

STATE OF MAINE  
YORK, SS.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. RE-09-111

ROBERT F. ALMEDER et al.,	)	
Plaintiffs,	)	PLAINTIFFS' OPPOSITION TO THE
	)	TOWN'S CONSOLIDATED MOTION TO
v.	)	ENLARGE, CONTINUE AND STAY
	)	DEADLINE TO RESPOND TO MOTION
TOWN OF KENNEBUNKPORT et al.,	)	FOR PARTIAL SUMMARY JUDGMENT
Defendants.	)	

I. INTRODUCTION

*Summary judgment will be granted against a party if after reasonable discovery the party continues to be unable to identify specific genuine issues of material fact but desires to keep trying. As one court has stated: "All things must end—even litigation."<sup>1</sup>*

Plaintiffs oppose the Town of Kennebunkport's (the "Town") Motion to Enlarge, Continue and/or Stay Deadline to Respond to Motion for Partial Summary Judgment ("Town's 56(f) Motion") because the Town has had over two years to conduct discovery in this case to fully support *its own counterclaims* but has not done so. The Town's 56(f) Motion is an attempt to postpone judgment on claims that it simply cannot support. The Town has not met the five mandatory requirements for granting a motion under Rule 56(f) of the Maine Rules of Civil Procedure. Therefore, the Town's 56(f) Motion must be denied.

The Town originally filed its counterclaims on November 19, 2009. Now, two years after the Town filed its claims, after two scheduling orders, and two months after the second discovery deadline lapsed, it still does not have enough evidence to support its own counterclaims and overcome summary judgment. The Town has *never* served interrogatories on Plaintiffs related to its counterclaims and has *never* served any notices to take the depositions of any of the Plaintiffs it now claims are essential to the Town's counterclaims. This is hardly

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<sup>1</sup> 10B Wright, Miller & Kane, *Federal Practice and Procedure* § 2741 at 445–46 (3 ed. 1998) (citing *Southern Rambler Sales, Inc. v. American Motors Corp.*, 375 F.2d 932, 938 (5th Cir. 1967)) (interpreting Rule 56(f) of the Federal Rules of Civil Procedure).

evidence of the “diligence” in pursuing discovery that the Town is required to prove before it can be granted time to conduct additional discovery under Rule 56(f).

Toward the end of the discovery period, Plaintiffs timely served interrogatories on the Town, specifically requesting factual support for the counterclaims at issue. On October 28, 2011, a month after the discovery deadline lapsed, a month after the Town was required to answer Plaintiffs’ interrogatories regarding these claims—which it still has not answered<sup>2</sup>—and on the day before the deadline to file motions, the Plaintiffs filed their Partial Motion for Summary Judgment.

The Town’s argument that the TMF Group’s notices to take depositions and Plaintiffs’ objections thereto can somehow prove the Plaintiffs have refused to allow the Town to proceed with discovery should be dismissed on its face. Additionally, the Town has failed to set forth the specific facts it hopes to gather or how those facts will help the Town avoid summary judgment. After having two years to come up with facts to support its own claims, Plaintiffs respectfully request that this Court deny the Town’s attempt to drag on discovery for these claims any longer.

## **II. THE TOWN’S MOTION MUST MEET THE LEGAL REQUIREMENTS OF RULE 56(f).**

The Town’s motion does not mention or address the legal standard that governs a Rule 56(f) motion. Once a party has filed a motion for summary judgment, “the opposing party either must establish a genuine issue for trial under Rule 56(e) or explain why he cannot yet do so under 56(f).”<sup>3</sup> 10B Wright, Miller & Kane, *Federal Practice and Procedure* § 2740 at 399 (3 ed. 1998). The opposing party must support the opposition with an affidavit establishing personal

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<sup>2</sup> In mid-October, Plaintiffs’ Attorney Thaxter notified the Town’s attorney that Plaintiffs were preparing to file a partial motion for summary judgment as to the Town’s Counterclaims II, III, V and VIII. Plaintiffs requested that the Town provide answers to the Plaintiffs’ interrogatories (already late) before the deadline for filing motions pursuant to the scheduling order. At no time did Plaintiffs grant the Town an extension to answer the interrogatories.

<sup>3</sup> The amendments to the Federal Rules of Civil Procedure effective December 1, 2010 amended the wording of Rule 56(f)(2007) and renumbered Rule 56(f) as Rule 56(d). Maine has not adopted either the 2007 or 2010 amendments to the Federal Rules. However, prior to 2007, Federal Rule 56(f) and Maine Rule 56(f) were identical.

knowledge of the facts in the affidavit; the affidavit cannot allege facts “based on information and belief.” *Selby v. Cumberland County*, 2000 Me. Super. LEXIS 170, \*6 (2000) (affirmed by the Law Court). Rule 56(f) allows an opposing party to file a motion for a “continuance to permit . . . depositions to be taken or discovery to be had . . .” M.R. Civ. P. 56(f).

However, in order for the court to grant the opposing party’s motion for continuance, The law court has indicated that a Rule 56(f) motion must:

- (1) be made within a “reasonable time” after filing of a summary judgment motion;
- (2) place the trial court on notice that the movant wants the court to delay action on the summary judgment motion;
- (3) demonstrate that *the movant has been diligent in conducting discovery*, and show “good cause” why the additional discovery *was not previously practicable with reasonable diligence*;
- (4) set forth a plausible basis for believing that *specified facts*, susceptible of collection within a reasonable time frame, probably exist, and indicate *how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion*; and
- (5) attest that the movant has personal knowledge of the recited grounds for the requested continuance.

3 Harvey, *Maine Civil Practice* § 56:7 at 247–48 (3d ed. 2011) (citing *Bay View Bank, N.A. v. The Highland Golf Mortgagees Realty Trust*, 2002 ME 178, ¶ 22, 814 A.2d 449, 454 (2002) (emphasis added).

Similar to the rule in a motion to extend the discovery deadline,<sup>4</sup> the third element above prevents a party from “forestall[ing] summary judgment by contending more discovery is needed without showing diligence in proceeding down the discovery road.” *Instituto Nacional De Commercialization Agricola v. Continental Illinois Bank & Trust Co. of Chicago*, 576 F. Supp. 991, 1003 (Ill. D.C. 1983). Even when the discovery deadline has not passed, “Rule 56(f) requires a specific showing of . . . why the party opposing summary judgment cannot now bring that evidence forward—particularly where, as here, ample time and opportunity for discovery have already lapsed.” *Id.* (internal quotations omitted); see 10B Wright, Miller & Kane, *Federal*

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<sup>4</sup> As set forth in Plaintiffs’ November 21, 2011 Opposition to the Town’s Motion to Enlarge Discovery.

*Practice and Procedure* § 2741 at 431 (3 ed. 1998) (“a request for relief under Rule 56(f) is *extremely unlikely to succeed* when the party seeking the delay has failed to take advantage of discovery.”) (emphasis added); *Federal Republic of Germany v. Elicofon*, 536 F. Supp. 813, 828 (D.N.Y. 1978) (“where a party has had a reasonable opportunity to engage in discovery and continues to be unable to identify specific, genuine issues of material fact, the court should deny the motion for a continuance and enter summary judgment for the movant.”)

Courts are especially unwilling to grant a 56(f) motion when the discovery deadline *has already lapsed*. See *Hauser v. Farrell*, 14 F.3d 1338, 1341 (9<sup>th</sup> Cir. 1994) (upholding the lower court’s denial of Plaintiff’s 56(f) motion where “Plaintiffs offered no reason why they did not depose Mr. Ruhl during the 27 months from the date the lawsuit was filed to the close of discovery.”); *Mendez Marrero v. Toledo*, 968 F. Supp. 27, 34 (D.P.R. 1997) (Plaintiffs were not diligent where they did not serve discovery requests and sought to take depositions until after the discovery deadline had passed and nearly two years after filing the complaint).

The fourth element of the Law Court’s 56(f) analysis requires an opposing party to state what specific facts exist that it is likely to collect in further discovery and how those facts will affect the outcome of a motion for summary judgment. *Bay View Bank, N.A. v. The Highland Golf Mortgagees Realty Trust*, 2002 ME 178, ¶ 22, 814 A.2d 449, 454 (2002). Simply speculating that a fact *might* exist is not sufficient, a party must articulate “a plausible basis for the belief that discoverable materials existed which would have raised a trialworthy issue.” *Fennell v. First Step Designs, Ltd.* 83 F.3d 526, 531 (1st Cir. 1996); *South Portland Police Patrol v. South Portland*, 2006 ME 55, ¶ 12, 896 A.2d 960, 965.

This element is designed to avoid situations where a party uses the “process to find evidence in support of a mere ‘hunch’ or ‘suspicion’ of a cause of action.” *Elicofon*, 536 F.Supp. at 828 (citing *Waldron v. Cities Service Co.*, 361 F.2d 671, 673 (2d Cir. 1966)). This

requirement does not allow for a party to engage in a “fishing expedition *in the hope* that he could come up with some tenable cause of action.” *Id.* (emphasis added). Courts will deny a party’s 56(f) motion where the discovery requested would be *costly* and would constitute a “fishing expedition.” *See e.g. Fennell*, 83 F.3d 530–34 (upholding the lower court’s decision that the discovery sought would be “a ‘fishing expedition without any particularized likelihood of discovering appropriate information,’ while, ‘at the same time . . . [involving] substantial risks and costs.’”) (emphasis added); *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994) (“while Rule 56(f) discovery is specifically designed to enable a plaintiff to fill material evidentiary gaps in its case . . . it does not permit a plaintiff to engage in a ‘fishing expedition.’”) (citing *Waldron v. Cities Service Co.*, 361 F.2d 671, 673 (2d Cir. 1966)).

**III. THE TOWN’S MOTION HAS FAILED TO ADDRESS THE MANDATORY REQUIREMENTS OF RULE 56(F) AND MUST BE DENIED.**

*A. The Town’s motion fails to demonstrate that it has “diligently proceed[ed] down the discovery road.”*

The Town has not demonstrated that it has been diligent in proceeding with discovery during the two years since the Town filed its counterclaims. The Town’s main argument—that it should be allowed to conduct depositions that the Plaintiffs have “refused to permit”—is wholly without merit.

The Town has *never* noticed the deposition of any of the Plaintiffs that it claims the Plaintiffs refused to allow. Instead, the Town argues that it has been working with the TMF Group to take depositions since February 11, 2011. Town’s 56(f) Motion at 1–2. However, the Town’s own exhibits quite clearly demonstrate that all correspondence regarding the depositions were between Plaintiffs and counsel for TMF. The Town never stepped forward in the spring or summer to arrange depositions —when the Town knew Plaintiffs would be at their Goose Rocks properties—it now claims Plaintiffs refused to allow, nor has it ever attempted to disclose that it

was working with the TMF Group. The TMF Group attempted to schedule depositions in February but many of the Plaintiffs that TMF was seeking to depose do not live in Maine during the winter. The parties all recognized that the summer would be a better time to schedule depositions when parties were available but did allow the deposition of Susan Lewis, who was available for deposition during the winter. During the summer, neither the Town nor TMF attempted to schedule the depositions when they knew Plaintiffs would be available and when the Town had full-knowledge that Plaintiffs moved for summary judgment against the TMF Group based on the TMF Group's answers to interrogatories.

Like the facts in *Mendez Marrero*, two years have passed since the filing of the Town's counterclaims and the discovery deadline has already passed. However, unlike the facts in *Mendez Marrero*, the Town *still* has not served a notice to take any of the depositions the Town now claims are dispositive to its counterclaims. Like the opposing party in *Hauser v. Farrell*, the Town has not offered any reason why it did not serve any notice to take depositions in the last two years. Because the Town has had a reasonable opportunity to notice these depositions, because it never noticed depositions, and since the discovery deadline has already lapsed, the Town's motion is the exact type of motion that legal authority deems "extremely unlikely to succeed." 10B Wright, Miller & Kane, *Federal Practice and Procedure* § 2741 at 431 (3 ed. 1998).

For whatever reason, the Town made the tactical decision not to pursue discovery on their own. The Town cannot hide in the shadow of a completely separate party's discovery efforts to support its own lack thereof. It cannot avoid the reality that during *the past two years* it has not noticed a single deposition that it now claims is essential to its counterclaims.

The Town also claims that the Plaintiffs have refused to provide "requested documents." The Town has only made one Rule 34 request in the last two years. Plaintiffs asked their clients

to respond to the request and their clients have responded and produced everything that they have and have supplemented these documents as additional documents were produced. The Town argues that the Plaintiffs repeatedly “refused to produce” the requested documents. This is simply untrue. It is uncontested that the Town never requested a 26(g) discovery meeting with the court before the discovery deadline lapsed. Furthermore, as discussed below, the Town’s motion fails to demonstrate how any of the documents the Town now vaguely asserts were not produced have any dispositive effect on the motion for summary judgment. Thus, the Town cannot demonstrate that it has been diligent in seeking discovery.<sup>5</sup>

*B. The Town’s 56(f) Motion is an impermissible “fishing expedition” that will add unnecessary costs to this litigation.*

It is not the duty of this Court to come up with hypothetical situations in which unspecified facts might possibly help the Town oppose summary judgment. It is up to the Town to set forth the specific facts it seeks and explain how those facts will raise a trial worthy issue. Because the Town’s 56(f) Motion does not do so as required by Rule 56(f), the Town’s motion should be denied. Regarding the Town’s adverse possession claim, the Town argues that it needs to take depositions to seek information relating to the Plaintiffs’ use of the beach in order to address the “exclusive use” element of adverse possession. Town’s 56(f) Motion at 3–4. However, the Town could not possibly possess a “hunch,” “suspicion” or even a “hope” that they will discover that none of the Plaintiffs used their beach property for the last 20 years because the Town already knows that *they have*. For example, the depositions of both Mary Davis and Susan Lewis clearly establish that they have used the beach in front of their homes.

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<sup>5</sup> Furthermore, the Town’s motion with incorporated affidavit and notary certificate expressly certifies the oath to the truth of the facts “and as to those facts stated on information or belief that he believes them to be true.” Town’s 56(f) Motion at 7. This is the exact kind of affidavit and oath that the *Selby* court found to be expressly impermissible under Rule 56(f) and eventually struck from the record.

Furthermore, many of the Plaintiffs that the Town now claims it needs to depose have already produced photographs showing their use of their beach property.<sup>6</sup>

Finally, and most importantly, in answers to the TMF Group's January 27, 2011 First Set of Interrogatories, Plaintiffs stated *under oath* that they used their beach properties. Upon service of their answers upon TMF Group, Plaintiffs provided the Town with copies of the Plaintiffs' answers. Thus, the Town cannot possibly hope to find, through additional discovery, that a Plaintiff, let alone all the Plaintiffs, have never used their beach properties when Plaintiffs have already explained that they have. Therefore, the Town's motion fails to satisfy the requirements of 56(f) because the Town cannot explain how further discovery and depositions will help it avoid summary judgment as to its claim of adverse possession.

The Town also argues that it needs to take discovery of Plaintiffs relating to the "boundary of the upland property and acquiescence of each plaintiff." Town's 56(f) Motion at 5. Again, the Town fails to demonstrate or state how such information will affect the outcome of summary judgment on the Town's counterclaim of title by acquiescence and fails to identify the "specific facts" that Rule 56(f) requires. Furthermore, vaguely stating that the Town wants to take discovery "relating" to the acquiescence is the exact type of "fishing expedition without any particularized likelihood of discovering appropriate information," while, "at the same time . . . [involving] substantial risks and costs" that Rule 56(f) does not allow. *Fennell*, 83 F.3d 530-34. The Town already possesses the deeds and title information related to each Plaintiffs' properties. As to the Plaintiffs' "acquiescence," the Town knows about the existence of the seawall and recently produced police records to Plaintiffs demonstrating that many of the Plaintiffs have demanded that people be removed from their beach property. Furthermore, the

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<sup>6</sup> For example, Plaintiff Josselyn-Rose provided photographs to the Town on December 12, 2010, clearly showing the family's use of their beach property. Furthermore, Carolyn Sherman produced photographs on December 13, 2010, clearly capturing her family's extensive use of their beach property.

discovery cannot and will not provide any *further evidence* that the Town is an “abutting landowner” to each of Plaintiffs’ properties, which is an essential element of a claim of title by acquiescence.<sup>7</sup>

Regarding the Town’s counterclaim of dedication and acceptance, the Town again only makes the vague assertion that it needs discovery and depositions “concerning the public’s use of the beach before Plaintiffs’ can seek summary judgment against the Town on its on its [sic] dedication counterclaim.” Town’s 56(f) Motion at 5. This statement does not identify specific facts the Town reasonably believes will be discovered but does not already possess, nor does it indicate how it will help the Town oppose summary judgment, as required by Rule 56(f). Furthermore, the Town represents the public in this case and the Town has failed to explain why it needs to *ask Plaintiffs* about the public’s use of the beach. Thus, the Town has not satisfied the requirements of 56(f) as they relate to summary judgment on the Town’s counterclaim of dedication and acceptance.

The Town asserts that it must be allowed to conduct discovery and take depositions to fully oppose Plaintiffs’ motion for summary judgment on the Town’s counterclaim of implied/quasi-easement. Again, the Town claims it must elicit information from the Plaintiffs regarding the “use of the beach by the public at the time of” various conveyances of Plaintiffs’ individual properties, despite the fact that the Town represents the public and should know what use the public made of the beach. Town’s 56(f) Motion at 6. Furthermore, a claim of implied/quasi easement requires proof that both the Town and Plaintiffs own land that was owned by a *common grantor*.<sup>8</sup> The Town has failed to demonstrate how discovery relating to the

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<sup>7</sup> The Town attempts to substantively address this element in footnote 3 of its motion. Plaintiffs will address this issue if and when the Town makes an appropriate opposition to summary judgment. Plaintiffs are not required to substantively respond to this assertion for the purposes of opposing the Town’s 56(f) Motion.

<sup>8</sup> In their October 28, 2011 Partial Motion for Summary Judgment, Plaintiffs fully explain this requirement and the Town’s failure to provide any proof of a common grantor besides itself.

“public’s use” of the beach could possibly help it establish the existence of a common grantor to the Town and Plaintiffs’ properties.


In sum, the Town’s arguments for additional time to conduct discovery under Rule 56(f) fail to explain how the discovery will fill all the material evidentiary gaps in its counterclaims. The Town’s vague assertions that it needs further discovery in certain areas of law does not satisfy the requirement that the Town explain what *facts exist* that it is likely to collect in further discovery and *how those facts will affect the outcome* of a motion for summary judgment. *Bay View Bank, N.A.*, 2002 ME 178, ¶ 22.

#### IV. CONCLUSION

The Town’s motion does not set forth specific facts with a “particularized likelihood” of discovering germane information, does not explain how the information will avoid summary judgment in Plaintiffs’ favor, and does not show that the Town has been diligent in proceeding with discovery over the last two years. Rather, the Town asks to conduct a fishing expedition in the hope of supporting tenable causes of action, which it cut and pasted from a completely separate case. These counterclaims were made by the Town, and two years later, the Town still has not, and cannot, factually support these claims. Now the Town seeks to drag out discovery even longer, adding to litigation costs and inconveniencing Plaintiffs who live in other states during the winter.

In the interest of fairness to all the parties, judicial efficiency, and in accordance with settled case law and for all the reasons argued above, Plaintiffs respectfully request this Court deny the Town’s Motion to Enlarge, Continue and/or Stay Deadline to Respond to Motion for Partial Summary Judgment. To the extent that this Court finds that additional discovery is not warranted for some of the claims and is warranted for others, Plaintiffs request this Court enter summary judgment for Plaintiffs as to the appropriate claims.

Dated: December 8, 2011

  
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**STATE OF MAINE  
YORK, ss.**

**SUPERIOR COURT  
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**ROBERT F. ALMEDER et al.,** )  
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 **Plaintiffs,** )  
 )  
 **v.** )  
 )  
 **TOWN OF KENNEBUNKPORT,** )  
 )  
 **Defendants.** )

**ORDER**  
**(Title to Real Estate Involved)**

On the Town’s Motion to Enlarge, Continue and/or Stay Deadline to Respond to Motion for Partial Summary Judgment as to the Town’s Counterclaims II (adverse possession), III (title by acquiescence), V (dedication and acceptance), and VIII (implied quasi-easement), WITH/WITHOUT hearing, after review and consideration of the written submissions of the parties, said motion to enlarge is DENIED.

IT IS ALSO ORDERED that summary judgment is entered in favor of the Plaintiffs on the Town’s Counterclaims II (adverse possession), III (title by acquiescence), V (dedication and acceptance), and VIII (implied quasi-easement) as Plaintiffs’ statements of material fact have not been opposed by motion or otherwise and is therefore deemed to be admitted.

Judgment in this action shall be recorded in the York County Registry of Deeds within thirty (30) days after final judgment is entered in this case.

The clerk is directed to incorporate this Order into the docket by reference pursuant to M. R. Civ. P. 79(a).

Dated: \_\_\_\_\_

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Justice, Superior Court