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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD APPEL, DAVID COHEN,
KEE PARTNERS, LLC, a Delaware
limited liability company,

Plaintiffs,

v.

BOSTON NATIONAL TITLE
AGENCY, LLC, a Florida limited
liability company,

Defendant.

Case No.: 18-cv-0873-BAS-MDD

**ORDER ON *EX PARTE*
APPLICATION PURSUANT TO
FED. R. CIV. P. 56(d) TO DEFER
CONSIDERATION OF
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

[ECF NO. 44]

Presently before the Court is Plaintiffs’ Ex Parte Application to defer consideration of Defendant’s Motion for Summary Judgment and to allow time to take discovery pursuant to Federal Rule of Civil Procedure 56(d). (ECF No. 44). Plaintiffs filed this Ex Parte Application on March 15, 2019. (ECF No. 44). Defendant filed its opposition on March 19, 2019. (ECF No. 46).

I. Background

Discovery opened in this case on August 8, 2018. (ECF No. 22). Defendant filed its MSJ on March 8, 2019, the deadline to bring such motions. (*Id.*; ECF No. 42). Apart from a few outstanding depositions that

1 were the subject of individualized extensions, discovery also closed on March
2 8, 2019. (ECF No. 22). Despite having seven months to discover facts to
3 support their case, Plaintiffs contend they still require significant additional
4 discovery. Plaintiffs want to, “at a minimum[:]” (1) conduct discovery
5 resulting from the Rule 72 Objections;¹ (2) obtain communications that have
6 allegedly never been produced; (3) depose Keith Lewis regarding his MSJ
7 supporting declaration; (4) review the over 1,000 pages of documents
8 produced by Concierge; and (5) receive and review the transcripts of
9 depositions taken on March 11 and 12, 2019. (ECF No. 44 at 8). Plaintiffs
10 then claim they will need to do any follow-on discovery that results from the
11 proposed discovery. (*Id.*). Plaintiffs request that a new hearing date for
12 Defendant’s pending MSJ “be set only after Plaintiffs have received and
13 reviewed the discovery requested.” (*Id.* at 13).

14 In Plaintiffs’ Counsel’s declaration, Plaintiffs explain that through the
15 above proposed discovery, they seek facts to prove their case. This would
16 include: (1) what happened to their funds while on deposit with Boston
17 National; (2) who had control over the funds; (3) who was giving Boston
18 National direction concerning the funds; (4) why Boston National paid
19 Concierge more deference than it did to Plaintiffs with regard to their funds,
20 and whether or not that deference breached its fiduciary duties to Plaintiffs;
21 and (5) why Boston National did not do more to return Plaintiffs’ funds after
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24 ¹ The unredacted escrow account records have been the subject of significant motion
25 practice in this and related litigation. (ECF Nos. 30, 31, 35, 36, 57, 58, 61, 63, 68; *see*
26 *generally* 18-cv-2617). This Court denied Plaintiffs’ request to compel the production of
27 unredacted account records on January 14, 2019. (ECF No. 30). The Court then denied
Plaintiffs’ motion to reconsider that order on April 30, 2019. (ECF No. 68). In light of this
ruling, Plaintiffs have nothing further to review than what has already been produced.
Therefore, these documents cannot form the basis for reopening discovery.

1 it became clear that the underlying transaction failed. (ECF No. 44-2, ¶ 7).
2 Defendant opposes Plaintiffs' Application because Plaintiffs failed to
3 specifically state the facts they believe will be revealed through additional
4 discovery and how those facts will preclude summary judgment. (*See*
5 *generally* ECF No. 46).

6 **II. Legal Standard**

7 District courts have "wide latitude in controlling discovery, and [their]
8 rulings will not be overturned in the absence of a clear abuse of discretion."
9 *State of California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998) (quoting
10 *Foster v. Arcata Assoc., Inc.*, 772 F.2d 1453, 1467 (9th Cir.1985)). Federal
11 Rule of Civil Procedure 56(d) permits a court to grant certain relief to the
12 nonmoving party when it "shows by affidavit or declaration that, for specified
13 reasons, it cannot present facts essential to justify its opposition [of a motion
14 for summary judgment]." The court may "(1) defer considering the [summary
15 judgment] motion or deny it; (2) allow time to obtain affidavits or
16 declarations or to take discovery; or (3) issue any other appropriate order."
17 FED. R. CIV. P. 56(d). Rule 56(d) is designed to deal with "premature"
18 summary judgment motions, where the nonmoving party has not had a fair
19 opportunity to conduct discovery prior to filing its opposition. *See Celotex*
20 *Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

21 Relief under Rule 56(d) is not a matter of right. The nonmoving party
22 must provide more than just "[b]are allegations or vague assertions of the
23 need for discovery." *Everson v. Leis*, 556 F.3d 484, 493 (6th Cir. 2009).
24 Instead, they "must identify by affidavit the specific facts that further
25 discovery would reveal, and explain why those facts would preclude summary
26 judgment." *Tatum v. City & Cnty. of S.F.*, 441 F.3d 1090, 1100 (9th Cir.
27 2006).

1 **III. Discussion**

2 The Court finds that deferring consideration of Defendant’s MSJ and
3 granting Plaintiffs an unlimited time to continue their search for facts to
4 support their case is not warranted. Rule 56(d) is designed to prevent a party
5 from being “railroaded” by an opponent’s premature summary judgment
6 motion. *See Celotex Corp.*, 477 U.S. at 326. That is not the case here.
7 Plaintiffs have had more than seven months to complete discovery.

8 Ninth Circuit case law clearly outlines a party’s burden in requesting
9 relief under Rule 56(d). The party must “*identify the specific facts that*
10 *further discovery would reveal and explain why those facts would preclude*
11 *summary judgment.*” *Tatum*, 441 F.3d at 1100 (emphasis added). Plaintiffs
12 have only identified the general discovery they wish to engage in, described
13 the documents they have not had time to review, and restate the general
14 allegations they must prove to prevail on their claims. Plaintiffs’ opposition
15 to the MSJ was not due until March 25, 2019. They had sufficient time to
16 identify the specific facts that would likely be revealed by the desired
17 discovery as required under the rule. They had an opportunity to explain
18 how those facts would preclude summary judgment. They failed to do so.

19 Plaintiffs instead claim they cannot inform the Court about any specific
20 facts they seek because that would “surely violate the Attorney Work-Product
21 doctrine.” (ECF No. 44 at 14). The Court fails to see how explaining the
22 basis for Plaintiffs’ request for additional time to complete discovery would
23 violate the work product doctrine. Therefore, the Court finds Plaintiffs failed
24 to meet their burden under Rule 56(d).

25 Even if Plaintiffs had met their burden, the Court concludes that
26 Plaintiffs’ concerns regarding past discovery or any failure to engage in
27 desired discovery is not good cause to reopen discovery after it has closed. To

1 the extent Plaintiffs contest the sufficiency of other discovery already
2 produced, per this Court's Civil Chambers Rule IV. C. 2, discovery disputes
3 must be brought within 30 days or they are waived. A Rule 56(d) request is
4 not a substitute vehicle to bring discovery disputes after the time has lapsed.
5 To the extent Plaintiffs seek new opportunities to discover the facts they need
6 or additional time to review documents already produced, the Court does not
7 find good cause to further delay this case by reopening discovery.

8 **CONCLUSION**

9 Plaintiffs failed to meet their burden to show that additional time to
10 complete the voluminous discovery sought and the unlimited time in which to
11 review it is warranted. Accordingly, Plaintiffs' Ex Parte Application
12 pursuant to Rule 56(d) is **DENIED**.

13 In light of Plaintiffs' pending motion for leave to file a first amended
14 complaint, and after conferring with the District Judge, briefing on the MSJ
15 **will remain stayed until further order by the District Judge.**

16 However, no additional discovery will be permitted at this time unless
17 separately authorized by the Court.

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19 Dated: May 9, 2019

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21 Hon. Mitchell D. Dembin
22 United States Magistrate Judge
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