The following constitutes the ruling of the court and has the force and effect therein described.

United States Bankruptcy Judge

Signed June 21, 2011

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
TEXAS RANGERS BASEBALL PARTNERS,	§	
	§	CASE NO. 10-43400-DML
	§	
Debtor.	§	CHAPTER 11
	§	

RTKL ASSOCIATES, INC., *et al.*,	§	
	§	
Plaintiffs,	§	DISTRICT COURT CASE
	§	No. 4:11-CV-051-A
v.	§	(consolidated with
	§	No. 4:11-CV-238-A and
	§	No. 4:11-CV-242-A)
TEXAS RANGERS BASEBALL	§	

PARTNERS, *et al.*, §
§
Defendants.[1] §

MEMORANDUM ORDER GRANTING AND DENYING MOTION FOR CONTINUANCE UNDER RULE 56(D) OR IN THE ALTERNATIVE FOR LEAVE TO FILE SURREPLY

Before the court is the *Defendants' Amended Motion for Continuance under Rule 56(d) or, in the Alternative, for Leave to File Sur-Reply and Memorandum in Support Thereof* (the "Motion"), filed by RTKL Associates, Inc. ("RTKL") and Vratsinas Construction Company ("VCC," and together with RTKL, "Plaintiffs") in the Adversary. By the Motion, Plaintiffs seek a continuance pursuant to Rule 56(d) of the Federal Rules of Civil Procedure to permit them to conduct additional discovery or, alternatively, leave to file their *Sur Reply* [sic] *to Rangers Baseball Express LLC's Reply in Support of Motion for Partial Summary Judgment Regarding*

[1] The matter before the court stems from an adversary proceeding styled *Rangers Baseball Express LLC v. RTKL Associates, Inc., et al.*, case no. 10-04272 (the "Adversary"). The subject matter underlying that Adversary is also the basis for a largely mirror image adversary proceeding styled *RTKL Associates, Inc., et al. v. Texas Rangers Baseball Partners, et al.*, case no. 10-04263 (the "Second Adversary," and with the Adversary, the "Adversaries").

The Second Adversary was originally commenced in state court in Dallas County (the "Dallas County Action"), and subsequently was removed to this court on November 4, 2010. The Adversary was commenced approximately one week later on November 10, 2010. On May 16, 2011, pursuant to an order (the "Withdrawal Order") signed by the Honorable John McBryde, the references were withdrawn with respect to the Adversaries and the Adversaries were consolidated in U.S. District Court (the "Consolidated Action"). The Withdrawal Order instructed the undersigned judge to consider any dispositive motions in the Adversaries (in addition to ruling on non-dispositive pretrial matters) and to submit to Judge McBryde proposed findings of fact and conclusions of law.

The Withdrawal Order also ordered that the parties use the following caption on all items filed in the Consolidated Action: *RTKL Associates, Inc., et al. v. Texas Rangers Baseball Partners, et al.* The court has applied defined terms to the parties in this memorandum order in accordance with the case style ordered in the Withdrawal Order – i.e., RTKL Associates, Inc. and Vratsinas Construction Company are "Plaintiffs" in this memorandum order and Rangers Baseball Express LLC is "Defendant." One of the filings which the court considered for this memorandum order was originally filed in the Adversary, and therefore incorporates into its title the party designations as set forth by the Adversary's case style – specifically, the *Defendants' Amended Motion for Continuance under Rule 56(d) or, in the Alternative, for Leave to File Sur-Reply and Memorandum in Support Thereof* was filed by RTKL Associates, Inc. and Vratsinas Construction Company, defendants in the Adversary but "Plaintiffs" in the Consolidated Action and in this memorandum order.

Objection to Proofs of Claim Nos. 2 and 3 Filed by Vratsinas Construction Company and RTKL Associates, Inc., Respectively, and Baseball Express' [sic] LLC's Counterclaims (the "Surreply"). The court has reviewed, in addition to the Motion, the *Consolidated Response of Rangers Baseball Express LLC to Plaintiffs' Motion and Amended Motion for Continuance under Rule 56(d) or, in the Alternative, for Leave to File Sur-Reply and Memorandum of Law* filed by Rangers Baseball Express LLC ("RBE" or "Defendant"), as well as the *Plaintiffs' Reply to Consolidated Response of Rangers Baseball Express LLC* filed by Plaintiffs. The court has also considered any accompanying affidavits and exhibits and has reviewed the relevant statutes and case law, in addition to other authorities. For the reasons discussed below, the court concludes that Plaintiffs' request for a continuance should be DENIED and that Plaintiffs' request for leave to file the Surreply should be GRANTED.

Plaintiffs first argue that they are entitled to a continuance pursuant to Rule 56(d).[2] A party requesting a Rule 56(d) continuance must explain with specificity why it is unable to present evidence creating a genuine issue of material fact and how obtaining a continuance would enable the party to do so. *See Solo Serve Corp. v. Westowne Assocs.*, 929 F.2d 160, 167 n.25 (5th Cir. 1991). To satisfy this requirement, Plaintiffs point to numerous statements made to the court by Defendant in support of the motion for partial summary judgment (the "Defendant's MSJ") that Defendant filed in the Adversary on January 5, 2011. Plaintiffs assert that, when these statements are compared to statements Defendant made in connection with an

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[2] Rule 56(d) provides:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
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> . . .
>
> (2) allow time to obtain affidavits or declarations or to take discovery[.]

action filed in state court in Tarrant County on April 11, 2011 (the "Tarrant County Action"), it becomes clear that "RBE's statements to this Court in support of [the Defendant's MSJ], were misleading, at best and at worst, a subterfuge." Motion at 15. According to Plaintiffs, with respect to the Adversaries, Defendant denies having any interest in the development commonly referred to as "Glorypark," while simultaneously maintaining in the Tarrant County Action that Defendant holds sufficient interest in Glorypark to have standing to request injunctive relief.

The court is not convinced. Upon close inspection, the supposed contradictions upon which Plaintiffs rely go to the heart of the dispute between Plaintiffs and Defendant: the extent to which Texas Rangers Baseball Partners ("TRBP") had an interest in "Glorypark." Defendant has taken the position in the Adversaries that TRBP had a limited contractual right to use certain land – upon which some or all of the real estate development commonly referred to as "Glorypark" was to be built – for parking purposes during Texas Rangers home games. Defendant asserts it succeeded to this right as a result of its asset purchase agreement with TRBP, and it is this limited contractual right that gives it standing to pursue injunctive relief in the Tarrant County Action. Defendant also asserts (in contradiction to Plaintiffs' position in the Adversaries) that it has no interest in the aborted *real estate development* referred to as Glorypark.[3] Defendant's respective positions in the Adversaries and the Tarrant County Action therefore do not appear contradictory at all.

Another requirement a party requesting a continuance under Rule 56(d) must meet is that the requesting party must have exercised diligence in conducting discovery with respect to the opportunities available to it. *See Baker v. Am. Airlines, Inc.*, 430 F.3d 750, 756 (5th Cir. 2005).

[3] Defendant contends – and the evidence reviewed by the court in preparation for hearing the Defendant's MSJ supports the contention – that TRBP's interest in Glorypark was limited to ensuring that parking would be available for fans of the Texas Rangers. Although Plaintiffs did perform work for TRBP, according to Defendant it was for projects distinct from Glorypark. The Defendant's MSJ did not cover amounts owed to Plaintiffs for this work.

A review of the record makes clear that Plaintiffs were, in fact, not diligent in pursuing discovery during the applicable discovery period. Plaintiffs and Defendant entered into an agreed scheduling order (the "Agreed Scheduling Order") on December 20, 2010. The Agreed Scheduling Order required all written discovery to be completed by February 15, 2011, and also mandated that all dispositive motions and responses be filed by the close of written discovery. Though Plaintiffs filed a response to the Defendant's MSJ on January 27, 2011, they filed no discovery requests during the discovery period specified in the Agreed Scheduling Order, preferring instead to wait until May 2011 to serve their first requests for production on Defendant.

Aside from the "evidence" put forth by Plaintiffs respecting Defendant's scheme to mislead the court, Plaintiffs explain their failure to diligently conduct discovery by pointing to an unsigned proposed settlement agreement (the "Proposed Settlement Agreement") between Plaintiffs and Defendant. The Proposed Settlement Agreement contains language requiring Defendant to "reasonably cooperate" with Plaintiffs' "factual investigation with respect to the [Second Adversary]." Plaintiffs assert they "relied on [Defendant's] agreement to cooperate" to their detriment, such that once settlement failed, Defendant immediately sought to have the Defendant's MSJ heard, "knowing that RTKL and VCC had not obtained the documents they needed to adequately rebut the statements made by [Defendant]." Motion at 23.

Plaintiffs' argument lacks merit. The Proposed Settlement Agreement was not signed and was never approved by the court, and thus binds no one. If Plaintiffs truly were relying on their negotiations with Defendant in postponing discovery, they should have either documented that understanding or brought to the court's attention the potential need to modify the Agreed

Scheduling Order. Having failed to so protect themselves, they cannot now obtain retroactive relief by attempting to shift blame for their predicament to Defendant.

Even assuming, for sake of argument alone, that Plaintiffs' arguments were otherwise sufficiently compelling to justify granting the requested continuance, the court would be hard-pressed to do so. A party requesting relief pursuant to Rule 56(d) must do so by affidavit or declaration.[4] *See* FED. R. CIV. P. 56(d); *see also Hinds v. Dallas Indep. Sch. Dist.*, 188 F. Supp. 2d 664, 677 (N.D. Tex. 2002). The Motion is neither sworn nor signed under penalty of perjury, and thus no statement therein can support granting a Rule 56(d) continuance (unless such statement is taken from an affidavit or declaration in the record). Any documents which the court has been provided that do comply with this requirement (e.g., Declaration of Patrick E. Blanton, Dkt. No. 55, App. 000001-000008) do not provide sufficient support for Plaintiffs' position to justify granting a continuance.

For the foregoing reasons, Plaintiffs' request for a continuance pursuant to Rule 56(d) is DENIED. Except as otherwise stated in this memorandum order, the court will base its report to the District Court respecting the Defendant's MSJ on the record as it presently stands.

Plaintiffs next ask that, should the court deny their request for a continuance, they be granted leave to file the Surreply. Civil Rule 7.1 of the Local Rules of the U.S. District Court for the Northern District of Texas[5] does not provide for a surreply as a matter of right. *See* L. Civ. R. 7.1 ("Motion Practice"). Surreplies are in fact "highly disfavored" in the Northern District of

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[4] Former Rule 56(f) required a party seeking relief to do so via affidavit. Rule 56(d) allows a written unsworn declaration signed under penalty of perjury pursuant to 28 U.S.C. § 1746 to substitute for this affidavit. *See* Notes to 2010 Amendments to Federal Rules of Civil Procedure, Rule 56, Subdivision (c).

[5] The Local Rules of the U.S. District Court for the Northern District of Texas do not apply in proceedings in this court. The Local Rules of the U.S. Bankruptcy Court for the Northern District of Texas make no provision for a surreply. *See* L.B.R. 7007.1–7007.3. Because the Adversaries are presently before the District Court (and because the court regards the local rules of the District Court to provide persuasive guidance on this issue), the court will apply Civil Rule 7.1 and accompanying case law in this instance.

Texas, "as they usually are a strategic effort by the nonmovant to have the last word on a matter." *Lacher v. West*, 147 F. Supp. 2d 538, 539 (N.D. Tex. 2001). Courts in the Northern District of Texas therefore grant a request to file a surreply only "in exceptional or extraordinary circumstances." *Id.* In *Lacher*, for example, the District Court determined that the plaintiff had not met this standard where the plaintiff's request was based on the fact that the defendant had included an appendix with the defendant's reply brief. *Id.* at 540. As the court would not consider arguments raised for the first time in a reply brief, it concluded that the defendant's action had not prejudiced the plaintiff and therefore there was no need for a surreply brief.

The "exceptional and extraordinary circumstances" Plaintiffs point to in the case at bar are the same as those underlying their request for a continuance[6] – that "RTKL and VCC have recently discovered that RBE falsely represented to this Court and to RTKL and VCC its interests in Glory Park [sic] in both written and oral statements on the record." Motion at 25. As noted previously, Plaintiffs have provided no credible support for this argument.

The court is nevertheless convinced that the complex and often convoluted procedural history of the Adversaries, in addition to the court's preference for resolving disputes on the merits, justifies granting Plaintiffs' request to file the Surreply. Unlike *Lacher*, the present case involves more than a situation where one party provided the court with an appendix in connection with a reply brief. Here, the court has before it mirror image adversaries, one of which began over sixteen months ago when Plaintiffs filed the Dallas County Action against TRBP and certain other defendants. The Dallas County Action (along with TRBP's much-publicized bankruptcy case) eventually led to the filing of the Adversaries, suits which the parties at one point attempted to resolve by agreement. To be sure, any initial optimism

[6] Rather than setting forth in detail their arguments in favor of granting their request to file the Surreply, Plaintiffs incorporate by reference their prior allegations respecting their request for a continuance. *See* Motion at 25.

respecting the Proposed Settlement Agreement in no way justified Plaintiffs' failure to conduct discovery in accordance with the Agreed Scheduling Order. Given that the parties have elected to resolve the Adversaries by judicial determination, however, the court wishes the report it submits to Judge McBryde to be thorough in every respect.[7] To ensure that that is the case, the court must be confident that it fully understands the parties' respective positions, particularly given that the views of Plaintiffs and Defendant respecting whether Defendant held an interest in Glorypark are diametrically opposed.

The court therefore concludes that Plaintiffs' request for leave to file the Surreply should be GRANTED. In ruling as it does, the court is cognizant of the District Court's statement in *Lacher* that a movant is ordinarily entitled to have the last word on its motion. *See id.* at 539. Therefore, to the extent the Surreply contains new arguments presented for the first time by Plaintiffs, Defendant may move for an opportunity to respond, pointing out with specificity any such arguments. It is therefore

ORDERED that, to the extent it requests a continuance pursuant to Rule 56(d), the Motion is DENIED; and it is further

ORDERED that, to the extent it requests leave to file the Surreply, the Motion is GRANTED.

END OF ORDER # # #

[7] Obviously, Judge McBryde may choose to disregard the Surreply, either on Defendant's motion, or *sua sponte*.