

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF PUERTO RICO

3 PRAMCO CV7, LLC,

4 Plaintiff,

5 v.

CIVIL NO. 08-1222 (RLA)

6 E & C COMPUTERS, INC., et al.,

7 Defendants.

8
9 **ORDER DENYING RULE 56(f) REQUEST**
10 **AND SETTING DEADLINE FOR RESPONDING**
11 **TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

12 Codefendants EMILIO JOSE RODRIGUEZ JARABO and his wife, SONIA
13 TERESA SANTOS MIRABAL, have petitioned the court for additional time
14 to conduct discovery in these proceedings in order to respond to the
15 outstanding summary judgment request filed by plaintiff. Plaintiff
16 has opposed the motion under our consideration adducing that it does
17 not meet the requirements of Rule 56(f) Fed. R. Civ. P.

18 **RULE 56(f)**

19 Parties wishing to conduct discovery prior to responding to
20 summary judgment requests must comply with the provisions of Rule
21 56(f) Fed. R. Civ. P. which reads:

22 Should it appear from the affidavits of a party opposing
23 the motion that the party cannot for reasons stated present
24 by affidavit facts essential to justify the party's
25 opposition, the court may ... order a continuance to permit
26 affidavits to be obtained or depositions to be taken or
discovery to be had....

2 Plaintiff objected to defendants' request pointing to a
3 procedural deficiency in that the Rule 56(f) petition was not
4 presented via an affidavit. Additionally respondent argues that
5 defendants were not diligent in their discovery efforts nor did they
6 adequately proffer the need for discovery at this time.

7 It has been held that a sworn statement in support of a Rule
8 56(f) request is not indispensable provided that the "statement...
9 [is] made, if not by affidavit, then in some authoritative manner -
10 say, by the party under penalty of perjury or by written
11 representations of counsel subject to the strictures of Fed. R. Civ.
12 P. 11". Vargas-Ruiz v. Golden Arch Dev., Inc., 368 F.3d 1, 4 (1st Cir.
13 2004) (*citing* Paterson-Leitch co. v. Mass. Mun. Wholesale Elec. Co.,
14 840 F.2d 985, 988 (1st Cir. 1988)). *See also*, Velez v. Awning Windows,
15 Inc., 375 F.3d 35, 40 (1st Cir. 2004).

16 "To benefit from the protections of Rule 56(f), a litigant
17 ordinarily must furnish the *nisi prius* court with a timely statement
18 - if not by affidavit, then in some other authoritative manner that
19 (i) explains his or her current inability to adduce the facts
20 essential to filing an opposition, (ii) provides a plausible basis
21 for believing that the sought-after facts can be assembled within a
22 reasonable time, and (iii) indicates how those factors would
23 influence the outcome of the pending summary judgment motion." Velez,
24 375 F.3d at 40. *See also*, Hernandez-Santiago v. Ecolab, Inc., 397
25 F.3d 30, 34-35 (1st Cir. 2005) (need to identify discovery demanded
26 and explain its relevancy).

2 The rule requires petitioner to identify for the court the
3 particular discovery it wishes to conduct as well as present credible
4 grounds to conclude that the information sought, if available, would
5 prove crucial in contesting material facts propounded by the summary
6 judgment proponent. "[T]he requested discovery [must] be capable of
7 influencing the outcome of the motion for summary judgment." Adorno
8 v. Crowley Towing and Transp. Co., 443 F.3d 122, 128 (1st Cir. 2006).
9 "[T]he moving papers must contain a proffer which, at a bare minimum,
10 articulates a plausible basis for the movant's belief that previously
11 undisclosed or undocumented facts exist, that those facts can be
12 secured by further discovery, and that, if obtained, there is some
13 credible prospect that the new evidence will create a trialworthy
14 issue." Mass. School of Law at Andover, Inc. v. Am. Bar Ass'n, 142
15 F.3d 26, 44 (1st Cir. 1998).

16 Central to this rule's applicability is the proponent's due
17 diligence in the judicial proceedings. Dennis v. Osram Sylvania,
18 Inc., 549 F.3d 851, 860 (1st Cir. 2008); Rivera-Torres v. Rey-
19 Hernandez, 502 F.3d 7, 11 (1st Cir. 2007); Ayala-Gerena v. Bristol
20 Myers-Squibb Co., 95 F.3d 86, 93 (1st Cir. 1996). "To savor the balm
21 of Rule 56(f), a party must act in a timely fashion." Mass. Sch. of
22 Law, 142 F.3d at 44. Additionally, "the motion must set forth good
23 cause to explain the movant's failure to have conducted the desired
24 discovery at an earlier date." *Id.*

25

26

2 THE CASE

3 This is a mortgage foreclosure action instituted against E&C
4 COMPUTERS, INC., EMILIO JOSE RODRIGUEZ JARABO and his wife, SONIA
5 TERESA SANTOS MIRABAL, and SANTIAGO LEVY TORRES and his spouse,
6 SANDRA SOFIA LOUBRIEL MENDEZARE. The underlying loan, as well as
7 other non-related loans were purchased by plaintiff from SCOTIABANK
8 DE PUERTO RICO ("SCOTIABANK"). The individual defendants entered into
9 a repayment agreement with SCOTIABANK whereby they secured payment
10 thereof with their respective properties and personal guarantees.
11 According to plaintiff, defendants failed to meet their payment
12 obligations which, as of January 22, 2008, totaled \$695,004.14 in
13 principal, plus interest accrued, plus disbursements made by
14 plaintiff.

15 Since their initial request for additional time to respond to
16 plaintiff's motion for summary judgment filed on November 3, 2008
17 (docket No. 39) the RODRIGUEZ-SANTOS defendants pointed out the need
18 for disclosure of information and for production of documents.¹
19 Information regarding the defendant corporation was also critical to
20 the settlement negotiation process between the parties which did not
21 yield the expected results.²

22
23 ¹ See Motion for Extension of Time (docket No. 43).

24 ² See Second Motion for Extension of Time filed by codefendants
25 RODRIGUEZ-SANTOS (docket No. 50) making reference to the Second
26 Motion for Extension of Time filed by E&C COMPUTERS, INC. (docket No.
46) which reads as follows:

2 It appears from the record that the RODRIGUEZ-SANTOS defendants
3 have encountered difficulties in obtaining access to the corporate
4 documents of E&C COMPUTERS, INC.³ According to the LEVY-LOUBRIEL
5 defendants, "until just this week [January 16, 2009], the owner of
6 the premises where the [corporate] documents are stored was denying
7 access to Mr. Levis to retrieve them. That changed this week,
8 however, upon the premises' owner changing his mind after retaining
9 new counsel."⁴

10 We surmise that this hurdle has been cleared because no mention
11 of discovery regarding the corporate records was mentioned in
12 petitioners' most recent request for additional time to respond.
13 Rather, the RODRIGUEZ-SANTOS defendants argue that inasmuch as
14 plaintiff was not the original lending institution they wish to
15 ascertain information related to the claim and in particular how the
16

17
18 4. After the extensions were granted by this Court,
19 Defendants met with plaintiff's counsel to discuss all
20 possible alternatives of settlement in the present case. In
21 that meeting, plaintiff's counsel requested some documents
22 to be able to discuss with his client a settlement
23 proposal.

24 5. Mr. Santiago Levy sent some of the information requested
25 by plaintiff and is the process of gathering some of
26 additional data requested to E & C Computers.

23 ³ See, *i.e.*, Motion for Additional Extension of Time (docket No.
24 52) and Emergency Motion as to Response (docket No. 56) pointing out
25 their futile efforts to obtain these documents from the LEVY-LOUBRIEL
26 defendants.

26 ⁴ Motion Requesting Additional Time filed by LEVY-LOUBRIEL
(docket No. 53).

2 amounts claimed were computed. In this regard they have moved the
3 court to instruct plaintiff to make the initial disclosures provided
4 in Rule 26(a)(1) Fed. R. Civ. P. and depending on the information
5 provided, that they be allowed to conduct additional discovery.

6 We must note that no formal discovery request was served by
7 petitioners on any of the parties to this suit. Further, we find that
8 the justification proffered for Rule 26(a)(1) disclosures with the
9 undefined prospect of additional discovery is too vague to comply
10 with the Rule 56(f) strictures which mandates that the proponent
11 "articulate some plausible basis to support a belief that
12 discoverable material exists which, if available, would suffice to
13 raise a trialworthy issue." Filiatrault v. Comverse Technology, Inc.,
14 275 F.3d 131, 138 (1st Cir. 2001).

15 Rule 56(f) is not available merely for the asking. A
16 litigant who seeks to invoke the rule must act with due
17 diligence to show that his predicament fits within its
18 confines. To that end, the litigant must submit to the
19 trial court an affidavit or other authoritative document
20 showing (i) good cause for his inability to have discovered
21 or marshalled the necessary facts earlier in the
22 proceedings; (ii) a plausible basis for believing that
23 additional facts probably exist and can be retrieved within
24 a reasonable time; and (iii) an explanation of how these
25
26

2 facts, if collected, will suffice to defeat the pending
3 summary judgment motion.

4 Rivera-Torres, 502 F.3d at 10; Adorno v. Crowley Towing and Transp.
5 Co., 443 F.3d 122, 127 (1st Cir. 2006); Fennell v. First Step Designs,
6 Ltd., 83 F.3d 526, 531 (1st Cir. 1996).

7 Based on the foregoing, we agree with plaintiff's position that
8 additional time to conduct discovery prior to responding to the
9 outstanding summary judgment is not warranted in this case under the
10 provisions of Rule 56(f).

11 Accordingly, the Emergency Motion as to Response to Motion for
12 Summary Judgment filed by the RODRIGUEZ-SANTOS defendants (docket No.
13 **56**) is **DENIED**.⁵ Defendants⁶ shall respond to plaintiff's Motion for
14 Summary Judgment **on or before March 3, 2009**.

15 IT IS SO ORDERED.

16 San Juan, Puerto Rico, this 12th day of February, 2009.

17
18 S/Raymond L. Acosta
RAYMOND L. ACOSTA
19 United States District Judge

20
21 _____
22 ⁵ See Opposition (docket No. **59**). Defendants' Leave to Reply
23 (docket No. **60**) and plaintiff's Motion Requesting Leave to Submit
Brief Surreply (docket No. **61**) are **GRANTED**.

24 ⁶ It must be noted that only the RODRIGUEZ-SANTOS defendants
25 moved for relief under Rule 56(f). Responses to the summary judgment
26 request by all other defendants were due on February 10, 2008. See
Order Extending Term for Defendants to Respond to Plaintiff's Motion
for Summary Judgment (docket No. 55).