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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MELISSA NYLAND,
Plaintiff,

vs.

ROOKE, LLC, d/b/a RIOT
HOSPITALITY GROUP,
Defendant.

2:15-cv-01670 JWS

ORDER AND OPINION

[Re: Motion at Docket 8]

I. MOTION PRESENTED

At docket 8, Defendant Rooke, LLC, d/b/a Riot Hospitality Group (“Rooke” or “Defendant”) filed a motion for summary judgment. Plaintiff Melissa Nyland (“Plaintiff”) filed a response at docket 15, requesting that the court deny the motion for summary judgment as premature pursuant to Rule 56(d) of the Federal Rules of Civil Procedure. Defendant’s reply is at docket 17. Oral argument was not requested and would not be of assistance to the court.

II. BACKGROUND

Plaintiff alleges she worked at a restaurant, El Hefe Super Macho Taqueria (“El Hefe”), in Scottsdale, Arizona, and that Rooke was her employer because it “owns and

1 operates” El Hefe.¹ Plaintiff brings two Title VII sexual harassment claims against
2 Rooke.

3 The complaint was filed in late August of 2015. On November 4, 2015, the
4 parties submitted their Rule 26(f) report to the court. On that same day, before the
5 court filed its scheduling and planning order, and therefore before any deadlines had
6 been set or any discovery had taken place, Defendant filed the motion for summary
7 judgment. In the motion, Defendant argues that summary judgment is warranted
8 because it is not Plaintiff’s employer and that Plaintiff knew as much based on her
9 personal experience with El Hefe. Defendant alternatively argues that it cannot be an
10 employer liable under Title VII because it has less than fifteen employees. In support of
11 its motion, Defendant submitted a declaration of Justin Cohen, Rooke’s Director of
12 Operations. The declaration alleges that Rooke is only one of several members of the
13 limited liability corporation 4425 Saddlebag, LLC (“Saddlebag”), which is the entity that
14 actually owns El Hefe. The declaration asserts that Saddlebag is a separate entity, with
15 separate employees, separate employee handbooks, and separate management. It
16 asserts that Saddlebag alone makes employment decisions for El Hefe. It asserts that
17 the manager at El Hefe, whose actions form the basis of Plaintiff’s complaint, was
18 Saddlebag’s employee. It asserts that Plaintiff knew her employer was Saddlebag and
19 not Rooke because the restaurant’s employee handbook and her payroll records reflect
20 Saddlebag as her employer.

21 Plaintiff argues in her response that ruling in favor of summary judgment would
22 be premature because the issue of which entity could be deemed her employer is an
23 issue of fact and law that cannot be resolved without discovery. She requests that the
24 court deny the motion pursuant to Rule 56(d) to allow her adequate time to develop her
25 theory of the case as it relates to which entity can be considered her employer. As
26 required under the Rule 56(d), Plaintiff attached a declaration to her response

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28 ¹Doc. 1 at ¶ 4.

1 explaining that her attorney has not had an opportunity to conduct discovery and
2 therefore cannot present facts essential to oppose the motion for summary judgment at
3 this time. Her response also indicates that she plans to file a motion to amend the
4 complaint to add other allegedly related entities as defendants. Indeed, at docket 19
5 Plaintiff has filed such a motion, along with a proposed amended complaint that seeks
6 to add Saddlebag and three other corporate entities as defendants. She alleges in the
7 proposed amended complaint that all the corporate entities, including Rooke, operate
8 identically and all do business under the name Riot Hospitality Group.²

9 III. STANDARD OF REVIEW

10 Rule 56(d) of the Federal Rules of Civil Procedure applies “where the
11 non-moving party has not had the opportunity to discover information that is essential to
12 its opposition.”³ It permits a party to resist a summary judgment motion by “show[ing]
13 by affidavit or declaration that, for specified reasons, it cannot present facts essential to
14 justify its opposition” to the motion.⁴ The declaration must put forth “the specific facts
15 that [the party] hope[s] to elicit from further discovery” and must indicate that the “facts
16 sought exist” and are “essential” to oppose summary judgment.⁵ However, when a
17 party has not “had any realistic opportunity to pursue discovery relating to its theory of
18 the case” courts grant Rule 56(d) motions “fairly freely.”⁶

19
20 ²See doc. 19-1. The proposed amended complaint also seeks to add an individual,
21 Ryan Hibbert, as a defendant and seeks to bring a claim for assault and battery against him.
22 Defendant opposes the request to amend. The motion only recently became ripe and has not
yet been ruled on by the court.

23 ³*Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1169 (9th Cir. 2011) (quoting *Metabolife Int'l,*
24 *Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001)).

25 ⁴Fed. R. Civ. P. 56(d).

26 ⁵*California ex rel. Cal. Dep’t of Toxic Substances v. Campbell*, 138 F.3d 772, 779 (9th
27 Cir.1998)

28 ⁶*Burlington N. Santa Fe R.R. Co. v. Assiniboine and Sioux Tribes of Fort Peck*
Reservation, 323 F.3d 767, 773 (9th Cir.2003).

1 **IV. DISCUSSION**

2 As required by Rule 56(d), Plaintiff’s attorney submitted a declaration in support
3 of Plaintiff’s request to deny summary judgment pending further discovery. In the
4 declaration, the attorney asserts that he needs time to discover information about the
5 corporate relationships between Rooke and other affiliated corporate entities; whether
6 Rooke or any of its affiliated corporate entities had the ability to hire, fire, or discipline
7 Plaintiff; and whether Rooke or any of its affiliated corporate entities had the ability to
8 monitor or control Plaintiff’s work environment or dictate the terms and conditions of her
9 employment. The declaration also states that Plaintiff has not had time to discover
10 facts to contest the number of employees Rooke has for purposes of establishing
11 whether Rooke can be liable under Title VII.

12 Rooke argues that the declaration lacks specifics or any indication that such
13 facts actually exist. While it is proper for a court to deny a Rule 56(d) application
14 “where it is clear that the evidence sought is almost certainly nonexistent or is the object
15 of pure speculation,”⁷ here the court cannot conclude that such facts are clearly
16 nonexistent at such an early stage of litigation. Indeed, at the time the motion was filed
17 Plaintiff had not had any time to develop affirmative evidence that could oppose
18 summary judgment by showing that Rooke could be considered Plaintiff’s employer for
19 purposes of Title VII. Rooke brought this motion for summary judgment the same day
20 the parties filed their Rule 26(f) report and before the court could issue a scheduling
21 and planning order. Thus, at the time the motion was filed, there had been no
22 discovery exchanged between the parties. Therefore, the situation here is one where
23 Plaintiff has not “had any realistic opportunity to pursue discovery relating to its theory
24 of the case” and the court should therefore more freely grant the request to deny
25 summary judgment pending further discovery.⁸

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27 ⁷*Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir. 1991).

28 ⁸*Burlington N. Santa Fe R.R. Co.*, 323 F.3d at 773.

1 Defendant also argues that Plaintiff failed to allege in the complaint that it was
2 her employer and therefore contends she has not adequately stated the elements of
3 her claim. However, paragraph 7 of Plaintiff's complaint clearly alleges that Rooke was
4 her employer.⁹ Rooke argues that her theory as to why it would be liable as her
5 employer even though it is simply an investor in the company that actually owns El Hefe
6 is not adequately pled in her complaint. Even if such a deficiency were fatal to her
7 complaint, the case is still in the early stages of litigation, and Plaintiff has timely filed a
8 motion to amend, which is currently pending before the court. The proposed amended
9 complaint more clearly sets forth her theory of employment. She has not had any
10 realistic opportunity to pursue such a theory. Therefore, summary judgment is not
11 appropriate at this time.

12 **V. CONCLUSION**

13 Based on the preceding discussion, pursuant to Rule 56(d)(1), Defendant's
14 motion for summary judgment at docket 8 is DENIED without prejudice to renew after
15 adequate discovery has taken place.

16 DATED this 18th day of February 2016.

17
18 /s/ JOHN W. SEDWICK
19 SENIOR UNITED STATES DISTRICT JUDGE
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28 ⁹Doc. 1 at ¶ 7.