEFENDANTS'  
WITNESS LIST  
AND  
DEFENDANTS' MOTION TO FILE LATE WITNESS LIST  
AND  
PLAINTIFFS' MOTION TO HOLD DEFENDANTS IN CONTEMPT

At a session of Court  
Held in Pontiac, Michigan

On

AUG 15 2014

The matter is before the Court on the parties' disputes over Defendants' alleged failure or refusal to cooperate with discovery or timely identify their witnesses. The discovery process was quite contentious, and the Court was forced to issue multiple orders compelling Defendants to answer written discovery or cooperate with scheduling depositions and twice sanctioned Defendants for failure to comply with the discovery or the Court's orders. Plaintiffs then filed a motion to hold Defendants in contempt claiming that Defendants continued to delay, resist, or obstruct discovery. The Court issued an order for Defendants to appear and show cause why the Court should not hold them in contempt. Plaintiffs also moved to strike Defendants' witness list because it was not timely filed, and Defendants moved the Court to allow them to file a late witness list.

The Court will first address the matter of Defendants' witness list. There is no question that Defendants failed to file their witness list by October 15, 2013 as ordered by the Court and did not file it until December 2, 2013. Defendants claim that they filed their witness list in compliance with the scheduling order issued in the consolidated case No. 2013-134695-CK, which required witness lists to be filed by December 31, 2013. However, the cases were not consolidated until October 28, 2013, almost two weeks after Defendants' witness list was due. Further, Defendants never asked this Court to adjourn the scheduling order dates set for case No. 135199 or adopt the dates set in case No. 134695 for the consolidated cases. Thus, Defendants' witness list was plainly late by several weeks.

However, the mere fact that a witness was not timely identified does not, in and of itself, justify barring a witness' testimony. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). Rather, the Court must consider several factors including (1) whether the violation was wilful or accidental; (2) Defendants' history of refusing to comply with discovery requests or disclose witnesses; (3) the prejudice to Plaintiffs; (4) when Plaintiffs had actual notice of the witness and the length of time prior to trial they had notice; (5) whether Defendants have a history of engaging in deliberate delay; (6) Defendants' degree of compliance with other provisions of the Court's order; (7) Defendants' attempts to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice. *Richardson v Ryder Truck Rental*, 213 Mich App 447, 451; 540 NW2d 696 (1995).

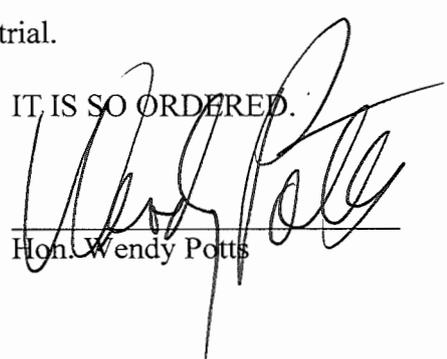
Although the Court has no evidence that Defendants intentionally ignored the witness list filing date, Defendants have not provided any reasonable excuse for the delay. Further, as noted above, Defendants have shown a propensity for failing or refusing to cooperate with discovery, deliberately delaying discovery responses or depositions, and failing to comply with the Court's orders mandating discovery. Thus, the late witness list may very well be part and parcel of

Defendants' apparent strategy to delay and obstruct Plaintiffs' discovery. Although Plaintiffs did receive the witness list prior to the close of discovery, it unclear whether Plaintiffs were able to obtain discovery on any of Defendants' witnesses other than the parties. Allowing Defendants to present witnesses without Plaintiffs having the opportunity to conduct discovery on those witnesses would be highly prejudicial to Plaintiffs. Based on these considerations, the Court concludes that Defendants will be allowed to call the named parties as witnesses. However, as to any other witness named on the December 2<sup>nd</sup> witness list, Defendants may not call them as witnesses unless they can demonstrate that Plaintiffs were afforded an opportunity to conduct discovery on those witnesses and Defendants fully complied with Plaintiffs' discovery.

As for Plaintiffs' request to hold Defendants in contempt for failing to comply with the Court's orders, the Court agrees with Plaintiffs that Defendants have been uncooperative and even hostile to Plaintiffs' attempts to obtain written discovery and schedule depositions. The Court further agrees that Defendants have not demonstrated that they fully complied with the Court's orders. However, an order finding Defendants in contempt would be overly harsh and likely counterproductive to the prompt resolution of this matter. In lieu of a contempt sanction, the Court concludes that Defendants will be barred from presenting any evidence or argument regarding matters for which they have not fully cooperated with Plaintiffs' discovery. To the extent that Plaintiffs can demonstrate that they sought discovery on a claim, issue, fact, or witness and Defendants did not comply with and allow that discovery, the Court will entertain a motion to bar Defendants from presenting that evidence at trial.

Dated:           **AUG 15 2014**

IT IS SO ORDERED.

  
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Hon. Wendy Potts