

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT IN AND
FOR THE STATE OF IDAHO, COUNTY OF BANNOCK

HAROLD L. RUPP SR. TRUST, an
Idaho trust; and VEDA J. RUPP
REVOCABLE LIVING TRUST, an
Idaho trust,

Plaintiffs,

vs.

CITY OF POCA TELLO, an Idaho
municipality; MILLENNIAL
DEVELOPMENT PARTNERS, LLC, a
Utah limited liability company;
PORTNEUF DEVELOPMENT, LLC
an Idaho limited liability company;
PORTNEUF BUILDERS, LLC, an
Idaho limited liability company; KEN
PAPE, individually; ARVIL B.
SWANEY, individually; and JOHN OR
JANE DOES 1- 10,

Defendants.

Case No. CV03-22-0398

**MEMORANDUM DECISION
AND ORDER**

NATURE OF THE ACTION

This is a property dispute involving undeveloped commercial real estate located immediately next to the Northgate Interchange Exit from I-15 in Chubbuck, Idaho. That land is owned by the plaintiffs, Rupp Trusts.¹ Rupp Trusts initiated this action by filing a complaint against the Defendants seeking declaratory relief and damages. Among the allegations raised in the complaint are claims for breach of contract for failure “to perform provisions in the contract to allow access points to the Rupp Trusts’ property sufficient for development” and allegations the Defendants “engaged in a fraudulent scheme to deprive the value of the Rupp Trusts’

¹ See Compl. for Declaratory and Monetary J., Feb. 4, 2022.

property in an effort to force a sale of the property and water rights at a fraction of its value and to punish the Rupp Trusts for deciding to annex their property into the City of Chubbuck.”² The Rupp Trusts also allege the defendants “interfered with prospective purchasers of the Rupp Trusts’ property, while at the same time misleading prospective purchasers into believing the Rupp Trusts did not own the property, or by falsely representing to them that the Rupp Trusts were not selling or could not develop their property.”³ As a result of the Defendants’ alleged conduct, the Rupp Trusts claim to “have been deprived of significant economic opportunities, sustaining damages totaling to date at least \$21 million and which increase daily.”⁴

RELEVANT PROCEDURAL HISTORY

In response to the lawsuit, some of the Defendants, including Portneuf Development, LLC, Portneuf Builders, LLC, and Ken Pape (collectively referred to herein as “the Portneuf Defendants”) moved to dismiss this action, which motion was denied.⁵ Those same Defendants filed a second motion to dismiss the Amended Complaint as it pertains to the Portneuf Defendants pursuant to Idaho Rule of Civil Procedure 12(b)(6)⁶, which motion was also denied.⁷

Now, all of the named defendants, including the Portneuf Defendants, Defendants Millennial Development Partners, LLC, and Arvil B. Swaney (hereinafter “the Millennial Defendants”), and Defendants City of Pocatello and Brian Blad, have moved for summary

² Obj. to Portneuf Development Partners, LLC, Portneuf Builders, LLC and Ken Pape’s Mot. to Dismiss, March 28, 2022, 2.

³ Obj. to Portneuf Development Partners, LLC, Portneuf Builders, LLC and Ken Pape’s Mot. to Dismiss, March 28, 2022, 2.

⁴ Obj. to Portneuf Development Partners, LLC, Portneuf Builders, LLC and Ken Pape’s Mot. to Dismiss, March 28, 2022, 2.

⁵ See Mem. Decision and Order, May 11, 2022.

⁶ Defs.’ Mot. to Dismiss, Sept. 14, 2022, 1.

⁷ Mem. Decision and Order, Nov. 7, 2022, 9 (After drawing all reasonable inferences in favor of the Plaintiffs according to IRCP 12(b)(6), this Court determined the Plaintiffs had met their threshold of putting the Portneuf Defendants on notice of the claims against them.).

judgment.⁸ Those motions were all set for hearing on April 17, 2023.⁹ In response, counsel for the Plaintiffs sought “to continue the hearing on the ... Defendants’ motions for summary judgment set for April 17, 2023, to allow for the completion of the pending discovery and an opportunity for Rupp Trusts’ to review in response to defendants’ motions and to consider possible issues that could be decided on summary judgment in favor of the Rupp Trusts pursuant to I.R.C.P 56(e) and (f).”¹⁰ Following oral argument, this Court determined there was “no showing of good cause” to continue the hearing and denied the Plaintiffs’ request, thereby leaving the date set to consider the Defendants’ motions for summary judgment as April 17, 2023.¹¹

On April 12, 2023, five days before the scheduled hearing on the Defendants’ motions for summary judgment, the Plaintiffs filed a Memorandum in Opposition to the Defendants’ Motions for Summary Judgment. The Plaintiffs supported that opposition memorandum with a number of declarations.¹² The Defendants then moved to strike the Plaintiffs’ response in opposition, including the supporting declarations, as untimely under Idaho Rule of Civil Procedure 56(b).¹³ The Plaintiffs also filed a Renewed Motion to Continue or Alternatively to

⁸ See, I.R.C.P. 56 Mot. for Summ. J., March 8, 2023 (Millennial Defs.); Mot. for Summ. J., March 8, 2023 (City of Pocatello and Brian Blad); Def., Ken Pape’s, Mot. for Summ. J., March 8, 2023; Defs., Portneuf Development, LLC’s, Mot. for Summ. J., March 8, 2023.

⁹ See *e.g.*, Not. of Hr’g, March 8, 2023.

¹⁰ Mot. to Continue the Hr’gs on Defs’ Mots. for Summ. J. Pursuant to I.R.C.P. 56(d), March 15, 2023, 2.

¹¹ Order Denying Pls.’ Rule 56(d) Mot., March, 22, 2023, 2 (“After reviewing the pleadings and hearing argument of the parties, there being no showing of good cause: NOW THEREFORE, the Court hereby denies Plaintiffs’ Rule 56(d) Motion to Continue the Hearing on the Motions for Summary Judgment.”)

¹² Pls.’ Mem. in Opp’n to the Defs.’ Mots. for Summ. J., April 12, 2023 (“This Memorandum is supported by the Plaintiffs’ Statement of Material Facts in Opposition to Defendants’ Motions for Summary Judgment (hereafter “Plaintiffs’ Statement of Material Facts”); Declaration of Harold Lavelle Rupp Jr. in Opposition to Defendants’ Motions for Summary Judgment (hereafter “Lavelle Decl.”); the SEALED Declaration of Harold Lavelle Rupp Jr. in Opposition to Defendants’ Motions for Summary Judgment (hereinafter “SEALED Lavelle Dec.”) the Declaration of Nathan M. Olsen in Opposition to Defendants’ Motions For Summary Judgment (hereafter “Olsen Decl.”); the SEALED Declaration of Nathan M. Olsen in Opposition to Defendants’ Motions For Summary Judgment (hereafter “SEALED Olsen Decl.”); the and the pleadings and record in this case.”).

¹³ See Portneuf Defs.’ Mot. to Strike Pls.’ Late Filings, April 14, 2023; *see also*, Mot. to Strike, April 14, 2023.

Alter Time for Response and Reply, whereby the Plaintiffs sought to continue the pending motions for summary judgment to allow an “adequate and fair opportunity’ to respond to summary judgment.”¹⁴

Oral arguments regarding the Defendants’ motions for summary judgment and motions to strike, as well as the Plaintiffs’ Renewed Motion to Continue, were heard on April 17, 2023, with this Court taking the matters under advisement at that time.

ISSUES

1. Should this Court strike the Plaintiffs’ late-filed memorandum and accompanying documents in opposition to summary judgment?
2. Should this Court grant the Defendants’ motions for summary judgment?

DISCUSSION

All of the Defendants have requested summary judgment. The record shows the Defendants filed their motions for summary judgment on March 8, 2023. On that same date, a notice of hearing was filed setting the hearing on the motion for summary judgment for April 17, 2023. As explained, the Plaintiffs initially sought to continue the hearing on the Defendants’ motions for summary judgment, which request was denied, leaving the hearing date set for April 17. The Plaintiffs then filed a renewed motion to continue the summary judgment hearing or an alternative request to alter the time for response and reply. The Plaintiffs later also filed a response in opposition to summary judgment. Because the opposition brief and accompanying documents were filed outside of the timeframe provided for service of an answering brief and any opposing documents under the rules of civil procedure, the Defendants moved to strike the

¹⁴See Mem. in Supp. of Pls.’ Renewed Mot. to Continue or Alternatively to Alter Time Period for Resp. and Reply, April 4, 2023, 1-2.

Plaintiffs' Memorandum in Opposition to the Defendants' motions for summary judgment, including all the accompanying documents and declarations.

Because a determination regarding summary judgment hinges upon whether this Court considers the Plaintiffs' opposition materials, the request to strike must be addressed first.

a. Whether this Court should strike the late-filed materials filed in opposition to summary judgment.

The Defendants filed motions for summary judgment on March 8, 2023, within the dispositive motion deadline. The hearing on those motions was set for April 17, 2023, which deadline remained in place after this Court denied the Plaintiffs' first request for additional time to respond.¹⁵ Pursuant to Idaho Rule of Civil Procedure 56(b)(2), "If the adverse party wishes to oppose summary judgment, the party must serve an answering brief. The answering brief and any opposing documents must be served at least 14 days before the date of the hearing."¹⁶ Thus, based on Rule 56(b)(2) and the filing date of the motions for summary judgment, the deadline for the Plaintiffs' response was April 3, 2023. However, the Plaintiffs waited until April 12, 2023, before filing any opposing documents. Because the Plaintiffs' answering brief was filed outside of the time limits allowed by Rule 56, the Defendants asked this Court to strike all the opposing documents from the record.¹⁷

First, a request to continue a hearing regarding a motion for summary judgment or alter the time requirements must be supported by a showing of good cause.¹⁸ Because there is no fixed

¹⁵ See Order Denying Pls.' Rule 56(d) Mot., March 22, 2023, 2.

¹⁶ Idaho R. Civ. Pro. 56(b)(2).

¹⁷ See e.g., Mem. in Supp. of City's Mot. to Strike, April 14, 2023; Portneuf Defs' Mot. to Strike Pls.' Late Filings, April 14, 2023.

¹⁸ **Idaho R. Civ. Pro. 7(b)(3)(H).**

(b) Motions and Other Papers.

...

(3) *Filing and Serving Motions, Affidavits and Briefs; Time Limits.*

...

rule for determining what constitutes good cause, a trial court's decision "involving application of a 'good cause' standard" is discretionary.¹⁹ The Idaho Supreme Court has also indicated that presentation of mere conclusory arguments in support of a request for a continuance is insufficient to show the trial court abused its discretion in denying the continuance.²⁰ Thus, the decision to grant a motion for a continuance is within the discretion of the trial court.

When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry requires consideration of *four* essentials. Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.²¹

The language of Rule 56(b)(2) is clear, "any opposing documents must be served at least 14 days before the date of the hearing."²² While a motion to continue is indeed contemplated by the Idaho Rules of Civil Procedure, this Court has discretion whether or not to accept the untimely documents.²³ As confirmed by the Idaho Supreme Court, "[a] rule to the contrary," requiring a court to accept documents untimely for consideration at summary judgment per Idaho

(H) Any exception to the time limits in this rule may be granted by the court for good cause shown. If time does not permit a hearing or response on a motion to extend or shorten time, the court may rule without opportunity for response or hearing.

Idaho R. Civ. Pro. 56(b)(3).

(b) Time.

...

(3) *Altering Time Requirements.* The court may alter or shorten the time periods and requirements of this rule for good cause shown, may continue the hearing, and may impose costs, attorney fees and sanctions against a party or the party's attorney, or both.

¹⁹ *Mercy Med. Ctr. v. Ada Cty., Bd. of Cty. Commissioners of Ada Cty.*, 146 Idaho 226, 230, 192 P.3d 1050, 1054 (2008)(citing *State v. Young*, 136 Idaho 113, 116, 29 P.3d 949, 952 (2001) (considering I.C. § 19–3501(2), noting that "[b]ecause there is no fixed rule for determining what constitutes good cause, the matter is initially left to the discretion of the district court.")).

²⁰ See *Estate of Ekic v. Geico Indem. Co.*, 163 Idaho 895, 899, 422 P.3d 1101, 1105 (2018), *reh'g denied* (Aug. 16, 2018).

²¹ *Dodge v. Bonners Ferry Police Dep't*, 165 Idaho 650, 656, 450 P.3d 298, 304 (2019), *cert. denied*, 140 S. Ct. 1167, 206 L. Ed. 2d 213 (2020)(quoting *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018) (emphasis in original)).

²² Idaho R. Civ. Pro. 56(b)(2).

²³ *Ciccarello v. Davies*, 166 Idaho 153, 162, 456 P.3d 519, 528 (2019); see also, *Summerfield v. St. Luke's McCall, Ltd.*, 169 Idaho 221, 234, 494 P.3d 769, 782 (2021).

Rule Civil Procedure 56(b)(2), “cuts against the nature of the proceeding, to determine whether the matter should proceed to trial. . . .”²⁴ Moreover, “A rule to the contrary ... also risks incentivizing gaming of summary judgment proceedings by the parties, encouraging them to try to file ‘just enough’ disclosure to beat summary judgment with the knowledge that, if the offered evidence were not enough, they could simply supplement the facts.”²⁵

The timeline applied by the Court in this case conforms to the rules. The Defendants filed motions for summary judgment on March 8, 2023, within the dispositive motion deadline. The hearing on those motions was set for April 17, 2023. The deadline for the Plaintiffs’ response was April 3, 2023. However, even after their request for a continuance was denied, rather than using the remaining time to submit a prompt opposition to the motions for summary judgment, the Plaintiffs still waited until April 12, 2023, after the deadline for objecting to summary judgment had passed, before filing any opposing documents. In fact, instead of filing an answering brief, counsel for the Plaintiffs first filed a renewed motion to continue the summary judgment hearing or an alternative request to alter the time for response and reply, which was filed on April 4, 2023, one day after the deadline for filing an answering brief had passed. By that motion, counsel for the Plaintiffs argued “good cause exists for continuing the hearing”, or, in the alternative, the Plaintiffs requested to “alter the time periods set for responses and replies to summary judgement motions ... and permit the Rupp Trusts to file a response brief 7 days before the April 17, 2023, hearing, and permit the defendants to file a reply brief in support of the summary judgment two days before the summary judgment hearing.”²⁶

Specifically, the Plaintiffs requested a due date of April 10, 2023, for submission of their

²⁴ *Ciccarello v. Davies*, 166 Idaho 153, 162, 456 P.3d 519, 528 (2019).

²⁵ *Ciccarello v. Davies*, 166 Idaho 153, 162, 456 P.3d 519, 528 (2019).

²⁶ Pls.’ Renewed Mot. to Continue or Alternatively to Alter the Time for Response and Reply, April 4, 2023, 2.

answering brief, giving the Defendants until April 15, 2023, to submit their reply briefs.²⁷ However, regardless of those suggested deadlines, the Plaintiffs still waited to file their memorandum in opposition to summary judgment until 5:02 p.m. on April 12, 2023, two business days prior to the scheduled hearing. Thus, rather than timely filing an answering brief, counsel for the Plaintiffs instead filed a motion to continue or an alternative motion to extend the time for response. When the Plaintiffs did file an answering brief opposing summary judgment, it was received after the April 3rd deadline required by Rule 52 and also past the Plaintiffs' requested deadline of April 10th. Therefore, the answering brief and opposing documents were not only untimely filed for consideration at summary judgment per Idaho Rule of Civil Procedure 56(b)(2), but were also untimely under the extended deadline suggested by the Plaintiffs. As such, this Court is not required to consider the opposition materials in ruling on the motion. The discretion to alter the time requirements cannot be exploited to "allow parties to bypass timing rules or fail to conduct due diligence prior to a court's ruling."²⁸ The Plaintiffs received the Defendants' motions and supporting documents 40 days before the scheduled hearing, more than the 28 days required by IRCP 56(b)(2). The language of Rule 56(b)(2) is clear, "any opposing documents must be served at least 14 days before the date of the hearing."²⁹ The record in this case shows the Plaintiffs failed to comply with the deadline set by Idaho Rule of Civil Procedure 56, even after this Court determined there was not good cause to extend that deadline, leaving the Plaintiffs more than sufficient time to submit any opposition materials in a timely manner pursuant to the timeline mandated by the rules of civil procedure.³⁰ As such, the

²⁷ Pls.' Renewed Mot. to Continue or Alternatively to Alter the Time for Response and Reply, April 4, 2023, 2.

²⁸ *Ciccarello v. Davies*, 166 Idaho 153, 162, 456 P.3d 519, 528 (2019).

²⁹ Idaho R. Civ. Pro. 56(b)(2).

³⁰ *See Est. of Ekic v. Geico Indem. Co.*, 163 Idaho 895, 899, 422 P.3d 1101, 1105 (2018)(The Plaintiffs' claims of injustice fall short when they were provided more than the time required by the applicable rules.)

materials submitted by the Plaintiffs in opposition to summary judgment are hereby stricken from consideration per Rule 56(b)(2), and this Court will not consider the late-filed documents in ruling on summary judgment.

b. Whether summary judgment should be granted in favor of the Defendants.

Having determined the documents filed in opposition to summary judgment must be stricken as untimely, this Court must next consider the Defendants' motions for summary judgment.

1. Standard of Review

"Summary judgment is proper 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'"³¹ Thus, "[a] party moving for summary judgment bears the initial burden to establish not only that there is no genuine issue of material fact, but also that, based upon evidence and legal authority, the movant 'is entitled to judgment as a matter of law.'"³² Only when that initial burden is met does the burden shift to the "adverse party to 'by affidavits or as otherwise provided in this rule ... set forth specific facts showing that there is a genuine issue for trial.'"³³

When reviewing a motion for summary judgment, the court "liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor."³⁴ "If there are conflicting inferences contained in the record or reasonable minds might reach different conclusions, summary judgment must be

³¹ *Vreeken v. Lockwood Eng'g, B.V.*, 148 Idaho 89, 101, 218 P.3d 1150, 1162 (2009)(quoting prior version of IDAHO R.Civ. P. 56 (c)).

³² *Id.* (quoting Idaho R.Civ. P. 56(c); *see also, Harris v. State, Dep't of Health & Welfare*, 123 Idaho 295, 298–99 n. 1, 847 P.2d 1156, 1159–60 n. 1 (1992); *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct.App.1992).

³³ *Idaho Prop. Mgmt. Servs., Inc. v. Macdonald*, 157 Idaho 959, 342 P.3d 671, 674 (Ct. App. 2014)(quoting Idaho R. Civ. P. 56(e)).

³⁴ *Avila v. Wahlquist*, 126 Idaho 745, 747, 890 P.2d 331, 333 (1995).

denied.”³⁵ However, “[i]t is well established that a party against whom a motion for summary judgment is sought ‘may not merely rest on allegations contained in his pleadings, but must come forward and produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact.’”³⁶ Therefore, summary judgment will be granted in favor of the moving party when the nonmoving party fails to establish the existence of an element essential to that party’s case upon which that party bears the burden of proof at trial.³⁷ However, it is important to note the Idaho Supreme Court’s admonition that “[n]otwithstanding the utility of a summary judgment, a motion for summary judgment should be granted with caution.”³⁸

2. Discussion

As determined above, the declarations and other materials submitted in opposition by the Plaintiffs were untimely for consideration at summary judgment per Idaho Rule of Civil Procedure 56(b)(2). As such, there has been no response to show a genuine issue for trial, and the Defendants’ motions for summary judgment effectively stand unopposed. Thus, the Plaintiffs have failed to support their claims and allegations. Rule 56 of the Idaho Rules of Civil Procedure is clear: the party opposing summary judgment must present more than a conclusory assertion that an issue of fact exists, but must respond to the motion with specific facts showing there is a genuine issue for trial. According to IRCP 56(e), “If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may ... grant summary judgment if the motion and supporting materials,

³⁵ *Bilow v. Preco, Inc.*, 132 Idaho 23, 27, 966 P.2d 23, 27 (1998).

³⁶ *McCoy v. Lyons*, 120 Idaho 765, 770, 820 P.2d 360, 365 (1991)(quoting *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990)); see also IDAHO R.CIV. P. 56(e).

³⁷ *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530-31, 887 P.2d 1034, 1037-38 (1994); *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988).

³⁸ *McCoy v. Lyons*, 120 Idaho 765, 770, 820 P.2d 360, 365 (1991)(citing *Steele v. Nagel*, 89 Idaho 522, 406 P.2d 805 (1965)).

including the facts considered undisputed, show that the movant is entitled to it. . . .”³⁹ Because this Court declined to consider the answering brief and opposing materials as untimely, the Plaintiffs have not submitted any reliable evidentiary material that would meet the requirements of Rule 56. Thus, due to the lack of any affidavits or other evidentiary material that is properly before this Court for consideration, the Plaintiffs have failed to meet their burden, and summary judgment in favor of the Defendants is warranted.

CONCLUSION

Pursuant to Rule 56(e), this Court has the discretion to consider the facts which have not been unopposed as undisputed for purposes of the motion for summary judgment. This Court also has the discretion to grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show the movant is entitled to summary judgment. Based on the preceding discussion, this Court determined that summary judgment in favor of the Defendants must be entered as the Plaintiffs failed to meet their burden pursuant to the Idaho Rules of Civil Procedure. Consequently, the Defendants are entitled to judgment as a matter of law with respect to the Motions for Summary Judgment. All Defendants’ Motions for Summary Judgment are GRANTED.

This matter is DISMISSED. Counsel for the Defendants shall submit proposed judgments for this Court’s consideration.

IT IS SO ORDERED.

³⁹ Idaho R. Civ. Pro. 56(e).

DATED this 24th day of May 2023.



ROBERT C. NAFTZ
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5/24/2023 8:06:39 AM, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

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Jason Dixon
CLERK OF THE COURT

By: 
APRIL HILGERT
Deputy Clerk