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MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

DANIEL K. O'CONNELL and VALERY A. O'CONNELL, Plaintiffs, v. GLASTONBURY LANDOWNERS ASSOCIATION, INC. Board of Directors, Defendants.	Cause No.: DV-2011-114 Judge David Cybulski **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' RULE 52, 59, & RULE 60 MOTION IN OPPOSITION TO ORDERS SEPT. 2014 & 2015 & ORDERS GRANTING SUMMARY JUDGMENT MOTION**

COMES NOW the above named Defendants Glastonbury Landowners Association, Inc. (GLA) and submits this response in opposition to "PLAINTIFFS' Rule 52, 59, & Rule 60 MOTION IN OPPOSITION TO ORDERS Sept. 2014 & 2015 & ORDERS GRANTING SUMMARY JUDGMENT MOTION." Plaintiffs ask the Court to set aside or amend its Sept. 8, 2014 order quashing Plaintiffs' defective subpoenas and granting the GLA's reasonable attorney fees and costs and its Sept. 14, 2015 order granting the GLA's Motion for Protective Order and granting's the GLA's attorney fees and costs incurred in bringing the Motion. Plaintiffs' also ask the Court to set aside the Court's May 31, 2016 Order granting the GLA summary judgment on all of Plaintiffs' claims and upholding its previous

Orders on Sept. 8, 2014 and Sept. 14, 2015. Plaintiffs provide no basis beyond their own denials, speculation, and conclusory statements to justify the relief sought.

1. Rules 52 and 59 are inapplicable.

Mont. R. Civ. P. 52 gives the requirements for findings of fact in a non-jury trial. Here, there was no trial, jury or otherwise, so the rule is inapplicable. In fact, Mont. R. Civ. P. 52(a)(3) specifically exempts motions for summary judgment from its requirements. This is simply because a motion for summary judgment is based on undisputed facts and should not involve a finding of fact. Therefore, as a threshold issue, all of Plaintiffs' claims in their Motion relating to Rule 52 are void.

Similarly, Mont. R. Civ. P. 59 gives the requirements for moving for a new trial or amending a judgment. There was no trial here so that part of the rule is inapplicable. Also, no judgment has been entered yet. The Court's Orders have not been entered into a judgment yet because the GLA's counter-claim remains to be adjudicated. Therefore, Rule 59 is inapplicable.

2. Plaintiffs' give no grounds for relief under Mont. R. Civ. P. 60.

Plaintiffs also challenge the Order under Rule 60 claiming "oversights and omissions, mistake, inadvertence, surprise, excusable neglect, and any other reason that justifies relief." Plaintiffs already challenged the Court's discovery orders with various motions, and here they take another bite from the apple. However, they fail to show why they are entitled to relief under Mont. R. Civ. P. 60 which states:

> Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Plaintiffs appear to be asking for relief under subsections (1) and (6). It is the district court's discretion whether to grant a motion under Mont. R. Civ. P. 60(b). *Tanascu v. Tanascu*, 2014 MT 293, ¶ 9, 377 Mont. 1, ¶ 9, 338 P.3d 47, ¶ 9.

Plaintiffs claim that the Court ignored "numerous evidences to prove their Complaint claims." They claim the Court relied on "made-up facts only GLA Defendants wrote or created," and they take issue with the Court adopting the GLA's proposed order. First, they completely ignored their burden of proof to demonstrate material issues of fact exist and instead relied on mere denial and speculation which is not sufficient to defeat a motion for summary judgment. *Bruner v. Yellowstone Co.*, 272 Mont. 261, 264, 900 P.2d 901, 903 (1995). Second, an "opposing party's facts must be material and of substantial nature, not fanciful, frivolous, gauzy, nor merely suspicions." *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1265 (1997). Plaintiffs repeatedly deny and accuse but fail to provide anything to show a genuine material issue of fact. Plaintiffs erroneously equate hundreds of pages of motions and accusations with fact. Finally, "a district court may adopt a party's proposed order where it is sufficiently comprehensive and pertinent to the issues to provide a basis for the decision." *Wurl v. Polson Sch. Dist. No. 23*, 2006 MT 8, ¶ 29, 330 Mont. 282, ¶ 29, 127 P.3d 436, ¶ 29. Plaintiffs simply did not show any issues of material fact then or now—what they claim are issues of fact are simply repetitions of their unsubstantiated allegations.

Plaintiffs also claim they were denied a hearing even though they never asked for one. They claim 'O'Connells SJ Response page two requesting a Hearing (mistakenly called a jury trial) to "overcome the motion" was never granted as a mistake/oversight that should have been allowed.' First, they admit they did not ask for a hearing; instead they claim their request for a "jury trial" on page one of their brief filed April 20, 2014 was a mistake and they meant "hearing." Second, they did not request a hearing within the 14 days required by Mont. R. Civ. P. 56(c)(2). Finally, Rule 60 contemplates a

mistake on the part of the Court, not on the part of the Plaintiffs, who now claim they made a mistake in not asking for a hearing.

Additionally, Plaintiffs claim they were denied the opportunity to conduct discovery. Nothing could be farther from the truth. Plaintiffs filed this case in 2011 and in fact, did conduct discovery. They were also sanctioned for improper discovery and instructed by the Court how to properly conduct discovery. On August 7, 2015, Plaintiffs filed a Motion for Sanctions against the GLA and stated: "**Plaintiffs do not need nor request any more discovery at this time.**" (emphasis in the original). Plaintiffs cannot not credibly claim they need more discovery.

Finally, Plaintiffs devote the majority of their Motion to rearguing their Motion to Amend their Complaint a second time. Notably, the Motion to Amend came after the Summary Judgment Motion was completely briefed and the GLA submitted a proposed order. Plaintiffs attempted to amend claiming the 12 new allegations made the Summary Judgment Motion moot. "Although the rule has been liberally interpreted, a district court is justified in refusing amendment because of undue prejudice to the opposing party, undue delay, and dilatory tactics by the moving party." *Smith on Behalf of Smith v. Butte-Silver Bow Cty.*, 266 Mont. 1, 10, 878 P.2d 870, 875 (1994) abrogated on other grounds by *Citizens Awareness Network v. Montana Bd. of Envtl. Review*, 2010 MT 10, 355 Mont. 60, 227 P.3d 583. . "[L]iberal construction and amendment of pleadings does not grant carte blanche to advance new theories on an unsuspecting opponent." *McJunkin v. Kaufman & Broad Home Sys., Inc.*, 229 Mont. 432, 437, 748 P.2d 910, 913 (1987).

"Generally, it is an abuse of discretion to refuse amendments to pleadings offered at a reasonable time and which would further justice; on the other hand, amendments which would result in undue delay or undue prejudice to the opposing party or amendments which would be futile need not be permitted." *Reier Broad. Co. v. Montana State Univ.-Bozeman*, 2005 MT 240, ¶ 8, 328 Mont. 471, ¶ 8,

121 P.3d 549, ¶ 8. Plaintiffs' Motion to Amend was simply a tactic to delay and prolong this litigation. Indeed, it is evident from Plaintiffs' history that they would happily add new claims as needed as long as the Court would tolerate such dilatory tactics. Here, the Court justifiably denied the Motion to Amend and brought a conclusion to Plaintiffs' claims and to prevent delay and prejudice.

3. Plaintiffs' arguments that the Court did not have jurisdiction to grant the GLA attorney fees for Plaintiffs' discovery abuse are without merit.

Plaintiffs' final arguments are repeats of arguments in numerous motions in 2014 and 2015. Here, they argue the Court lacked jurisdiction to order them to properly use discovery procedures in requesting information from the GLA and to grant the GLA attorney fees due to the necessity of quashing Plaintiffs' defective subpoenas and seeking a protective order. These arguments are clearly contrary to the law because a "District Court has inherent discretionary power to control discovery," and "must regulate traffic to insure a fair trial to all concerned, neither according one party an unfair advantage nor placing the other party at a disadvantage ...." *Rix v.General Motors Corp.*, 222 Mont. 318, 333, 723 P.2d 195, 204-205 (1986).

Mont. R. Civ. P. 45(d) allows a court to impose sanctions, including reasonable attorney fees, on a party which fails to comply with the Rule. There is no hearing requirement. Likewise, Mont. R. Civ. P. 26(c) allows a court to issue a protective order and specify the terms and methods of discovery and sanctions if necessary. Mont. R. Civ. P. 37(a)(5) allows the court to require the offending party to pay the reasonable expenses incurred in seeking the motion. "Rule 37(a)(4) does not require a hearing but merely an opportunity for a hearing." *State ex rel. Burlington N. R. Co. v. Dist. Court of Eighth Judicial Dist. of State of Mont. In & For Cty. of Cascade*, 239 Mont. 207, 222, 779 P.2d 885, 895 (1989). Plaintiffs did not request a hearing but extensively briefed the issue and filed for a Writ of Supervisory Control as well. Clearly, the Rules of Civil Procedure grant the Court the jurisdiction to impose attorney fees as sanctions.

Plaintiffs argue nothing allows the GLA attorney fees and argue the American Rule prohibits it as well. However, they ignore the case law they cite which states "[t]he general rule in Montana is that absent a statutory or contractual provision, attorney fees are not recoverable." *Nat'l Cas. Co. v. Am. Bankers Ins. Co. of Florida*, 2001 MT 28, ¶ 27, 304 Mont. 163, 169, 19 P.3d 223, 227 (emphasis added). Plaintiffs argue there is no contractual provision but ignore the statutory provisions (namely the Montana Rules of Civil Procedure) which the Court used to grant the GLA attorney fees in bringing the Motion to Quash and Motion for Protective Order.

Plaintiffs claim they had no warning they would be sanctioned, but it is not necessary for trial courts to warn of sanctions before imposing them for a violation of discovery. *Smart v. Molinario*, 2004 MT 21, ¶ 13, 83 P.3d 1284, ¶ 13, 319 Mont. 335, ¶ 13. Indeed, Plaintiffs were warned repeatedly by GLA's counsel that their conduct was in violation of the Rules of Civil Procedure yet they rebuffed every attempt to seek a resolution short of going to the Court. Abuse of discovery must not be dealt with leniently and the transgressors of discovery abuses should be punished rather than encourage repeatedly to cooperate. *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶ 70, 16 P.3d 1002, ¶ 70, 303 Mont. 274, ¶ 70. Plaintiffs ignored every warning and were sanctioned appropriately.

4. Conclusion

Plaintiffs fail to demonstrate why the Court should withdraw, alter, or amend its Order of May 31, 2016. The Court should allow the Order to stand as is and let Plaintiffs argue the issues on appeal at the appropriate time once the counter-claim is decided.

DATED this 14th day of July, 2016.

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BY _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was duly served by U.S. mail, postage prepaid, and addressed as follows this 14th day of July, 2016:

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