

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

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

Plaintiffs,

v

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

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.

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR
LEAVE TO FILE SECOND MOTION FOR SUMMARY JUDGMENT**

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QUESTION PRESENTED

Fed. R. Civ. P. 56(d) provides that the Court may defer ruling on a motion for summary judgment when the non-movant lacks facts essential to oppose the motion. Here, Defendants seek leave to file a second (partial) motion for summary judgment regarding claims against Defendants Green and Brandt—before discovery is closed and before Plaintiffs have had an opportunity to depose Defendant Green or obtain the transcript of Defendant Brandt. Should the Court grant leave to file a second motion for summary judgment at this time?

Plaintiffs answer: “No.”

Defendants answer: “Yes.”

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 56(d)

Eastern District of Michigan L.R. 7.1(b)(2)

SUMMARY

On April 19, 2019, Defendants moved for leave to file a second motion for (partial) summary judgment, relating strictly to claims against Defendants Donald Green and Timothy Brandt. (Dkt. No. 35.) At the time of the Motion, Plaintiffs had not had an opportunity to depose Defendants Green and Brandt.

Since the Motion's filing, Plaintiffs deposed Defendant Brandt, specifically on April 23, 2019. Plaintiffs have ordered Defendant Brandt's deposition transcript but still have not received it. That said, undersigned counsel represents that:

- Mr. Brandt confirmed that Milford Township, through Mr. Brandt, required Plaintiffs, nearly 12 months ago, to post a bond in excess of \$4,000.
- Mr. Brandt confirmed that the bond's purpose was to ensure the driveway was built; if Plaintiffs did not build it, the money was to be used by Milford Township to complete the driveway.
- Mr. Brandt confirmed Plaintiffs posted that bond.
- Mr. Brandt confirmed that Plaintiffs' egress and ingress to their home was severely impaired by the water and lack of a driveway.
- Mr. Brandt acknowledged Plaintiffs' lack of driveway created safety issues for the Plaintiffs, particularly given the water impeding access.
- **Mr. Brandt confirmed that Defendants have declined to use the bond money to construct the driveway.**
- When asked why, Mr. Brandt answered to this effect: "Because of the litigation."

Plaintiffs believe the Court will recognize that Mr. Brandt's above testimony is remarkable and outrageous, particularly in light of the safety issues posed to Plaintiffs; Defendants possess Plaintiffs' money, which Defendants demanded to resolve the exact problem creating safety issues for Plaintiffs: construction of a driveway. And yet Defendants decline to use the money to build the driveway. Because of the litigation. Already there is a significant question for the jury as to whether Mr. Brandt (and the other Defendants) violated Plaintiffs' constitutional right to due process and unlawfully deprived Plaintiffs of their constitutional property and due process rights acting under color of state law.

As to Mr. Green, Plaintiffs scheduled Mr. Green's deposition as promptly (and cooperatively) as possible; it is scheduled to occur on May 17, 2019. Plaintiffs therefore cannot present facts essential to their opposition to Defendants' proposed second motion for summary judgment; this alone is a basis for delaying a motion for summary judgment. Fed. R. Civ. P. 56(d).

At the last motion hearing, Defendants' counsel requested that the Court permit time, after the close of discovery, to file a renewed motion for summary judgment; Plaintiffs thus anticipate that Defendants will file another motion for summary judgment, as to all claims, at the close of discovery. This serial, staggered filing of motions for summary judgment is hardly sensible or cost-effective for either the Court or Plaintiffs. But maybe that is the point.

Discovery closes May 30, 2019, and the dispositive motion cutoff is June 15, 2019. (Dkt. No. 19). Defendants' motion for leave to file a second (partial) motion for summary judgment is premature and prejudicial to Plaintiffs, at this juncture, due to pending discovery directly related to the subject matter of Defendants' proposed motion for summary judgment.

Plaintiffs request that the Court deny Defendants' motion, without prejudice.

ARGUMENT

A. Standard of review.

“Matters of docket control and discovery are within the sound discretion of the district court. The court of appeals will not interfere with the trial court's control of its docket except upon the clear showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant.” *In re Air Crash Disaster*, 86 F.3d 498, 516 (6th Cir. 1996).

B. Defendants' motion is premature.

Fed. R. Civ. P. 56(d) provides as follows:

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

Defendants seek to file a motion for summary judgment relating to claims against Defendants Brandt and Green alone. But Plaintiffs do not even possess the deposition transcript of Mr. Brandt, nor has Mr. Green been deposed. Plaintiff thus lacks facts essential to justify their opposition to Defendants' requested motion for summary judgment.

Fed. R. Civ. P. 56(d)(1) specifically authorizes the Court to defer considering a motion until the appropriate time. In these circumstances, Defendants' motion is premature and deferral sensible.

ACCORDINGLY, Plaintiffs Joel Q. Hack and Wren Beaulieu-Hack respectfully request that this Court enter an order denying Defendants' Motion for Leave to File Second Motion for Summary Judgment, without prejudice.

Respectfully submitted,

/s/ R.J. Cronkhite

R.J. Cronkhite (P78374)
Maddin, Hauser, Roth & Heller, P.C.
Attorneys for Plaintiffs
28400 Northwestern Hwy, Floor 2
Southfield, MI 48034-1839
(248) 351-7017
rcronkhite@maddinhauser.com

Dated: May 3, 2019

CERTIFICATE OF SERVICE

I hereby certify that on **May 3, 2019**, I electronically filed the above document(s) with the Clerk of the Court using the ECF system, which will send notification of such filing to those who are currently on the list to receive e-mail notices for this case.

/s/ R.J. Cronhite
Attorney for Plaintiffs