UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Civil Action Nos.
78-322 and 78-420
(Consolidated)

DEFENDANT'S MOTION TO STRIKE AND TO HAVE ITS STATEMENT OF MATERIAL FACTS DEEMED ADMITTED

Defendant, by its undersigned attorneys, hereby moves, the Court, pursuant to Rules 12(f) and 56(e) of the Federal Rules of Civil Procedure, to strike the affidavits filed by plaintiff in support of his opposition to the defendant's motion for partial summary judgment on the ground that they fail to comply with Rule 56, F. R. Civ. P. The defendant also moves the Court to have its statement of material facts deemed admitted on the ground that plaintiff has failed to state any material facts as to which there exists a genuine issue to be litigated.

In support of these motions, the Court is referred to the attached memorandum of points and authorities.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
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HAROLD WEISBERG,

Plaintiff,

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FEDERAL BUREAU OF INVESTIGATION,

Defendants.

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DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTIONS TO STRIKE AND TO HAVE ITS STATEMENT OF MATERIAL FACTS DEEMED ADMITTED

I. PRELIMINARY STATEMENT

On May 3, 1982, the defendant filed a motion for partial summary judgment on the question of the adequacy of its search for records response to plaintiff's FOIA request in these consolidated actions. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the defendant supported its motion with the thorough, yet concise, declaration of Special Agent John N. Phillips, which detailed the files that were searched in response to plaintiff's FOIA requests, and identified the individuals under whose direction those searches were conducted. The defendant also appended to its motion, pursuant to Local Rule 1-9(h), a statement of the material facts as to which it contends there is no genuine issue, and included therein references to the parts of the record relied on to support such statement.

On June 7, 1982, the plaintiff filed his opposition to the defendant's motion for partial summary judgment. In support of this opposition, plaintiff submitted a 97 page affidavit of his own, a 5 page affidavit of his attorney, and a one sentence "statement of genuine issues." As demonstrated below, however, the affidavits fail to meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure and plaintiff's "statement of genuine issues" fails to comply with the requirements of Local Rule 1-9(h). The affidavits should thus be stricken. Lacy v. Lumber Mutual Life Insurance Co., 554 F.2d 1204, 1205 (1st Cir.

1977); Noblett v. General Electric, 400 F.2d 442, 445 (10th Cir. 1968); Government of the Republic of China v. Compass Communications, 473 F. Supp. 1306 (D.D.C. 1979). And, the facts claimed by the defendant in its statement of material facts should be deemed admitted. See Crooker v. BATF, 670 F.2d 1051, 1054 n.7 (D.C. Cir. 1981) (en banc); Zerilli v. Smith, 656 F.2d 705, 718 n.74 (D.C. Cir. 1981); Thompson v. Evening Star, 394 F.2d 774, 777 (D.C. Cir. 1968).*/

II. ARGUMENT

A. Plaintiff's Affidavits Opposing Defendant's Motion For Partial Summary Judgment Do Not Meet The Requirements of Rule 56(e).

Rule 56(e) of the Federal Rules of Civil Procedures provides that a party who wishes to oppose a motion for summary judgment on factual grounds must set forth "specific facts" which establish the existence of a genuine issue for trial. In so doing, the non-moving party's affidavits must, under the dictates of Rule 56(e),

> 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.

Applying these requirements strictly, courts have held that any affidavits submitted under this rule must only "contain evidentiary matter which, if the affiant were in court and testified on the witness stand, would be admissible as part of his testimony." American Security Co. v. Hamilton Glass, 254 F.2d 889, 893 (7th Cir. 1958). See also Union Insurance Society v. William Gluckin & Co., 353 F.2d 946, 952 (2d Cir. 1965); Jameson v. Jameson, 176 F.2d 58, 60 (D.C. Cir. 1949). Thus, Rule 56 affidavits cannot contain hearsay, conclusory language, speculation, or statements which purport to examine the intent or state of mind of other persons. Maiorana v. McDonald, 596 F.2d 1072, 1080 (1st Cir. 1980); Peroff v. Manuel, 421 F. Supp. 570, 576

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*/ This motion and supporting memorandum does not constitute the defendant's reply to the legal arguments raised by plaintiff in his opposition brief. The defendant will submit its reply to those arguments within the next 10 days.

(D.D.C. 1976); Hotel and Restaurant Employees v. Allegheny Hotel Co., 374 F. Supp. 1259, 1262-63 (E.D.Pa. 1974). The affidavits must also be devoid of unsubstantiated statements, inferences derived from the opposing party's affidavits, or facts irrelevant to the issues raised by the summary judgment motion. Merit Motors v. Chrysler Corp., 417 F. Supp. 263, 272 (D.D.C. 1976), aff'd 569 F.2d 666 (D.C. Cir. 1977); Ritz v. O'Donnell, 413 F. Supp. 1365, 1376 (D.D.C. 1976), aff'd 566 F.2d 731 (D.C. Cir. 1977); Raitport v. SBA, 380 F. Supp. 1059, 1060 (E.D.Pa. 1974). If a party's affidavits do set forth matters which are not admissible into evidence, they will, upon proper motion, be striken by the court. Carey v. Beans, 500 F. Supp. 580, 583 (E.D.Pa. 1980); Government of the Republic of China v. Compass Communication Corp., 473 F. Supp 1306 (D.D.C. 1979).

When viewed against this legal backdrop, it is clear that plaintiff's affidavit fails to meet the requirements of Rule 56(e). In fact, that statement does not contain, as far as the defendant can ascertain, any admissible facts whatsoever. Rather, it is a discursive 97 page, 364 paragraph recitation of, inter alia, hearsay, innuendo, speculation, conclusory language, irrelevant and unsubstantiated statements, and scurrilous and unfounded charges against FBI personnel. To attempt to list each and every inadmissible matter in plaintiff's affidavit would, however, only further burden the record of this case. The defendant will thus limit itself to pointing out some instances which are representative of the evidentiary deficiencies in that affidavit.

Throughout his affidavit, plaintiff cavalierly asserts that special agents of the FBI have intentionally submitted false statements to this and other courts concerning his FOIA requests. (See, e.g., ¶¶ 1, 3, 89, 111, 215, 336). But never once does he offer any credible evidence that substantiates these assertions. In addition, plaintiff constantly claims that the FBI did or did not take certain actions with respect to other FOIA requests of

his, such as his request on the assassination of Martin Luther King or on the spectrographic analysis conducted in the Kennedy assassination. (See, e.g., ¶¶ 6, 13, 54, 65). Even if these claims were true (which they are not), they are completely irrelevant to whether the FBI's search in this case was adequate. Furthermore, plaintiff's affidavit is replete with hearsay (see, e.g., ¶¶ 7, 29, 109, 270), recitations of the intent or state of mind of other persons (see, e.g., ¶¶ 28, 41, 134, 225, 275, 327), and inferences allegedly drawn from the defendant's earlier affidavits in this case. (See, e.g., ¶¶ 104, 144, 203, 253, 302). All of these practices are unacceptable under Rule 56.

In short, as mentioned earlier, it does not appear that even one paragraph of plaintiff's affidavit would be be admitted into evidence if plaintiff were testifying about those matters in court. See American Security Co., supra, 254 F.2d at 893; Jameson, supra, 176 F.2d at 60. Plaintiff has attempted instead "to build a case on gossamer threads of whimsy, speculation and conjecture." Maiorana, supra, 596 F.2d at 1078, quoting Manganaro v. Delaval, 309 F.2d 389, 393 (1st Cir. 1962). Plaintiff's affidavit is thus clearly at odds with the requirements of Rule 56(e).

Equally deficient under Rule 56 is the affidavit submitted by plaintiff's counsel, James H. Lesar. In the first four paragraphs of that document, counsel does not state any admissible facts that bear on the issue of what Associate Attorney General John H. Shenefield meant when he stated in his letter of December 16, 1980, that, as a matter of agency discretion (as opposed to a mandate under the FOIA), the Department agreed to search for files on "critics" or "criticism" of the Kennedy assassination investigation. Instead, throughout those four paragraphs, counsel merely presents arguments to support plaintiff's position that Mr. Shenefield meant for the FBI to conduct an "all reference" search on the names of unspecified individuals. Not only are Mr. Lesar's

arguments contrived, they fail to meet the requirements of Rule 56(e) that affidavits contain only admissible facts.

In the fifth paragraph of his affidavit, Mr. Lesar claims that the Justice Department's Office of Privacy and Information Appeals allowed the release of certain material surrounding the King assassination without privacy waivers being obtained from certain individuals. Even assuming arguendo that counsel is correct, this claim is irrelevant to the issue of whether the FBI's search under the FOIA was adequate and reasonable in this case.

Finally, Mr. Lesar, in the last four paragraphs of his affidavit, attempts to rationalize to the Court why, prior to the status conference on March 10, 1982, he failed, per the Court's request, to detail to government counsel the complaints, if any, that plaintiff had concerning the FBI's administrative reprocessing of his FOIA request. Not only are counsel's comments inaccurate and self-serving, but they have no relevance to the issue before the Court.

Mr. Lesar's affidavit, similar to his client's, thus fails to meet the requirements of Rule 56(e) that affidavits be made on personal knowledge, set forth only facts admissible in evidence, and demonstrate the competence of the affiant to testify to the matters asserted therein. Accordingly, this Court should adhere to its precedent in Compass Communications, supra, 473 F. Supp. 1306, and strike the affidavits of plaintiff and his counsel.

B. Plaintiff Has Failed To Meet The Requirements of Local Rule 1-9(h).

In addition to the directions of Rule 56 of the Federal Rules of Civil Procedure, this Court has promulgated local requirements for summary judgment motions and oppositions thereto. Those requirements are set out in Local Rule 1-9(h) which provides, in pertinent part, as follows:

> With each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure there shall be served and filed . . . a statement of the material facts as to which the moving party contends there is no genuine issue,

> and shall include therein references to the parts of the records relied on to support such statement. A party opposing such a motion shall serve and file, together with his opposing statement of points and authorities, a concise "statement of genuine issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, and shall include therein references to the parts of the record relied on to support such statement. In determining a motion for summary judgment, the court may assume that the facts as claimed by the moving party in his statement of material facts are admitted to exist except as and to the extent that such facts are controverted in a statement filed in opposition to the motion.

(Emphasis added).

Similar to the provisions of Rule 56(e), this local rule has been applied strictly by the courts of this Circuit. See, e.g., Zerilli v. Smith, 656 F.2d 705, 718 n.74 (D.C. Cir. 1981); Thompson v. Evening Star, 394 F.2d 774, 776-77 (D.C. Cir.), cert. denied, 393 U.S. 884 (1968). The rationale underlying this application was cogently explained by the court in Gardels v. CIA, 637 F.2d 770 (D.C. Cir. 1980):

> Requiring strict compliance with the local rule is justified both by the nature of summary judgment and by the rule's purposes. The moving party's statement specifies the material facts and directs the district judge and the opponent of summary judgment to the parts of the record which the movant believes support his satement. The opponent then has the opportunity to respond by filing a counter-statement and affidavits showing genuine factual issues. The procedure contemplated by the rule thus isolates the facts that the parties assert are material, distinguishes disputed from undisputed facts, and identifies the pertinent parts of the record. These purposes clearly are not served when one party, particularly the moving party, fails in his statement to specify the material facts upon which he relies and merely incorporates entire affidavits and other materials without reference to the particular facts recited therein which support his view. . . .

Id. at 773 (emphasis added). Consistent with these dictates, this Court has held that the failure to file a proper Rule 1-9(h)

statement may be fatal to the position of the delinquent party. Piccolo v. Department of Justice, 90 F.R.D. 287, 288 n.3 (D.D.C. 1981); Gillot v. WHATA, 507 F. Supp. 454, 455 n.1 (D. D.C. 1981). Moreover, if the delinquent party is the one opposing the motion, the rule itself provides that a court may assume that the facts as claimed by the moving party in his statement of material facts are admitted. In essence, a moving party's statement of material facts thus "operates as the equivalent of a request for admissions." Fleischhaker v. Adams, 26 FEP Cases 1451, 1452 (D.D.C. 1978). Consequently, a failure to specify the moving party's material facts which require a trial for resolution results in those facts being deemed admitted. Zerilli, supra, 656 F.2d at 718 n.74; Piccolo, supra, 90 F.R.D. at 288 n.3; Joseph v. Bond, 507 F. Supp. 453, 454 (D.D.C. 1981). See also United States v. Trans-World Bank, 382 F. Supp. 1100, 1102 (C.D.Cal. 1974).

In this case, the defendant supported its motion for partial summary judgment with a statement of 29 material facts as to which it contends there is no genuine issue. Each of those 29 material facts were, in turn, supported by references to the parts of the record relied on. In opposing the defendant's motion, the plaintiff made no attempt to set forth all the material facts as to which he contends there is a genuine issue or to reference the parts of the record relied on to support those contentions. Nor did he attempt to specify which, if any, of the defendant's material facts he contends require a trial for resolution. Instead, plaintiff filed a one sentence "statement of genuine issues" which merely restated the legal issue presented by the defendant's motion for partial summary judgment, "whether the Federal Bureau of Investigation has conducted a thorough, good-faith search for records responsive to [plaintiff's] requests." This fails to meet the requirements of Rule 1-9(h). It can only be assumed, therefore, that plaintiff is unable to detail any material facts "as to which there exists a genuine issue necessary to be litigated." Accordingly, under Local Rule 1-9(h) and the

judicial decisions interpreting it, the 29 material facts listed in defendant's Rule 1-9(h) statement should be deemed admitted.

CONCLUSION

For the reasons set forth above, the defendant's motions to strike and to have its statement of material facts deemed admitted, should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 17th day of June, 1982, I have served the foregoing Defendant's Motion To Strike And To Have Its Statement Of Material Issues Deemed Admitted, and Memorandum of Points and Authorities In Support Thereof, by first class mail to:

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