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Of Attorneys for Defendant The City of Ashland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AMERICAN BUDDHA, an Oregon Nonprofit Corporation,)	No. 06-CV-3054-PA
)	
Plaintiff,)	RESPONSE TO SUPPLEMENTAL
)	CONCISE STATEMENT OF FACTS AND
v.)	SUPPLEMENTAL AFFIDAVIT OF
)	PLAINTIFF
THE CITY OF ASHLAND AND THE WASHINGTON POST COMPANY,)	Oral Argument Requested
)	
Defendants.)	
)	

LOCAL RULE 7.1 CERTIFICATION

The undersigned certifies that a good faith effort has been made to resolve the subject matter of this motion and the Court’s ruling is necessary on this matter.

LEGAL ARGUMENT

1. Response and Motion to Strike Supplemental Concise Statement of Facts

Defendant filed its motion for summary judgment on December 1, 2006. Plaintiff filed its response on January 28, 2007. As part of that response, plaintiff filed its own concise statement of facts. Plaintiff did not file any objections to the concise statement of facts submitted by defendant. As a result, defendant filed its reply pointing out that a number of facts had been conceded by plaintiff for purposes of the motion. Defendant also moved to strike some of the

evidence relied on by plaintiff in its response. Pursuant to this court's order, plaintiff was allowed additional time to respond to these evidentiary objections (Documents No. 27). At no time did plaintiff request leave to file objections to defendant's concise statement of facts, which if any, should have been filed with plaintiff's response to the summary judgment motion. This supplemental statement is untimely and not in compliance with local rules. Accordingly, it should be stricken.

The City of Ashland filed its motion for summary judgment on December 1, 2006. Plaintiff requested, and received additional time to file its opposition to the motion (Document No. 20). The court granted plaintiff until February 12, 2007 to file its opposition.

Local Rule 56.1(b)(1) states as follows:

(b) Opposition and Reply Requirements.

(1) Opposition to a motion for summary judgment must include a response to the separate concise statement that responds to each numbered paragraph of the moving party's facts by:

(A) Accepting or denying each fact contained in the moving party's concise statement; or

(B) Articulating opposition to the moving party's contention or interpretation of the undisputed material fact.

Plaintiff had until February 12, 2007 to file any objection to defendant's concise statement. Plaintiff failed to do so. Only until after it was argued in defendant's reply that certain facts were conceded did plaintiff file a "supplemental" concise statement. After a deadline has passed, an extension may be granted only "where the failure to act was the result of excusable neglect." FRCP 6(b). The party seeking to enlarge the time after a deadline has passed bears the burden of explaining why it failed to comply with the court's deadline. *Kyle v. Campbell Soup Co.*, 28 F.3d 928, 930 (9th Cir.), *cert. denied* 513 U.S. 867 (1994). To establish "excusable neglect," one must demonstrate both good faith and a reasonable basis for not

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complying within the specified period. *Silber v. Mabon*, 18 F.3d 1449, 1455 (9th Cir. 1994) (citing *In re Four Seasons Sec. Laws Litig.*, 493 F.2d 1288, 1290 (10th Cir. 1974)).

Plaintiff fails to offer any explanation as to why it failed to follow the applicable rules. Plaintiff fails to move for an extension of time to file the “supplemental” concise statement, and fails to offer any explanation as to why it was not filed, and could not be filed, with its response to the summary judgment motion as required by Local Rule 56.1(b)(1). It appears from the record that the only reason it was filed was because defendant called its absence to plaintiff’s attention in its reply. This is not “excusable neglect” justifying an untimely filing. This supplemental objection to defendant’s concise statement should be stricken.

2. Response to Supplemental Affidavit

Plaintiff files as additional support of its response to the motion for summary judgment a supplemental affidavit, offering “evidence” about City Attorney Mike Franell’s resignation. Plaintiff makes the unsupported and speculative assertion that because an article about this lawsuit appeared in the local newspaper on the same day an article appeared about Franell’s resignation, the resignation must have had something to do with this case. Aside from being entirely speculative, this argument proves nothing in support of plaintiff’s claim that the City violated the First Amendment when it disconnected a modem. Plaintiff argues that all inferences must be made in favor of it. Inferences must be based on relevant, admissible facts. Plaintiff offers no evidence supporting the inferences it wishes the court to draw. For these reasons, as well as those set forth below, the supplemental affidavit does not create a question of fact on the merits of the case.

A. Paragraphs 3 through 7 of the Supplemental Affidavit.

Most of Paragraphs 3 through 7 contain what amounts to testimony by plaintiff’s counsel. For the reasons set forth in Section 1 of defendant City of Ashland’s first motion to strike, this is not a proper method for offering testimony, and those paragraphs should be stricken.

Moreover, Paragraph 3 in particular, contains a number of allegations which are either unsupported or have no relevance. These statements include an assertion that former City Attorney, Mike Franell, “has come under scrutiny.” Plaintiff offers no admissible factual evidence supporting this assertion. Further, plaintiff fails to establish any basis for relevance of this assertion. Accordingly, it should be stricken.

Additionally, the citations to the deposition of Mike Franell are not supported by any excerpts from that deposition and are irrelevant.

B. Exhibits 12 and 13. (Print-outs from the City’s Website.)

Plaintiff contends that Exhibits 12 and 13 “are self authenticating under Federal Rule of Evidence 902(5), and thereby qualify as admissions admissible against the City.” Supplemental Affidavit, ¶4. In making this argument, plaintiff confuses two different rules of evidence. The question of authenticity pertains to whether the document “is what its proponent claims” it to be. FRE 901(a). However, an “admission” concerns whether a statement is hearsay. To be an admission, and therefore not subject to a hearsay objection, a document must satisfy Federal Rule of Evidence 801(d)(2). It appears that plaintiff is attempting to assert that this satisfies subsection (D) of the rule which states as follows:

(2) Admission by Party-Opponent. The statement is offered against a party and is . . . (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . .

(Emphasis added.)

First and foremost, the statements contained in these exhibits do not “admit” to any fact at issue in this case. Second, these statements concern the resignation of the City Attorney. Such statements were not made “during the existence of the relationship” and, thus, would not satisfy that portion of the rule. *See Young v. James Green Management, Inc.*, 327 F.3d 616, 622-23 (7th Cir. 2003) (statements made by employee in resignation letter were not admissible against the

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employer under FRE 801(d)(2)(D)). Accordingly, these exhibits should be stricken from the record.

C. Exhibits 14, 15, and 16. (Excerpts from the Website of the Ashland Daily Tidings).

These exhibits are copies of news articles that appeared on the Ashland Daily Tidings website. Once again, plaintiff is confusing the issue of authentication with whether or not the statements are otherwise admissible. The newspaper articles are hearsay, not subject to any exceptions and are inadmissible. F.R.E. 801. Moreover, the supplemental affidavit inaccurately summarizes the content of these articles. For example, Paragraph 5 of the affidavit asserts that Franell's resignation related to "handling of City litigation." Exhibit 15 is cited in support of this statement. However, the news article does not indicate that the resignation has anything to do with this litigation. These exhibits are not relevant, and are inadmissible in any event and should be stricken.

CONCLUSION

_____ For all the foregoing reasons, the above-referenced evidence should be stricken.

DATED this 19th day of March, 2007.

HOFFMAN, HART & WAGNER, LLP

By: /s/ Karen O'Kasey
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2007, I served the foregoing RESPONSE TO SUPPLEMENTAL CONCISE STATEMENT OF FACTS AND SUPPLEMENTAL AFFIDAVIT OF PLAINTIFF on the following party:

Charles Carreon
Online Media Law, PLLC
423 Gateway Drive, #64
Pacifica, CA 94044

by electronic means through the Court's Case Management/Electronic Case File system.

/s/ Karen O'Kasey
Karen O'Kasey