

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

ANTON FELTON AND JUNE FELTON,

Plaintiffs,

v.

SCOTT W. ELKINS AND TAMMY TON
ELKINS,

Defendants.

Civ. No. 2003-68

SCOTT W. ELKINS

Third Party Plaintiff,

v.

MARTY BEECHLER, ISLANDIA REAL
ESTATE, INC., WILLIAM DOVE and
TROPICAL PROPERTIES, INC.

Third Party Defendants.

ATTORNEYS:

Gregory H. Hodges, Esq.

St. Thomas, U.S.V.I.

For the plaintiffs

Joel H. Holt, Esq.

St. Thomas, U.S.V.I.

For the defendants,

Denise M. Francois,

St. Thomas, U.S.V.I.

For the third party defendant.

MEMORANDUM

Plaintiffs object to and appeal from the magistrate judge's March 25, 2004 order permitting defendants limited discovery to respond to a motion for partial summary judgment. For the reasons stated, I will affirm the March 25, 2004 Order.

I. BACKGROUND

On January 6, 2003, plaintiffs, residents of the United Kingdom, agreed to purchase a condominium in St. John from defendant Scott Elkins for \$429,000.00. The agreement called for a deposit of \$42,900.00 and provided for of an initial cash deposit of \$1,000.00 followed by a wire transfer of the balance of the downpayment. On February 5, 2003, the wire transfer was complete. On the planned closing date of April 7, 2003, plaintiffs tendered full payment for the condominium and demanded a conveyance. Defendant Scott Elkins rejected payment explaining that he was entitled to terminate the contract because the initial deposit was untimely. On April 11, plaintiffs brought claims for breach of contract and asking that the Court order the defendants to specifically perform the contract. On May 29, plaintiffs amended their complaint to also ask the Court to set aside defendant Scott Elkins' conveyance of the condominium to himself and Tammy Elkins as fraudulent.

Defendants demanded that the foreign plaintiffs post

security for costs as provided by 5 V.I.C. § 547. Defendants moved to dismiss the action on June 3 because plaintiffs did not post the security within the 30-day period. Plaintiffs then opposed the defendants' request that they post a security. On December 9, plaintiffs filed a motion for summary judgment, propounded discovery on defendants, and requested leave to amend the complaint. On December 12, defendants moved to strike the motion for summary judgment as violating section 547(a)'s automatic stay of proceedings until security is posted. On January 5, 2004, plaintiffs posted security under protest. That same day, defendants moved for discovery under 56(f) so as to respond to plaintiffs' motion for summary judgment. Plaintiffs opposed this motion. On March 25, 2004, the magistrate judge granted this motion and ordered "limited discovery under [Rule] 56 to respond to the plaintiff's motion for summary judgment." Plaintiffs now object and take an appeal from this order.

II. DISCUSSION

Upon such an appeal under local Rule 72.1, I am to set aside any portion of the magistrate judge's order that I find to be clearly erroneous or contrary to law. Plaintiff alleges that the magistrate judge has failed to comply with the requirements of Rule 56(f) of the Federal Rules of Civil Procedure in that he did

not conduct a hearing on the record before granting defendants additional time for discovery. As Rule 56(f) does not require a hearing, this is not a basis to set aside the magistrate judge's order.

Secondly, the plaintiffs contend that defendants themselves have not met their burden under Rule 56(f). This rule "affords a party opposing summary judgment, who has not had the time or means to discover facts necessary to defeat the motion, the ability to ask the court to grant a continuance or deny the motion altogether." *Annulli v. Panikkar*, 200 F.3d 189, 201 (3d Cir.1999). Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion [for summary judgment] 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 make such other order as is just.

The Third Circuit Court of Appeals has interpreted Rule 56(f) motions as imposing certain requirements on the movant. In particular, when seeking additional discovery, the movant needs to "submit an affidavit specifying . . . what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not been obtained previously. See *Dowling v. City of Philadelphia*, 855 F.2d 136, 140 (3d

Cir.1988); *see also Pastore v. Bell*, 24 F.3d 508, 511 (3d Cir.1994) (citing *Dowling*, 855 F.2d at 140).

Plaintiffs argue that none of defendants' affidavits have specified how the information would preclude partial summary judgment or why further discovery is needed to obtain such information. The 56(f) affidavit, however, does explain that at the time plaintiffs filed their motion for partial summary judgment, the defendants believed the matter to be stayed and therefore had not conducted any discovery. Courts freely grant 56(f) motions when a summary judgment motion is filed before a realistic opportunity for discovery, and in such situations, they recognize that the 56(f) affiants may not be capable of great specificity. *See Burlington No. Santa Fe R. Co. V. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773-74 (9th Cir. 2003). Additionally, I find that the defendants' need for discovery outweighs the burden any additional discovery or delay would place on plaintiffs. *See Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1280 (11th Cir. 1998). I will not set aside the magistrate judge's March 25, 2004 Order because he did not clearly err in allowing limited discovery under Rule 56(f).

III. CONCLUSION

The magistrate judge's March 25, 2004 Order is affirmed because defendants are entitled to a realistic opportunity to conduct limited discovery under Rule 56(f) before responding to the plaintiffs' motion for partial summary judgment.

ENTERED this 13th day of May, 2004.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

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Denise M. Francois,

St. Thomas, U.S.V.I.

For the third party defendant.

ORDER

For the reasons set forth in the accompanying memorandum of even date, it is hereby

ORDERED, that the magistrate judge's March 25, 2004 Order is hereby **AFFIRMED**.

ENTERED this 13th day of May, 2004.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By:_____/s/_____
Deputy Clerk

Copies to:
Honorable Geoffrey W. Barnard
Gregory H. Hodges, Esq.
Joel H. Holt, Esq.
Denise M. Francois, Esq.
Mrs. Jackson
Timothy J. Abraham, Esq.