UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION (BISMARCK)

CISSY THUNDERHAWK; WAŠTÉ WIN YOUNG; REVEREND JOHN FLOBERG; and JOSÉ ZHAGÑAY on behalf of themselves and all similarly-situated persons,

Plaintiffs,

vs.

COUNTY OF MORTON, NORTH DAKOTA; SHERIFF KYLE KIRCHMEIER; GOVERNOR DOUG BURGUM; FORMER GOVERNOR JACK DALRYMPLE; DIRECTOR GRANT LEVI; SUPERINTENDENT MICHAEL GERHART JR; TIGERSWAN LLC; and DOES 1 to 100

Defendants.

Case No. 1:18-cv-00212

RESPONSE TO TIGERSWAN'S MOTION FOR SUMMARY JUDGMENT UNDER RULE 56(B) OR IN THE ALTERNATIVE TO DISMISS UNDER RULE 12(B)(6)

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BACKGROUND

On February 1, 2019, Plaintiffs filed their First Amended Complaint ("Amended Complaint") against TigerSwan, alleging a range of constitutional violations under Section 1983 and Section 1985(3). Amend. Compl., [Doc. 44]. The Amended Complaint describes, in significant and specific detail, numerous respects in which TigerSwan acted in close coordination with state and local officials to implement and maintain the five-month long discriminatory road closure at issue. *See, e.g.*, Amend. Compl. ¶¶ 24, 93-101; *see also* Amend. Compl. *et seq.* (detailing non-specific allegations against all Defendants). On February 21, 2019, six days *after* the federally mandated deadline (and without seeking leave of this Court or showing cause), TigerSwan responded to these allegations in an Answer and Counterclaim. [Doc. 56]; *see* Fed. R. Civ. P. 6(b). In its untimely Answer, TigerSwan denies every factual allegation in the Amended Complaint. [Doc. 56].

TigerSwan has now filed—prior to the institution of any discovery—a Rule 56 Motion for Summary Judgment or, in the alternative, a Rule 12(b)(6) Motion to Dismiss. TigerSwan's motion relies solely on a total of *two* cases (both of which are inapposite) and a four-page affidavit submitted by Shawn Sweeney, a TigerSwan Vice President, that largely consists of vague and conclusory statements.

Construed as a motion for summary judgment, TigerSwan's Motion must be denied: TigerSwan has not met its initial burden of showing that there are no material issues of dispute. To the contrary, there are numerous disputed material facts as well as material facts that are currently unavailable to Plaintiffs given the lack of discovery. Construed as a motion to dismiss, TigerSwan's Motion is untimely: the time for filing a Rule 12(b)(6) motion to dismiss lapsed in February 2019. Regardless, TigerSwan's meritless motion should not be granted.

1. TigerSwan's Motion for Summary Judgment Must be Denied

"Summary judgment is an extreme remedy and is to be granted only where the record clearly demonstrates no genuine issue of material fact." *Glover v. Nat'l Broad. Co.*, 594 F.2d 715, 717 (8th Cir. 1979). A party who moves for summary judgment bears the initial burden of showing that there is no genuine dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). When asserting that a fact cannot be reasonably disputed, a movant must support that assertion with affidavits or other "materials in the record." Fed. R. Civ. P. 56(c)(1)(a). Any affidavit supporting a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

If the moving party meets its initial burden, the nonmoving party must then "come forward with specific facts showing that there is a genuine issue for trial," *Conseco Life Ins. Co. v. Williams*, 620 F.3d 902, 910 (8th Cir. 2010), or "show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition," Fed. R. Civ. P. 56(d). A court considering a motion for summary judgment must scrutinize the evidence in the light most favorable to the nonmoving party, giving the nonmoving party "the benefit of all reasonable inferences." *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp.*, 950 F.2d 566, 569 (8th Cir. 1991).

TigerSwan has not met its initial burden for summary judgment. No discovery has yet occurred—because State and Local Defendants' Rule 12(b)(6) motions to dismiss are still pending—and so the relevant record for this case consists of the pleadings and the conclusory and vague Sweeney Affidavit submitted with TigerSwan's Motion. In its sworn Answer, submitted just five months ago and with no subsequent repudiation, TigerSwan alleged that there

are numerous material facts in dispute in this case. *See* TigerSwan Answer *et seq.* [Doc. 56]. Indeed, if TigerSwan's untimely Answer is to be taken seriously, very nearly *every* fact alleged by Plaintiffs in this case is in dispute. *Id.*; TigerSwan Memo ¶ 4, at 7 ("The Plaintiffs have made numerous allegations against TigerSwan, all of which have been disputed in our Answer to the First Amended Complaint."); *see also Wilkie v. Department of Health & Human Servs.*, 638 F.3d 944, 949 (8th Cir. 2011) (holding that the appropriateness of summary judgment is determined by looking to "the pleadings," affidavits, and other record materials).

The Sweeney Affidavit, the only other filing relevant to this question, fails to meet the requirements of Rule 56(c)(4). First of all, the Affidavit suggests that Mr. Sweeney is *not* competent to testify on the matters stated. *See* Rule 56(c)(4). As the Affidavit makes clear, Mr. Sweeney left North Dakota two weeks *before* the challenged road closure began—and did not even remain involved in an off-site capacity throughout the duration of the closure. *Compare* Sweeney Aff. ¶ 1 (alleging that he "remained the onsite contract supervisor from September 2016 until the week of October the 10th" and that he "remained the off-site contract supervisor through the end of the year") *with* Amend. Compl. ¶ 6 (alleging that the road was closed on October 24, 2016 and that it remained closed to the religious and expressive activity of the Tribe and its supporters until March 21, 2017). Moreover, Mr. Sweeney's vaguely stated roles of "onsite" or "offsite contract supervisor[s]" are insufficient to show that he had the personal knowledge of TigerSwan's engagement in these issues necessary to make the sort of bold sweeping generalizations contained within the affidavit. *See, e.g.*, Sweeney Aff. ¶ 3 ("TigerSwan had absolutely nothing to do with the decision to close 1806 or block the bridge."). Finally, few if any of the statements included in this Affidavit take the form of specific "facts that would be

admissible in evidence." Fed. R. Civ. P. 56(c)(4).[1] Facts do not become undisputed simply because TigerSwan labels them as such. *Cf. also* Plaintiffs' Statement of Contested Facts (appended below).

TigerSwan has also failed to advance a legal argument in support of its motion, citing no cases in its limited discussion of summary judgment. *See* TigerSwan Memo ¶¶ 1-6. For this reason, too, TigerSwan has not met its burden. *See, e.g.*, *Wilkie v. Department of Health & Human Servs.*, 638 F.3d 944, 949 (8th Cir. 2011) (holding that summary judgment is only appropriate if the available record shows "that there is no genuine issue as to any material fact *and* that the moving party is entitled to judgment as a matter of law" (emphasis added).

Even if the inadequacy of TigerSwan's motion did not itself merit dismissal, "summary judgment is proper only after the nonmovant has had adequate time for discovery." *Ray v. Am. Airlines, Inc.*, 609 F.3d 917, 923 (8th Cir. 2010). Given the procedural stance of this case, Plaintiffs have not had *any* time for discovery, let alone adequate time. Plaintiffs have shown, pursuant to Rule 56(d), that discovery is necessary to respond to TigerSwan's motion. *See* Rule 56(d); Smith-Drelich Decl. Summary judgment is also inappropriate for this independent reason.

2. TigerSwan's Rule 12(b)(6) Motion to Dismiss Must be Denied

"[A] Rule 12(b)(6) motion cannot be filed after an answer has been submitted." *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). Courts may still style untimely motions to dismiss as Rule 12(c) motions for judgment on the pleadings. *Id.* But "[j]udgment on the pleadings is appropriate only when there is no dispute as to any material facts and the moving

[1] The overly broad nature of these statements is highlighted by the fact that Mr. Sweeney contradicts himself at several points. *Compare, e.g.*, Sweeney Aff. ¶ 7 ("[W]e did not make any decisions related to the protests [or] the protesters . . . .") *with* Sweeney Aff. ¶ 5 (describing "two recommendations as to the protests and the protesters" made by TigerSwan).

party is entitled to judgment as a matter of law[.]" *Olin v. Dakota Access, LLC*, No. 1:17-CV-007, 2017 WL 4532581, at *2 (D.N.D. Oct. 10, 2017), *aff'd,* 910 F.3d 1072 (8th Cir. 2018) (quoting *Ashley Cty. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009)).

In this case, because the time for filing an answer lapsed, and because TigerSwan eventually did file an untimely answer, TigerSwan cannot now file a Rule 12(b)(6) motion to dismiss. *See Westcott*, 901 F.2d at 1488. Moreover, if this Court construes TigerSwan's Motion as one for judgment on the pleadings, it should be denied for similar reasons as its Motion for Summary Judgment: as TigerSwan's sworn Answer and subsequent Memo make clear, there remain numerous disputes of material fact in this case. *See* [Doc. 56]; TigerSwan Memo ¶ 4, at 7; *Olin*, 2017 WL 4532581, at *2; *see also* Plaintiffs' Statement of Contested Facts (appended below).[2]

Conclusion

For these reasons, Plaintiffs request that TigerSwan's motion be denied, or, in the alternative, deferred until discovery is complete pursuant to Rule 56(d).

[2] If this Court construes this motion as one under Rule 12(c)—and does not deny it for this, or some other, reason—Plaintiffs request notice and an opportunity to respond: Plaintiffs' substantive arguments on judgment on the pleadings will turn in significant part on whether this Court allows TigerSwan's Answer, filed untimely and in violation of Fed. R. Civ. P. 6(b).

Plaintiffs' Statement of Contested Facts

As described in the main body of this Response, essentially every fact in this litigation, including every material fact, is contested. Moreover, as described in the Smith-Drelich Declaration, pursuant to Rule 56(d), *no* discovery has yet been completed in this case and discovery is necessary for Plaintiffs to respond to this Motion.

Plaintiffs, nevertheless, set forth a statement of material contested facts in accordance with Local Rule 7.1(A)(3):

¶ **1** Each of the "material facts that TigerSwan claims are uncontested" are either contested now or Plaintiffs expect that they will be contested after discovery is completed:

- ¶ **1.1** "Road and bridge closer [sic] exclusively up to [sic] state and county" **[Amend. Compl. ¶¶ 24, 93-101; Smith-Drelich Decl.; Sweeney Aff. ¶ 5]**;

- ¶ **1.2** "TigerSwan was not hired to do any of the security work on site, including dealing with the protesters" **[Amend. Compl. ¶¶ 24, 93-101; Smith-Drelich Decl.; Sweeney Aff. ¶ 5]**;

- ¶ **1.3** "TigerSwan was hired by ETP to provide consultation and prepare daily reports" (Plaintiffs contest this statement to the extent that it implies that these represent the exclusive responsibilities of TigerSwan relevant to this case.) **[Amend. Compl. ¶¶ 24, 93-101; Smith-Drelich Decl.; Sweeney Aff. ¶ 5]**;

- ¶ **1.4** "TigerSwan had no decision-making authority as to [sic] road or bridge closure" **[Amend. Compl. ¶¶ 24, 93-101; Smith-Drelich Decl.; Sweeney Aff. ¶ 5]**;

- ¶ **1.5** "TigerSwan had no decision-making authority as to the protests or the protesters" **[Amend. Compl. ¶¶ 24, 93-101; Smith-Drelich Decl.; Sweeney Aff. ¶ 5]**;

- ¶ **1.6** "TigerSwan had nothing to do with the closure of the road or bridge" **[Amend. Compl. ¶¶ 24, 93-101; Smith-Drelich Decl.]**;

- ¶ **1.7** "TigerSwan did not interact with the protesters, this was done by law enforcement, ETP, or other persons hired by ETP **[Amend. Compl. ¶¶ 24, 93-101; Smith-Drelich Decl.]**;

- ¶ **1.8** "TigerSwan had no significant contact or interaction with the protests, [sic] the protesters, and had no decision-making authority relating to when or where the protesters could protest or assert their First Amendment rights **[Amend. Compl. ¶¶ 24, 93-101; Smith-Drelich Decl.; Sweeney Aff. ¶ 5]**;

¶ 2 Every allegation related to TigerSwan contained in Plaintiffs' Amended Complaint, and incorporated herein, is currently disputed. **[Amend. Compl. *et seq.*; TigerSwan Answer, Doc. 56; TigerSwan Memo ¶ 4 at 7]**. Plaintiffs do not specifically relist these allegations below, but would be happy to provide a supplement detailing these allegations at the Court's request.

¶ 3 TigerSwan also repeatedly describes an "essential" *additional* fact in its memorandum that it failed to include in its statement of uncontested facts: "that the protesters had refused to protest at the venue set up by ETP, the private landowners, and state and local authorities." TigerSwan Memo ¶ 8; *see id.* ¶ 1. TigerSwan's labeling of this allegation as "essential" and its failure to include this fact in its statement of uncontested material facts serves as an admission that it is a material *con*tested fact. This provides an additional basis for this Court to deny TigerSwan's Motion for Summary Judgment.

Moreover, Plaintiffs wish to make clear: this vague contention *is* contested. Although it is common in circumstances such as these for officials to set aside a close neighboring public forum for speech, Defendants here—including TigerSwan—went to extraordinary efforts to ensure that there was no such location available to Plaintiffs, going so far as to close nine miles of the nearest public forum to prevent any NoDAPL speech, assembly, travel, or prayer in the remotest vicinity. **[Amend. Compl. ¶¶ 6-9; 71]**. Indeed, Plaintiffs have alleged that a primary purpose of the road closure in question was to prevent Plaintiffs from exercising their constitutional rights and liberties in the series of camps located alongside the Standing Reservation border. **[Amend Compl. ¶¶ 79-84; *North Dakota v. U.S.*, No. 1:19-cv-00150-DLH-CRH (suing the federal government for allowing public access to the federal lands on which two of the camps were located); Amend. Compl.; ¶ 150 (alleging, also, that the camps in question were not located on land that was owned, let alone set aside by "Energy Transfer Partners, the various landowners, and the state and county officials")**.

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Respectfully Submitted

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