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DISTRICT COURT, GRAND COUNTY, COLORADO
307 Moffat Avenue
Hot Sulphur Springs, CO 80451

Plaintiff: GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado,

v.

Defendants: HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; GRAY JAY VENTURES, LLC.; REDWOOD CAPITAL FINANCE CO., LLC, GRANBY PRENTICE, LLC; and GR TERRA, LLC.

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Case No. 2021CV30008

Division 1

DEFENDANT GR TERRA LLC'S REPLY IN SUPPORT OF ITS MOTION TO CONTINUE OR STAY RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT PENDING DISCOVERY PURSUANT TO C.R.C.P. 56(F) AND ALTERNATIVE REQUEST FOR ADDITIONAL TIME TO RESPOND IF MOTION IS DENIED

The response filed by Granby Ranch Metropolitan District ("GRMD") to GR Terra's motion to continue or stay its response to GRMD's summary judgment motion demonstrates exactly why that motion should be granted. RMD response illustrates that it is asking this Court to grant summary judgment on GR Terra's claims before any opportunity for discovery, despite

factual issues identified in GRMD's own response. As GRMD concedes, its motion turns, at least in part, upon facts that require discovery from third parties – such as the prior owner and prior operator of the Granby Ranch development. Moreover, GRMD totally ignores that GR Terra has the right to discover GRMD's documents related to the factual issues, many of which turn upon GRMD's own conduct and the agreements it entered.

GRMD commenced this litigation. To some extent, GR Terra's counterclaims mirror and seek converse relief to the claims asserted by GRMD, such as GRMD's claim in Count VIII for a declaration that the LPA was not terminated via foreclosure, Gray Jay's notice of termination, or other means. By seeking summary judgment on GR Terra's counterclaims, GRMD essentially seeks rulings on the very issues it asserts entitle it to relief on its claims, without allowing GR Terra any opportunity for discovery on those issues.

Under these circumstances, this Court should grant GR Terra's requested continuance or stay. The parties are in the process of scheduling a case management conference with the Court. At that conference, the parties will discuss the anticipated timeframe for discovery and the Court can, if it desires, impose a specific timeframe for GR Terra's response to GRMD's Motion.

GR Terra's Motion Complies With Rule 56(f).

The Colorado Supreme Court has asserted in the context of reversing premature entry of summary judgment that "[o]ur rules of discovery provide that all relevant, non-privileged information should be discoverable unless it would cause annoyance, embarrassment, oppression, or undue burden or expense. Discovery rules should be accorded a broad and liberal interpretation in order to effect their purpose of adequately informing the litigants of the facts giving rise to a claim or defense." *Hadley v. Moffat Cty. Sch. Dist. RE-1*, 681 P.2d 938, 945 (Colo. 1984) (citing

Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979); *Bond v. District Court*, 682 P.2d 33 (Colo.1984)). "[A] party faced with a summary judgment motion is entitled to discover the facts, although they may be in the possession of the adversary." *Hadley v. Moffat Cty. Sch. Dist. RE-1*, 681 P.2d 938, 945 (Colo. 1984) (citations omitted) (reversing summary judgment, finding that the court erred in prohibiting discovery sought to respond to summary judgment).

GRMD asserts that GR Terra has not sufficiently stated the reasons for why it could not (without further discovery) present all the facts essential to justify its opposition. GR Terra's 15-page memorandum and affidavit verifying the facts therein is more than sufficient to satisfy the requirements of C.R.C.P. 56(f). Colorado Rule 56(f) follows the federal rule counterpart, and federal courts across the country have specifically stated that there is no requirement for the form of the Rule 56(f) affidavit, but instead the rule contemplates the party submitting and verifying the necessary facts that demonstrate a need for additional discovery – which is exactly what GR Terra has done here. *See, e.g.*, *Pasternak v. Lear Petroleum Expl., Inc.*, 790 F.2d 828, 833 (10th Cir. 1986) (the opposing party must only demonstrate "how additional time will enable him to rebut movant's allegations of no genuine issue of fact."); *Velez v. Awning Windows, Inc.*, 375 F.3d 35, 40 (1st Cir. 2004) ("To benefit from the protections of Rule 56(f), a litigant ordinarily must furnish the nisi prius court with a timely statement -- if not by affidavit, then in some other authoritative manner -- that (i) explains his or her current inability to adduce the facts essential to filing an opposition, (ii) provides a plausible basis for believing that the sought-after facts can be assembled within a reasonable time, and (iii) indicates how those facts would influence the outcome of the pending summary judgment motion."); *Horner v. Tyson Foods, Inc.*, No. 12-CV-00080-JHP-

TLW, 2012 U.S. Dist. LEXIS 170376, at *5 (N.D. Okla. Nov. 30, 2012) (recognizing that affidavit not "slavishly" required for stay of summary judgment briefing for discovery).

GR Terra has satisfied its burden under Rule 56(f) by submitting the expansive facts in support of its need for discovery and an accompanying affidavit verifying the facts therein. There is no requirement in Colorado law or otherwise that the affidavit must restate all the facts from the motion that it explicitly verifies by reference. GRMD relies on *Bailey v. Airgas-Intermountain, Inc.*, 250 P.3d 746 (Colo. App. 2010) to argue that a "conclusory affidavit" is not sufficient under Rule 56(f). However, *Bailey* is completely inapposite. The court there found that the moving party (under Rule 56f) failed to provide information related to what the plaintiffs expected to discover and how these facts could create a genuine issue of material fact. *Id.* at 751. GR Terra's motion (and by extension its affidavit affirming the facts set forth in the motion) are not conclusory. The motion specifically identified the facts that GR Terra it seeks to discover before responding to the summary judgment motion and its plan for obtaining that information.

Specifically, GR Terra provided the following detail of necessary discovery, which GRMD cannot discount or rebut:

- ***Discovery from the owner of the Property or its representatives and possibly the operator of the Amenities at the time of the alleged cessation of the Amenities in 2020. GR Terra Motion to Continue ("MTC" ¶ 21).***

As GRMD admits in its opposition to the MTC, none of the Defendants owned the Property at the time of the cessation of operation that gave rise to the notice. Opp. at 8 and Ex. 1 thereto. So, as GR Terra asserted, it is entitled to seek production of relevant documents and depositions from the identified third parties that would have the best information with respect to these operations. MTC, ¶ 21. Whether or not GR Terra can try to informally ask Gray Jay about the basis

for its notice is not the point; GR Terra should be entitled to discovery and production of **all** relevant evidence to oppose summary judgment, including evidence directly from the owner/operator of the development at the time. GRMD does not get to dictate what evidence GR Terra should use to oppose summary judgment or limit the sources of available evidence available to it for potential opposition to the summary judgment motion.

- ***Discovery, including document requests and depositions, to GRMD and its board members relating to the cessation of operations of the Amenities. (MTC, ¶ 21).***

As set forth on Exhibit K to the MTC, the current president of GRMD's board and president in 2020, made factual admission in an e-mail dated April 22, 2020 that the operator of the golf course (one of the "Amenities") had ceased to operate for over 30 days. MTC, Ex. 1. As GR Terra asserted, it is entitled to determine if other such documents exist and to depose GRMD and its board members with respect to this admission, any others that may exist, or any other relevant facts they may possess. (MTC, ¶ 21). Regardless of other sources of information, GR Terra is entitled to determine what evidence GRMD may have, including potential admissions, that undermine or defeat its right to summary judgment.

- ***Discovery relating to the facts and circumstances surrounding execution of the LPA and the seven subsequent documents supporting GR Terra's claim that any restrictive covenants in the LPA no longer benefit property within GRMD (assuming they ever did). (MTC, ¶ 24).***

The MTC specifically references paragraphs 61-85 of its Counterclaims, which paragraphs identify by name and date various agreements entered by GRMD that GR Terra asserts support its claim for cancellation of any restrictive covenants. GR Terra's allegations reference particular language in those agreements relevant to GR Terra's claim. Citing to those allegations, GR Terra's MTC specifically identified the need for discovery "relating to meeting minutes, communications and other relevant documents and depositions of the board members of GRMD during the relevant

timeframe." MTC, ¶ 24. This information is clearly not within GR Terra's control. And GRMD has not event tried to argue that it would not be relevant to GR Terra's claims, which turn upon the facts and circumstances surrounding GRMD's execution of those documents.

- ***Discovery related to GRMD's claim that the LPA gave rise to restrictive covenants at the time of the foreclosure in light of GRMD's relinquishment of interest in the amenity fees used to make the rental payments under the LPA and GRMD's agreement that the Maser IGA would terminate in its entirety if either district failed to appropriate funds for the succeeding year. (MTC, ¶ 30, citing references to the Exclusion Agreement and the First Amendment to the 2006 Master IGA, both entered in 2010, referenced in ¶¶ 35- 42 of GR Terra's Counterclaims.)***

Both the above-referenced agreements, as well as the LPA, were entered by parties other than GR Terra long before GR Terra purchased the Property; therefore, this information is not within GR Terra's control. GRMD is the party that would have information related to this claim, which turns upon its actions and intentions at the time those documents were executed, including its intent to waive or relinquish any interest in the payment of Amenities Fees as rent under the LPA. Thus, the MTC stated that "GR Terra will seek to discover the minutes of meetings of GRMD and Headwaters at which these agreements were discussed, communications between the parties relating to these agreements, and any admissions by any party with respect to the nature of the rights and obligations therein. And it will want to depose the board members and representatives of GRMD involved in the drafting and negotiation of those agreements and decisions to enter same." (MTC, ¶ 32).

- ***Discovery relating to facts and circumstances that may be relevant to interpretation of the language of the LPA relating to Headwaters' annual appropriation of funds to pay rental under the LPA. (MTC, ¶ 34).***

At this early stage of the litigation, the parties do not know whether the Court will consider the relevant language of the LPA ambiguous, and thus GR Terra should be entitled to determine

the existence of extrinsic evidence related to the intent of the parties when they entered the LPA, including the intent of GRMD as an alleged third-party beneficiary to the LPA. Again, the latter would be within the control of GRMD.

For all these reasons, GR Terra's motion more than adequately sets forth the discovery its needs to respond to the summary judgment motion, why that information is not within its control, and its plan for obtaining potentially relevant evidence to rebut GRMD's motion. This satisfies all the requirements of Rule 56(f).

Given the detail contained in GR Terra's motion, there was no need for counsel's affidavit to repeat all facts and contextual background. GR Terra properly submitted an affidavit of counsel that referenced "all the factual allegations" in the Motion and verified the truth of same. This satisfies the requirements of Rule 56(f).

GRMD's Legal Arguments Do Not Defeat GR Terra's Right to Discovery.

The balance of GRMD's opposition consists of legal arguments that essentially address the merits of its summary judgment claim – which arguments underscore the need for discovery to prevent a premature ruling on the issues. For instance, GRMD's opposition ignores the fact that Count I of GR Terra's Counterclaims asserts three different and **alternative** reasons why the LPA has been terminated. To succeed on summary judgment, GRMD must defeat each of those reasons. Thus, to the extent that any of the reasons for termination require discovery, GR Terra should be allowed to proceed with same now to present a full rebuttal to GRMR's motion for summary judgment on that claim and to avoid piecemeal presentation of the issues to this Court.

That is particularly true, where, as here, GRMD's legal arguments fail to defeat GR Terra's right to the requested discovery. For instance, GRMD's motion tries to sidestep factual issues

raised by Mr. Girard's e-mail by arguing that the Gray Jay was not the Landlord at the time of the cessation of operation of the Amenities and that Gray Jay did not give the notice within 10 days after Headwaters ceased operations. Neither is a requirement under the LPA. The LPA only requires 10 days' advance notice of the Landlord's election to terminate, LPA, § 10, which was given per the letter attached to the Opposition as Exhibit 2. It does not require that notice be given within 10 days following the cessation of operations. *Id*. Similarly, the LPA clearly allows successors in interest to the Property subject to the LPA to step into the shoes of the Landlord and enforce the rights thereunder. LPA, § 21. GRMD's erroneous legal arguments do not preclude GR Terra's right to discover all relevant facts relating to the termination of the operation of the Amenities.

Moreover, GRMD summary judgment argument turns upon speculation relating to use of funds in Headwaters' budget for the entire year of 2020; those documents do not prove that the Amenities were operated consistently without a 30-day cessation during 2020. *See* Ex. A to Summary Judgment Motion. And Mr. Girard's e-mail expressly states that golf course operator has "abandoned" the golf course and that it had no staff working and no intent to hire staff to work on opening the golf course, concluding that the operator had "for all practical purposes, 'ceasing operations", and had] already done so for a period of 30 days." *See* Ex. 1 to MTC. This directly refutes GRMD's summary judgment argument, and GR Terra is entitled to determine what other documents the owner, operator or GRMD may have on this factual issue.

Similarly, GRMD asserts that Headwaters' continued collection of Amenity Fees into 2022 somehow precludes GR Terra's argument that GRMD waived or relinquished any rights under the LPA to compel payment of the Amenity Fees to the Landlord as rent. While GR Terra disputes

that GRMD ever had any such rights, the mere fact that Headwaters continued to collect Amenity Fees does not establish that GRMD could require use of those funds to pay rent to the Landlord under the LPA (even if it still existed). Per the fee resolution and agreement establishing the Amenity Fees, those funds can be used for any purpose authorized therein. As the LPA makes clear, Headwaters never had any obligation under the LPA to appropriate those funds each year for payment of rent.[1] For this reason, GR Terra should be entitled to discover any and all facts supporting its claims of waiver.

GR Terra will not attempt to refute herein all the erroneous legal arguments set forth in GRMD's opposition. As these examples demonstrate, none of those arguments defeats GR Terra's right to conduct the requested discovery before responding to the summary judgment motion.

Conclusion

WHEREFORE, for the reasons set forth above and in GR Terra's MTC, GR Terra requests that its response to the Motion for Summary Judgment be continued or stayed until discovery has been completed by the parties in accordance with the Case Management Order to be entered by this Court. In the alternative, if the Court denies GR Terra's motion, GR Terra requests an additional fourteen days from the date of denial to file its response to the motion for summary judgment.

[1] In fact, if the LPA imposed such an obligation, it would render the LPA unconstitutional and void. *Black v. First Federal Savings and Loan Assn*., 830 P.2d 1103, 1110 (Colo App. 2011) (political subdivision's multi-year lease agreement violated the Colo. Const. art. XI, § 6 because it did not give the legislative body discretion to choose not to appropriate funds and terminate the lease).

Dated this 30th day of March, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via the Colorado Courts e-filing system on March 30, 2022, addressed to the following:

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