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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JIM BRANNON,

Plaintiff,

Vs.

SUSAN K. WEATHERS, in her capacity as the City of Coeur d'Alene City Clerk; MIKE KENNEDY, in his capacity as the incumbent candidate for the City of Coeur d'Alene Council Seat #2;

Defendants.

Case No. CV-09-10010

MEMORANDUM OF DEFENDANT KENNEDY IN RESPONSE TO PLAINTIFF'S MOTION TO REFUSE THE APPLICATION OF DEFENDANT KENNEDY FOR SUMMARY JUDGMENT PURSUANT TO IRCP Rule 56 (f)

From at least the voluntary dismissal by plaintiff of Kootenai County as defendant, this case has been carried on in disregard of the law in the election statutes and appellant opinions and upon erroneous assumptions not founded upon fact and, in most instances, immaterial. The plaintiff's Motion to Refuse is just one more waste of the time of Court and counsel.

Rule 56 (f), I.R.Civ.P. reads as follows:

> **Rule 56 (f). <u>When affidavits are unavailable in summary judgment proceedings.</u>**
>
> **Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.**

The motion purports to be supported by affidavit of plaintiff's attorney Starr Kelso expressing opinions and making assumptions totally without factual foundation.

As set forth in the rebuttal affidavit of undersigned counsel, there was only one conversation with potential witness Monica Paquin. Undersigned counsel's only legal opinion was the obvious shared by plaintiff's attorney that an Idaho court cannot compel a person in Canada to come to Coeur d'Alene to trial. The refusal to pass on her telephone number which plaintiff's investigator already had or her home address which defendants' counsel did not have resulted in an e-mail to plaintiff's counsel on February 8th as follows:

> **Feb. 8, 2010 04:23:55 P.M.** scottwreed@verizon.net **wrote:**
>
> **Starr: In the Sunday Spokesman of January 31st I read in Dave Oliveria's column that Monica Pacquin lived in Canada, that she had been contacted by one of your investigators and asked about her vote and that she thought such an inquiry about a vote in a city election rather than U.S. Senator or President was ridiculous. I sensed from her comment that she did not want to be bothered any more. I respect her wish for privacy. Pacquin is a legal vote, that is all I have to say.**

See Affidavit of Starr Kelso, page A-6.

The only other contact with plaintiff's target list of witnesses was a call on Tuesday, August 17th, the day after plaintiff filed his pleading from Tammy Currie Farkes who was frightened by receipt of a "Notice of Testimony" from attorney Kelso.

There has been no other contact by undersigned counsel or anyone else representing defendant Kennedy with any of plaintiff's listed witnesses.

There are no facts in the record to support anything in plaintiff's motion. It is hardly surprising that out-of-state residents after initially replying to questions from a private investigator, decided that they did want to become involved in a city council election of no importance to them nor in a trial that might require them to travel hundreds or thousands of miles at their own expense.

So much for paragraphs 1, 2, 6 and 7 of the Motion to Refuse. Paragraph 3 explains how the deposition of Susan Harris and Ronald Prior failed to elicit under oath an indication as for whom either voted.

In paragraph 4, plaintiff's attorney identifies two persons whom he believes to be ineligible voters in the city election whom he intended to depose, but did not. The record at the time of summary judgment motion does not provide any admissible evidence as to how either Nancy White or Dustin Ainsworth voted. By not deposing either, plaintiff forfeited the opportunity to establish either a vote for Kennedy or that such voter was not eligible.

The tape recordings as summarized on pages 3 to 5 are all inadmissible hearsay to be stricken. So much for allegations that go nowhere.

The amended complaint was filed December 10, 2010. As will be noted hereinafter, attorney Kelso in an affidavit filed February 28, 2010 averred that affidavits or depositions of all witnesses would be completed within two to three months.

On page 6 of the Motion to Refuse ten persons are named as ". . . identified as probable material witnesses" probably to be called at trial. As to each, the pleading only states that each may testify for whom he or she voted with no indication that any of them was an ineligible voter.

This scant identification is made 249 days after the filing of the Amended Complaint, 15 days before hearing on defendant's Motion for Summary Judgment and a month before trial.

In the last paragraph of the Motion to Refuse, plaintiff argues that summary judgment is not allowable in an election contest. Idaho Code §34-2013, selectively cited in plaintiff's motion, commences:

> **34-2013. Procedure in general. – The proceedings shall be held according to the Idaho Rules of Civil Procedure so far as practicable. . .**

Further reference to the Idaho Rules of Civil Procedure is made in Idaho Code Sections 34-2010, 34-2014, 34-2030 and 34-2033. The unchallenged Scheduling Order, Notice of Trial Setting and Initial Pre-Trial Order makes specific provision for motions for summary judgment.

So much more time and space continues to be devoted to rebutting unsupportable arguments by plaintiff.

Plaintiff is not following proper procedure in Rule 56 (f) I.R.Civ.P. Of even more importance and further indication that this suit has been brought and pursued frivolously, unreasonably and without foundation is to be found in plaintiff's own pleadings.

When the case was before Judge Simpson on a track on the city's motion to dismiss set for hearing on March 2nd, counsel for plaintiff filed on Sunday (!) February 28th his own affidavit captioned: "Affidavit in Support of Motion for Extended Time for Discovery and Depositions and To Vacate and Reschedule Trial."

A duplicate of that affidavit is filed with this response. Under oath, counsel represented as follows:

> §7, 8 and 9: Subpoenas would be obtained through Canadian counsel to depose Paquin, Farkes and Friend.
>
> §10 Three other non-residents who voted absentee would provide affidavits establishing ineligibility and that they voted for Kennedy.
>
> §12. Plaintiff is to take affidavits and depositions of those ineligible voters within two or three months.
>
> §18. Plaintiff would depose Deputy Secretary of State Tim Hurst, other out-of-state voters and Mike Kennedy.
>
> The affidavit concludes in paragraphs 19 and 20.
>
> **19. . . With the schedules of the attorneys for the parties hereto, and the schedules of the witnesses, it is my opinion that this process will take two or three months beyond the date of the scheduled trial in this matter.**
>
> **20. In my opinion, based upon my investigation so far, it is necessary that this discovery be completed prior to the trial in this matter so that the facts regarding the election can be properly presented by the Court for a fair and complete evaluation.**

Plaintiff has not deposed anybody. The only affidavit he has obtained and not filed is of Gregory A. Proft, a soldier in the army in Iraq alleged by plaintiff to be ineligible who voted absentee for Brannon.

As with many other pleadings of plaintiff in this case, this motion and supporting affidavit do not follow the proper procedure for invoking the rules, this time Rule 56 (f) I.R.Civ.P. The proper Rule 56 (f) motion is to assert in a timely fashion discoverable facts essential to the party's opposition and seek a continuance for depositions or other discovery.

By agreement of all parties and at the express request of attorney Starr in court conference in June the trial date of September 13th was set overriding the request of defendant Kennedy for a much earlier trial date.

Plaintiff's motion and affidavit do not assert any effort to obtain affidavits or depositions between August 16th and trial. For good and sufficient reason, plaintiff dare not seek a continuance.

Instead, plaintiff asserts that Monica Paquin, Denise Dobslaff, Alan Friend, Tammy Currie Farkes and Kimberly Gagnon will appear at commencement of trial on September 13th and testify that each has an ineligible voter and that each voted for Kennedy.

And how does plaintiff believe these five persons will be compelled to appear? Not subpoena served in Idaho nor by subpoenas in Canada and California under the Uniform Intestate Depositions and Discovery Act (Rule 45 (I), I.R.Civ.P.).

Counsel for plaintiff would have this Court believe that these five persons living in three provinces in Canada and in Petaluma, California will appear after this Court grants plaintiff's Motion to Compel Witness to attend trial with what plaintiff proposes as the Court's order:

> **Compelling the following persons who cast ballots in the 2009 City of Coeur d'Alene General Election to attend the trial in this matter and testify:**
>
> 1. **Monica Paquin – Boucherville, Quebec, Canada**
> 2. **Denise Dobslaff – Vernon, British Columbia, Canada**
> 3. **Tammy Farkes – Edmondton, Alberta, Canada**
> 4. **Alan Friend – Nelson, British Columbia, Canada**
> 5. **Kimberly Gagnon – Petaluma, California**

Motion to Compel Witnesses to Attend Trial, p. .1.

And what representations does plaintiff make that these five persons will, upon receipt by mail of the Court's order, voluntarily appear on September 13th in the courthouse in Coeur d'Alene? Plaintiff's affidavit in support of his Motion to Compel Witnesses to Attend Trial represents just as did plaintiff's February 28th affidavit total lack of interest and/or cooperation by any out-of-state potential witnesses.

Finally, plaintiff has not identified any witness nor set forth any law that is contrary to this conclusion of Chief Deputy Secretary of State Timothy A. Hurst in his letter to Dan English dated December 18, 2009 attested to in his affidavit of January 14, 2010 filed herein:

> **I am in receipt of your letter dated December 16, 2009, regarding the eligibility of a certain overseas citizen and military personnel to vote in the City of Coeur d'Alene election.**

It appears from the information that was entered into the statewide voter registration system that Tammy Farkes, Monica Pacquin, Gregory Proft and Alan Friend registered to vote in accordance with state law.

More than likely the same ruling would also apply to Kimberly Gagnon whose name did not appear in the Amended Complaint.

It is tempting to say three strikes and plaintiff is out but as a matter of law, plaintiff did not come to bat as to the five witnesses as supporting his case.

While plaintiff has not made a proper pleading to invoke Rule 56 (f), the record establishes abundance of reasons why any reliance upon any Rule 56 (f), motion must be rejected. In 73 American Jurisprudence 2nd "Summary Judgment" the following applicable comment is made.

> **For example, a party is entitled to a receive a continuance for additional discovery if he or she makes the request before the court's ruling on the summary judgment, places the court on notice that further discovery pertaining to summary judgment motion is being sought, and demonstrates to the court with reasonable specificity who the requested discovery pertains to the pending motion. However, Rule 56 (f) cannot be relied on if the result of the continuance to obtain further information would be wholly speculative.**
>
> 72 Am. Jur. 2d. 928, p. 673.

The result of continuance would be to let plaintiff unsuccessfully try to obtain information that is wholly speculative.

Five and one half months (270 days) have passed since counsel for plaintiff under oath stated that all discovery would be completed in two to three months. Lack of diligence is the most frequent reason given by courts in denying a Rule 56 (f) motion.

If a party opposing a motion for summary judgment has not been diligent to obtain affidavits or take depositions or have discovery, and seeks more time to obtain materials in opposition, or asserts or appeal that he or she should have been granted more time to do so, his or her claim of insufficient opportunity is not reason enough to require the application of Rule 56 (f).

73 Am.Jur. 2nd, §30, p. 673.

The few reported appellate cases in Idaho in which opinions cite Rule 56 (f) are not relevant. The Federal Rule 56 f) is identical so the following opinions are instructive.

Beattie v. Madison County School District, 1254 F.3d 595 (5th Cir. 2001) was a suit brought by a school secretary alleging that her termination was a First Amendment violation under 42 USC §1983.

Defendants moved for summary judgment. Plaintiff filed a Rule 56 (f) motion three days after the summary judgment motion was filed.

Beattie had only several months after she sued to depose board members, but the Court of Appeals upheld the District Court ruling that she had not been diligent:

Rule 56 (f) motions are generally favored and should be liberally granted. *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 535 (5th Cir. 1999). Beattie "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts." *Krim*, 989 F.2d at 1442 (Internal Citations omitted.) She must show (1) why she needs additional discovery and (2) how that discovery will create a genuine issue of material fact. *Stearns*, 170 F.3d at 535 (citing *Krim*, 989 F.2d at 1442). If Beattie has not diligently pursued discovery, however, she is not entitled to relief under rule 56 (f). *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination U nit*, 28 F.3d 1388, 1397 (5th Cir. 1994). We need not address whether Beattie has shown why she needs additional discovery to create a genuine issue of material fact, because she was not diligent. *Id.* At 1397.

254 F.3d at 606.

Springs Window Fashions v. Novo Industries, L.P., 323 F.3d 989 (Fed. Cir. Ct. Appeals, (2003) was a patent case.

Defendant had notice in September that Motion for Summary Judgment had to be pled by February 1st meaning its response must be filed by February 21st even though discovery was open until March 15th. Defendant scheduled the deposition of plaintiffs for March 1st and moved for a Rule 56 (f) delay which the District Court denied. The Federal Circuit Court affirmed:

> **Furthermore, "[a] party who has been dilatory in discovery may not use Rule 56 (f) to gain a continuance where he has only made vague assertions that further discovery would develop genuine issues of material fact." *United States v. Bob Stofer Oldsmobile-Cadillac, Inc.*, 766 F.2d 1147, 1153 (7th Cir. 1985). See also *Farmer v. Brennan*, 81 F.3d 1444, 1449 (7th Cir. 1996) ("this Court has noted that the party seeking further time to respond to a summary judgment motion must give an adequate explanation to the court of the reasons why the extension is necessary.")**
>
> 323 F.3d at 998.

SUMMARY

For each and all of the above reasons, plaintiff's Motion to Refuse the Application of Defendant Kennedy for Summary Judgment pursuant to IRCP Rule 56 (f) must be denied.

Respectfully submitted, this 23rd day of August, 2010.

Scott W. Reed, One of the
Attorneys for Mike Kennedy