

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

JOHN BERMAN,	)	Case No. 5:11-cv-03698-PSG
	)	
Plaintiff,	)	<b>ORDER DENYING PLAINTIFF’S</b>
v.	)	<b>MOTION FOR SUMMARY</b>
	)	<b>JUDGMENT</b>
KNIFE RIVER CORPORATION et al,	)	
	)	<b>(Re: Docket No. 124)</b>
Defendants.	)	
	)	

Plaintiff John Berman (“Berman”) moves for summary judgment on his negligence and gross negligence claims.<sup>1</sup> Defendant Knife River Corporation (“Knife River”) opposes.<sup>2</sup>

The parties are familiar with the factual and procedural background of this case, and in the interest of expediency, the court will not retrace that background here.

The legal standard concerning motions for summary judgment is well-known. Pursuant to Fed. R. Civ. P. 56(a), “the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>3</sup> Rule 56(c) requires the moving party to support its assertion by “citing to particular parts of materials in the record” or “showing the materials cited do not establish the presence of a genuine

<sup>1</sup> See Docket No. 124.

<sup>2</sup> See Docket No. 133.

<sup>3</sup> Fed. R. Civ. P. 56(a).

1 dispute” or “that an adverse party cannot produce admissible evidence to support the fact.”<sup>4</sup> A  
2 party’s failure to comply with Rule 56(c) is governed by Fed. R. Civ. P. 56(e).<sup>5</sup>

3 Berman’s request does not meet the standards of Rule 56 for at least two independent  
4 reasons. First, Berman’s motion and supporting evidence do not conclusively establish that no  
5 genuine dispute of material fact exists as to the issues of negligence and gross negligence. Berman  
6 offers the declaration of paving contractor Skip Brown regarding the feasibility of a “K-rail” at the  
7 site of the incident at the heart of this case.<sup>6</sup> But Knife River responds with its own declaration  
8 from traffic engineer Richard Ryan, who disputes that any K-rail was even viable, let alone  
9 necessary, under the terms of Knife River’s contract with CalTrans.<sup>7</sup> This creates a classic and  
10 genuine issue of material fact that must be resolved by the jury, not the court.  
11

12 Second, both the court and Knife River granted Berman repeated extensions to comply with  
13 discovery requests in this case.<sup>8</sup> However, even with extra time, Berman did not produce the  
14 documents in a timely fashion. On this record, summary judgment in favor of Berman is  
15 particularly unwarranted.  
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17 Berman’s motion for summary judgment regarding Knife River’s alleged negligence and  
18 gross negligence is DENIED.  
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<sup>4</sup> See Fed. R. Civ. P. 56(c).

23 <sup>5</sup> See Fed. R. Civ. P. 56(e). (“If a party fails to properly support an assertion of fact or fails to  
24 properly address another party’s assertion of fact as required by Rule 56(c), the court may: (1) give  
25 an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes  
26 of the motion; (3) grant summary judgment if the motion and supporting materials – including the  
facts considered undisputed – show that the movant is entitled to it; or (4) issue any other  
appropriate order.”).

27 <sup>6</sup> See Docket No. 124.

28 <sup>7</sup> See Docket No. 133-12.

<sup>8</sup> See Docket Nos. 138 and 143.

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**IT IS SO ORDERED.**

Dated: October 10, 2013

  
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PAUL S. GREWAL  
United States Magistrate Judge