

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

SUSAN POLGAR,
Plaintiff,

V.

UNITED STATES OF AMERICA
CHESS FEDERATION, INC.
and
BILL GOICHBERG, JIM BERRY,
RANDY BAUER, and
RANDALL HOUGH, all Individually
and in their Representative Capacities as
Members of the Executive Board of the
United States of America Chess Federation;
BILL HALL, Individually and in his
Representative Capacity as Executive
Director of the United States of America
Chess Federation;
BRIAN MOTTERSHEAD;
HAL BOGNER;
CHESS MAGNET, L.L.C.;
CONTINENTAL CHESS INCORPORATED;
JEROME HANKEN;
BRIAN LAFFERTY;
SAM SLOAN;
KARL S. KRONENBERGER; and
KRONENBERGER BURGOYNE, L.L.P.;

Defendants.

**PLAINTIFF SUSAN POLGAR’S BRIEF IN SUPPORT OF HER RESPONSE TO
DEFENDANT SAM SLOAN’S MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE SAM R. CUMMINGS:

COMES NOW, **SUSAN POLGAR**, Plaintiff, files this her Brief in Support of her Response to Defendant Sam Sloan's Motion for Summary Judgment under FED. R. CIV. P. 56, and shows the Court as follows:

I.

Procedural History

1. On August 7, 2008, Plaintiff filed her Original Petition in the 72nd District Court of Lubbock County, Texas. On August 20, 2008, ten of the defendants removed the lawsuit to the United States District Court for the Northern District of Texas, Lubbock Division, now pending before the Court.

2. On September 30, 2008, Plaintiff filed her *Motion to Dismiss for Failure to State a Claim Under Fed. R. Civ. P. 12(b)(6), or in the Alternative, Motion for a More Definite Statement Pursuant to Fed. R. Civ. P. 12(e)* [Document 22] against Defendant Sloan.

3. On October 6, 2008, before responding to the 12(b)(6) and 12(e) motions Plaintiff filed against him, Defendant Sloan filed his Motion for Summary Judgment [Document 23], and on October 27, 2008, filed his Supplemental Affidavit in Support of Motion for Summary Judgment [Document 37].

II.

Arguments and Authorities

4. Defendant Sloan's Motion for Summary Judgement fails to comply with Federal Rule of Civil Procedure 56(e) and Local Civil Rules LR 56.3, LR 56.5, LR 56.6, and LR 56.7. In addition, Sloan filed his motion for summary judgment before the Court has decided the motions under Fed. R. Civ. P.12(b)(6) and 12(e) Plaintiff filed against Sloan wherein Plaintiff challenges the sufficiency

of the pleadings Sloan filed against Plaintiff. Without a decision from the Court as to whether Sloan's counterclaim against Plaintiff should be dismissed or whether Sloan should make a more definite statement and replead his claims, Plaintiff remains without notice of the claims Sloan makes against her. Without this information and without Sloan having properly moved for judgment on each claim and/or defense, Plaintiff is unable to give an informed response on the merits to Sloan's Motion for Summary Judgment.

A. Defendant Sloan Failed to Meet the Affidavit Requirements of Fed. R. Civ. P. 56(e)

5. Fed. R. Civ. P. 56(e)(1) requires that an affidavit in support of a motion for summary judgment must (1) show that the affiant is competent to testify, (2) be based on personal knowledge, and (3) state admissible facts. FED. R. CIV. P. Rule 56(e)(1). A court must not consider parts of an affidavit that do not meet the standards of FRCP 56(e) when considering a motion for summary judgment. *Cooper-Schut v. Visteon Auto. Sys.*, 361 F.3d 421, 429 (7th Cir. 2004).

6. The Federal Rules and case law also require that an affidavit must affirmatively show that the affiant is competent to testify on matters in the affidavit, and that an affiant is not competent to testify about inadmissible hearsay or opinion. FED. R. CIV. P. Rule 56(e)(1); *Pfeil v. Rogers*, 757 F.2d 850, 860-61. An affidavit made on "information and belief" does not meet the Federal Rules requirement of personal knowledge. FED. R. CIV. P. Rule 56(e)(1); and *Columbia Pictures Indus. v. Professional Real Estate Inves.*, 944 F.2d 1525, 1529 (9th Cir. 1991), *aff'd*, 508 U.S. 49, 113 S.Ct. 1920 (1993).

7. The facts stated in an affidavit must be specific and must constitute admissible evidence. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188 (1990). Bare allegations of fact, ultimate or conclusory facts, and legal conclusions are not sufficient. *Marshall*

v. East Carroll Parish Hosp. Serv. Dist., 134 F.3d 319, 324 (5th Cir. 1998).

8. Documents, other than discovery products, must be properly authenticated and otherwise admissible to be used as summary-judgment proof; in order to authenticate such documents, an affidavit authenticating the document should be made by a person through whom the document would be introduced at trial and should prove the document is a true copy of the original. *Zoslaw v. MCA Distrib. Corp.*, 265 F.2d 870, 883 (9th Cir. 1982).

9. Sloan's Motion and the exhibits attached in support fail to meet the above requirements. First, Sloan is not competent to testify. Sloan's affidavit never affirmatively shows that he is competent to testify, and Document 23, ¶¶ 3, 5-8, 11-13, 24, 28, and 29; and Document 37, ¶¶ 2-8, 13, 14, 18-22, and 24 are based in part or in whole on inadmissible hearsay or opinion. Second, Sloan's Affidavits are not based on personal knowledge. Sloan's Verifications of Document 23 and Document 37 concede that his affidavits are supported in part by "matters herein stated to be alleged upon information and belief and as to those matters I [Sloan] believe it to be true." Sloan's reliance on information and belief can be further seen in Document 23, ¶¶ 2, 10, 13, 15, 22-24, 27, and 30-36; and Document 37, ¶¶ 9, 14, 16, 17-19, and 21-24. Most if not all of Defendant Sloan's affidavits are comprised of allegations and conclusions based on beliefs, hearsay, and speculation.

10. Defendant Sloan's exhibits in Document 23 are improperly attached and lack the required authentication. Sloan has failed to produce authenticating affidavits for any of the Exhibits A through E. As a result, the Court should strike all five of these exhibits. *See*, FED. R. CIV. P. Rule 56(e) and *Wiley v. U.S.*, 20 F.3d 222, 226 (6th Cir. 1994).

**B. Defendant Sloan Failed to Meet the Motion for Summary Judgment Requirements
Under Local Rule 56.3**

11. Local Rule 56.3(a) requires that a motion for summary judgment contain a summary, which includes a concise statement identifying the elements of each claim or defense, the legal and/or factual grounds on which the moving party relies, and citations to each page of the appendix which support each assertion that the party makes concerning the summary judgment evidence. N.D. Tex. L.R. 56.3(a) (2008). Local Rule 56.3(c) requires a moving party seeking summary judgment on fewer than all claims or defenses to style the motion as a motion for partial summary judgment. *Id.* at 56.3(c).

12. Defendant's motion for summary judgment does not contain the requisite summary. Defendant's motion not only lacks a concise statement that identifies the elements of his claim or defense, but also fails to even identify a legally cognizable claim; therefore, it is impossible for Plaintiff to adequately respond to Defendant's motion. Furthermore, Defendant's motion fails to provide a single legal ground to support his motion. The motion also lacks even one sufficient factual ground. All evidence provided in Defendant's motion is either conclusory, irrelevant, or suspect.

13. Defendant's motion is styled Motion for Summary Judgment, which indicates that he is moving for judgment on all claims and defense; however, Defendant fails to provide any facts or argument in support of any defense against Plaintiff's claims. It appears that Defendant is moving for a partial summary judgment on his counterclaims, but as mentioned above and in Plaintiff's Rule 12(b)(6) and Rule 12(e) motions, Defendant Sloan's pleadings and motions are so vague and ambiguous that Plaintiff is unable to decipher what his claims are and therefore cannot frame a response.

C. Defendant Sloan Failed to Meet the Motion for Summary Judgment Requirements

Local Rules 56.5 and 56.6

14. Local Rule 56.5 requires a summary judgment motion to be accompanied by a brief that sets forth the argument and authorities on which the party relies in support of the motion. N. Dist. Tex. L.R. 56.5(a) (2008). The brief must be filed as a separate document from the motion or response that it supports. *Id.* at 56.5(b). Furthermore, pleadings and memorandums are not competent summary-judgment evidence. *Wallace v. Tex. Tech Univ.* 80 F.3d 1042, 1047 (5th Cir. 1996).

15. Defendant's Motion fails to comply with Local Rules 56.5 in that Defendant failed to file a brief in support of his motion setting forth the argument and authorities on which he relies. Instead, Sloan filed a long and rambling, nonsensical pleading and then swore to the entire document in an attempt to make it an affidavit. [Document 23]. Such action fails to satisfy every Local Rule and Federal Rule of Civil Procedure governing motions for summary judgment, and as a result, Sloan's Motion for Summary Judgment must be denied.

D. Defendant Sloan Failed to Obtain Permission Pursuant to Local Rule 56.7 to File His

Supplemental Affidavit

16. Local Rule 56.7 requires a summary judgment movant to seek permission from the presiding judge to file supplemental pleadings, briefs, authorities, or evidence. N. Dist. Tex. L.R. 56.7 (2008).

17. Defendant's Supplemental Affidavit in Support of Motion for Summary Judgment [Document 37] violates Local Rule 56.7 because Sloan filed it without permission from the presiding judge. Plaintiff therefore requests the Court strike Document 37.

Conclusion

18. Defendant Sloan's affidavits supporting his motion for summary judgement are improper, and Sloan's Motion for Summary Judgment fails to conform with any of the Local Rules governing motions for summary judgment. Furthermore, Sloan's motion is premature, unsupported factually and legally, and vague and ambiguous. Even if all the facts claimed in Sloan's motion proved to be true, Sloan has still failed to provide factual allegations or legal theory showing that the right to relief against Polgar is plausible.

19. Because Sloan's motion is so deficient and at such variance with the Federal Rules and the Local Rules, the Court should deny Sloan's motion in its entirety, or in the alternative, the Court should abate Sloan's motion and order Sloan to amend his Counterclaim with a more definite statement of the suit. Furthermore, Plaintiff asks the Court to strike any and all improper summary judgment proof, including Document 37 and Exhibits A through E to Document 23.

20. This Response is based on the records, pleadings, and papers on file in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of November, 2008, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court, Northern District of Texas, using the ECF system of the Court. The ECF system sent a "Notice of Electronic Filing" to the following attorneys of record, all of whom have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Samantha Peabody Estrello

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