IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRIAN P. CARR, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	Civil Action No. 3:23-CV-02875-S

DEFENDANTS' MOTION TO STRIKE, DENY, OR DEFER CONSIDERATION OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND BRIEF IN SUPPORT

Respectfully submitted,

LEIGHA SIMONTON
UNITED STATES ATTORNEY

/s/ Emily H. Owen
Emily H. Owen
Assistant United States Attorney
Texas Bar No. 24116865
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
Telephone: 214-659-8605
Fax: 214-659-8807
emily.owen@usdoj.gov

Attorneys for Defendants

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Introduction and Summary of the Argument

After the Court denied Plaintiffs' first motion for partial summary judgment as premature (Doc. 26) Plaintiffs have filed a second motion for partial summary judgment without seeking leave in violation of Local Civil Rule 56.2(b). Defendants therefore move to strike Plaintiffs' second motion for partial summary judgment. Additionally, as with Plaintiffs' first motion for partial summary judgment, the Court has not ruled on Defendants' pending motion to dismiss, and Defendants have not yet filed an answer. Defendants move under Federal Rule of Civil Procedure 56(d) for the Court to either deny Plaintiffs' summary judgment motion as premature or, in the alternative, to extend Defendants' response deadline until 60 days after a decision on Defendants' pending or to-be-filed motion to dismiss (within 14 days after the filing of Plaintiffs' contemplated amended complaint).

I. Background

Plaintiffs Brian P. Carr and Rueangrong Carr (husband and wife) together with Mrs. Carr's sister, Buakhao Von Kramer sue Defendants the United States of America and several other federal agencies for allegedly having violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution. Plaintiffs also seek a monetary credit for future services from the United States Postal Service (USPS) for an allegedly delayed delivery of a package and a court order mandating that various federal agencies including the U.S. Department of Justice initiate investigations into the allegedly criminal circumstances surrounding their various attempts to obtain immigration benefits,

including naturalization for Mrs. Carr and a non-immigrant visa for Mrs. Von Kramer.

On March 8, 2024, the United States and the other federal agency Defendants timely moved to dismiss Plaintiffs' entire complaint. (Doc. 15). On March 28, 2024, Plaintiffs filed a document entitled "Response to Defendants' Motion to Dismiss" which included a response to the motion to dismiss, a motion to amend the complaint, and a motion for partial summary judgment. (Doc. 18 at 1, 51-52). Counsel for Defendants later conferred with Mr. Carr, informing him Defendants were unopposed to the request to file an amended complaint and such filing would render the Defendants' then-pending motion to dismiss moot. (Doc. 21).

In response to Plaintiffs' motion for partial summary judgment, Defendants filed a motion to deny Plaintiffs' motion for partial summary judgment as premature under Federal Rule of Civil Procedure 56(d). (Doc. 22). On April 22, 2024, the Court entered an order denying Plaintiffs' motion for partial summary judgment as premature, denying Defendants' motion to dismiss as moot, and issuing a schedule for the filing of Plaintiffs' amended complaint and responsive pleadings. (Doc. 26). The following day, Plaintiffs filed a "Reply in Support of Motion for Partial Summary Judgment and Response Opposing Defective Motion to Continue Consideration" regarding the already ruled-upon motions. Pursuant to the deadlines in the Court's order, Defendants have since filed a motion to dismiss Plaintiffs' amended complaint, and Plaintiffs have filed a response. (*See* Docs. 29 and 31). That motion is still pending with the Court, and, accordingly, Defendants have not yet filed an answer. On May 15, 2024, without requesting leave of the Court, Plaintiffs filed a second motion for partial summary judgment. (Doc. 33).

II. Legal Standards

A. Local Civil Rule 56.2(b)

In the Northern District of Texas, "unless otherwise directed by the presiding judge, or permitted by law, a party may file no more than one motion for summary judgment." U.S. Dist. Ct. Rules N.D.T.X., Civil Rule 56.2(b). This rule enables courts to "regulate successive motions that are filed after the court has devoted time and effort to deciding an initial motion" and disallows movants from having a "second bite at the apple." *Home Depot U.S.A., Inc. v. Nat'l Fire Ins. Co. of Hartford*, 3:06-CV-0073-D, 2007 WL 1969752, at *2 (N.D. Tex. June 27, 2007). When a litigant files a second motion for summary judgment without leave in violation of this local rule, it is appropriate for the Court to strike the second motion. *See Fu v. Chin*, 3:18-CV-2006-N-BN, 2021 WL 8014527, at *1 (N.D. Tex. Aug. 31, 2021) (Horan, M.J.).

B. Federal Rule of Civil Procedure 6(b)(1)(A)

District courts have discretion to grant extensions of time for good cause. *See* Fed. R. Civ. P. 6(b)(1)(A) (stating that courts may grant an extension for good cause "if a request is made [] before the original time or its extension expires"). So long as the request is made before the expiration of the time limit at issue, courts may extend time for any reason. *See L.A. Pub. Ins. Adjusters, Inc. v. Nelson*, 17 F.4th 521, 524 (5th Cir. 2021). Such requests "normally will be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party." *Bakri v. Nautilus Ins. Co.*, No. 3:21-CV-2001-N, 2023 WL 1805142, at *1 (N.D. Tex. Feb. 7, 2023) (quoting 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (4th ed. 2008)).

C. Federal Rule of Civil Procedure 56(d)

The Fifth Circuit has repeatedly explained that summary judgment is generally appropriate only after a non-movant has had a full opportunity to conduct relevant discovery. *See, e.g.*, *Bailey v. KS Mgmt. Servs., L.L.C.*, 35 F.4th 397, 401 (5th Cir. 2022). If a party moves for summary judgment prematurely, then the non-movant may move that the Court "defer considering the motion or deny it" under Rule 56(d). If the non-movant "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition," the Court "may . . . defer considering the motion or deny it." Fed. R. Civ. P. 56(d)(1). To obtain relief, the party invoking Rule 56(d) must show that "(A) that additional discovery will create a genuine issue of material fact"; and "(B) that [it] diligently pursued discovery." *Bailey*, 35 F.4th at 401. "Such motions are broadly favored and should be liberally granted." *Culwell v. City of Fort Worth*, 468 F.3d 868, 871 (5th Cir. 2006); *see also Wichita Falls Off. Assocs. v. Banc One Corp.*, 978 F.2d 915, 919 n.4 (5th Cir. 1992) (explaining that these motions "should be granted almost as a matter of course").

III. Argument and Authorities

The Court has already denied Plaintiffs' first, premature motion for summary judgment. Despite the Court's prior ruling, Plaintiffs have again prematurely filed a second motion for summary judgment without seeking leave in violation of the Court's local rules. As such, Defendants' move that Plaintiffs' second motion for partial summary judgment be stricken. Further, when a plaintiff files a motion for summary judgment, it "essentially takes the position that [it] is entitled to prevail as a matter of law

because the opponent has no valid defense to the action." *Rogers v. McLane*, No. 5:22-CV-130-BQ, 2022 WL 17418978, at *2 (N.D. Tex. Nov. 14, 2022), *R&R adopted*, 2022 WL 17418016 (N.D. Tex. Dec. 5, 2022). Defendants have substantial defenses to this action and have a legal right to assert such defenses in response to Plaintiffs' partial summary-judgment motion, including those defenses set forth in Defendants' motion to dismiss. But Plaintiffs' premature motion here prevents Defendants from having the opportunity to fully articulate potentially case-dispositive defenses supported by evidence in the unlikely event Defendants' motion to dismiss is denied. Defendants therefore alternatively move that the Court defer adjudication of or deny Plaintiffs' early partial summary-judgment motion to allow these threshold questions to be resolved.

A. Plaintiffs' second motion for partial summary judgment should be stricken because it was filed in violation of Local Civil Rule 56.2(b).

A party may not file multiple summary judgment motions as a matter of right. *Home Depot*, 2007 WL 1969752 at *2. Courts may regulate, and disallow, the filing of successive motions. *Id*. Here, the Court has already denied Plaintiffs' first motion for partial summary judgment seeking an order mandating federal agencies grant various immigration benefits, including naturalization. (Doc. 18, at 52-57; Doc. 26, at 2). Plaintiffs now seek a second bite at the apple. They again request a court order mandating that federal agencies grant immigration benefits, including naturalization for Mrs. Carr. (Doc. 33, at 3). And, again, Plaintiffs have filed their motion while Defendants have a motion to dismiss pending with the Court and before an answer is due to be filed.

The Court has already considered, and denied, the exact issues presented by Plaintiffs' second motion for partial summary judgment. And Plaintiffs have not sought leave to have these issues considered again through a second motion. This is the situation Local Civil Rule 56.2(b) was intended to prevent. *See Home Depot*, 2007 WL 1969752 at *2. Because Plaintiffs have violated Local Civil Rule 56.2(b) and because the Court has already denied Plaintiffs' motion for partial summary judgment as premature, the Court should strike Plaintiffs' second motion for partial summary judgment.

B. Plaintiffs' second motion for partial summary judgment should be denied, or consideration should be deferred.

If the Court determines Plaintiffs' second motion for partial summary judgment should not be stricken, it should deny or defer consideration of Plaintiffs' motion. Technically, the Federal Rules of Civil Procedure allow a party to file a motion for summary judgment before an answer has been filed. *See* Fed. R. Civ. P. 56(a); *see also HS Res., Inc. v. Wingate*, 327 F.3d 432, 440 (5th Cir. 2003) (explaining that "an answer is not a prerequisite to the consideration of a motion for summary judgment"). "However, courts have approached such motions with extreme caution." *Matini v. Reliance Standard Life Ins. Co.*, No. 1:05-CV-944-JCC, 2005 WL 2739030, at *2 (E.D. Va. Oct. 24, 2005); *see also Rogers*, 2022 WL 17418978, at *3 (collecting cases where courts denied plaintiffs' summary judgment motions when they were filed before the defendant had answered or the court was still conducting preliminary screening).

"Federal courts . . . are permitted to dismiss a motion for summary judgment without prejudice if it is filed before any party answers." *Dowl v. Prince*, No. 11-CV-

0417, 2011 WL 2457684, at *1 (E.D. La. June 20, 2011). In fact, a court should *not* grant a summary-judgment motion filed before an answer "unless in the situation presented, it appears to a certainty that no answer which the adverse party might properly serve could present a genuine issue of fact." *Stuart Inv. Co. v. Westinghouse Elec. Corp.*, 11 F.R.D. 277, 280 (D. Neb. 1951). As a result, courts both in this district and across this Circuit have often denied plaintiffs' summary judgment motions as premature when filed before an answer. *See, e.g.*, *Rogers*, 2022 WL 17418978, at *3; *Watkins v. Monroe*, No. 6:18-CV-347, 2019 WL 1869864, at *1 (E.D. Tex. Mar. 27, 2019), *R&R adopted*, 2019 WL 18581000 (E.D. Tex. Apr. 25, 2019); *Kuperman v. ICF Int'l*, No. Civ. A. 08-565, 2008 WL 647557, at *1 (E.D. La. Mar. 5, 2008); *Wartsila v. Duke Cap. LLC*, No. Civ. A. H-06-3908, 2007 WL 2274403, at *5 (S.D. Tex. Aug. 8, 2007); *see also Gabarick v. Laurin Mar. (Am.), Inc.*, 406 F. App'x 883, 889–90 (5th Cir. 2010) (remanding case because the grant of summary judgment was premature as the pleadings were "in their infancy" and "very little discovery [had] taken place").

Adjudicating a plaintiff's summary-judgment motion before the defendants "have yet to file answers to the complaint or oppositions of a substantive nature to the motions for summary judgment" could result in a decision that "overlook[s] material issues of fact which might have been raised." *First Am. Bank, N.A. v. United Equity Corp.*, 89 F.R.D. 81, 87 (D.D.C. 1981).

That exact result is a possibility here based on the current deadlines. After all, Defendants assert that lack of subject-matter jurisdiction and failure to state a claim may bar Plaintiff from receiving any relief on his claims in this case. Moreover, Defendants

are still evaluating whether Defendants have any other defenses that should be explored in discovery. A ruling on Defendants' motion to dismiss would likely significantly narrow the matters at issue on summary judgment. As a result, Defendants seek a ruling on Defendants' motion to dismiss and the opportunity to file an answer and engage in discovery before Plaintiffs' partial summary-judgment motion is evaluated by the Court.

C. The Court should defer or deny Plaintiffs' motion for summary judgment under Federal Rule of Civil Procedure 56(d).

Defendants move that the Court defer consideration of or deny Plaintiffs' motion for summary judgment under Rule 56(d) because discovery will be necessary for Defendants to adequately respond to Plaintiffs' motion if Defendants' own motion to dismiss is denied, but the Federal Rules do not allow for discovery at this stage of litigation. *See Bailey, L.L.C.*, 35 F.4th at 401 (requiring a party to show that additional discovery will create a genuine issue of material fact and diligence).

1. Discovery would be appropriate here as it will create a genuine issue of material fact.

As Defendants have asserted in the pending motion to dismiss, Plaintiffs have not stated a claim. *See* Fed. R. Civ. P. 12(b)(6). If this case survives the motion to dismiss, the undersigned AUSA would like the opportunity to investigate the circumstances of Plaintiffs' underlying disputes.

The Fifth Circuit has repeatedly held that a district court abuses its discretion by denying a proper Rule 56(d) motion before the close of the discovery period. *Bailey*, 35 F.4th at 401 (holding that a Rule 56(d) movant averred that additional discovery would create a genuine fact dispute and that she diligently pursued discovery such that "the

district court abused its discretion in holding otherwise."); *see id.* at 399 ("This is the third time we have been asked to consider whether a particular district court can deny discovery rights protected by the Federal Rules of Civil Procedure . . . . We have twice held no," and [t]oday we so hold a third time."). "When a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery is reversible error." *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 720 (5th Cir. 1999). Other U.S. courts of appeals have similarly held that district courts "[t]ypically" abuse their discretion if they deny a timely and proper Rule 56(d) motion and rule on a Rule 56 motion before the parties have an opportunity for discovery. *See, e.g.*, *In re PHC, Inc. S'holder Litig.*, 762 F.3d 138, 144 (1st Cir. 2014) (citing *CenTra, Inc. v. Estrin*, 538 F.3d 402, 420 (6th Cir. 2008)).

If Defendants motion to dismiss is denied, Defendants would seek discovery on various issues to establish a genuine dispute of material fact. *See* App. 002–03, ¶¶ 3–5.[1] This information is essential to allow Defendants to fully respond to Plaintiffs' assertions in their partial summary-judgment motion. *See* App. 003, ¶¶ 5–6.

2. Defendant cannot even begin discovery at this time.

As explained in detail above, Defendants' deadline to respond to the complaint has not yet occurred. *See* App. 002, ¶ 3. Thus, logically, the parties have not yet conferred in accordance with Rule 26(f), given that such conferences generally occur after the defendant files a response to the complaint. *See* Fed. R. Civ. P. 26(f)(2)–(3). But "[a]

[1] "App." citations refer to the appendix being filed with this motion.

party may not seek discovery from any source" before the Rule 26(f) conference occurs, except for limited exceptions such as by stipulation or a court order. Fed. R. Civ. P. 26(d). Thus, discovery is not allowed under the Federal Rules of Civil Procedure at this time.

Moreover, Plaintiffs would be still allowed 30 days to respond to any written discovery requests under the Rules. *See, e.g.*, Fed. R. Civ. P. 33(b)(2); Fed. R. Civ. P. 34(b)(2)(A); Fed. R. Civ. P. 36(a)(3). Thus, even if Defendants had served written discovery the day after Plaintiffs filed their summary-judgment motion (which discovery would have been in violation of the Federal Rules), Plaintiffs would not have been required to respond to the discovery requests until after Defendants' deadline to respond to the summary-judgment motion. Thus, Defendants has not been dilatory in seeking the necessary discovery. Indeed, Defendants literally cannot request discovery yet and realistically would have not received much (if any) of the requested information in time to incorporate into any summary-judgment response.

D. In the alternative, Defendants have established good cause for an extension of time to respond to Plaintiff's summary-judgment motion.

To the extent the Court does not strike Plaintiffs' motion, dismiss Plaintiffs' motion without prejudice, or does not defer consideration of or deny Plaintiffs' motion under Rule 56(d), Defendants would respectfully request an extension of time to respond to Plaintiffs' partial summary-judgment motion. A court may, for good cause, extend time "for any reason" if the request is made "prior to the expiration of the time limit at issue." *Nelson*, 17 F.4th at 524 (citing Fed. R. Civ. P. 6(b)(1)(A)). Rule 6(b)(1)(A)

"should be liberally construed to advance the goal of trying each case on the merits." *Rachel v. Troutt*, 820 F.3d 390, 394 (10th Cir. 2016). Indeed, district courts normally grant extension requests made before the deadline in the absence of bad faith by the requesting party or prejudice to the adverse party. *See Reed Migraine Ctrs. of Tex., PLLC v. Chapman*, No. 3:14-CV-1204-N, 2020 WL 869888, at *1 (N.D. Tex. Feb. 21, 2020) (quoting 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (4th ed. 2008)).

Defendants request an extension of time to respond until 60 days after the Court issues a decision on Defendants' motion to dismiss Plaintiffs' amended complaint. This would ensure neither the parties nor the Court are expending unnecessary resources on briefing and evaluating the summary-judgment motion if the matter is dismissed either in whole or in part based on Defendants' pending Rule 12 motion. Defendants would also request this additional time to respond to the summary-judgment motion so that they are not simultaneously briefing a motion to dismiss and a summary-judgment response in this case. Further, this extension would allow Defendants time to prepare the necessary affidavit(s) to file with Defendant's summary-judgment response.

This extension also would not unduly prejudice Plaintiffs, as it would not result in any significant delay in adjudicating this case. Moreover, it would also inure to Plaintiffs' benefit to avoid further summary-judgment briefing for any resolved claims and to avoid responding to the motion to dismiss and completing the summary-judgment briefing at the same time.

IV. Conclusion

Plaintiffs' second motion for partial summary judgment was filed without leave in violation of the Local Civil Rules and should therefore be stricken. It is also premature because it comes well before Defendants has answered the complaint and before the threshold questions, of subject-matter jurisdiction and whether a proper claim has been asserted, have been decided. Therefore, the Court should strike Plaintiffs' second motion for partial summary judgment, defer considering Plaintiffs' partial summary-judgment motion while these issues remain outstanding, or deny it as premature.

Date: June 5, 2024

Respectfully submitted,

LEIGHA SIMONTON
UNITED STATES ATTORNEY

/s/ Emily H. Owen
Emily H. Owen
Assistant United States Attorney
Texas Bar No. 24116865
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699
Telephone: 214-659-8605
Fax: 214-659-8807
emily.owen@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

On June 5, 2024, I electronically filed the above response with the clerk of court for the U.S. District Court, Northern District of Texas. I certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Emily H. Owen
Emily H. Owen

CERTIFICATE OF CONFERENCE

On June 3, 2024, I conferred with pro se Plaintiff Brian Carr who stated Plaintiffs are opposed to the relief sought in this motion.

/s/ Emily H. Owen
Emily H. Owen