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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

LOUIS J. BROUSSARD,
Plaintiff,

No. 2:12-CV-0984-CMK-P

vs.

ORDER

K. HIGGINS,
Defendant.

_____ /

Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s motion for summary judgement (Doc. 18, 20) and defendant’s opposition thereto. Defendant’s opposition is actually a request for Rule 56(d) order to deny or delay the consideration of the motion for summary judgment.

The purpose of Rule 56(d) is to provide a device for litigants to avoid summary judgment where they have not had sufficient time to develop affirmative defenses. See Burlington Northern Santa Fe R. Co. v. The Assiniboine and Sioux Tribes of the Fort Peck Reservation, 323 F.3d 767, 773 (9th Cir. 2003). Thus, where a motion for summary judgment is filed very early in the litigation before a party has had any realistic opportunity to pursue discovery, Rule 56(d) motion should be granted freely. See id. Where, however, the party

1 seeking a continuance has not diligently pursued discovery, the district court does not abuse its
2 discretion in denying a Rule 56(d) motion. See id. at 773-74 (citing Wichita Falls Office Assoc.
3 v. Banc One Corp., 978 F.2d 915, 919 n.4 (5th Cir. 1992)). A Rule 56(f) motion must be brought
4 before the summary judgment hearing. See U.S. v. Kitsap Physicians Service, 314 F.3d 995,
5 1000 (9th Cir. 2002). The facts supporting the request for continuance must be set forth in an
6 accompanying affidavit. See id. Failure to comply with either of these requirements is proper
7 basis for denying Rule 56(d) motion. See id.

8 A Rule 56(d) motion should be granted where the party seeking the continuance
9 puts forth a good faith showing by affidavit that the continuance is needed to obtain facts
10 essential to preclude summary judgment. See State of Cal., on Behalf of Cal. Dept. of Toxic
11 Substances Control v. Campbell, 138 F.3d 772, 775 (9th Cir. 1998). The party seeking to
12 conduct additional discovery under Rule 56(f) has the burden of demonstrating that the evidence
13 sought exists. See Conkle v. Jeong, 73 F.3d 909, 914 (9th Cir. 1995). Thus, to obtain relief
14 under Rule 56(d), the party seeking the continuance must show: (1) that they have set forth in
15 affidavit form the specific facts that they hope to elicit from further discovery; (2) that the facts
16 sought exist; and (3) that these sought-after facts are essential to resist the summary judgment
17 motion. See Campbell, 138 F.3d at 775.

18 Here, an answer to plaintiff's complaint was filed on December 3, 2012. After
19 which, the court issued a discovery and scheduling order on December 6, 2012. Less than a
20 week later, plaintiff filed his motion for summary judgment. As defendant has argued, the parties
21 have not had time to conduct any discovery in this action. Pursuant to the scheduling order
22 issued, discovery is set to continue through April 26, 2013. Plaintiff's motion for summary
23 judgment is therefore premature. Defendant's request to continue the motion for summary
24 judgment until the end of the discovery period will be granted. Defendant's opposition to
25 plaintiff's motion for summary judgment will be due 30 days after the close of discovery.

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1 Accordingly, IT IS HEREBY ORDERED that:

2 1. Defendant’s request for a Rule 56(d) order is granted;

3 2. Plaintiff’s motion for summary judgment (Doc. 18, 20) is prematurely
4 filed, and is therefore continued until the end of the discovery period;

5 3. The Clerk of the Court is directed to administratively terminate the
6 motion; and

7 4. Defendant’s opposition to plaintiff’s motion for summary judgment shall
8 be due 30 days after the close of discovery.

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11 DATED: January 7, 2013

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13 **CRAIG M. KELLISON**
14 UNITED STATES MAGISTRATE JUDGE
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