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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Case No.: CV-99-01034-FMC (SHx)
	)	
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
	)	UNITED STATES' MOTION TO STRIKE
v.	)	DECLARATION OF ATTORNEY
	)	GREGORY F. HURLEY
	)	
AMC ENTERTAINMENT, INC.,	)	DATE: November 18, 2002
et al.,	)	TIME: 10:00 a.m.
Defendants.	)	JUDGE: Hon. Florence-Marie Cooper

INTRODUCTION

Rule 56 (e) of the Federal Rules of Civil Procedure permits motions for summary judgment to be supported by competing declarations.[1] The rule places three straightforward requirements upon declarations that are filed in support of a motion for summary judgment – the declaration must be based upon personal knowledge, it must set forth admissible evidence, and it must show affirmatively that the declarant is competent to testify. Defendant AMC's motion for summary judgment is supported by a single declaration filed by its litigation counsel, Mr. Gregory Hurley. His declaration fails to satisfy all three requirements of Rule 56(e) and the United States moves that the offending paragraphs (¶¶ 4, 7, 9, 15-17) of Mr. Hurley's declaration be stricken.

ARGUMENT
Paragraphs of Mr. Hurley's Declaration Should Be Stricken Because They Fail to Satisfy the Requirements of Rule 56(e)

A. Rule 56(e) Legal Standards

Rule 56(e) of the Federal Rules of Civil Procedure requires that "[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." In reviewing motions for summary judgment, courts may not consider affidavits or declarations that do not comply with these requirements. El Deeb v. Univ. of Minnesota, 60 F.3d 423, 428 (8th Cir. 1995); School Dist. 1J v. AC and S, 5 F.3rd 1255, 1261 (9th Cir. 1993), cert. denied, 512 U.S. 1236 (1983); Mitchell v. Toledo Hosp., 964 F.2d 577, 585 (6th Cir. 1992); Friedel v. City of Madison, 832 F.2d 965, 970 (7th Cir. 1987); United States v. M.E. Dibble, 429 F.2d 598 (9th Cir. 1970).

All matters set forth in declarations must be based on personal knowledge and statements in a declaration are inadmissible unless the declaration itself affirmatively demonstrates that the

[1] Pursuant to 28 U.S.C. § 1746, declarations may substitute for sworn affidavits so long as the declaration includes an averment that the statement is true and correct "under penalty of perjury."

declarant has personal knowledge of those facts. Love v. Commerce Bank of St. Louis, N.A., 37 F.3d 1295, 1296 (8th Cir. 1994); Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 315-16 (6th Cir. 1989) (holding that statements in affidavits that are not based on personal knowledge and personal observation do not contain facts that are admissible evidence for summary judgment purposes); El Deeb, 60 F.3d at 428 (affidavits "shall be made on personal knowledge" and must include facts "to show the affiant possesses that knowledge.") Dibble, 429 F.2d at 602.

To be admissible to support or oppose a motion for summary judgment, declarations must also set out specific facts – not mere conclusory allegations. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 888 (1990) (holding that the object of Rule 56 is not to replace conclusory averments in a pleading with conclusory allegations in an affidavit); Mitchell, 964 F.2d at 585 (holding that "conclusory allegations and subjective beliefs ... are wholly insufficient evidence...."); O'Shea v. Detroit News, 887 F.2d 683 (6th Cir. 1989) (holding that conclusory allegations are not admissible evidence).

In addition, Rule 56(e) requires that declarations contain statements that would be otherwise "admissible in evidence," so declarations cannot contain hearsay. Hal Roach Studios v. Richard Frier & Co., 896 F.2d 1542, 1550 (9th Cir. 1984); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Mitchell, 964 F.2d at 585 (holding that affidavit based on hearsay "is not proper Rule 56(e) affidavit because it was not made on personal knowledge and did not set forth 'facts' that would be admissible into evidence"); Hartsel v. Keys, 87 F.3d 795, 799 (6th Cir. 1996), cert. denied 519 U.S. 1055 (1997)(hearsay evidence may not be considered on a motion for summary judgment). See also United States v. Leak, 123 F.3d 787, 796 & n.4 (4th Cir. 1997) (hearsay evidence in affidavits is not admissible to oppose motion for summary judgment); Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 962 (4th Cir. 1996); United States v. One Parcel of Real Estate, 963 F.2d 1496, 1501 (11th Cir. 1992); Visser v. Packer Eng'g Ass'n, 924 F.2d 655, 659 (7th Cir. 1991).

Finally, an attorney's declaration is governed by the same rules that apply to other declarants under Rule 56(e). Thus, an attorney's declaration is admissible only to prove facts that are within the attorney's personal knowledge and based on facts cited that support the

conclusion that the attorney is competent to testify. Sellers v. M.C. Floor Crafters, Inc., 842 F.2d 639 (2nd Cir. 1988); Friedel v. City of Madison, 832 F.2d 965, 969 (7th Cir. 1987); Local Union No. 490 v. Kirkhill Rubber Co., 367 F.2d 956 (9th Cir. 1966).

Unless the party's attorney has first-hand knowledge, no insistence on his part, not even his declaration, can have probative force on a motion for summary judgment. School Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1261 (9th Cir.)(affirmed summary judgment because attorney affidavit did not provide facts or authenticated documents to support allegations), cert. denied, 512 U.S. 1236 (1993); Inter-Ocean (Free Zone), Inc. v. Manaure Lines, Inc., 615 F. Supp. 710 (S.D. Fla. 1985); see also 10B C. Wright, M. Miller & M. Kane, Federal Practice and Procedure § 2738 (1998). While it is true that a court may exercise discretion in dealing with deficiencies in declarations, "leniency does not stretch so far that Rule 56(e) becomes meaningless." School Dist. No. 1J, 5 F.3d at 1261, citing Peterson v. United States, 694 F.2d 943, 945 (3rd Cir. 1982)(lack of personal knowledge and failure to attach authenticated document violated rule 56(e) and made summary judgment improper). Lacking personal knowledge, an attorney is not qualified to testify, and unauthenticated documents cannot support summary judgment. Canada v. Blain's Helicopters, Inc. 831 F.2d 920, 925 (9th Cir. 1987).

B. Paragraphs 4, 7, 9, 15, 16, and 17 of Attorney Gregory Hurley's Declaration Are Inadmissible And Should Be Stricken

Paragraphs 4, 7, 9, 15, 16, and 17 of the Hurley declaration fails to meet one or more of the legal requirements of Rule 56(e) and should, therefore, be stricken.

Paragraph 4

In paragraph 4 of his declaration, Attorney Hurley states:

> ***4. As a result of this litigation (referring to Fiedler v. AMC, Civil Action No. 92-0486 TPJ (D.D.C.)) , AMC placed wheelchair spaces in the front of all its auditoriums.***

This paragraph should be stricken for several reasons. Mr. Hurley, as trial counsel to AMC, is plainly testifying as to matters outside his personal knowledge and merely offering conclusory, self-serving statements that he is not competent to make. The declaration does not affirmatively show that Mr. Hurley is qualified to testify about AMC's decisions about seating

locations or the results of internal AMC decision-making processes in 1995 following the Fiedler decision. The declaration provides no factual support for the claim that decisions were made based upon the Fiedler decision or details of how any such AMC decisions were made. Furthermore, Mr. Hurley states no facts showing that he has personal knowledge of AMC's decision making process in 1995, nor even that he was employed by AMC at that time.[2]

Finally, the decision in Fielder was not an interpretation of "comparable lines of sight," but instead upheld the Department's interpretation of the regulatory requirement that wheelchair locations be dispersed throughout a theater with more than 300 seats to offer a choice of seats to persons who use wheelchairs. Id. Fiedler did not involve "comparable lines of sight" in movie theaters, in part, because lines of sight were less controversial in "traditional" sloped-floor theaters where seats are all located on gently sloping floors with viewing angles that are generally similar from seat to seat unlike stadium-style theaters. The creation of tiered stadium seating introduced the possibility of radically varying viewing angles within one auditorium, especially when stadium sections are combined with sloped-floor seating in front of the stadium section. With the opportunity for dramatically different viewing angles and lines of sight – depending upon where the seat is located and whether it is in the stadium section – the requirement for "comparable lines of sight" gained significance. See Memorandum In Support of United States' Motion For Partial Summary Judgment Re: Line of Sight Issues 6-8, 18 n.7 (served Oct. 25, 2002) ("US SJ Mem."). If, as Mr. Hurley alleges, AMC in fact moved seats in traditional-style theaters after Fiedler, it had more to do with offering dispersal of wheelchair seats (in AMC theaters that were still exclusively "traditional" sloped floor theaters at the time) than with providing "comparable lines of sight." Paragraph 4 is no more than a self-serving attempt to provide AMC's legal arguments with otherwise nonexistent factual support.

Paragraph 7

Paragraph 7 of the Hurley declaration states:

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[2] Mr. Hurley was not counsel of record in the Fiedler litigation. See Fielder v. AMC, 871 F.Supp. 75 (D.D.C. 1995)(AMC counsel identified as Norman Knopf).

In response to this decree (referring to Connie Arnold v. United Artists, Case No. C 93 0079 THE (N.D. CA.), AMC modified the plans for all future theaters to meet the fourth row criteria in all auditoriums.

Paragraph 7 is objectionable on several grounds, and should be stricken for the many of the same reasons as paragraph 4, above. Mr. Hurley purports to provide factual information regarding AMC's decisions about seat locations in its theaters following the April 1996 consent decree entered in Arnold v. United Artists, a case in which AMC was not directly involved and about which Mr. Hurley alleges no facts demonstrating any personal knowledge. The original Arnold agreement, which followed soon after the Fiedler decision, was negotiated in spring 1996, less than a year after Fiedler, and like Fiedler, the original Arnold agreement primarily addressed dispersal of seating in traditional style movie theaters. The Arnold agreement, predated the construction of all but the earliest stadium style theaters, the first of which AMC opened in May 1995.[3] See Statement of Uncontroverted Facts and Conclusions of Law In Support of Plaintiff United States' Motion for Partial Summary Judgment Re: Line of Sight Issues ¶ 3 (served Oct. 25, 2002) [hereinafter "US SJ Facts"].

Besides lacking a factual basis for paragraph 7 of his declaration, Mr. Hurley's statement on its face is vague and misleading. It is not clear from the declaration what Mr. Hurley means by the language "*AMC modified the plans for all future theaters.*" His statement does not cite facts to describe the extent of "modifications," the meaning of "all future theaters," the costs, or the specific nature of any such "modifications." Mr. Hurley only says that "AMC modified plans," then he says that the plans for future theaters were modified "to meet the fourth row criteria in all auditoriums." Presumably, he is using shorthand for the first of the two Arnold agreements to describe the nature of changes that AMC actually made, although it is impossible to tell from this declaration what "the fourth row criteria," means or what changes AMC made.

Mr. Hurley plainly does not have, and does not specifically allege that he has, personal knowledge of these matters, nor does he allege that he was acting as counsel to AMC during that

[3] A supplemental stipulation was entered among the parties in Arnold v. United Artists in January 2001 to amend the consent decree to specify terms for location of wheelchairs in newly constructed United Artists stadium style theaters. See Exhibit A.

time period. Indeed, Mr. Hurley's statement, like paragraph 4, is self-serving, conclusory, and contains unsubstantiated hearsay lacking any reference to the factual record. Paragraph 7 should be stricken because it fails to satisfy Rule 56(e) requirements.

Paragraph 9

Paragraph 9 of Attorney Hurley's declaration provides:

> ***In December of 1998, the Department advised AMC that it would file suit unless AMC agreed that §4.33.3 required wheelchair spaces to provide viewing angles that were at the median or better than the viewing angles provided to patrons in the stadium portion of the auditorium.***

Paragraph 9 should be stricken because it contains statements that are conclusory, not based upon Mr. Hurley's personal knowledge, and that are incorrect and misleading representations of pre-filing settlement discussions between the United States and AMC. Between October 1998 and the January 1999 filing date in this case, AMC counsel Robert Harrop and Justice Department attorney Jeanine Worden exchanged several letters trying to reach an agreement following nearly two years of investigation of AMC theaters. See US SJ Facts ¶¶ 35-36. The United States was obligated by Executive Order 12988 (February 5, 1996) to discuss settlement before filing suit. None of the written correspondence that predated the filing of this lawsuit demanded that AMC "provide viewing angles that were at the median or better than the viewing angles provided to patrons seated in the stadium portion of the auditorium." There were contemporaneous conversations between Mr. Harrop and Ms. Worden about settlement; however, even assuming the subject came up in conversation at that time, Mr. Hurley's statement is hearsay, especially because he did not join in the settlement negotiations.[4] This paragraph is inadmissible because Mr. Hurley lacks personal knowledge and has not specified facts sufficient to show that he has actual knowledge of relevant facts. Moreover,

[4]AMC's Rule 30(b)(6) witness (Mr. Philip Pennington) referred in his deposition to settlement discussions that took place in Summer, 2000, after the suit was filed, when the Department met with the National Association of Theater Owners, and with Mr. Harrop and Mr. Pennington on behalf of AMC, along with attorneys for Cinemark. Testifying as a Rule 30(b)(6) witness, Mr. Pennington said, "As I recall the discussions of – of the median issue, if you will, it was in the context of settlement." See Deposition Transcript of Philip Pennington 244 (Oct. 24, 2002) (excerpted copy attached as Exhibit B).

AMC counsel may not introduce any privileged dialogue from pre-filing settlement discussions; such settlement discussions are privileged and are inadmissible pursuant to Federal Rule of Evidence 408.

Paragraph 15

Paragraph 15 of the Hurley declaration states:

> ***Less than two months after becoming aware of the Department's position as set forth in the Lara brief, AMC changed its design criteria to require that wheelchair spaces be placed in the stadium seating area and that they provide specific viewing angles to the top of the screen.***

For the same reasons that paragraphs discussed above are inadmissible, paragraph 15 should also be stricken. In his declaration, Mr. Hurley does not specify a particular date when AMC modified its "design criteria" nor does he describe what those "design criteria" include, so it is impossible to determine what his statement means and whether it is true.[5] He says that within "two months after becoming aware of the Department's position in Lara" – a phrase that does not specify when AMC actually *became* aware of "the Department's position in Lara;" It may have been immediately after the United States filed its *amicus* brief in United States District Court on July 24, 1998, or later when appellate briefs were filed, or two months after whatever date AMC actually learned of the Lara briefs – it is impossible to tell from the declaration.

Mr. Hurley goes on to state that AMC moved the wheelchair locations "to the stadium seating area," but he does not specify what that means. He refers to no facts, plans, or evidence about wheelchair seating locations in different theaters, and more importantly, whether they offer lines of sight comparable to those for members of the general public. Finally, Mr. Hurley says that AMC provided "*specific* viewing angles to the top of the screen" from those wheelchair locations, but he does not state whether "specific viewing angles" included horizontal and

[5]Interestingly, when the AMC Rule 30(b)(6) witness was asked when AMC became aware of the United States' *amicus* brief filed in Lara v. Cinemark, in the Western District of Texas, the witness answered, "I don't know." See Pennington Dep. Tr. at 339. He went on to say that the only way to determine when AMC learned about the United States' brief in Lara would be to refer to AMC mail files "That's– again, that's based on assuming it was received and assuming it's still there." Id.

vertical angles or others; nor does he explain what "specific" means, how AMC measured viewing angles, or how they compare to those offered to other members of the general public. In sum, Mr. Hurley's statement is so vague that it has no meaning and he fails to allege facts sufficient to support his allegations. In paragraph 15, Mr. Hurley addresses issues that appear to be outside his personal knowledge and his declaration does not affirmatively set forth the basis for his statements, as required by Rule 56(e), and is thus deficient and should be stricken.

Paragraph 16

Paragraph 16 of the Hurley Declaration states:

> ***Of the 83 complexes at issue in this suit, nearly 75% were designed before the Department promulgated its position in Lara.***

Just like his earlier paragraphs, Mr. Hurley's statement here is unsubstantiated by any factual support and should be stricken because he has not alleged facts specific enough show that he has personal knowledge about the allegations in the paragraph, and the paragraph is inconsistent with information provided to the United States in discovery. AMC currently operates 84 stadium style theater complexes that are at issue in this lawsuit, not 83. See US SJ Facts ¶ 9. More importantly, the statement that 75 percent of AMC's stadium-style complexes "were designed before the Department promulgated its position in Lara" is vague, misleading, and inaccurate. The United States' *amicus* brief was filed in the United States District Court for the Western District of Texas in Lara v. Cinemark on July 24, 1998. See US SJ Mem. at 16-17. The declaration states that 75 percent of AMC theaters were "designed" before Lara, but that term is both broad and imprecise, and may reasonably include anything from preliminary discussions, to drafting initial drawings, to final design changes to a new theater ready to open.[6] In Lara, the United States only clarified the longstanding requirement to provide "comparable lines of sight," a term well-understood by AMC and the industry. See Id. Moreover, the

[6] A list of AMC "Stadium-Style" Theaters produced by AMC during the course of discovery in this action shows that 53 complexes were opened by AMC on or before July 24, 1998, which constitutes approximately 65 percent of all AMC stadium style complexes opened. See Appendix (Volume One) of Declarations and Exhibits In Support of Plaintiff United States' Motion for Partial Summary Judgment Re: Line of Sight Issues, Ex. 1 (served Oct. 25, 2002).

requirement for "comparable lines of sight" in assembly areas has been in place since the ADA's title III regulation was published in 1991, and before that the same language was published in the 1980 ANSI model code that also applies to assembly areas. See ANSI Section 4.33.3 (1980) (copy attached as Exhibit C).

Paragraph 17

Paragraph 17 of the Hurley declaration states:

> ***Twelve of the complexes at issue in this case are located in the Fifth Circuit: Deerbrook 24, Houston; First Colony 24, Dallas; Grand 24, Dallas; Grapevine 30, Dallas; Grand Pointe 30, Houston; Huebner Oaks 24, San Antonio; Katy Mills 20, Houston; Mesquite 30, Houston; Palace 9, Ft. Worth; Stonebriar, Dallas; Studio 30, Houston; and Willowbrook 24, Houston.***

The United States does not dispute that the cities listed are all in Texas, or that Texas is located within the jurisdiction of the United States Court of Appeals for the Fifth Circuit; however, once again Mr. Hurley fails to provide any factual support for his claims that each of these theaters is actually located in the cities he identifies. The declarant's failure to provide even minimal facts from the record to support his statement renders the allegations inadmissible pursuant to Rule 56(e).

Conclusion

Paragraphs 4, 7, 9, 15, 16, and 17 of the Gregory F. Hurley declaration do not constitute evidence that is properly admissible under Rule 56(e) of the Federal Rules of Civil Procedure, because Mr. Hurley lacks personal knowledge, fails to put forth facts that would be admissible, or does not provide facts affirmatively showing that he is competent to testify about matters discussed in the various paragraphs. Paragraphs 3, 5, 6, 8, 11, 12, 13 are intended to introduce documents that Mr. Hurley seeks to admit into evidence; however, those paragraphs also fail to satisfy the requirements of Rule 56(e) of the Federal Rules of Civil Procedure. The United States respectfully requests that the Court strike objectionable paragraphs of the declaration of AMC counsel Gregory F. Hurley submitted in support of defendant's motion for summary judgment.

DATED: Oct. 25, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this __ day of October, 2002, true and correct copies of **Memorandum In Support of United States' Motion to Strike Declaration of Attorney Gregory F. Hurley** were served by Federal Express, postage pre-paid, on the following parties:

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