

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,) CIVIL ACTION NO. 2008-004
)
Plaintiff-Counterdefendant,)
)
vs.)
)
GMP HAWAII, INC., a Hawaii)
corporation, d/b/a GMP ASSOCIATES,)
)
Defendant-Counterclaimant.)
)

ORDER CONCERNING YANOVIK TESTIMONY

Dennis K. Yamase
Associate Justice

Decided: July 1, 2010

APPEARANCES:

For the Plaintiff: Dana Smith, Esq.
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For the Defendant: Daniel M. Benjamin, Esq. (pro hac vice)
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HEADNOTES

Civil Procedure – Affidavits; Civil Procedure – Summary Judgment – Procedure

Under FSM Civil Rule 56(e), supporting and opposing affidavits must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. The first requisite is that the information the affidavits contain (as opposed to the affidavits themselves) would be admissible at trial. Thus, ex parte affidavits, which are not admissible at trial, are appropriate on a summary-judgment hearing to the extent they contain admissible information. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 192, 193-94 (Pon. 2010).

Civil Procedure

While the court must first consult FSM sources of law rather than begin with a review of foreign sources, when an FSM civil procedure rule that was drawn from a U.S. counterpart, has not previously been construed, the court may look to U.S. sources for guidance. FSM v. GMP Hawaii, Inc., 17 FSM

Intrm. 192, 194 n.1 (Pon. 2010).

Civil Procedure – Affidavits; Civil Procedure – Summary Judgment – Procedure

The function of summary-judgment motions and affidavits is not to resolve disputed factual issues but only to determine if any factual issues are in dispute. It is the policy of rule 56(e) to allow the affidavit to contain evidentiary matter, which if the affiant were in court and testified on the stand, would be admissible as part of his testimony. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 192, 194 (Pon. 2010).

Civil Procedure – Affidavits; Civil Procedure – Summary Judgment – Procedure

There is no requirement that a summary judgment affiant submit to a deposition in order for his affidavit to be properly before the court for the purpose of the summary judgment motion. There is also no requirement that the affiant later testify or that his summary judgment affidavit will retroactively be stricken if he is unable to. Therefore, affidavits filed in already-decided motions or in a pending motion will not be stricken from the record regardless of whether affiant completes his deposition. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 192, 194 (Pon. 2010).

Civil Procedure – Depositions; Evidence – Expert Opinion

A party needs to finish deposing the opposing party's witness far enough ahead of trial so that it would have a fair opportunity to meet the witness's expected expert opinion testimony. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 192, 194 (Pon. 2010).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

This comes before the court on defendant GMP Hawaii, Inc.'s Renewed Motion to Exclude Testimony of Andrew Yanoviak Based on Unavailability, filed June 5, 2010; the FSM's opposition memorandum, filed June 16, 2010; and GMP Hawaii, Inc.'s reply, filed June 17, 2010.

GMP Hawaii, Inc. ("GMP") asks that unless the FSM's expert witness, Andrew Yanoviak, is made to complete his deposition by June 28, 2010, when the one remaining deposition, John Okita's, is to be taken, then Yanoviak's past and present testimony should be excluded from this case. GMP asserts that the current six-month delay to accommodate Yanoviak's medical condition is long enough. The FSM responds that since no firm trial date has been set there should be no rush to finish Yanoviak's deposition when he has continuing health problems. The FSM also states that the court, not GMP, should set any deadline for the Yanoviak deposition. The FSM asserts that Yanoviak's prior affidavits and declarations should not be stricken since the filings on previously-decided motions and on GMP's pending partial summary judgment motion are closed. GMP replies that they all should be stricken because they are all hearsay since they are all prior statements not subject to full [cross-examination and thus inadmissible.

GMP's motion, to the extent that it asks to affidavits in support of or in opposition to motions already decided or in support of or in opposition to GMP's pending partial summary judgment motion, is denied with prejudice. First, for the motions already decided, GMP has offered no authority to support striking any Yanoviak affidavits attached to moving or opposing papers. Second, GMP misunderstands the nature and function of affidavits used in summary judgment motion practice.

Under FSM Civil Rule 56(e), "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively

that the affiant is competent to testify to the matters stated therein." Therefore, "the first requisite is that the information they contain (as opposed to the affidavits themselves) would be admissible at trial. Thus, ex parte affidavits, which are not admissible at trial, are appropriate on a summary-judgment hearing to the extent they contain admissible information." 10B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2738, at 330-33 (3d ed. 1998) (footnote omitted).¹ The function of summary-judgment motion affidavits is not to resolve disputed factual issues but only to determine if any factual issues are in dispute. *Id.* at 371. "It is the policy of rule 56(e) to allow the affidavit to contain evidentiary matter, which if the affiant were in court and testified on the stand, would be admissible as part of his testimony." American Securit Co. v. Hamilton Glass Co., 254 F.2d 889, 893 (7th Cir. 1958). GMP does not claim that if Yanoviak were in court and testified on the stand that the affidavits' contents would not be admissible as part of his testimony. GMP's claim is that because it has been unable to complete his deposition, Yanoviak should not be permitted to testify in court. There is no requirement that a summary judgment affiant submit to a deposition in order for his affidavit to be properly before the court for the purpose of the summary judgment motion. There is also no requirement that the affiant later testify at trial or his summary judgment affidavit will retroactively be stricken if he is unable to. Accordingly, Yanoviak's filed affidavits, including any in opposition to GMP's partial summary judgment motion, will not be stricken from the record.

Since GMP had not finished questioning Yanoviak when he walked out of the deposition and since, despite the court's order six months ago that it resume, Yanoviak's deposition has not resumed, GMP now seeks to bar the use of Yanoviak's deposition and to bar Yanoviak from giving any testimony at trial. The FSM feels that, without a firm trial date, there should be no hurry to complete the Yanoviak deposition in light of his continuing health problems.

Last December, the court ordered that the Yanoviak deposition resume. FSM v. GMP Hawaii, Inc., 16 FSM Intrm. 648, 651 (Pon. 2009). It has not. GMP has legitimate concerns about whether it will be completed before trial. GMP needs to finish deposing Yanoviak far enough ahead of trial so that it would have a fair opportunity to meet Yanoviak's expected expert opinion testimony. Yanoviak's continued unavailability to testify in a deposition is worrisome. If he is unable to withstand the physical demands of testifying by deposition, it would seem that trial testimony may be beyond his capability. The FSM may need to reconsider its options if Yanoviak continues to be unavailable. In this large and complex dispute between the FSM and GMP, the court would be reluctant to hold trial when only one side can present expert opinion testimony. The time may soon come when the FSM will need to engage a different expert.

NOW THEREFORE IT IS HEREBY ORDERED that if Andrew Yanoviak's deposition has not been completed by September 7, 2010, or is not in progress at that time, the court will consider a renewed motion to strike Andrew Yanoviak's deposition and to bar his future testimony at trial. Andrew Yanoviak's affidavits filed in support of or in opposition to decided or pending motions are not stricken from the record.

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¹ While the court must first consult FSM sources of law rather than begin with a review of foreign sources, when an FSM civil procedure rule that was drawn from a U.S. counterpart, has not previously been construed, the court may look to U.S. sources for guidance, *see, e.g.*, Berman v. College of Micronesia-FSM, 15 FSM Intrm. 582, 589 n.1 (App. 2008); Senda v. Mid-Pacific Constr. Co., 6 FSM Intrm. 440, 444 (App. 1994). This aspect of Rule 56(e), which is identical to the U.S. rule, has not previously been construed.