

STATE OF MAINE  
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT  
Location: Portland  
DKT. NO. BCDWB-RE-2019-14

RANDY SLAGER, )  
)  
Plaintiff/Counterclaim-Defendant, )  
)  
v. )  
)  
LORI L. BELL and JOHN W. )  
SCANNELL, )  
)  
Defendants/Counterclaim-Plaintiffs. )

**ORDER ON PLAINTIFF’S RULE  
56(f) MOTION**

This case involves a dispute between neighbors in Kennebunkport (the “Town”) over the construction of a retaining wall on Defendants’ property close to the boundary line between the properties. The first claim at issue in Plaintiff Randy Slager’s operative complaint is a claim for private nuisance. Presently before the Court are a number of motions. One such motion that affects the proceedings on another motion is Plaintiff’s Rule 56(f) motion. In that motion, he seeks to continue proceedings on and conduct discovery regarding Defendants Lori Bell and John Scannell’s motion for summary judgment on Plaintiff’s nuisance claim. The Court held oral argument on the Rule 56(f) motion on June 2, 2021.<sup>1</sup> After considering the parties’ arguments on this motion as well as the summary judgment motion, it issues this decision.

Maine Rule of Civil Procedure 56(f) provides the following:

Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

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<sup>1</sup> At that oral argument the parties also argued Plaintiff’s pending motion to dismiss Defendants’ counterclaims. A separate order will issue regarding that motion.

The Law Court has said that Rule 56(f) motions must:

(1) be made within a “reasonable time” after the filing of a summary judgment motion; (2) place the [trial] court on notice that movant wants the court to delay action on the summary judgment motion . . . ; (3) demonstrate that 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.

*Bay View Bank, N.A. v. Highland Golf Mortgagees Realty Tr.*, 2002 ME 178, ¶ 22, 814 A.2d 449.

Here, Defendants’ motion for summary judgment on Plaintiff’s nuisance claim is based on three closely related legal arguments: (1) the nuisance claim is barred by claim preclusion; (2) the nuisance claim is barred by issue preclusion; and (3) the nuisance claim is barred by the doctrine of exhaustion of administrative remedies. As Defendants frame it, “[t]he facts on which the MSJ is based consist squarely of the sequence of events at the Town level, the allegations and arguments Plaintiff asserted there, the Town CEO’s decision, Plaintiff’s appeal to the York County Superior Court, Plaintiff’s allegations in Count I, and the overlap between all of the above.” (Def.’s Opp. to 56(f) Mot. 2.) Plaintiff contends the proceedings on the motion for summary judgment must be continued to allow him to conduct discovery to permit him to respond effectively to the motion. He argues he needs additional discovery – including depositions of contractors and Defendants’ structural engineer, as well as conducting an inspection of the retaining wall – “[i]n order to make factual determinations regarding the construction, structural integrity, and safety of the raised patio retaining wall . . . .” (Pl.’s 56(f) Mot. 4.) He further notes that his success on his nuisance claim depends, in part, on demonstrating that the wall “is structurally insufficient and unsafe . . . .” (Pl.’s 56(f) Mot. 5.)

By seeking the discovery that he does, Plaintiff essentially seeks to respond to Defendants' motion for summary judgment by arguing the factual merits of his nuisance claim. However, the factual merits of his nuisance claim are not at issue in Defendants' motion for summary judgment. Instead, there must first be a legal determination made regarding whether his nuisance claim is barred by preclusion or a failure to exhaust administrative remedies. Whether his claim is barred by judicial legal doctrines is different than whether the wall is structurally insufficient and unsafe, i.e., whether his claim has factual merit. Perhaps tellingly, Plaintiff does not clearly articulate "how the emergent facts, if adduced, will influence" whether his nuisance claim is barred by preclusion or a failure to exhaust administrative remedies. *Highland Golf Mortgagees*, 2002 ME 178, ¶ 22, 814 A.2d 449. His Rule 56(f) motion is denied.

The entry is:

1. Plaintiff Randy Slager's Rule 56(f) motion is **DENIED**.
2. The Clerk will schedule oral argument on Defendants Lori Bell and John Scannell's motion for summary judgment to take place within 45 days of the date of this order.
3. The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

Dated: 7/15/2021



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**Hon. M. Michaela Murphy**  
**Justice, Maine Superior Court**