

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL

PAULINE LYNCH,

Plaintiff,

vs.

DEPENDABLE CLEANING, INC. and HESS
OIL VIRGIN ISLANDS CORPORATION,

Defendants.

CIVIL NO. 885/1995

ACTION FOR DAMAGES

NOT FOR PUBLICATION

APPEARANCES:

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CABRET, Judge

MEMORANDUM OPINION

(Filed: November 14th, 1997)

THIS MATTER came before this Court on Defendant Hess Oil Virgin Islands Corporation's ("HOVIC") motion for summary judgment which was filed on January 28, 1997. In response to defendant's motion, the plaintiff asks this Court to delay ruling on this matter pursuant to Fed.R.Civ.P. 56(f) primarily to take the depositions of a number of witnesses as well as to discover

information that would be relevant to whether HOVIC is liable. HOVIC opposes plaintiff's Rule 56(f) motion. The plaintiff is suing the defendants as a result of her slip and fall accident at HOVIC's Administration Building. For the following reasons, the Court will grant plaintiff's Rule 56(f) motion.

Rule 56(f) of the Federal Rules of Civil Procedure states

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f)(1997).

Thus, Rule 56(f) allows a party who has no specific material contradicting his adversary's presentation to survive a summary judgment if he presents valid reasons justifying his failure of proof. The Third Circuit has provided clear guidelines for determining whether the reasons offered by the non-moving party are sufficient to merit postponement of a summary judgment motion. A party seeking to delay responding to a summary judgment motion pending further discovery must specify [by way of affidavit]: (1) what particular information is sought, (2) how, if uncovered, the information would preclude summary judgment, and (3) why the information has not previously been obtained. Dowling v. City of Philadelphia, 855 F.2d 136, 140 (3d Cir. 1988); Pastore v. Bell Telephone Company of Pennsylvania, 24 F.3d 508, 511 (3d Cir. 1994). The purpose of the affidavit is to ensure that the nonmoving party is invoking the protection of Rule 56(f) in good faith and to afford the trial court the showing necessary to assess the merit of a party's opposition. Radich v. Goode, 886 F.2d 1391, 1394 (3d Cir. 1989). However, failure to support a Rule 56(f) motion by affidavit is not automatically fatal to its consideration so long as the motion still identifies with specificity what

particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.” See Sames v. Gable, 732 F.2d 49, 52 n.3 (3d Cir. 1984) and Lunderstadt v. Colafella, 885 F.2d 66,71 (3d Cir. 1989).

In the instant matter, counsel for plaintiff submitted an affidavit in support of the Rule 56(f) motion where he testifies that

Plaintiff has to conduct depositions of HOVIC personnel named within this Rule 56(f) motion in order to properly respond to defendant HOVIC’s summary judgment motion; and

The information plaintiff needs to obtain is not available from any other source and is relevant to the duty owed to plaintiff by defendant HOVIC.

Although plaintiff has identified what particular information is being sought, HOVIC argues that plaintiff has not satisfied the last two affidavit requirements since the affidavit fails to specify (1) why the information had not been previously obtained during fifteen (15) months since filing lawsuit, and (2) how the information would preclude summary judgment. Plaintiff, in her response to HOVIC’s opposition to the Rule 56(f) motion, states that her Rule 56(f) motion provides sufficient information to permit this Court to postpone a ruling on HOVIC’s summary judgment motion until plaintiff has had time to complete depositions and discovery.

With respect to the second prong, how the information would preclude summary judgment, plaintiff, in her Rule 56(f) motion, states that (1) factual information in possession of HOVIC and the witnesses is necessary to define the scope and control HOVIC had over Dependable Cleaning (“Dependable”) personnel¹ and (2) “the information is relevant to whether liability exists on the part

¹ See Plaintiff’s Rule 56(f) Motion, paragraphs 1 and 7.

of HOVIC². Specifically, plaintiff claims that despite HOVIC's claim that Dependable is an independent contractor, the work "agreement" between HOVIC and Dependable was never signed by an agent or representative of Dependable and clearly indicates that HOVIC controlled the time Dependable employees would work as well as that HOVIC was to provide cleaning equipment and supplies.³ Plaintiff further claims that HOVIC personnel are in possession of knowledge of the events surrounding the creation of the "agreement" between HOVIC and Dependable and that this factual information is necessary in order to define the scope of control HOVIC had over Dependable personnel. Thus, there may be sufficient evidence that has not yet been discovered that would refute the employer/ contractor distinction between HOVIC and Dependable and would be relevant to the issue of whether HOVIC knew or should have known of the dangerous condition. See RESTATEMENT (SECOND) OF TORTS § § 410⁴, 411⁵, 414⁶(1965).

² Rule 56(f) Motion, paragraph 9.

³ Rule 56(f) Motion, Exhibit 2.

⁴ Section 410 states

The employer of an independent contractor is subject to the same liability for physical harm caused by an act or omission committed by the contractor pursuant to orders or directions negligently given by the employer, as though the act or omission were that of the employer himself.

⁵ Section 411 states

An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor

(a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or

Additionally, plaintiff notes that there are inconsistencies in the present record concerning the factual circumstances of the accident. HOVIC's Post-Accident investigation revealed that (1) there were warning markers indicating wet floor⁷, (2) Dependable's employees were the only ones who knew of the danger⁸, and (3) plaintiff walked through the area where Dependable employees were mopping and that plaintiff walked through it anyway and slipped⁹. However, Lewis Luke, a former employee of Dependable, has testified that he never put up any markers or cones because he immediately wiped up the spill using paper towels and never used a mop¹⁰. Additionally, Mr. Monaville Bonit, owner and manager of Dependable, has testified that it was his understanding that there was no need for signs placed at the area of the fall since he was informed that the spill had been cleaned up¹¹.

(b) to perform any duty which the employer owes to third persons.

⁶ Section 414 states

One who contracts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

⁷ Plaintiff's Exhibit 5- HOVIC's response to plaintiff's First Set of Interrogatories, Interrogatory No. 12.

⁸ Id.

⁹ Plaintiff's Exhibit 8- HOVIC's response to plaintiff's First Set of Interrogatories, Interrogatory No. 9.

¹⁰ Plaintiff's Exhibit 9- November 22, 1996 Deposition of Lewis Luke at pages 18 and 19.

¹¹ Plaintiff's Exhibit 7- November 22, 1996 Deposition of Monaville Bonit at page 28, lines 3-7.

The Court finds that plaintiff's Rule 56(f) motion sufficiently specifies how the sought after information would preclude the granting of HOVIC's motion for summary judgment. If any future evidence reveals that HOVIC had significant control over Dependable's employees and that said employees had knowledge of the spill prior to the accident, HOVIC may be found liable for plaintiff's injuries. Accordingly, the Court finds that plaintiff has met the second prong of the Third Circuit test.

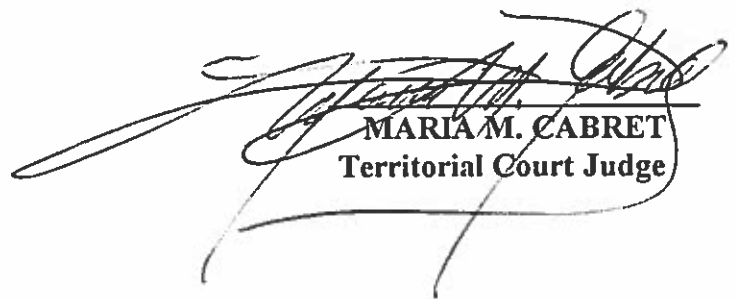
With respect to the third prong, why the information has not previously been obtained, the plaintiff states she has indicated the "need" for more information arising due to the new knowledge plaintiff has gained from discovery requests and interrogatories. Plaintiff further claims that as to the witnesses she wishes to depose, she only gained knowledge of these individuals when she received defendant HOVIC's responses to interrogatories on November 20, 1996. Finally, plaintiff claims that she has attempted to schedule these individuals' 30(b)(6) depositions, but to no avail.¹² HOVIC, in opposition to the Rule 56(f) motion, argues that during the fifteen (15) month pendency of this lawsuit, plaintiff has had ample time to gather information regarding the allegations in her complaint.

The Court finds that plaintiff has sufficiently stated why she was unable to obtain the requested information earlier. A review of the casefile shows that plaintiff only learned of the witnesses she seeks to depose on November 20, 1996 and that she at least attempted twice before HOVIC's filing of the summary judgment motion to schedule the depositions. Additionally, the Court also notes that no scheduling order has been entered in this matter. Thus, plaintiff's motion satisfies the third prong of the Third Circuit's test.

¹² Rule 56(f) Motion, Exhibit 10.

CONCLUSION

Plaintiff meets the Third Circuit's three-prong test for postponing a summary judgment motion pursuant to Rule 56(f). Although plaintiff failed to specify in an affidavit *how the information sought would preclude summary judgment and why the information had not been previously obtained*, plaintiff's Rule 56(f) motion sufficiently addresses these questions to allow this Court to determine that postponement of a ruling on HOVIC's summary judgment motion is warranted. Accordingly, the Court will grant plaintiff's Rule 56(f) motion.



MARIA M. CABRET
Territorial Court Judge