

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

| | | |
|---------------------------------------|---|----------------------------------|
| Cissy Thunderhawk; Waste'Win Young; |) | Civil No. 1:18-cv-00212-CSM |
| Reverend John Floberg; and Jose |) | |
| Zhagnay, on behalf of themselves and |) | |
| all similarly-situated persons, |) | TIGERSWAN’S REPLY BRIEF |
| |) | AS TO RULE 56 MOTION FOR |
| Plaintiffs, |) | SUMMARY JUDGMENT, |
| |) | OR IN THE ALTERNATIVE |
| vs. |) | TIGERSWAN’S RULE 12(b)(6) |
| |) | MOTION TO DISMISS |
| County of Morton, North Dakota; |) | |
| Sheriff Kyle Kirchmeier; Governor |) | |
| Doug Burgum; Former Governor Jack |) | |
| Dalrymple; Director Grant Levi; |) | |
| Superintendent Michael Gerhardt, Jr.; |) | |
| TigerSwan LLC, and Does 1 to 100, |) | |
| |) | |
| Defendants. |) | |

¶1 Introduction

¶2 TigerSwan has moved that this Court grant summary judgment in favor of TigerSwan and against the above-named plaintiffs and dismiss TigerSwan from this action, or in the alternative grant TigerSwan’s motion to dismiss. **Docket No. 81.** TigerSwan’s main assertion is that the state and county authorities had full control over the road closure and that TigerSwan had no control over any of the actions that Plaintiffs allege were violations of their First Amendment rights. TigerSwan submitted a brief in support of the motion as well as an affidavit of Shawn Sweeney that provides evidentiary support for TigerSwan’s position..

Docket Nos. 82 & 83. The Plaintiffs provided a responsive brief, but failed to provide any evidentiary support – by affidavit or other admissible evidence – in support of its allegations against TigerSwan or as a counter to the evidentiary evidence provided by TigerSwan in support of its motion. **Docket No. 84.** This Reply brief is in response to the Plaintiffs’ response.

¶3 Discussion

¶4 Local Rule 7.1(A)(3) provides what the responding party must provide to a Rule 56 motion for summary judgment:

(3) RESPONSE TO A MOTION FOR SUMMARY JUDGMENT

A response to a motion for summary judgment must also state the facts upon which the party opposing summary judgment relies and must clearly identify those facts that the opposing party claims are contested and that require a trial. The recitation of facts in the response to a motion for summary judgment may be in narrative form, but must be supported by reference to specific pages, paragraphs, or parts of the pleadings, depositions, answers to interrogatories, exhibits, and affidavits that have been served and filed with the court and that conform to the requirements of Fed. R. Civ. P. 56(c). The party opposing summary judgment must clearly explain in the argument portion of the response why the facts claimed to be contested are material to the issues to be resolved. A party’s failure to comply with these requirements may result in a motion for summary judgment being granted.

U.S. District Court for the District of North Dakota Rule 7.1(A)(3) (emphasis added). Rule 56(c) provides as follows:

(c) PROCEDURES.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion 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) (emphasis added).

¶5 TigerSwan's motion should be granted because the Plaintiffs have entirely failed to provide any counter evidence in response to Shawn Sweeney's affidavit. Failure to provide any counter evidence is alone a sufficient reason for granting TigerSwan's motion, as is clear when looking to Rule 56 itself and well-settled Eighth Circuit law:

But here, even though the case advanced to summary judgment, Thomas never presented evidence that would have allowed a reasonable factfinder to conclude that his constitutional rights had been violated. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). . . . It was Thomas's burden, as the plaintiff, to introduce evidence supporting his claims. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (explaining that summary judgment is proper when the party with the burden of proof "has failed to make a sufficient showing on an essential element"); Fed.R.Civ.P. 56. Instead, he offered only threadbare allegations, including that he was "medicated ... for the wrong reasons."

Thomas v. Eschen, 928 F.3d 709, 714-15 (8th Cir. 2019).

¶6 Plaintiffs have failed to provide *any* information under oath countering the information provided by TigerSwan under oath, which is that TigerSwan had no control or authority over the road closure and was not the entity that made the decisions relating to the actions that are alleged in the Complaint. In addition, TigerSwan was not one of the third-party entities that provided security services. As shown by the affidavit of Shawn Sweeney, the Plaintiffs have sued TigerSwan even though it had absolutely no authority as to the closure of the road (as well as any other actions taken by state and county) and no control over the other matters alleged in their Complaint. As to the non-road closure matters, the Plaintiffs sued the wrong entity; that is, as to the claims alleged the Plaintiffs should have sued Energy Transfer Partners and perhaps one of the security companies Energy Transfer Partners employed to perform the security on site – not TigerSwan.

¶7 Plaintiffs decry the fact that TigerSwan failed to provide in its original brief the boilerplate law relating to Rule 56 and the legal standards relating to a summary judgment motion. The federal court, which receives hundreds of summary judgment motions each year, most certainly knows the law relating to summary judgment motions and most probably has the language most recently employed by the Eighth Circuit at its fingertips. Nonetheless, we herein have provided above the legal authority that supports our motion.

¶8 Application of that law in this instance is clear: The Plaintiffs cannot rest on summary or conclusory statements — or the mere assertion or listing of facts supposedly in dispute. To survive the pending motion for summary judgment the Plaintiffs have to provide sufficient and credible evidence (under oath) that is admissible and actually counters the information supplied by TigerSwan. The incantation of a mere shibboleth will not do: under the applicable rule 56 law, the Plaintiffs must put forth facts, provide sworn statements, present admissible documents — all of which must demonstrate a sufficient basis for their allegations and not merely a bald-faced assertion of wrong-doing. But the Plaintiffs in the materials filed – which is merely a brief in opposition – have not done so. As such, the granting of TigerSwan’s motion for summary judgment is not only proper, but required under the rules and the applicable law.

¶9 Nor does the assertion that discovery had not yet been conducted or completed provide a proper basis for denying the motion. If the Plaintiffs did not have evidentiary support pursuing TigerSwan, then it should not have been sued. Before suing TigerSwan the Plaintiffs are required to have a factual basis for the allegations made, and in response to TigerSwan’s motion for summary judgment , the Plaintiffs are required not to make mere repeated reference to their unsupported allegations but produce specific facts – under oath and containing admissible evidentiary support – that at the very least provide demonstrated evidence of a

prima facie case. Such evidence must go directly to the issue and specially put before the Court actual contested material of fact that serves to justify the factual claims made by the Plaintiffs. To survive the instant motion, the Plaintiffs must provide a clear legal basis for the legal theory advanced in their Complaint, as well as demonstrate that the law – as applied to this case and the facts alleged – actually provides a right to a legal remedy. As such, TigerSwan’s motion for summary judgment should be granted. And if our motion for summary judgment is not granted, our motion to dismiss should be granted because TigerSwan had no control over the road closure and was not the entity that was responsible for any of the conduct alleged in the Complaint.

¶10 Conclusion

¶11 The Plaintiffs have failed to meet the basic burden required under rule 56 to provide counter admissible evidence in response to the pending motions made by TigerSwan, and as such TigerSwan’s motion for such summary judgment should be granted; or in the alternative, TigerSwan’s motion to dismiss should be granted.

¶12 Dated this 13th day of August, 2019.

_____/s/_____
Lynn Boughey (#04046)
Attorney for TigerSwan, LLC
lynnboughey@midconetwork.com
P.O. Box 1202

Mandan, ND 58554-1202
(701) 751-1485

CERTIFICATE OF SERVICE

I hereby certify that on August 13th, 2019, a true and correct copy of the foregoing document was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the Following:

ATTORNEYS FOR PLAINTIFFS:

Noah Smith-Drelich

435 W. 116th St.
Ste 510b
New York, NY 10027
605-863-0707
noah.smith.drelich@gmail.com

Bernard E Harcourt

Columbia University
Columbia Law School
435 West 116th Street
Suite 603
New York, NY 10027
212-854-1997
beh2139@columbia.edu

**ATTORNEYS FOR DEFENDANTS – Morton, County of, North Dakota and
Sheriff Kyle Kirchmeier**

Randall J. Bakke

Bakke Grinolds Wiederholt
P.O. Box 4247
300 W. Century Ave
Bismarck, ND 58502-4247
701-751-8188
rbakke@bgwattorneys.com

Shawn A. Grinolds

Bakke Grinolds Wiederholt
P.O. Box 4247
300 W. Century Ave
Bismarck, ND 58502-4247

701-751-8188
sgrinolds@bgwattorneys.com

ATTORNEYS FOR DEFENDANTS – Governor Doug Burgum, Former Governor Jack Dalrymple, Director Grant Levi, Superintendent Michael Gerhardt, Jr.

James E. Nicolai
Office of the Attorney General
500 N. 9th St.
Bismarck, ND 58501
701-328-3640
jnicolai@nd.gov

Matthew A. Sagsveen
ATTORNEY GENERAL'S OFFICE
NATURAL RESOURCES DIV.
500 N 9TH STREET
BISMARCK, ND 58501-4509
701-328-3640
masagsve@nd.gov

Dated this 13th day of August, 2019.

_____/s/_____
Lynn Boughey (#04046)
Attorney for TigerSwan, LLC
lynnboughey@midconetwork.com
P.O. Box 836
Bismarck, ND 58502-0836
(701) 751-1485