

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Joseph Robert Gilliam,

Case No.: 19-CV-2749 (NEB/LIB)

Plaintiff,

v.

Robin Roach, Michael Engel,
Nickolas Eberheart, Ryan Manley,
Jesse Kenow, and Troy Griffith,

**Defendants Troy Griffith and Jesse
Kenow's Reply Memorandum in
Support of their Motion to Dismiss**

Defendants.

The motion to dismiss this matter as it relates to Defendants Pine County Deputies Troy Griffith and Jesse Kenow should be granted for the reasons outlined in the opening memorandum. Representatives of the County have been in contact with Plaintiff since the filing of the County Defendants' motion in order to (1) respond a data practices request by Plaintiff for data related to the subject incident, and (2) address matters that would be typically addressed prior to a Federal Pre-Trial Conference. The undersigned has not received a response to the letter addressing Pre-Trial Conference matters, nor other communications.

Plaintiff filed documents indicating an opposition to the motion to dismiss, but the response does not address the motion brought by the County Defendants. *ECF DN 21-1 and 22*. Instead, Plaintiff's response emphasizes that he is concerned with the conduct of the casino and its employees, not with the County Defendants in completing a lawful welfare check. *Id.* As a result, it appears that no opposition has been filed; and, the failure

to do so, is sufficient reason to grant the County Defendants' Motion to Dismiss. *See GFI Am., Inc. v. Chernin*, No. CIV. 01-798 (PAM/JGL), 2001 WL 1636499, at *3 (D. Minn. Sept. 19, 2001) (finding dismissal appropriate where plaintiff offered no opposition); *Weseman-Roth v. Conversion Sols., LLC*, No. CIV. 06-1185 (DSD/JJG), 2007 WL 656263, at *5 (D. Minn. Feb. 28, 2007) (finding that because plaintiff failed to oppose a summary judgment motion, the evidentiary burden was not met, and dismissal is warranted).

Even if this Court treats the documents filed as an opposition to the County Defendants' Motion to Dismiss, Plaintiff did not respond to the County Defendants' arguments that his claims are barred by (1) qualified immunity, and (2) that there was no violation of Plaintiff's constitutional rights as a matter of law because the circumstances allowed for the entry into, and sweep of, Plaintiff's home for purposes of a welfare check under the community caretaking function and exception and the use of force, action, and resulting property damage was de minimus. Nor did Plaintiff refute the supporting case law favoring County Defendants' position. Failure to respond to an argument constitutes a waiver. *Express Scripts, Inc. v. Aegon Direct Mktg. Servs., Inc.*, 516 F.3d 695, 701 (8th Cir. 2008); accord *Satcher v. University of Ark. at Pine Bluff Bd. Of Trs.*, 558 F.3d 731, 735 (8th Cir.2009) ("[F]ailure to oppose a basis for summary judgment constitutes waiver of that argument."). As a result, even where some sort of response is filed, courts take notice of those arguments that are unopposed and grant dismissal where, as here, such outcome is appropriate. *Satcher*, 558 F.3d 734-735 (affirming dismissal on the basis of immunity where the plaintiff did not oppose immunity argument raised on summary judgment); *Njema v. Wells Fargo Bank, N.A.*, 124 F. Supp. 3d 852, 867 (D. Minn.

2015), *aff'd sub nom. Njema v. Wells Fargo Bank, N.A.*, 673 F. App'x 609 (8th Cir. 2017)(granting summary judgment dismissal for multiple reasons and noting that failing to respond to defendant's statements in a motion for summary judgment regarding damages resulted in waiver of plaintiff's argument on that point).

Under the circumstances outlined above, Plaintiff's claim against the County Defendants cannot survive the motion to dismiss. The efficient administration of justice requires that courts dispose of claims at the first opportunity so as to not waste the time and resources of the judicial system or the parties involved. *Orlando v. Alamo*, 646 F.2d 1288, 1289 (8th Cir. 1981) (citation omitted).

The County Defendants received what they believed was a credible report of a welfare concern and acted in such a way to check on the health and safety of Plaintiff. In their community caretaker function, the deputies conducted the welfare check at Plaintiff's home and proceeded to open the front door after hearing no response to their verbal calls and seeing Plaintiff's vehicle in the driveway. The front door was damaged in the process of its opening, but the deputies operated in a way to cause only *de minimus* damage to the door. The deputies' conduct was reasonable as a matter of law and does not give rise to a constitutional violation.

Therefore, Defendants Pine County Deputies Kenow and Griffith respectfully request that this Court grant an Order for dismissal, dismissing Plaintiff's Complaint and all the claims therein against them in its entirety and with prejudice.

Dated: January 9, 2020

Kennedy & Graven, Chartered

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