

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

NORMAN V. WHITESIDE,

Plaintiff,

vs.

Civil Action 2:08-CV-875
Judge Graham
Magistrate Judge King

TERRY COLLINS, et al.,

Defendants.

OPINION AND ORDER

The only claims remaining in this action are those of plaintiff Norman V. Whiteside, a state inmate proceeding without the assistance of counsel, who alleges that Ohio Admin. Code § 5120-9-06 Rules (C)(28), (50) and (51) are vague and lack fair notice. *Opinion and Order*, Doc. No. 66. This matter is before the Court on *Plaintiff's Motion for Extension and for Additional Discovery Per FRCVP 56(d)/Doc. #148*, Doc. No. 160 ("*Rule 56(d) Motion*").

I. BACKGROUND

On March 12, 2012, this Court ordered defendants Collins¹ and Lazaroff to respond to plaintiff's discovery requests, advising that hypertechnical or inaccurate responses due to "oversight" would not be tolerated. *Order and Report and Recommendation*, p. 9. The undersigned also recommended that defendants' motion for summary

¹As this Court previously noted, Gary C. Mohr is the current ODRC director and, to the extent that plaintiff asserts claims against the ODRC director in his official capacity, current director Mohr has been automatically substituted in place of former director Collins pursuant to Fed. R. Civ. P. 25(d). *Order and Report and Recommendation*, Doc. No. 148, p. 6 n.2.

judgment be denied without prejudice to refiling. *Id.* at 10.² The Court also detailed the requirements under Fed. R. Civ. P. 56(d) and noted that plaintiff's request for additional time and discovery to respond to the motion for summary judgment did not comply with that rule. *Id.* at 10-11. In so doing, the Court specifically advised plaintiff that he must comply with Rule 56(d), if applicable, in any future request. *Id.* at 11. ("Stated differently, the Court will no longer overlook any failure on plaintiff's part to comply with the requirements of Rule 56(d) should plaintiff request any future extension of time to respond to a renewed motion for summary judgment based on a need for additional discovery.").

On April 9, 2012, defendants filed another motion for summary judgment, Doc. No. 157, and plaintiff filed the current *Rule 56(d) Motion*, seeking additional time in which to conduct additional discovery before responding to the motion for summary judgment. Defendants oppose the *Rule 56(d) Motion*, Doc. No. 163. With the filing of plaintiff's reply on May 31, 2012, Doc. No. 167, this matter is ripe for resolution.

II. STANDARD

Rule 56(d), formerly Rule 56(f), establishes the proper procedure to be followed when a party concludes that additional discovery is necessary to respond to a motion for summary judgment:

When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;

²This recommendation was adopted and affirmed on April 4, 2012. *Order*, Doc. No. 156.

- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d). The affidavit or declaration required by the rule must "indicate to the district court [the party's] need for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information." *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir. 2000)(citing *Radich v. Goode*, 866 F.2d 1391, 1393-94 (3d Cir. 1989)). A motion under Rule 56(d) may be properly denied where the requesting party "makes only general and conclusory statements regarding the need for more discovery," *Ball v. Union Carbide Corp.*, 385 F.3d 713, 720 (6th Cir. 2004) (citing *Ironside v. Simi Valley Hosp.*, 188 F.3d 350, 354 (6th Cir. 1999)), or where the affidavit "lacks 'any details' or 'specificity.'" *Id.* (quoting *Emmons v. McLaughlin*, 874 F.2d 351, 357 (6th Cir. 1989)). The importance of complying with Rule 56(d) cannot be over-emphasized. *Cacevic*, 226 F.3d at 488. Finally, whether or not to grant a request for additional discovery falls within the trial court's discretion. *Egerer v. Woodland Realty, Inc.*, 556 F.3d 415, 426 (6th Cir. 2009).

III. DISCUSSION

In this case, plaintiff offers his declaration, executed under penalty of perjury, as to the need for additional discovery. Doc. No. 160, pp. 2-3. Under 28 U.S.C. § 1746, unsworn declarations have the same force and effect as a sworn affidavit only if "subscribed by [the declarant], as true under penalty of perjury, and dated, in substantially the following form: . . . 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).'" 28 U.S.C. §

1746(2). Although plaintiff's declaration is made under penalty of perjury, it is not dated.³ This failure violates the strict requirements of Section 1746 and the Court therefore need not consider this defective declaration. See, e.g., *Bonds v. C.W. Cox*, 20 F.3d 697, 702 (6th Cir. 1994) (excluding from consideration affidavits that were subscribed under penalty of perjury, but were undated). Having failed to offer a proper declaration to support his *Rule 56(d) Motion*, plaintiff has not complied with Rule 56(d). As discussed *supra*, the Court previously warned plaintiff that it would no longer overlook his failures to comply with that rule. *Order and Report and Recommendation*, p. 11.⁴ Accordingly, plaintiff's unsupported *Rule 56(d) Motion* is without merit.

Even considering the substance of the *Rule 56(d) Motion*, however, plaintiff's request for additional time in which to conduct discovery is nevertheless without merit. In complaining that defendants Collins and Lazaroff "failed to adequately respond to material interrogatories[,]" plaintiff identifies only Interrogatory No. 7 directed to these defendants. Interrogatory No. 7 seeks the following information:

Please state the specific conduct and/or action(s) and/or inaction(s) which you or any of your co-defendants in this case are alleged to have committed in Court of Claims Case Number 2007-07621 and 2009-05731 which is the exact same conduct and/or action(s) and/or inaction(s) which you or any

³The only date that plaintiff provides in his *Rule 56(d) Motion* appears in the certificate of mailing, not in the declaration. *Rule 56(d) Motion*, p. 3.

⁴Indeed, in light of the Court's specific warning and considering plaintiff's extensive litigation experience, it is difficult to conclude that plaintiff's failure to comply with the express requirements of Rule 56(d) was inadvertent.

of your co-defendants in this case are alleged to have committed in the complaint in the instant case.

Rule 56(d) Motion, p. 1. Plaintiff represents that defendant Lazaroff's response to this interrogatory was: "I have no knowledge." *Id.* Plaintiff also represents that "Assistant Attorney General Lawrence H. Babich[,]" rather than defendant Collins or Director Mohr, responded to the same interrogatory in the following way on behalf of defendant Collins:

Objection, irrelevant, the conduct does not have to be the "exact same conduct" to apply the doctrines of claims preclusion or issue preclusion. Without waving [sic] this objection and reserving all rights, you are the individual who filed the Court of Claims cases 2007-07261 and 2009-05732 and are fully aware of the allegations made therein so no response is necessary. The complaint in the Ohio Court of Claims Case No. 2007-7621 claims that Melody Haskins and other staff members took inappropriate action regarding possession of property. The complaint in Ohio Court of Claims 2009-0573 [sic] accuses the Defendant Melody Haskins and unnamed 'agents of Madison Correctional Institution' of taking possession of Plaintiff's property.

Id. Believing that defendants' responses are evasive, plaintiff represents that the information sought by Interrogatory No. 7 is necessary to respond to arguments raised in defendants' motion for summary judgment, Doc. No. 157. *Rule 56(d) Motion*, p. 2. According to plaintiff, defendants argue, *inter alia*, that the current action is barred because plaintiff previously filed an action based on the same occurrences in the Ohio Court of Claims ("the state court action") and that plaintiff failed to exhaust his administrative remedies as to RIB convictions under Rules 50 and 51. *Id.* Plaintiff seeks to discover "material facts related to defendants' claim in this regard." *Id.* He also seeks to depose "certain Defendants and non-parties . . . Defendants Collins, Director Mohr, Defendant Lazaroff, Defendant

Haskins, Defendant Lambert, Defendant Perry, Defendant Clark and Defendant Willingham[.]” *Id.*

In response, defendants argue, *inter alia*, that “[t]his issue is now moot since this Court has already ruled in Defendants’ favor (Doc.#103, *Report and Recommendation*)[.]” Doc. No. 163, p. 1. Defendants further contend that whether or not plaintiff’s lawsuit in the Court of Claims bars the instant action is a question of law based on those state court pleadings, which speak for themselves. *Id.* Plaintiff disagrees, first arguing that the Court has not ruled in defendants’ favor. Doc. No. 167, p. 1. Plaintiff also takes the position that “none of the Defendants can point to any particular section in those pleadings which involve the same or similar issues/allegations raised in the instant matter[.]” *Id.* (emphasis in original).

As an initial matter, the Court understands defendants’ response to assert that the Court has already resolved in defendants’ favor the issue of whether or not the current action is barred because of his filings in the Ohio Court of Claims. However, in ruling on the objections to the *Report and Recommendation*, Doc. No. 103, the Court actually denied defendants’ motion for judgment on the pleadings, which raised this argument, without prejudice to the filing of motions for summary judgment. *Opinion and Order*, Doc. No. 106, p. 4. See also *Order and Report and Recommendation*, Doc. No. 148, p. 2. Accordingly, the Court disagrees with defendants’ characterization of the Court’s prior rulings.

Turning to the merits of the *Rule 56(d) Motion*, plaintiff alleges that defendants have failed to adequately respond to Interrogatory No.

7. As detailed *supra*, this interrogatory asks defendants Collins and Lazaroff to specify the common conduct that, they contend, gave rise to both the state court action and this litigation. Rule 56(d) specifically requires plaintiff to establish that he "cannot present facts essential to justify" his opposition to the motion for summary judgment without the requested discovery. Here, however, plaintiff filed both actions and therefore presumably possesses the information sought by this interrogatory. Stated differently, plaintiff already knows whether the conduct alleged in both of his actions is the same and he is therefore able to "present facts essential" to his opposition to defendants' motion for summary judgment. Under these circumstances, requiring further response to Interrogatory No. 7 is unnecessary. Accordingly, as to Interrogatory No. 7, plaintiff has failed to meet his burden and the *Rule 56(d) Motion* in this regard is without merit. *Cf. Storm v. Swiger*, No. 4:07CV2387, 2008 U.S. Dist. LEXIS 117142, at *14-15 (N.D. Ohio July 31, 2008) (recommending denial of plaintiff's Rule 56(f) motion where, *inter alia*, plaintiff "should already have in his hands" pertinent documents) (*adopted and aff'd by Storm v. Swiger*, No. 4:07CV2387, 2008 U.S. Dist. LEXIS 79465 (N.D. Ohio Oct. 9, 2008)); *Chesner v. Stewart Title Guar. Co.*, No. 1:06CV476, 2008 U.S. Dist. LEXIS 108004, at *11-12 (N.D. Ohio July 2, 2008) (finding that plaintiffs failed to meet their burden of showing that the information sought is necessary to oppose the motion for summary judgment where, *inter alia*, plaintiffs "already possess some facts supporting the inferences they believe additional discovery would support").

Next, plaintiff asks to depose several defendants and non-

parties, representing that the "material facts" likely to be discovered by such depositions will enable him to establish "exhaustion under Rules 50 and 51, and to prove [that] Rules 28, 50, and 51 are vague and lack fair notice." *Rule 56(d) Motion*, p. 2. Plaintiff explains that he has been unable to previously discover this information "because most of the Defendants have been evasive and/or otherwise uncooperative in their responses. The additional discovery will also prove that Defendants are not entitled to qualified immunity." *Id.* However, plaintiff's lack of specificity as to the "material facts" necessary to prove his claims is impermissibly "general and conclusory," *See Ball*, 385 F.3d at 720. Without a more particularized showing of how an extension of time in order to conduct additional discovery would allow him to challenge the arguments raised by defendants, plaintiff has failed to establish his need for more discovery. Accordingly, as to his request for depositions, the *Rule 56(f) Motion* is not well-taken.⁵ *Cf. Emmons v. McLaughlin*, 874 F.2d 351, 358 (6th Cir. 1989) (finding no abuse of discretion in district court's refusal to permit additional discovery where supporting affidavit suffered from a "total lack of specificity").

WHEREUPON, *Plaintiff's Motion for Extension and for Additional Discovery Per FRCVP 56(d)/Doc. #148*, Doc. No. 160, is **DENIED**. The Court notes, however, that a separate motion, Doc. No. 153, remains pending in part, which may impact briefing on defendants' motion for summary judgment, Doc. No. 157. Once that motion, Doc. No. 153, is

⁵To the extent that the request for these depositions is directed at the information sought in Interrogatory No. 7, the request fails for the reasons discussed *supra*.

fully resolved, the Court will establish a briefing schedule on defendants' motion for summary judgment. The Court **ADVISES** the parties that it will permit **no additional discovery** pending resolution of Doc. No. 153.⁶

June 22, 2012

s/Norah McCann King
Norah McCann King
United States Magistrate Judge

⁶Plaintiff suggests that he may file a motion to compel at some indeterminate point in the future. *Rule 56(d) Motion*, p. 3 ("In the event of a motion to compel, Plaintiff will submit the interrogatories and responses in their entirety, unless Your Honor specifies that the Court wants them presented earlier."). However, defendants served their discovery responses nearly three months ago. Doc. No. 150.