

2009 SEP -4 A 10: 4

CHRISTOPHER HAGAN  
Plaintiff

v.

CITY OF BARRE  
Defendant

SUPERIOR COURT SUPERIOR CO  
WASHINGTON CO  
Docket No. 320-5-09 Wncv

RULING ON MOTION FOR SUMMARY JUDGMENT

The court previously granted Plaintiff's motion for a preliminary injunction in this case, which involves the power of a Vermont municipality to restrict where a person who has been convicted of a sex offense may live. See Ruling on Motion for Preliminary Injunction (June 29, 2009). Plaintiff Hagan has now filed a motion for summary judgment. Defendant City disputes only two of the facts set forth in Hagan's statement of material facts. In connection with those two facts, it asks that the court delay ruling on the motion until the City has obtained a copy of Hagan's lease and "associated rental documents."

The City's Request for a Delay

Although not citing any rule in support of its request for delay, the City's request arises under Rule 56(f), which sets forth the procedures for requesting additional time to respond to a motion for summary judgment. V.R.C.P. 56(f). The City's request fails to satisfy the requirements of that rule. It requires that to obtain a continuance for discovery

<sup>1</sup> The "citations to the record" for many of the facts set forth by Hagan refer to the court's preliminary injunction ruling. While those factual findings were preliminary in the sense that additional or contrary evidence could be proffered by the City now to challenge them, the City does not do so. Thus, those undisputed findings are an adequate record basis for a ruling on the merits.

before responding to a motion for summary judgment, the party seeking the continuance must submit an affidavit explaining why “the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition.” V.R.C.P. 56(f). No affidavit has been submitted by the City at all. This failure to comply with the civil rules itself justifies denial of the request for additional time. *See, e.g., Alan Wright, Arthur Miller and Mary Kay Kane, 10B Federal Practice & Procedure, Civil 3d § 2740 (West, Westlaw though 2009 update) (“The rule will not be liberally applied to aid parties who have been dilatory ... The most obvious indication of lack of diligence is a failure on the part of the nonmovant to present affidavits under either subdivision (e) or (f).”)*

To the extent that the court might otherwise consider waiving the requirements of the rules, it is disinclined to do so here because the issue of the lease is not a new one: the City raised it at the preliminary injunction hearing in this case. It was also discussed again at the status conference on July 16 when the briefing schedule for this motion was set. Despite its assertion from the start that the lease might be relevant, the discovery certificate in the court’s file reflects that no document request was made in this case until August 14, almost a month *after* the summary judgment motion was filed.<sup>2</sup>

Had a document request been served earlier, and the documents not been produced, a motion to compel could have been filed and might well have justified a delay in the summary judgment proceedings. However, the City did not take timely steps to request the documents that it asserts it needs.<sup>3</sup> It was apparent from the briefing schedule

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<sup>2</sup> While the City asserts that it sent an informal request in May and that a copy is attached to its Opposition, the referenced letter in fact was not appended to the City’s filing. In any case, an informal letter is not an enforceable discovery request.

<sup>3</sup> The City also asserts that the Vermont State Housing Authority likely has the documents, yet offers no explanation as to why it has not then asked VSHA for a copy.

that any request for records would need to be served promptly to comply with that schedule. No reason has been offered for the failure to do so until days before the response to the summary judgment motion was due. A request for delay pursuant to Rule 56(f) requires more. *See, e.g., Resolution Trust Corp. v. North Bridge Associates, Inc.*, 22 F.3d 198, 1203 (1st Cir. 1994)(“when, as is often the case, the reason relates to incomplete discovery, the party’s explanation should show good cause for the failure to have discovered the facts sooner”)

The court finds no basis on which to grant the City’s request to delay ruling on the motion for summary judgment. *See* 10B Wright, Miller & Kane, *supra* at § 2741 (“a request for relief under Rule 56(f) is extremely unlikely to succeed when the party seeking the delay has failed to take advantage of discovery. The courts will not delay a case to allow discovery when the discovery sought could have been instituted earlier .”); Hebert v. Wicklund, 744 F. 2d 218, 222 (1<sup>st</sup> Cir. 1984)(“the court need not employ the rule to spare litigants from their own lack of diligence”).<sup>4</sup>

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<sup>4</sup> Aside from the above procedural problems with the City’s request to delay the ruling on this motion, the court finds the issue of the lease to be one that does not go the merits of the case, but only to the issue of “clean hands.” *See* Ruling on Motion for Preliminary Injunction, pp. 11-12. The two statements of material fact the City wishes to investigate are as follows: that Hagan’s landlord “believed that the Exclusion Ordinance did not apply to Mr. Hagan” and that Hagan “signed the paperwork necessary to rent the apartment, but did not sign the lease itself.” Barre City’s Opposition, p. 2; Plaintiff’s Statement of Undisputed Facts, ¶¶ 16-17. As to the first fact, although the court’s earlier decision recited as part of the history of what occurred that “apparently” the landlord so believed, the court does not find that fact relevant to whether summary judgment is appropriate. Even if the landlord believed the ordinance did apply to Hagan, the landlord’s belief alone would not in any way change the court’s views as to the legal issues in this case.

Likewise, whether Hagan did or did not sign the lease (as opposed to his wife) is not material to the substantive issues in this case. The City argues that “there may be something in the Lease or other rental documents that would not reflect well on Plaintiff’s case or might otherwise reflect poorly on Plaintiff’s credibility.” Barre City’s Opposition at 3. However, the only possible “somethings” to which the City refers are both speculative and collateral to the substantive issues of fact. Those are the possibilities that Hagan may have lied to the landlord about his criminal record or that he actually signed the lease knowing that the ordinance applied to him. *Id.* at 3-4. While both might be relevant considerations under the “clean hands” doctrine, they would not mandate any particular result because the doctrine is entirely discretionary with the court. Moreover, “the ‘hope’ or ‘hunch’ that evidence creating an issue of fact will

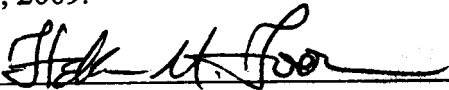
The Merits of the Motion for Summary Judgment

When it ruled on the preliminary injunction motion, the court held that Hagan was likely to succeed on the merits of his claims. The City has failed to proffer any new evidence or legal arguments in its response to the motion, instead “rest[ing] upon its legal memoranda” filed in connection with the preliminary hearing. Barre City’s Opposition at 4. For the reasons stated in its ruling granting the preliminary injunction, the court finds that Hagan is entitled to summary judgment.

Order

The City of Barre is hereby enjoined from enforcing Ordinance § 11-36 against Hagan. Judgment will be entered for Hagan.

Dated at Montpelier this 3<sup>rd</sup> day of September, 2009.

  
Helen M. Toor  
Superior Court Judge

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emerge at trial is insufficient” to justify a continuance under Rule 56(f). 10B Wright, Miller & Kane, *supra* at § 2741.