

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

CNH INDUSTRIAL AMERICA LLC,)	
)	
Plaintiff,)	C.A. No. N12C-07-108 EMD CCLD
)	
v.)	
)	
AMERICAN CASUALTY COMPANY OF)	TRIAL BY JURY OF TWELVE
READING, PENNSYLVANIA, et al.)	DEMANDED
)	
Defendants.)	
)	

*Upon Consideration of Plaintiff CNH Industrial America, LLC’s Motion to Strike Affidavit of Gary Bennett Submitted in Support of Travelers’ Motions for Summary Judgment
DENIED however certain paragraphs and documents of the Affidavit will be disregarded*

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DAVIS, J.

I. INTRODUCTION AND PROCEDURAL HISTORY

This is an action for declaratory relief and breach of contract filed by Plaintiff CNH Industrial America LLC (“CNH”) against a number of insurance companies, including Travelers Indemnity Company (“Travelers”). The complaint alleges that the defendant insurance companies have failed to honor defense and coverage obligations arising from asbestos-related lawsuits filed against CNH.

On July 21, 2014, CNH served its Re-Notice of Deposition to Travelers pursuant to Rule 30(b)(6) of the Superior Court Rules of Civil Procedure (“Rule 30(b)(6)”), which specified that

Travelers produce a corporate designee to testify on eight designated topics. Travelers produced Erik Sandberg as its 30(b)(6) witness on July 25, 2014. Thereafter, Travelers filed summary judgment motions, and partially supported the motions with the Affidavit of Gary C. Bennett (the “Affidavit”). As part of the summary judgment motions, Travelers makes arguments which relate to choice of law issues. Specifically, Travelers argues that the Court should apply Texas law when interpreting and applying the terms of the insurance policies. The Affidavit is intended to support Travelers’ choice of law arguments.

On December 10, 2014, CNH filed Plaintiff CNH Industrial America, LLC’s Motion to Strike Affidavit of Gary Bennett Submitted in Support of Travelers’ Motions for Summary Judgment (the “Motion”). On January 12, 2015, Travelers filed the Opposition of Defendants the Travelers Indemnity Company to Plaintiff CNH Industrial America, LLC’s Motion to Strike Affidavit of Gary Bennett Submitted in Support of Travelers’ Motions for Summary Judgment (the “Opposition”). Recently, Travelers submitted a letter, dated March 10, 2015, from Seth A. Niederman, Esq., to the Honorable Eric M. Davis (the “Letter”). The Letter provides two additional authorities that support arguments made in the Opposition.

In the course of litigation, CNH deposed Mr. Bennett. CNH provided the Court with a copy of Mr. Bennett’s deposition. The Court has reviewed Mr. Bennett’s deposition in coming to the decision contained in this Order.

II. PARTIES’ CONTENTIONS

CNH makes a number of arguments in support of the Motion. CNH first argues that the Affidavit constitutes a “sham affidavit” because it contradicts the testimony of Mr. Sandberg, Travelers’ Rule 30(b)(6) witness. Second, CNH claims that Mr. Bennett lacks personal

knowledge to support substantial portions of his affidavit. Third, CNH contends that the Affidavit relies on inadmissible hearsay.

Travelers addresses each of CNH's arguments in the Opposition. Travelers first states that the Affidavit is not a "sham affidavit" because it was not offered to contradict any prior testimony provided by Mr. Bennett. Second, Travelers notes that Mr. Bennett has personal knowledge of the facts in the affidavit because for several years Mr. Bennett was directly involved in underwriting the Tenneco Insurance Program -- the insurance program at issue in these motions. Third, Travelers argues that the documents referenced by Mr. Bennett do not constitute hearsay because they fall within the "ancient documents" exception to hearsay.

III. DISCUSSION

A. The Affidavit of Gary C. Bennett is not a "sham affidavit"

CNH contends that the Affidavit constitutes a "sham affidavit" because it contradicts testimony given by Mr. Sandberg, Travelers' Rule 30(b)(6) witness. In the Motion, CNH states that it sought a Rule 30(b)(6) witness from Travelers on its "insured issues" and that during the deposition, Mr. Sandberg failed to raise or identify any of the alleged factual matters later disclosed by Travelers through the Affidavit, and that Mr. Sandberg was wholly unprepared to answer any of CNH's questions regarding the alleged factual bases that Travelers is relying on to contend that its "insured issues" are governed by Texas law.

The sham affidavit doctrine "refers to the practice of striking or disregarding an affidavit that is submitted in opposition to a motion for summary judgment, in cases where the affidavit contradicts the affiant's prior sworn deposition testimony. The core of the doctrine is that where a witness at a deposition has previously responded to unambiguous questions with clear answers that negate the existence of a genuine issue of material fact, that witness cannot thereafter create

a fact issue by submitting an affidavit which contradicts the earlier deposition testimony, without an adequate explanation.”¹

The sham affidavit doctrine does not apply here. Mr. Bennett did not offer any prior sworn testimony in this matter before the Affidavit was submitted to the Court. Moreover, the Court has reviewed Mr. Sandberg’s deposition, and determined that Mr. Bennett’s Affidavit does not contradict Mr. Sandberg’s deposition in a manner that would invoke the sham affidavit doctrine. Mr. Sandberg was prepared to testify on certain deposition topics. For example, Mr. Sandberg was specifically asked about the basis of the Fourth Defense asserted in response to CNH’s Amended Complaint, Mr. Sandberg mentioned the anti-assignment clause, and the fact that his review of the policies did not produce any endorsement which indicated that Travelers consented to an assignment.² Mr. Sandberg was prepared for his deposition to the extent that he knew of the anti-assignment clause. Mr. Sandberg did not appear prepared on the choice of law issues.³ In fact, when specifically asked whether it is Travelers’ position that Texas law applied to an insurance policy, Mr. Sandberg stated that he did not know.⁴ Mr. Bennett’s Affidavit does not contradict Mr. Sandberg’s testimony, but rather supplies additional facts on choice of law issues.

The Court is also not prepared to extend the sham affidavit doctrine to a situation where the moving party submits the affidavit in support of its motion for summary judgment. Normally, a sham affidavit is provided in opposition to a motion for summary judgment so as to create a genuine issue as to a material fact. Here, Travelers submitted the Affidavit in support of summary judgment. Moreover, as stated above, the Affidavit does not contradict Mr. Bennett’s

¹ *Cain v. Green Tweed Co., Inc.*, 832 A.2d 737, 740 (Del. 2003).

² Deposition of Erik Sandberg, July 25, 2014, 107:4-108:2.

³ *Id.* at 123:21-124:6.

⁴ *Id.* at 124:23-125:6.

prior sworn deposition testimony. CNH did not depose Mr. Bennett prior to Travelers submitting the Affidavit in support of summary judgment. Under these circumstances, the Court will not strike the Affidavit on the basis that it is a sham affidavit.

B. Personal Knowledge

CNH contends that Mr. Bennett lacks personal knowledge to support substantial portions of the Affidavit, and as such seeks to strike paragraphs 3, 5, 6-11, 23-53. Travelers replies that Mr. Bennett has personal knowledge of the facts in the Affidavit because for several years Mr. Bennett was directly involved in underwriting the Tenneco Insurance Program.

Under Delaware law “a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.”⁵ Affidavits may be submitted by a party for the purpose of creating a material issue of fact, but the affidavits must provide facts admissible in evidence and affiants must be competent to testify thereto.⁶ Under certain circumstances, courts have accepted an affidavit of a corporate officer who had no personal knowledge but, instead, relied on staff reports.⁷ In those circumstances, enough information regarding the matter testified to exists in the documents accompanying the pleadings and moving papers so as to bring the affiant within the classification of a person having knowledge of the facts, or because other corroborating testimony existed as to the information sought to be admitted.

In reviewing affidavits attached to a motion for summary judgment, the Court may disregard those portions which do not comply with the Rules of this Court.⁸ The Court does not

⁵ Del. R. Evid. 602.

⁶ *Mehiel v. Solo Cup Co.*, No. 06C-01-169 2010 WL 4513389 *6 (Del. Super. Ct. Oct. 14, 2010).

⁷ *Id.*

⁸ *Van De Walle v. Unimation, Inc.*, No. 7046, 8 Del. J. Corp. L. 623, 634 (Del. Ch. Ct. 1983).

need to strike an affidavit in its entirety if part of the information in the affidavit is clearly proper.⁹

Mr. Bennett began his employment with Travelers in December 1973. From October 1977 until his retirement in 2011, he worked on the Tenneco Insurance Program. Mr. Bennett started in October 1977 as a Senior Underwriter on the Tenneco account, and was subsequently promoted to Account Executive, Assistant Secretary, and finally Director. During that time Mr. Bennett became familiar with the Tenneco Insurance Program, personally negotiated several of the Tenneco policies, and worked with the Tenneco brokers. At his deposition, Mr. Bennett stated that when he joined the Tenneco account he spent a lot of time with the primary contact on the Tenneco account, familiarizing himself with all the policies, the workings of the account and the relationship.¹⁰

Applying these principles, and after a review of the Affidavit and Mr. Bennett's deposition, the Court has determined that not all of the statements contained in the Affidavit are competent for consideration by the Court on summary judgment. As to paragraph 1-4, 6-24,¹¹ 29-31, 33-34, 35 and 36 (only from 1977 forward), 37j, 38b-38h, 40 (only from 1977 forward), 41, 44, 47, 49 (only from 1977 forward), 51, 54 and 55, the Court finds that (i) the paragraph is one of general knowledge, (ii) is background information, (iii) Mr. Bennett has personal knowledge of those facts which occurred between 1977 and 1986, and/or (iv) as to those facts which occurred from 1973 to 1977, there exists sufficient information in the documents accompanying the pleadings and moving papers so as to bring Mr. Bennett within the classification of a person having knowledge of these facts.

⁹ *Id.*

¹⁰ Deposition of Gary C. Bennett, November 19, 2014, 54:9-54:20.

¹¹ The Court notes that paragraph 22 is a blanket statement as to what a particular document states. The actual document and not Mr. Bennett's statement as to the document will control.

As to paragraphs 5, 25-28, 32, 35 and 36 (any time prior to 1977), 37a-37i, 38a, 39, 40 (any time prior to 1977 except facts provided in paragraph 41 which are supported by documents accompanying the moving papers), 42, 43, 45-46, 48, 49 (any time prior to 1977), 50, 52, and 53, the Court finds that Mr. Bennett did not have personal knowledge of these facts, and therefore these paragraphs will be disregarded by the Court when considering Travelers' summary judgment papers.

C. The hearsay arguments.

CNH contends that those portions of the Affidavit which rely on the documents referenced in paragraphs 5, 25, 28, 32, 33, 37-40, 42, 46, and 50-53 should be stricken because they rely on inadmissible hearsay.¹² Travelers argues that the documents referenced in these paragraphs do not constitute hearsay because they fall within the "ancient documents" exception to hearsay.

Under Evidence Rule 803(16) statements in a document in existence 20 years or more, the authenticity of which is established are not excluded by the hearsay rule, even though the declarant is available as a witness. Evidence Rule 803(16) is generally used out of necessity due to the lapse of memory, death of witnesses or alike. To satisfy the authenticity requirement, Evidence Rule 901(b)(8) states that ancient documents must be in such condition as to create no suspicion concerning their authenticity, and were in a place where, if authentic, they would likely be. The proponent of an ancient document must make a *prima facie* showing to the Court of authenticity before the document may be considered under Evidence Rule 803(16).¹³

The Court has reviewed the Affidavit to determine how Travelers attempted to authenticate the contested documents under Rule of Evidence 803(16) and Evidence Rule 901(b)(8). Other than

¹² Paragraph 46 of the Affidavit does not reference or rely upon a document. The Court has already ruled above that the Court will not consider paragraph 46 because Mr. Bennett is not competent to testify on that point.

¹³ See, e.g., *Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1375-76 (3rd Cir. 1991).

statements that the documents are “true and correct copies” and come from someone’s files, the Court observes that Travelers did not otherwise attempt to authenticate the documents. The Court notes that Mr. Bennett’s statement regarding “true and correct copies” might meet, on a *prima facie* basis, the requirement that the ancient document is in such a condition to create no suspicion concerning the document’s authenticity, but Mr. Bennett makes no statements (nor could he) that the documents were in a place where, if authentic, the documents would likely be. Mr. Bennett is not Travelers’ custodian of records nor is he presently employed by Travelers so that he would know that the documents have been found in a location where, if authentic, the documents would likely be. Accordingly, as to the documents attached to paragraphs 5, 25, 28, 32, 33, 37, 38a, 39, 40, 42, and 50-52, the authenticity of these documents has not been established, and therefore the Court will disregard these documents.

As to paragraph 46, Mr. Bennett has personal knowledge of this information, and the information is not hearsay.

IV. CONCLUSION

Based on the foregoing, **IT IS HEREBY ORDERED** that the Motion is **DENIED**, however the Court will disregard certain paragraphs and documents of the Affidavit.¹⁴

Dated: March 10, 2015
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

¹⁴ In the Motion CNH highlights as significant, that Mr. Bennett is being paid \$150 per hour for his fact testimony in this case. The Court finds little if any significance to the fact that Travelers compensated Mr. Bennett for his time. If CNH is implying that Mr. Bennett is being influenced financially to testify in Travelers’ favor, the Court notes that Mr. Bennett is retired, and it does not seem unreasonable that he provide his services to his previous employer free of charge.