IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CONSOLIDATED WATER POWER COMPANY,

Plaintiff,

v.

0.46 ACRES OF LAND, MORE OR LESS,
IN PORTAGE COUNTY, WISCONSIN,
ROBERT D. MOODIE and UNKNOWN OTHERS,

Defendants.

OPINION and ORDER

10-cv-397-bbc

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Plaintiff Consolidated Water Power Company has filed a motion for leave to amend its complaint to add a state law claim for a declaration that it owns two adjacent parcels of land through adverse possession. Dkt. #29. These two parcels are located in Stevens Point, Wisconsin, next to the Wisconsin River. Defendant Robert Moodie claims that he owns one of the parcels; plaintiff says that "unknown others" may claim an interest in the remaining .06 acres. According to plaintiff, the parcels include a "dike and [a] ditch" that "are necessary to safe, efficient and proper operation of" the Stevens Point Hydroelectric Project, which plaintiff runs. Dkt. #29-1.

In its original complaint, plaintiff asked for a "judgment in its favor condemning the

property . . . and awarding possession thereof to plaintiff" under the Federal Power Act, 16 U.S.C. § 814. Cpt., dkt. #1. Plaintiff's position is that the Act authorizes condemnation of the land because plaintiff is a licensee under the Act, the parcels are a necessary part of the project and it has been unable to obtain the property through contract. A party obtaining condemnation under the Act must pay the property owner just compensation, Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 113 (1960), but, in its motion for summary judgment, plaintiff argued that just compensation is "$0.00 because [it] obtained ownership of the Property by adverse possession decades ago." Plt.'s Br., dkt. #12, at 2.

In the order addressing plaintiff's motion for summary judgment, I noted that plaintiff had not brought a claim for adverse possession in its complaint, but that a ruling on plaintiff's right to condemn the parcels would be advisory if plaintiff already owned them. Feb. 28, 2011 Order, dkt. #28. Accordingly, I gave plaintiff two options: (1) seek leave to amend the complaint to include a claim for declaratory relief under state law regarding the ownership of the land and ask for condemnation in the alternative; or (2) concede for the purpose of this case that defendants own the land and abandon its argument that defendants are entitled to no compensation because they do not own the land. In the event that plaintiff chose to seek leave to amend its complaint to add a state law claim, I directed plaintiff to show that the court could exercise jurisdiction over the state law claim under 28

U.S.C. § 1367 or another statute.

Also in the February 28 order, I raised the question whether plaintiff had given the "unknown others" identified in the caption the notice to which they are entitled. Although plaintiff asked for judgment as to the .06 acres, plaintiff did not show that it had made a reasonably diligent search for the unknown parties or, if it had, that it had served those parties by publication in accordance with Fed. R. Civ. P. 71.1. Accordingly, I directed plaintiff "to show that it has complied with Fed. R. Civ. P. 71.1. and any other applicable rule or statute in providing adequate notice to parties who may have an interest in the property at issue in this case." Dkt. #28, at 5. I noted that, in the event plaintiff chose to amend its complaint to seek a declaration that it has acquired the property through adverse possession, plaintiff would have to show that it complied with notice requirements under state law. Fed. R. Civ. P. 4(n).

In response to the February 28 order, plaintiff has (1) described the efforts it took to locate the "unknown others" and to give them notice of this lawsuit; (2) asked for leave to amend its complaint to add a claim for adverse possession against both defendant Moodie and the "unknown others"; and (3) filed a brief in which it argues that the court may exercise supplemental jurisdiction over the state law claim in accordance with 28 U.S.C. § 1367. For the reasons discussed below, I am granting plaintiff's motion for leave to amend its complaint as it relates to defendant Moodie, but I am dismissing the complaint as to the "unknown

others" for plaintiff's failure to provide timely service through publication.

With respect to the merits of plaintiff's adverse possession claim, the current record suggests that plaintiff is entitled to summary judgment. Although plaintiff and defendant Moodie briefed the issue of adverse possession in the context of plaintiff's summary judgment motion, I will give Moodie an opportunity to supplement his materials because plaintiff had not raised adverse possession as a separate claim at the time it filed its motion.

OPINION

A. Notice to the Unnamed Defendants

Plaintiff says that it has conducted a "reasonably diligent search" for those who might claim an interest in the .06 acres, as required by Fed. R. Civ. P. 71.1, but that it has been unable to determine the identity of those parties. It admits that it "has not served the original complaint on the 'unknown others' by publication, and recognizes that it is required to do so" under Rule 71.1. Plt.'s Br., dkt. #30, at 11. It says that it will publish notice of its claims "promptly upon issuance of the Court's decision on [plaintiff's] motion for leave to amend." Id.

With respect to the efforts plaintiff took to identify the unnamed defendants, plaintiff simply says that it discovered that the parcel was deeded to William and Melanie Steffanus

in 1887 and that it "might be owned by Steffanus' heirs," Plt.'s Br., dkt. #30, at 10-11, but it does not describe any efforts it took to find those heirs. Even if I assume that plaintiff's efforts to find the unnamed defendants were sufficient, the next question is whether plaintiff has given them proper notice of the lawsuit through publication, in accordance with Rule 71.1. Plaintiff admits that it has not and it fails to explain why it has waited until now to attempt service on the unnamed defendants.

Plaintiff seems to suggest that it cannot give notice to the unnamed defendants until the court rules on its motion for leave to amend its complaint, but that makes no sense. Plaintiff is seeking leave to amend its complaint to add a state law claim that is not governed by Rule 71.1. That rule relates to plaintiff's federal claim for condemnation under the Federal Power Act, 16 U.S.C. § 814, a claim that plaintiff asserted against the unnamed defendants in its original complaint nine months ago.

This case is scheduled for trial in approximately one month. Allowing plaintiff to attempt service at this late date would be unfair to any parties who might appear. They would be deprived of any opportunity to file a motion for summary judgment and any meaningful opportunity to prepare for trial. Further, plaintiff ignores the requirements for service on the unnamed defendants with respect to its proposed state law claim, even though I instructed plaintiff in the February 28 order to address the issue. Accordingly, I am dismissing the complaint as to the unnamed defendants for plaintiff's failure to properly

serve them and denying its motion for leave to amend the complaint as to those defendants. (For the remainder of the opinion, I will refer to defendant Moodie simply as "defendant.")

B. Motion for Leave to Amend

Turning to plaintiff's motion for leave to amend, I note that defendant does not object to the amendment on the ground that it would be prejudicial. This is not surprising because both parties included arguments in their summary judgment briefs and submitted evidence regarding the issue of adverse possession. Defendant's only argument is that the case should be in state court rather than federal court, which I understand to mean that defendant objects to this court's exercising supplemental jurisdiction over plaintiff's adverse possession claim.

Under 28 U.S.C. § 1367(a), a federal court has supplemental jurisdiction over a state law claim if it shares "a common nucleus of operative fact" with a federal claim in the same lawsuit, Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 936 (7th Cir. 2008), which means that the two claims arise out of "the same set of circumstances." Houskins v. Sheahan, 549 F.3d 480, 495 (7th Cir. 2008). This is a liberal standard, requiring only a "loose factual connection between the claims." Ammerman v. Sween, 54 F.3d 423, 424 (7th Cir. 1995). Plaintiff meets this standard because both his federal and state law claim relate to the ownership of the same parcel of land.

A court may decline to exercise supplemental jurisdiction for one of several reasons listed in § 1367(c). Defendant does not cite § 1367(c), but he says in his brief that plaintiff is "asking a federal court to rule on adverse possession, a state issue which [plaintiff] has made to be the substantial predominant issue, and then possibly rule on eminent domain if all else fails." Dft.'s Br., dkt. #38, at 1-2. This language is evocative of § 1367(c)(2), which allows the district court to decline to exercise supplemental jurisdiction when the state law claim "substantially predominates over the" federal law claim. Defendant's argument seems to be that the adverse possession claim "predominates" over the federal claim because the federal claim will become moot if plaintiff succeeds on its state claim.

I decline to read § 1367(c)(2) as requiring federal courts to dismiss a state law claim simply because success on that claim would make it unnecessary to consider the federal claim. Such a rule would require parties in plaintiff's situation to choose between abandoning their state law claim or bringing separate lawsuits for each claim. Neither result would promote fairness or judicial economy, two primary purposes of § 1367. Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 (1988) ("[A] federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims."). Plaintiff has cited cases in which courts have exercised supplemental jurisdiction over a state law claim even if that claim must be decided

before the federal claim and even if the federal claim is "contingent" in the sense that the court will not consider it unless the state law claim is unsuccessful. E.g., Tennessee Gas Pipeline Co. v. Mississippi Central Railroad Co., 164 F. Supp. 2d 823, 829 (N.D. Miss. 2001) (exercising jurisdiction over state law claim for adverse possession and federal law condemnation claim). Defendant has not cited any cases to the contrary.

In my view, the question whether state law "predominates" over federal law does not turn on the likelihood that the plaintiff will receive relief under one claim or another. A plaintiff filing a lawsuit has no way of determining which issue will be dispositive. Rather, a better question is whether the resources required to resolve the state law claims would be significantly greater than those necessary to resolve the federal claims. De Asencio v. Tyson, Foods, Inc., 342 F.3d 301, 309 (3d Cir. 2003) ("Generally, a district court will find substantial predomination where a state claim constitutes the real body of a case, to which the federal claim is only an appendage—only where permitting litigation of all claims in the district court can accurately be described as allowing a federal tail to wag what is in substance a state dog."). In this case, the answer to that question is "no," making the exercise of supplemental jurisdiction appropriate. Accordingly, I will grant plaintiff's motion for leave to amend its complaint to add a claim against defendant for adverse possession.

C. Adverse Possession

As noted above, both sides have submitted evidence and argument on the question whether plaintiff has acquired the .40 acre parcel through adverse possession. Wisconsin has codified its requirements for adverse possession in a statute: "A person who, in connection with his or her predecessors in interest, is in uninterrupted adverse possession of real estate for 20 years, except as provided by s. 893.29, may commence an action to establish title under ch. 841." Wis. Stat. § 893.25(1). (Section 893.29 deals with property owned by the government, so that exception does not apply in this case.) Under § 893.25(2), property is possessed adversely under the following circumstances:

> (a) Only if the person possessing it, in connection with his or her predecessors in interest, is in actual continued occupation under claim of title, exclusive of any other right; and
>
> (b) Only to the extent that it is actually occupied and:
>
> 1. Protected by a substantial enclosure; or
>
> 2. Usually cultivated or improved.

Wisconsin courts have added the judicial gloss that the occupation must be "hostile, open and notorious," Allie v. Russo, 88 Wis. 2d 334, 343, 276 N.W.2d 730, 735 (1979), which simply means that it must "apprise a reasonably diligent landowner and the public that the possessor claims the land as his own." Peter H. and Barbara J. Steuck Living Trust v. Easley, 2010 WI App 74, ¶ 14, 325 Wis. 2d 455, 467, 785 N.W.2d 631, 637 (internal

quotations omitted). Generally, this standard cannot be met "if possession was pursuant to permission of the true owner." Northwoods Development Corp. v. Klement, 24 Wis. 2d 387, 392, 129 N.W.2d 121, 123 (1964).

Relevant to this standard, plaintiff has adduced evidence of the following facts:

- in 1926, plaintiff began operating a dam and power site on the Wisconsin River in Stevens Point;

- at some time before 1951, plaintiff or one of its predecessors constructed a 2600-foot long earthen dike on the river's west embankment and a drainage ditch immediately upland of the dike; in addition, plaintiff installed riprap (large stones) along the river bank to insure the stability of the dike; these features have remained on the property continuously to the present day;

- the .40 acres at issue in this case includes part of the dike, ditch and ripap; these features cover "almost all" of the parcel at issue and run the entire length of the parcel; the remaining portion of the parcel is land submerged by plaintiff's impoundment; (a legal description and survey of the parcel is attached to this opinion; "Parcel B" is the parcel that defendant claims to own);

- since at least 1951, plaintiff has (1) "regularly" inspected the dike for erosion, seepage and other damage or instability; (2) "regularly" removed brush, weeds, trees and other vegetation from the dike; (3) "regularly" monitored the riprap for effectiveness and vegetation growth; (4) rooted out burrowing animals and back filled animal holes in the dike; (5) removed fallen trees from the dike; (6) monitored the effects of floods, storms and other weather conditions; and (7) installed and used "observation wells" for monitoring the elevation and pressure of groundwater inside the dike; all of these actions include the portion of the dike that runs across the parcel at issue.

- since at least 1951 plaintiff has (1) cleaned and removed vegetation

from the ditch "as needed"; (2) dredged the ditch "at least once"; (3) reinforced areas of the ditch affected by sloughing "as needed"; and (4) "frequently" monitored the contents and flow of the ditch; all of these actions include the portion of the ditch that runs across the parcel at issue.

- since at least 1951, the federal government has conducted inspections of the dike and ditch at least once every two years; plaintiff observes these inspections, implements any mandates from the government and, when necessary, submits a letter describing its actions;

- a line of trees separates the ditch from other property that defendant owns;

- plaintiff has used a gravel road running along top of the dike "for years" to inspect the dike and ditch and perform maintenance;

- since at least 1951 until 1998 no one other than plaintiff used the parcel;

- plaintiff never sought or received permission from any predecessor of defendant to use the dike or the ditch on the parcel;

- before defendant, no one objected to any of plaintiff's activities on the parcel;

- in 1998, defendant purchased a deed that includes the parcel at issue, along with several other nearby parcels that total approximately five acres;

- in 1999 plaintiff asked defendant to quit claim the parcel in exchange for other property and an easement; the parties were unable to come to an agreement;

- in 2007, plaintiff discovered that defendant intended to develop the parcel; plaintiff made another offer to exchange land; in 2009, plaintiff offered defendant $60,000 for the parcel or $12,000 for an easement;

> defendant made a counter offer to sell all five acres for $1,600,000 or the parcel at issue for $1,080,000; again, the parties did not come to an agreement.

This evidence suggests that plaintiff obtained the parcel through adverse possession no later than 1971. By that time, plaintiff had been continuously, openly and exclusively in possession of the parcel for 20 years without the permission of anyone else. Although plaintiff did not construct an enclosure, it "cultivated and improved" the parcel by maintaining the dike and ditch. Burkhardt v. Smith, 17 Wis. 2d 132, 138, 115 N.W.2d 540, 544 (1962) ("'Usually improved' means to put to the exclusive use of the occupant as the true owner might use such land in the usual course of events."); See also O'Kon v. Laude, 2004 WI App 200, 276 Wis. 2d 666, 677, 688 N.W.2d 747, 752 (adverse possession claim supported by evidence that plaintiff "always cut the grass" and planted garden on property); Northwoods Development, 24 Wis. 2d at 391-92, 129 N.W.2d at 123 (pasturing cattle on parcel sufficient to support adverse possession claim).

Defendant raises a number of arguments challenging plaintiff's claim of adverse possession, but none are persuasive in their current form. First, he questions whether plaintiff or one of its predecessors constructed the ditch and dike, but he has adduced no evidence that it did not. In any event, even if plaintiff did not create one or both of these features, plaintiff's claim for adverse possession rests on plaintiff's exclusive use and occupation of the parcel for more than 20 years after 1951, not the construction of those features at some time

before that.

Second, defendant suggests that plaintiff did not have *exclusive* possession of the parcel for 20 years because he and his predecessors used the dike to "kee[p] river water from flooding" the parcel. Plt.'s Br. dkt. #20, at 7. Defendant does not develop this argument or point to any particular actions that his predecessors took, so I understand his position to be that he and his predecessors "used" the dike simply by receiving the benefit it provided. If I accepted this view, it would turn the doctrine of adverse possession on its head. The purpose of adverse possession is to reward the industrious possessor who improves the land and puts it to good use and to penalize the "negligent and dormant owner, who allows another for many years to exercise acts of possession over his property." Illinois Steel Co. v. Budzisz, 139 Wis. 281, 119 N.W. 935, 938 (1909). Thus, passive enjoyment of the fruits of another's labor cannot qualify as "occupation" of the land. If it were not for plaintiff's maintenance of the dike, it is quite possible that the dike would not be there to provide any benefit to defendant.

Third, defendant seems to be arguing that plaintiff did not acquire the parcel through adverse possession because it did not maintain the portion of the dike and ditch that runs along the parcel. However, defendant's sole piece of evidence for this is a statement from Chris Northwood: "Dike was not maintained by Consolidated Water Power Co. When they spread Red Granite on the dike and stopped at the north lot line and continued at the south

line. The maintenance people were aware of the boundaries and didn't spread granite on Bob's land." Dkt. #22, at 15. (Defendant refers to this statement as "Exhibit 507," but the exhibits defendant filed with the court are not numbered.)

Northwood's statement is not sufficient to raise a genuine issue of material fact. Northwood does not identify who he is, whether his statement comes from personal observation, when this observation occurred or what he means by "Bob's land." Drake v. Minnesota Mining & Manufacturing Co., 134 F.3d 878, 887 (7th Cir. 1998) ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted."). The date is particularly important because plaintiff started its possession of the parcel no later than 1951. If Northwood's observations occurred after 1971 (more than 20 years later), they could not defeat plaintiff's claim. In any event, even if I assume that Northwood observed agents of plaintiff putting gravel on the portions of the dike outside the parcel but not inside it, this still leaves undisputed plaintiff's evidence that it has otherwise maintained the dike for more than 50 years.

Fourth, defendant brings up a number of matters that occurred *after* he attempted to purchase the parcel in 1998, such as work that he allegedly has done on the dike and an easement that he gave the city. (Plaintiff says it gave the city an easement as well.) It is not clear how any of these facts are relevant. As discussed above, the evidence in the record

shows that plaintiff acquired the parcel through adverse possession no later than 1971. Thus, even if defendant began using the property as an owner would after 1998, that was too late. By that time, plaintiff already had been in possession of the property exclusively for more than 20 years, so any "interruptions" in plaintiff's possession during this time could not prevent plaintiff from taking title.

Finally, defendant raises a number of arguments related to the idea that he bought the parcel in 1998 with a good faith belief that plaintiff did not own it. Although defendant does not develop these arguments or cite any authority for them, the gist seems to be that his rights to the parcel should trump plaintiff's because he is a bona fide purchaser.

In a number of states, being a bona fide purchaser cannot defeat a claim for adverse possession. BP America Production Co. v. Marshall, 288 S.W.3d 430, 462 (Tex. Ct. App. 2008); Stat-o-matic Retirement Fund v. Assistance League of Yuma, 941 P.2d 233, 235 (Ariz. Ct. App. 1997); Mugaas v. Smith, 206 P.2d 332 (Wash. 1949); Howatt v. Green, 102 N.W. 734 (Mich. 1905). The reasoning of the courts in these states is that, regardless of the good faith of the purchaser, the transaction could not give the purchaser an interest in the property because the seller had no interest to convey. In other words, "bona fide purchaser status cannot confer rights that do not exist." Marshall, 288 S.W.3d at 462.

Wisconsin has a statute that gives bona fide purchasers rights under particular circumstances. Wis. Stat. § 706.09. See also Turner v. Taylor, 2003 WI App 256, ¶ 8, 268

Wis. 2d 628, 635, 673 N.W.2d 716, 720 (describing requirements of statute). The statute lists adverse possession as one situation in which a "purchaser for a valuable consideration" may "take and hold the estate or interest purported to be conveyed to such purchaser free of any claim adverse to or inconsistent with such estate or interest." Wis. Stat. § 706.09(1)(i).

Unfortunately, neither side discusses § 706.09 and I have not uncovered any cases in which courts have applied it to a claim for adverse possession. However, even if I assume that the statute could apply, it has two important limitations that could be relevant to this case. First, a party cannot qualify as a bona fide purchaser if he has "actual or constructive" notice "of a prior outstanding claim or interest." Wis. Stat. § 706.09(2). Constructive notice may include the same facts that give rise to an adverse possession claim. Miller v. Green, 264 Wis. 159, 163-64, 58 N.W.2d 704, 707 (1953) ("[The requirements as to the type of possession that will constitute constructive notice are practically identical with the requirements of the type of possession necessary to constitute adverse possession.").

The notice defendant had when he purchased the property is not clear from the current record. Presumably, when defendant purchased the land, he could see that the dike and ditch extended beyond just the parcel at issue and into land that he knew was owned by plaintiff. In fact, it would be surprising if the power company had sectioned off a portion of the dike that it needed to control the elevation of the water. Plaintiff's maintenance of the dike would be open and visible as well, but neither side has adduced any evidence regarding whether

plaintiff was performing any maintenance of the dike or ditch around the time that defendant purchased the property.

In his brief and proposed findings of fact, defendant states repeatedly that he did not realize plaintiff was maintaining the portion of the dike in his parcel because it "was different in appearance" from the other sections, but he does not explain what he means by this. Further, the only evidence he cites for this fact is Northwood's statement, which is not helpful to defendant for the reasons discussed above.

Defendant raises an alternative argument that plaintiff should not prevail on its adverse possession claim because it denied owning the land before he purchased it. Although the state of mind of the adverse possessor generally is not relevant to determining the parties' rights to the land, Camacho v. Trimble Irrevocable Trust, 2008 WI App 112, ¶ 14, 313 Wis. 2d 272, 756 N.W.2d 596; Beasley v. Konczal, 87 Wis. 2d 233, 241, 275 N.W.2d 634, 639 (1979), a denial by plaintiff that it owned the land could be relevant to determining whether defendant had actual or constructive notice that plaintiff had an interest in the parcel. The problem is that defendant fails to cite any admissible evidence to support his argument. Included in his stack of exhibits is a letter to plaintiff dated May 8, 2007, in which defendant writes, "[b]efore I bought the first parcel . . . [y]ou agreed that Consolidated Water and Power did not own it." Dkt. #22, at 46. (In another letter included in defendant's exhibits, plaintiff denied having any conversations with defendant about the parcel before he 1purchased it.

Dkt. #22, at 25.) I cannot consider defendant's letter because it is not sworn. Collins v. Seeman, 462 F.3d 757, 760 n.1 (7th Cir. 2006). (Defendat did not submit his own affidavit with his summary judgment materials.) Even if the letter were admissible, it is too vague to be probative. Defendant does not describe the circumstances of the conversation: to whom he spoke, when and where the conversation took place or exactly what was said by defendant and plaintiff during the conversation. Again, defendant cannot raise a genuine issue of material fact with conclusory statements.

A second limitation on the rights of bona fide purchasers is Wis. Stat. § 706.09(3)(a). Under that provision, the purchaser cannot use § 706.09 to perfect a title if the property at issue is "owned, occupied or used by any public service corporation, . . . any water carrier as defined in s. 195.02(5), any electric cooperative organized and operating on a nonprofit basis under ch. 185." Neither side addresses the question whether plaintiff is an entity covered by this provision.

In sum, the current record supports a conclusion that plaintiff is entitled to summary judgment on its adverse possession claim, but questions remain regarding the potential application of § 706.09. Although it is defendant's burden to answer these questions (because § 706.09 is a defense and not part of plaintiff's claim, Turner, 2003 WI App 256, at ¶ 1), I am reluctant to grant summary judgment in plaintiff's favor on this claim because plaintiff had not yet raised adverse possession as a separate claim when it filed its motion for summary

judgment. To insure that defendant has a full opportunity to present evidence on that claim and develop any arguments in opposition to it, I will give both sides a chance to supplement their materials.

ORDER

IT IS ORDERED that

1. Plaintiff Consolidated Water Power Company's motion for leave to amend its complaint to add a claim for adverse possession is GRANTED as to defendant Robert Moodie and DENIED as to the unnamed defendants. The complaint is DISMISSED as to the unnamed defendants for lack of proper service.

2. The caption is AMENDED as follows: the words ".40 Acres of Land, More or Less," are SUBSTITUTED for "0.46 Acres of Land, More or Less."

3. The parties may have until May 11, 2011, to supplement their summary judgment materials with additional evidence and argument related to plaintiff Consolidate Water Power Company's adverse possession claim. In particular, the parties should address the effect that Wis. Stat. § 706.09 has on this case, if any. If defendant does not respond by that date, I will

grant summary judgment in favor of plaintiff.

Entered this 28th day of April, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge