

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

APR 20 2015

TIM RHODES
COURT CLERK

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Oklahoma Department of Securities)
ex rel. Irving L. Faught,)
Administrator,)
)
Plaintiff,)
)
v.)
)
Bruce J. Scambler,)
)
Defendant.)

Case No. CJ-2014-1346

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE

Plaintiff objects and responds herein to the motion to strike filed by Defendant on April 2, 2015, in a document entitled *Supplement to Defendant's Reply to Plaintiff's Motion for Summary Judgment, Reply to Claim for Fees, Defendant's Motion to Strike and Supplement to Defendant's Motion to Reconsider Previous Ruling Based on New Evidence. Plaintiff's Objection to Defendant's Motion to Reconsider*, filed on April 13, 2015, is incorporated herein by reference. Plaintiff asks that the Court not strike any declaration or affidavit in its entirety, not reverse its order striking Defendant's first response to Plaintiff's *Motion for Summary Judgment* (MSJ), and not treat any stricken declarations or affidavits as rulings *in limine*.

1) Declarations Supporting Plaintiff's MSJ Should Not Be Stricken in Their Entirety

Defendant moved to strike parts of the declarations of Tejinder Grewal and Gary Berar in Plaintiff's MSJ on the grounds that they did not contain certified or sworn copies of documents as required by Okla. Stat. tit. 12, § 2056(E). Defendant

further argued that because these declarations did not contain certified or sworn copies of the documents they referenced, Plaintiff's MSJ is not "ripe" and Plaintiff's subsequent motions are "superfluous and non-relevant."

The declarations at issue have the same effect as affidavits. Okla. Stat. tit. 12, § 426 (2011). Section 2056(E) provides that the Court may permit Plaintiff to supplement the affidavits by filing additional affidavits. Okla. Stat. tit. 12, § 2056(E) (2011). Plaintiff plans to submit an additional declaration of Tejinder Grewal with its reply to Defendant's response to the MSJ to rebut Defendant's unsupported claims and to authenticate the documents attached to Tejinder Grewal's first declaration. Plaintiff asks that the Court accept the additional declaration and deny Defendant's motion to strike any portion of the initial declaration of Tejinder Grewal.

If the Court strikes any of the declarations, it should be with a "scalpel, not a butcher knife." *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 593 (6th Cir. 2009) (quoting *Giles v. Univ. of Toledo*, 241 F.R.D. 466, 469 (N.D. Ohio 2007)). Only the portions that contain inadmissible information or do not satisfy the requirements of Section 2056 should be stricken. *Id.* The declarations should not be stricken in their entirety.

Even without the additional declaration by Tejinder Grewal, Plaintiff's MSJ is "ripe" because other acceptable evidentiary materials Plaintiff submitted to the Court show that there is no substantial controversy as to any material fact. For example, Gary Berar's declaration shows, without referring to a document, that he purchased shares of CanTex stock from CanTex on or about October 14, 2010, by wiring funds to a bank account in Oklahoma. See Pl.'s MSJ, Ex. G at ¶¶ 4-6 (Dec. 31, 2014).

Other acceptable evidentiary materials show that Defendant was in control of CanTex at the time of that sale. See Pl.'s MSJ, § III(A), Ex. B at ¶¶ 5-6, Ex. C at ¶ 4, Ex. D at ¶¶ 1-2, Ex. E at ¶¶ 2-4, and Ex. F at ¶ 4. Defendant's argument, that because the MSJ is not ripe, Plaintiff's motions subsequent to the MSJ are "superfluous and non-relevant," is meritless.

2) The Ruling Striking Defendant's First MSJ Response Should Not Be Stricken

Defendant also moved the Court to reverse its Order filed March 18, 2015, wherein the Court struck Defendant's first response to Plaintiff's MSJ because it was submitted in bad faith. The Plaintiff's motion to strike on which that ruling was based included a declaration by Trace Maurin and an affidavit by Beau Williams, Esq., that contained documents that Defendant claims were not certified or sworn. See Pl.'s Mot. Strike, Exs. E-F (Jan. 30, 2015).

Contrary to Defendant's claim, the documents attached to the declaration and affidavit at issue were, in effect, sworn. The declaration and the affidavit each stated that "true and correct" copies of the documents were attached. See Pl.'s Mot. Strike, Ex. E at ¶ 3, and Ex. F (Jan. 30, 2015). The declaration has the same effect as an affidavit. Okla. Stat. tit. 12, § 426.

Further, Plaintiff's motion to strike was not a motion for summary judgment requiring compliance with Section 2056(E). It was a distinct motion, subject to Okla. Stat. tit. 12, § 2007(B), and Rule 4 of the Rules for the District Courts of Oklahoma, that challenged the admissibility of evidentiary materials submitted by Defendant. As such, it was not necessary for any affidavit or declaration submitted with Plaintiff's motion to strike to comply with Section 2056(E).

Even if the declaration and affidavit at issue were subject to the requirements of Section 2056(E) and failed to meet those requirements, Defendant's motion to strike the declaration and affidavit should still be denied because Defendant failed to raise such objection before the Rule 4 deadline for filing a brief in opposition to Plaintiff's motion to strike and before the Court ruled on Plaintiff's motion to strike. Plaintiff asks the Court to deny Defendant's motion to strike the declaration and affidavit.

3) The Declarations and Testimony of Trace Maurin Should Not Be Stricken

In paragraph 24 of the document containing Defendant's motion to strike, under the heading "Consequential Supplement to Motion of Defendant to Request Court Reconsider Previous Ruling Based on New Evidence Added as Filed After Order 3/13/2015," Defendant moved to strike the "entire affidavit and testimony" of Trace Maurin on the grounds that Trace Maurin lacks personal knowledge and is the chief "gainant" in this action. Plaintiff interprets Defendant's motion as a motion to strike the Declaration of Trace Maurin that Plaintiff submitted in support of the MSJ and the Supplemental Declaration of Trace Maurin that Plaintiff submitted in support of its motion to strike Defendant's first response to the MSJ. See Pl.'s MSJ, Ex. B; Pl.'s Mot. Strike, Ex. E (Jan. 30, 2015).

An affidavit supporting a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Okla. Stat. tit. 12, § 2056(E). Trace Maurin's declaration, submitted in support of summary judgment, meets the requirements of Section 2056(E). To the extent it is subject to Section

2056(E) (see *supra* part 2), Trace Maurin's supplemental declaration meets the requirements of Section 2056(E). Both the declaration and the supplemental declaration are based on the personal knowledge of Trace Maurin and show that they are based on such knowledge. See Pl.'s MSJ, Ex. B; Pl.'s Mot. Strike, Ex. E (Jan. 30, 2015). Defendant has not pointed to any specific paragraph of the declaration or supplemental declaration as not being based on personal knowledge and has not submitted any evidence that demonstrates that they are not based on personal knowledge.

Further, Trace Maurin stands to gain nothing from this action by Plaintiff to enforce Oklahoma's securities laws. Even if he did, such an interest in this action would not be grounds to strike his declarations or his testimony at trial. See Okla. Stat. tit. 12, § 2056(E); Dist. Ct. R. 13(c). Plaintiff asks the Court to deny Defendant's motion to strike the declaration and supplemental declaration of Trace Maurin.

4) A Ruling Striking the Declarations or Affidavit Should Not Be Treated as Rulings *in Limine*

In the event the Court sustained Defendant's motion to strike, Defendant also moved the Court to rule that the striking of the declarations and affidavit be treated as rulings *in limine* at any subsequent trial. However, that sanction is only proper where the evidence does not appear to be convertible to admissible evidence at trial. See Dist. Ct. R. 13(c). The documents at issue can be authenticated at trial. The testimony of these witnesses will be admissible evidence at trial. It would not be appropriate to exclude these documents or this testimony from trial. The case cited

by Defendant, *MidFirst Bank v. Wilson*, 2013 OK CIV APP 15, 295 P.3d 1142, does not support a different result.

CONCLUSION

Plaintiff asks that the Court not strike any portion of the declarations of Tejinder Grewal and Trace Maurin, not strike the declaration of Gary Berar in its entirety, not retract its order striking Defendant's first response to the MSJ, and not treat any stricken declarations or affidavits as rulings *in limine*.

Respectfully submitted,



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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 20th day of April, 2015, a true and correct copy of the above and foregoing response was mailed with postage prepaid thereon, addressed to:

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