

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

JAMES W. DURBIN and JOANIE DURBIN,  
his wife,

Plaintiffs,

v.

Civil Action No. 5:09CV54  
(STAMP)

ARLEN M. DACAR, individually and  
d/b/a ARLEN M. DACAR MASONRY,

Defendant.

**MEMORANDUM OPINION AND ORDER**  
**DENYING WITHOUT PREJUDICE DEFENDANT'S**  
**MOTION FOR SUMMARY JUDGMENT AS PREMATURE**

On July 1, 2009, this Court entered a scheduling order in the above-styled civil action, ordering that all dispositive motions shall be filed by January 5, 2010. Thereafter, the Court granted the parties' joint motion for extension to disclose experts and to complete examination, and accordingly extended the deadline for dispositive motions until January 22, 2010. On January 5, 2010, the defendant filed a motion for summary judgment, erroneously believing that the dispositive motion deadline was still scheduled for that date.

On January 6, 2010, this Court held a status and scheduling conference regarding the parties' joint motion for modification of the Court's scheduling order. At that time, this Court entered an amended scheduling order, in which discovery is to be completed by April 6, 2010, and dispositive motions shall be filed by April 20, 2010.

This Court believes, and case law suggests, that the parties are entitled to conduct discovery regarding any potential issues of material fact before responding to a summary judgment motion. The Supreme Court has found that summary judgment is appropriate only when "no serious claim can be made that [the nonmovant] was in any sense 'railroaded' by a premature motion for summary judgment." Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986).

This Court finds that the plaintiffs should be given "the opportunity to discover information that is essential to [their] opposition." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Furthermore, the defendant conceded at the status and scheduling conference held on January 6, 2010, that his motion for summary judgment was premature, especially in light of this Court's ruling to amend the scheduling order and extend discovery until April 6, 2010. Accordingly, the defendant's motion for summary judgment is hereby DENIED WITHOUT PREJUDICE as premature, subject to refileing after the parties have completed discovery in this action.

IT IS SO ORDERED.

The Clerk is directed to transmit a copy of this order to counsel of record herein.

DATED: January 6, 2010

/s/ Frederick P. Stamp, Jr.  
FREDERICK P. STAMP, JR.  
UNITED STATES DISTRICT JUDGE