UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

Hon. Marianne O. Battani
Case No. 2:18-cv-13330

THE CHARTER TOWNSHIP OF MILFORD, a Michigan municipal corporation, TOWNSHIP OF MILFORD BOARD, a public body, DONALD D. GREEN, in his personal capacity and in his official capacity as Supervisor of Milford Township, and TIMOTHY C. BRANDT, in his personal capacity and in his official capacity as Building and Zoning Administrator of Milford Township,

Defendants.

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DEFENDANTS' MOTION FOR LEAVE TO FILE SECOND MOTION FOR SUMMARY JUDGMENT

BRIEF IN SUPPORT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

Hon. Marianne O. Battani
Case No. 2:18-cv-13330

v.

THE CHARTER TOWNSHIP OF MILFORD, a Michigan municipal corporation, TOWNSHIP OF MILFORD BOARD, a public body, DONALD D. GREEN, in his personal capacity and in his official capacity as Supervisor of Milford Township, and TIMOTHY C. BRANDT, in his personal capacity and in his official capacity as Building and Zoning Administrator of Milford Township,

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DEFENDANTS' MOTION FOR LEAVE TO FILE SECOND MOTION FOR SUMMARY JUDGMENT

NOW COME the Defendants, **THE CHARTER TOWNSHIP OF MILFORD, TOWNSHIP OF MILFORD BOARD, DONALD D. GREEN** and **TIMOTHY C. BRANDT,** by and through their attorneys, **O'CONNOR, DeGRAZIA, TAMM & O'CONNOR, P.C.**, and for their Motion for Leave to File Second Motion for Summary Judgment, state as follows:

1. This case arises out of a claim that Defendants placed unlawful conditions on Plaintiffs in their attempt to construct a residential driveway.

2. On October 17, 2018, Plaintiffs filed their Complaint in the Oakland County Circuit Court which Defendants subsequently removed to this Court. **(Dkt. 1)**.

3. Plaintiffs' Complaint asserts five counts: Count I, Action for Declaratory Relief and Judgment; Count II, Injunctive Relief; Count III, Inverse Condemnation; Count IV, Violation of Due Process; Count V, Violation of 42 U.S.C. §§ 1983 and 1988. **(Dkt. 1, Pg. ID 28-34)**.

4. On December 12, 2018, Defendants filed a Motion for Summary Judgment. **(Dkt. 16)**. The Motion was filed at an early stage of the case because Plaintiffs had failed to exhaust administrative remedies prior to filing suit. See *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172; 105 S. Ct. 3108; 87 L. Ed. 2d 126 (1985). It was therefore argued that the claim was not ripe for review. See *Texas Gas Transmissions, LLC v. Butler*

Cty. Bd. of Comm'rs, 625 F.3d 973, 976 (6th Cir. 2010) ("Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed.").

5. Oral argument was heard on Defendants' Motion for Summary Judgment on February 28, 2019. The Motion was taken under advisement by this Court and is presently pending.

6. Since the filing of Defendants' Motion for Summary Judgment, the parties have engaged in significant discovery including the depositions of Plaintiffs which occurred on April 4, 2019.

7. At their deposition, Plaintiffs made it abundantly clear that they do not a claim against Defendants Donald D. Green or Timothy C. Brandt in their individual capacity. Both are entitled to dismissal on the basis of qualified immunity.

8. Mr. Hack explained that he sued Defendant Green simply because he is the supervisor and he "represents the Township." **(Exhibit A, Joel Hack Dep., Pg. 180)**. As to Mr. Brandt, Plaintiff merely claimed, "he's not doing his job". **(*Id*., Pg. 181)**. Representing the Township or a vague allegation of not doing one's job does not rise to the level of a constitutional violation.

9. The only constitutional claims plead in the Complaint are for an unlawful taking and a deprival of due process. **(See Counts III-IV, Doc. #1, Pg. ID 30-33).** Neither Defendant Green nor Brandt caused any such violation. A taking has not occurred in this case because Plaintiffs have been permitted to continuously reside in their property pursuant to a temporary occupancy permit granted by Defendants. Deprival of due process has not occurred because Plaintiffs were afforded notice and an opportunity to be heard before the Township Board on two occasions in which the construction of their driveway was discussed.

10. Pursuant to E.D. Mich. Local Rule 7.1(b)(2), "[a] party must obtain leave of court to file more than one motion for summary judgment."

11. "Permitting a second summary judgment motion is especially appropriate if there has been an intervening change in controlling law, *a party has expanded the factual record*, or there is a need to correct a clear error or prevent manifest injustice." *Rhinehart v. Scutt*, No. 2:11-CV-11254, 2017 WL 2242391, at *1 (E.D. Mich. May 23, 2017) [emphasis added] **(Exhibit B)**; see also *Whitford v. Boglino*, 63 F.3d 527, 530 (7th Cir. 1995).

12. In this case, the factual record has been expanded by the depositions of Plaintiffs to make it evident that they lack a claim against Defendants Green and Brandt in their individual capacity, and a dismissal on the basis of qualified immunity is warranted.

13. Qualified immunity ensures governmental officials protection "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806; 102 S.Ct. 2727; 73 L.Ed.2d 396 (1982). Qualified immunity is available for a §1983 claim if the official is "performing discretionary functions" and his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. To be clearly established the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier v. Katz*, 533 U.S. 194, 202; 121 S.Ct. 2151; 150 L.Ed.2d 272 (2001), overruled in part on other grounds in *Pearson v. Callahan*, 555 U.S. 223; 129 S.Ct. 808; 172 L.Ed.2d 565 (2009). Plaintiffs have the ultimate burden of establishing that Defendants are not entitled to qualified immunity. *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991).

14. Moreover, "[q]ualified immunity is an immunity from suit rather than a mere defense to liability." *Pearson*, *supra*, 555 U.S. at 237 [quotations omitted]. "It not only protects a defendant from liability but may also protect a defendant from the burdens of trial and discovery." *English v. Dyke*, 23 F.3d 1086, 1089 (6th Cir. 1994). Accordingly, the Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in

litigation." *Hunter v. Bryant*, 502 U.S. 224, 227; 112 S.Ct. 534; 116 L.Ed. 2d 589 (1991).

15. Defendants respectfully request leave to file a Second Motion for Summary Judgment as to Defendants Green and Brandt.

16. Pursuant to Local Rule 7.1, Counsel for Defendants certifies that, on April 17, 2019, Counsel requested the concurrence of Plaintiffs' Counsel regarding the relief sought herein. This request was explicitly denied.

WHEREFORE, Defendants respectfully request that this Honorable Court grant the present Motion and enter an order allowing Defendants Donald D. Green and Timothy C. Brandt to file a second motion for summary judgment on the basis of qualified immunity.

Respectfully submitted,

O'CONNOR, DEGRAZIA, TAMM & O'CONNOR, P.C.

BY:/s/ Michael J. Bonvolanta

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Dated: April 19, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR LEAVE TO FILE SECOND MOTION FOR SUMMARY JUDGMENT

ISSUES PRESENTED

I. WHETHER DEFENDANTS SHOULD BE PERMITTED TO FILE A SECOND MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY?

Defendants answer: Yes

Plaintiffs would answer: No

This Court should answer: Yes

CONTROLLING AUTHORITY

The controlling or most appropriate authority for the relief sought, in addition to E.D. Mich. LR 7.1(b)(2), is:

I. Defendants should be permitted to file a second motion for summary judgment where it is clear that Defendants Green and Brandt are entitled to qualified immunity. *Rhinehart v. Scutt*, No. 2:11-CV-11254, 2017 WL 2242391, at *1 (E.D. Mich. May 23, 2017); *Harlow v. Fitzgerald*, 457 U.S. 800, 806; 102 S.Ct. 2727; 73 L.Ed.2d 396 (1982); *English v. Dyke*, 23 F.3d 1086, 1089 (6th Cir. 1994).

STATEMENT OF MATERIAL FACTS

On October 17, 2018, Plaintiffs filed their Complaint in the Oakland County Circuit Court which Defendants subsequently removed to this Court. **(Dkt. 1)**. Plaintiffs claim that Defendants placed unlawful conditions in their attempt to construct a residential driveway. The Complaint alleges two constitutional violations – takings and due process – but fails to make any specific allegations of impropriety by the individually named Defendants, Donald D. Green and Timothy C. Brandt. Defendant Green is the supervisor for Milford Township and Brandt serves as the Building and Zoning Administrator.

On December 12, 2018, Defendants filed a Motion for Summary Judgment. **(Dkt. 16)**. The Motion was filed at an early stage of the case because Plaintiffs had failed to exhaust administrative remedies prior to filing suit. See *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172; 105 S. Ct. 3108; 87 L. Ed. 2d 126 (1985). It was therefore argued that the claim was not ripe for review. See *Texas Gas Transmissions, LLC v. Butler Cty. Bd. of Comm'rs*, 625 F.3d 973, 976 (6th Cir. 2010) ("Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed."). The Motion is currently pending.

Plaintiffs Joel and Wren Hack were deposed on April 4, 2019 and were questioned about their decision to name Messrs. Green and Brandt as Defendants in their individual capacity. Mr. Hack testified as follows in regard to Defendant Green:

Q. Well, you know you're suing Mr. Green personally?

A. Yes.

Q. What did he do that caused you to sue him?

A. What did he do? Prevented us from finishing our house.

Q. And describe the particular action that Mr. Green took.

A. ***Getting involved.***

….

Q. ***But I want to know what in particular Mr. Green did.***

A. ***Represents the Township.***

Q. So that's it, he represents the Township, he's the supervisor?

A. ***Yeah.*** **(Exhibit A, Pg. 179-180)**.

Mr. Hack's testimony makes clear that he has no claim against Defendant Green. Serving as Township Supervisor is not a valid basis to sue someone *in their personal capacity*. Moreover, the claim that Plaintiffs were prevented by Green from finishing their house is entirely false. Plaintiffs are permitted to finish their home subject to three lawful preconditions imposed by the Township's planning consultant and approved by the Township board. **(Exhibit C, 10/08/18**

Letter). These preconditions are neither onerous nor burdensome and were estimated to cost $2,500 to complete. **(Exhibit D, Change Order)**. Plaintiffs instead chose to file the instant lawsuit. Notwithstanding, Plaintiffs have been permitted to continuously reside in the property pursuant to a temporary occupancy permit granted by Defendants. **(Exhibit A, Pg. 55, 129)**. It is clear any action of Defendant Green did not violate clearly established constitutional rights of which a reasonable person would have known. See *Harlow v Fitzgerald*, 457 U.S. 800, 806; 102 S.Ct. 2727; 73 L.Ed.2d 396 (1982). He is therefore entitled to qualified immunity and must be dismissed from this lawsuit.

Plaintiffs have also failed to identify any constitutional claims against Brandt:

> **Q.** Tell me what Mr. Brandt did.
>
> **A.** Tim?
>
> **Q.** Tim Brandt, what did he do?
>
> **A.** ***He's not doing his job.***
>
> **Q.** In what way is he not doing his job?
>
> **A.** ***Recognizing that the things that we need to do aren't necessarily required by law.***
>
> **Q.** And have you gone back to look at the ordinances that the Township enacted to see whether or not they apply to your property?
>
> **A.** ***No.*** **(*Id.*, Pg. 180-181)**.

Despite the allegation that Defendant Brandt is not doing his job by imposing restrictions not required by law, Mr. Hack admitted that he did not look at the Township ordinances to see what is required when constructing a home. **(*Id.*)**. Had he reviewed the ordinance, it would have been clear that requiring a fill and grade permit is expressly authorized in Section 32-583 which states: "[i]t shall be unlawful for any person to use land for filling with materials of any kind without approval of the township board and subject to requirements as may be appropriate." **(Exhibit E, Ordinance)**. There is simply no basis for Mr. Hack's allegation that he was required to do something that was not expressly permitted under Milford's ordinance.

Moreover, even assuming Brandt was not entitled to require a fill and grade permit, the imposition of this requirement does not amount to a taking or deprival of due process. Brandt became involved after Plaintiffs' neighbor, David Mamo, repeatedly complained that fill material was being brought on site causing flooding on his land. **(Exhibit F, Mamo Email)**. These complaints apparently began around February 2018 but it was not until June 13, 2018 that Brandt took action and issued a cease and desist letter to Plaintiffs' builder indicating that a permit was required to place any additional fill on the property. **(Exhibit G, 06/13/18 Letter)**. Despite requiring Plaintiffs cease the construction of the driveway,

Plaintiffs have been permitted to continuously reside in the property pursuant to a temporary occupancy permit granted by Defendants. **(Exhibit A, Pg. 55, 129)**.

STANDARD OF REVIEW

The legal standard for allowing a successive motion for summary judgment was succinctly described by Judge Stephen Murphy, III in *Rhinehart v. Scutt*, No. 2:11-CV-11254, 2017 WL 2242391, at *1 (E.D. Mich. May 23, 2017) **(Exhibit B)**:

> Because the denial of summary judgment has no res judicata effect, the Court may, in its discretion, permit a second motion for summary judgment. *Kovacevich v. Kent State Univ.*, 224 F.3d 806, 835 (6th Cir. 2000). Permitting a second summary judgment motion is especially appropriate if there has been an intervening change in controlling law, a party has expanded the factual record, or there is a "need to correct a clear error or prevent manifest injustice." *Durfee v. Rich*, No. 02-10041, 2007 WL 1011066, at *9 (E.D. Mich. Mar. 30, 2007) (quoting *Whitford v. Boglino*, 63 F.3d 527, 530 (7th Cir. 1995)).

LAW & ARGUMENT

Pursuant to E.D. Mich. Local Rule 7.1(b)(2), "[a] party must obtain leave of court to file more than one motion for summary judgment." Permitting a second motion for summary judgment is proper when "a party has expanded the factual record." *Rienhart*, *supra*. Plaintiffs were deposed on April 4, 2019 – after the filing of Defendants' original motion for summary judgment. Plaintiffs' testimony clearly demonstrates that they do not have a claim against the individually-named Defendants. The expanded factual record makes clear Defendants are entitled to dismissal on the basis of qualified immunity.

Qualified immunity ensures governmental officials protection "from undue interference with their duties and from potentially disabling threats of liability." *Harlow, supra* at 806. Qualified immunity is available for a §1983 claim if the official is "performing discretionary functions" and his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id*. at 818. To be clearly established the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier v. Katz*, 533 U.S. 194, 202; 121 S.Ct. 2151; 150 L.Ed.2d 272 (2001), overruled in part on other grounds in *Pearson v. Callahan*, 555 U.S. 223; 129 S.Ct. 808; 172 L.Ed.2d 565 (2009). Plaintiffs have the ultimate burden of establishing that Defendants are not entitled to qualified immunity. *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991).

Moreover, "[q]ualified immunity is an immunity from suit rather than a mere defense to liability." *Pearson, supra*, 555 U.S. at 237 [quotations omitted]. "It not only protects a defendant from liability but may also protect a defendant from the burdens of trial and discovery." *English v. Dyke*, 23 F.3d 1086, 1089 (6th Cir. 1994). Accordingly, the Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227; 112 S.Ct. 534; 116 L.Ed. 2d 589 (1991).

Following the depositions of Plaintiffs, the record is clear that Defendants Green and Brandt are entitled to qualified immunity. Plaintiffs have no evidence to support any claim that these Defendants violated their constitutional rights. These Defendants did not "take" Plaintiffs' property because they are currently living there. No due process violation occurred because Plaintiffs were afforded notice and an opportunity to be heard before the Milford board.

Moreover, even if a violation is established, the right was not clearly established for purposes of the qualified immunity analysis. Plaintiffs cannot point to any pre-existing case law that mandates the conclusion that what Defendants did (required a fill and grade permit pursuant to an ordinance) would be a constitutional violation. See *Saylor v. Bd. of Educ. of Harlan County, Ky.*, 118 F.3d 507, 515 (6th Cir.1997) ("For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.").

WHEREFORE, Defendants respectfully request that this Honorable Court grant the present Motion and enter an order allowing Defendants Donald D. Green and Timothy C. Brandt to file a second motion for summary judgment on the basis of qualified immunity.

Respectfully submitted,

O'CONNOR, DEGRAZIA, TAMM & O'CONNOR, P.C.

BY:/s/ Michael J. Bonvolanta

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Dated: April 19, 2019

PROOF OF SERVICE

Jemmis F. Lawrence states that on April 19, 2019, on behalf of Defendants she served the attached *Defendants' Motion for Leave to File Second Motion for Summary Judgment, Brief in Support* and *Proof of Service* upon counsel of record via e-filing with the ECF Filing system to their e-mail addresses of record.

/s/ *Jemmis F. Lawrence*
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