

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 13 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE VERA,

Plaintiff-Appellant,

v.

BUREAU OF INDIAN AFFAIRS, U.S.
DEPARTMENT OF THE INTERIOR and
UNITED STATES OF AMERICA,

Defendants-Appellees.

No. 17-35724

D.C. No. 1:17-cv-03005-RMP

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Rosanna Malouf Peterson, District Judge, Presiding

Argued and Submitted August 28, 2018
Seattle, Washington

Before: McKEOWN, W. FLETCHER, and GOULD, Circuit Judges.

Vera appeals the district court's order dismissing his negligence suit against the United States for lack of subject matter jurisdiction. Because we conclude that this jurisdictional motion should have been treated as a motion for summary judgment and that some discovery must be conducted before summary judgment

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

can be granted, we vacate and remand for further proceedings.

1. The district court erred in granting the Rule 12(b)(1) motion to dismiss without treating it as a motion for summary judgment. As we have held, where “the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits,” challenges to the presence of jurisdictional facts must be treated as motions for summary judgment with the corresponding protections for the nonmoving party. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (quoting *Sun Valley Gas., Inc. v. Ernst Enters.*, 711 F.2d 138, 139 (9th Cir. 1983)). This rule squarely controls this case.

Here, the basis of the United States’ jurisdictional attack is an allegation that it does not control the relevant portion of Signal Peak Road. That jurisdictional issue is closely intertwined with the merits question of the government’s duty to Vera as asserted in his tort action, to have taken steps to make the road safe. The district court’s handling of the government’s 12(b)(1) motion required Vera to defend a core element of his substantive tort case at its outset. Under our precedents, particularly *Safe Air* and *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983), this entitles Vera to the protections of a summary judgment motion rather than the more limited protections given to a plaintiff responding to a factual attack on jurisdiction.

2. The district court's decision cannot be affirmed because the United States is not entitled to summary judgment. While we agree with the United States that the evidence currently in the record would entitle it to summary judgment, we cannot agree that Vera's case should be dismissed without a chance for him to obtain discovery related to his case.

To be sure, the merits of Vera's requests for discovery were far from transparent, and we do not fault the district court for discounting them to some extent. However, because discovery may yield information relevant to critical matters at issue—specifically, the precise location of the accident and portion of the road over which the United States had direct control—we are reluctant to grant summary judgment before the nonmoving party has had an opportunity for discovery. *See Jacobson v. United States Dep't of Homeland Sec.*, 882 F.3d 878, 883 (9th Cir. 2018) (citing *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003)); *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)).

This hesitancy is reinforced because procedural complications have obscured the substance of a motion for summary judgment, dressed up as a jurisdictional challenge. Because the government's motion was filed as a 12(b)(1) motion and not as a motion for summary judgment, we cannot assume that

discovery-related objections to summary judgment would have been raised with Rule 56(d) and its requirements in mind. We vacate and remand so that appropriate discovery can take place, after which either party may renew or assert a summary judgment motion.

3. The district court's decision cannot be affirmed on the basis that Vera failed to state a claim. The complaint, by alleging that the government had control over the road and a duty to install signs and/or boundary features that would have prevented Vera's accident, is sufficiently specific to meet the standard set out under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

Costs are awarded to the appellant under Fed. R. App. Proc. 39.

VACATED AND REMANDED.