

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MAHMOUD SAAD, Individually, and
ZIHRA SAAD, Individually,

Plaintiffs,

Case No.: 10-cv-12635

vs.

Hon. Patrick J. Duggan

MICHAEL KRAUSE, Individually and in
his official capacity, CITY OF DEARBORN
HEIGHTS, CITY OF DEARBORN HEIGHTS
POLICE DEPARTMENT, CITY OF DEARBORN,
CITY OF DEARBORN POLICE DEPARTMENT,
and JOHN DOE OFFICERS I-XXX,

Defendants.

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**DEFENDANTS' RESPONSE TO PLAINTIFFS' COMBINED
MOTION TO STRIKE AND TO PERMIT DISCOVERY**

Request to Strike Pursuant to Fed. R. Civ. P. 12(f)

The Plaintiffs have moved this Court to strike the following statement from page 2 of the Defendants' motion for partial dismissal: "Defendants have sought concurrence in the relief requested and such concurrence has been denied." Plaintiffs assert that Defendants failed to contact them prior to filing the motion. Defendants' counsel is very much aware of the LR 7.1(a) dealing with seeking the concurrence of opposing counsel in order to avoid the needless expenditure of judicial resources and their common routine and practice is to do so even, as in this case, where it is clear that such attempts would be fruitless. There was simply a misunderstanding in Defense counsels' office as to which of the attorneys working on this case was to contact Plaintiffs' counsel before filing the motion for partial dismissal.

Plaintiffs bring this motion pursuant to Fed. R. Civ. P. 12(f) which states:

The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent or scandalous matter. The Court may act:

- 1) On its own; or
- 2) On motion made by a party either **before responding to the pleading** or, if a response is not allowed, within 20 days after being served with the pleading. (Emphasis added).

In this case, since a response is allowed to Defendants' motion, a Plaintiff is required to file the motion to strike before responding to the motion. However, Plaintiffs failed to do so. Instead, Plaintiffs filed the motion to strike at the same time that Plaintiffs filed their response to Defendants' motion for partial dismissal. Plaintiffs' response brief, however, indicates that they oppose the Defendants' motion and, therefore, the issue of whether or not Defendants sought Plaintiffs' concurrence is moot.

Request for Discovery Pursuant to Fed. R. Civ. P. 56(f)

Plaintiffs move this Court under Rule 56(f) to permit them adequate time to conduct discovery "prior to ruling on any motion dispositive to any of the Plaintiffs' claims." Pursuant to Rule 56(f) a court may deny a motion for summary judgment "if [the] party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition." See *Grain v. Trinity Health*, 2008 U.S. Dist. LEXIS 84901 (E.D. Mich. 2008)(Ex. 1). The Sixth Circuit has indicated that the filing of a discovery motion may be sufficient in lieu of a Rule 56(f) affidavit. *Id.*; *Vance v. United States*, 90 F.3d.1145, 1149 (6th Cir. 1996).

The Plaintiffs' motion lacks merit as Rule 56(f) motion asserting inadequate discovery applies only to motions for summary judgment, not a motion to dismiss or partial dismissal under Rule 12(b)(6) filed by the Defendants.

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the Plaintiffs' claims. The Defendants' motion addresses the issue of whether Plaintiffs have stated a claim entitling them to relief or whether Plaintiffs' claims have been adequately pleaded. Discovery is therefore not needed to respond to the Defendants' motion for partial dismissal under Rule 12(b)(6). See *Chevere v. Chicago Transit Authority*, 1990 U.S. Dist. LEXIS 16730 (N. D. Ill. 1990)(Ex. 2)(holding that discovery is not needed to respond to Defendants' motion to dismiss on the grounds that the allegations are insufficient to support the conspiracy claim asserted and that the claim is barred by intracorporate conspiracy doctrine); *Beydoun v. Countrywide Home Loans Inc.*, 2009 U.S. Dist. LEXIS 53309 (E.D. Mich. 2009)(Ex. 3)(dismissing Plaintiffs' claims where the allegations in Plaintiffs' complaint were barred by limitation periods, insufficiently pleaded, and otherwise failed to state claims upon which relief may be granted, and noting that discovery would not alter the fact that Plaintiff has not stated a claim).

Because Defendants' motion for partial dismissal was filed under Rule 12(b)(6) and asserts that Plaintiffs have failed to state a claim, discovery is not needed to respond to the motion. The Plaintiffs' motion to permit discovery under Rule 56(5) is therefore, without merit. However, Defendants are not opposed to discovery within the confines of the Court rules. The Defendants filed the motion for partial dismissal at this stage so that the parties can expend their time and resources on the real issues raised by the Plaintiffs' lawsuit instead of the wild allegations of conspiracy that do not state a claim.

CONCLUSION

For the foregoing reasons, the Defendants, CITY OF DEARBORN HEIGHTS, DEARBORN HEIGHTS POLICE DEPARTMENT, AND OFFICER KRAUSE, request this Court to deny Plaintiffs' combined motion to strike and to permit discovery.

Respectfully Submitted,

s/Jeffrey R. Clark

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Dated: September 1, 2010

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

ALL ATTORNEYS OF RECORD

and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: N/A.

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