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| **RAYMOND SCHULTZ** | * | **NO. 2017-CA-0165** |
| **VERSUS** | * | **COURT OF APPEAL** |
| **COX OPERATING, LLC AND TERRY VINCENT** | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
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**LOBRANO, J., DISSENTS AND ASSIGNS REASONS.**

I respectfully dissent. I would affirm the October 11, 2016 judgment of the district court, granting the motion to re-urge summary judgment filed by Cox Operating, L.L.C. ("Cox") and Terry Vincent ("Vincent") and dismissing Raymond Schultz's ("Schultz") claims against Cox and Vincent.

I find no abuse of discretion in the district court's denial of a continuance. I disagree with the majority's conclusion that summary judgment was premature and that Schultz is entitled to additional time for discovery. It is undisputed and the record on appeal verifies that Schultz issued no written discovery and noticed no depositions in the nearly three-year period this litigation was pending before the motion to re-urge summary judgment was filed. His unsuccessful attempt to schedule a single deposition at this late date is wholly insufficient to defeat summary judgment.

Under La. C.C.P. art 966(A)(3), a properly supported motion for summary judgment shall be granted "[a]fter an ***opportunity*** for adequate discovery." (Emphasis added). "[O]ur jurisprudence holds that while parties must be given fair opportunity to carry out discovery and present their claim, there is no absolute right to delay action on motion for summary judgment until discovery is complete." *Hayes v. Sheraton Operating Corp.*, 2014-0675, pp. 5-6 (La. App. 4

Cir. 12/10/14), 156 So.3d 1193, 1197 (quoting *Thomas v. N. 40 Land Dev., Inc.*, 2004-0610, p. 31 (La. App. 4 Cir. 1/26/05), 894 So.2d 1160, 1179). It is well within the district court's discretion to render summary judgment or require further discovery; the district court's decision in this regard should only be reversed upon a showing of an abuse of that discretion. *Roadrunner Transportation Sys. v. Brown*, 2017-0040, p. 11 (La. App. 4 Cir. 5/10/17), 219 So.3d 1265, 1272; *Ladart v. Harahan Living Ctr., Inc.*, 2013-923, p. 12 (La. App. 5 Cir. 5/14/14), 142 So.3d 103, 110.

This Court has held that "in the appropriate factual context, a court can 'be receptive to an argument that discovery has been hindered by some circumstance beyond the [opponent's] control.'" *Roadrunner*, 2017-0040 at p. 13, 219 So.3d at 1274 (quoting *Bourgeois v. Curry*, 2005-0211, p. 10 (La. App. 4 Cir. 12/14/05), 921 So.2d 1001, 1008). "This court, however, cautioned that the need for additional time to conduct discovery based on such a hindering circumstance should be documented in the record; the need should be 'expressed in a motion to continue, motion to compel, or other pleading.'" *Id.*

The record herein does not support the majority's conclusion that Schultz was hindered in conducting discovery by circumstances beyond his control or that Schultz was otherwise denied adequate opportunity to conduct discovery. I am constrained to find, on the evidence of record, that Schultz was simply not diligent in conducting the discovery he needed to prosecute his case. There is nothing in the record to suggest that Schultz issued written discovery to anyone at any time since he filed this lawsuit. In the nearly three years this litigation was pending before the motion to re-urge summary judgment was filed, Schultz took no depositions. It was not until after Cox and Vincent filed their first summary judgment motion, two years into this litigation, that the district court imposed a six-month deadline for discovery. Five more months elapsed before Schultz contacted opposing counsel to

make his first attempt to depose anyone. Schultz gives no indication of any other discovery he seeks beyond the deposition of Vincent.

Even though Schultz filed motions to compel Vincent's deposition and continue the hearing on the motion to re-urge summary judgment, he only did so after the district court's discovery deadlines had run. More importantly, these motions were not supported by any evidence that Schultz exercised due diligence in conducting discovery or that he was denied a reasonable opportunity to take relevant depositions prior to being required to defend against the motion for summary judgment. *See Bourgeois*, 2005-0211 at p. 9, 921 So.2d at 1008 (rejecting plaintiff's inadequate discovery argument where the case had been pending for nearly two years before the motion for summary judgment was filed). *See also Hayes*, 2014-0675 at p. 5, 156 So.3d at 1197 (rejecting arguments that summary judgment was premature, where the plaintiff "put forth nothing to show that efforts were made to locate potential witnesses or facilitate the production of documents" and almost three years had passed between the filing of the petition for damages and the motion for summary judgment). *Cf. Doe v. ABC Corp.*, 2000-1905, p. 11 (La. App. 4 Cir. 6/27/01), 790 So.2d 136, 143 (reversing summary judgment where district court found plaintiff entitled to depose certain witnesses subject to protective order but did not allow sufficient time to take depositions before ruling on motion for summary judgment); *Crawford v. City of New Orleans*, 2001-0802, p. 7 (La. App. 4 Cir. 1/23/02), 807 So.2d 1054, 1058 (finding an abuse of discretion in the district court's application of a former version of its local rule regarding certification of the parties that discovery was complete, where efforts to schedule a corporate deposition were ongoing before and at the time motion for summary judgment was filed).

Here, the district court denied the 2015 motion for summary judgment to permit Schultz time to conduct additional discovery, but declined to continue the

hearing on the motion to re-urge when no new discovery was conducted. Under the particular facts of this case, the district court did not abuse its vast discretion in determining that Schultz had sufficient opportunity to conduct discovery or in choosing to hold the hearing on the motion to re-urge motion for summary judgment, instead of granting any additional continuance. I would affirm the judgment of the district court granting summary judgment in favor of Cox and Vincent.