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

TIMOTHY H. COOPER,

Plaintiffs,

Case No. 2:12-cv-0825
JUDGE GREGORY L. FROST
Magistrate Judge Norah McCann King

v.

THE COMMERCIAL SAVINGS BANK, et al.,

Defendant.

OPINION AND ORDER

This matter is before the Court on Plaintiff Timothy H. Cooper's motion to "postpone" ruling on the motions for summary judgment filed by Defendants Charles Bartholomew and Sean Martin. (ECF No. 32.) Plaintiff asks the Court not to rule upon the motions for summary judgment (ECF Nos. 21 and 22) until (1) Defendants have made initial disclosures under Fed. R. Civ. P. 26(a), (2) the parties have otherwise completed discovery, and (3) the Court has ruled upon Plaintiff's motion to certify a class action. (ECF No. 32 at PAGEID# 300.) This Court set an expedited briefing schedule on Plaintiffs' Motion. (ECF No. 33.) Defendants filed opposition memoranda in response to Plaintiff's Motion (ECF Nos. 38 and 39) and Plaintiff filed a reply in support (ECF No. 41). Upon consideration of the parties' memoranda, the Court **DENIES** Plaintiff's Motion.

Though none of the parties cites the rule in their respective memoranda, Plaintiff's motion is, in substance, one brought under Fed. R. Civ. P. 56(d), which provides:

> 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;
> (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) (emphasis added).

A party invoking Rule 56(d) bears the burden of informing the district court of his need for discovery. *Murphy v. Greiner*, 406 F. App'x 972, 976 (6th Cir. 2011). A necessary prerequisite to meeting this burden is submitting an *affidavit or declaration* to support the party's explanation why it cannot present facts essential to justify its opposition to a motion for summary judgment. Critically, Plaintiff has not satisfied this prerequisite for obtaining Fed. R. Civ. P. 56(d) relief.

Instead of complying with Rule 56(d)'s requirements, Plaintiff relies simply on the bare facts recited in his motion, namely that Defendants have not timely made Fed. R. Civ. P. 26(a) disclosures and that discovery has not been completed. (ECF No. 32 at PAGEID# 301.)[1] Plaintiff also contends that class action issues are "an important part of this case" that "should be reviewed by the Court" before ruling on Defendants' summary judgment motion.[2] (*Id.*) Missing from these largely conclusory arguments, however, is an explanation of how or why he is unable to respond to the motions for summary judgment filed by Defendants Bartholomew and Martin. If the summary judgment non-movant fails to file the affidavit or declaration required by the

[1] For his part, Defendant Martin says that he served Rule 26(a) initial disclosures contemporaneously with the filing of his opposition to Plaintiff's motion to postpone ruling on the motions for summary judgment. (ECF No. 38 at PAGEID# 336.)

[2] Plaintiff has not filed a motion for class certification. Under the Court's preliminary pretrial order, he has until April 30, 2013, in which to do so. (ECF No. 7.)

rule, the Court will not normally address the issue of whether there has been adequate time for discovery before ruling on the summary judgment motion. *Murphy*, 406 F. App'x at 976 (quoting *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 627 (6th Cir. 2002)).

The absence of the declaration or affidavit in this case is particularly significant. It is not at all clear to the Court why Plaintiff would need any sort of discovery to effectively respond to the motions for summary judgment; those motions appear rest in large part on issues capable of determination as a matter of law based on the allegations in the complaint. *Cf. Toms v. Taft*, 338 F.3d 519, 523 (6th Cir. 2003) (finding that the district court did not have to await discovery before ruling on a summary judgment motion when the motion was based on a purely legal question). Nor does Plaintiff demonstrate why this Court must first consider class certification before ruling on Defendants' motions for summary judgment. Indeed, if Plaintiff's claims against Defendants fail as a matter of law, it stands to reason that claims of similarly-situated class members would also be barred. If anything, it is arguably more desirable to address the merits of the potential class claims at this juncture before ruling on the (as yet unfiled) motion for class certification. *Cf. Griffin v. Copperweld Steel Co.*, No. C75-138, 22 Fair. Empl. Prac. Cas. (BNA) 1112, 1978 U.S. Dist. LEXIS 15522, at *5 (N.D. Ohio Sept. 15, 1978) ("If the Court were to certify the class and then dismiss the action on the merits, other class members with possibly better cases on their facts might be inadvertently barred from judicial forums.").

In short, Plaintiff has failed to satisfy his burden under Fed. R. Civ. P. 56(d) to show why he cannot oppose Defendants' motions for summary judgment without further discovery or why the Court should consider class certification before ruling on the motions for summary judgment.

Accordingly, the Court **DENIES** Plaintiff's motion to postpone ruling on the pending motions for summary judgment filed by Defendants Bartholomew and Martin. (ECF No. 32.)

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE