

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

=O=

DEBORAH H. AVERY,	:	
Plaintiff	:	
vs.	:	CIVIL NO. 145/1982
AVILDA MATTHIAS,	:	
Defendant	:	

GEORGE MARSHALL MILLER, ESQ.
5-6 Kongens Gade
St. Thomas, Virgin Islands
(Attorney for Plaintiff)

DESMOND L. MAYNARD, ESQ.
P. O. Box 8388
St. Thomas, Virgin Islands
(Attorney for Defendant)

MEMORANDUM OPINION AND ORDER
(February 10, 1983)

FEUERZEIG, J.

In this action for assault and battery, the plaintiff, Deborah Avery, has moved for summary judgment on the issue of defendant's liability. She also has moved in limine to exclude the testimony of a defense witness, who failed to appear at a scheduled deposition. The defendant, Avilda Matthias, opposes both motions, contending that genuine issues of material fact remain with respect to whether the actions she admittedly committed were done in self-defense or in response to provocation. The court finds that there are no material issues of fact with respect to liability and will grant summary judgment to the plaintiff. The motion in limine will be denied.

To grant summary judgment a court must determine that there are no genuine issues of material fact and that, as a matter of law, the moving party is entitled to judgment. Fed.R.Civ.P. 56, Smith v. Sparky's Inc., Civ. No. 78-232 (D.V.I. Dec. 6, 1979). In considering a motion for summary judgment, the court must resolve all inferences and factual disputes against the moving party unless the motion is supported by affidavits or other evidence that permit only one conclusion. Chulani (V.I.) Inc. v. Fireman's Fund Insurance, Civ. No. 79-93 (D.V.I. February 20, 1980). A party opposing summary judgment does not always have a duty to present evidence in opposition, but "if the proof in support of the motion is largely documentary and has a high degree of credibility, the opponent must produce convincing proof attacking the documents in order to sustain his burden." 10 C. Wright and A. Miller, Federal Practice and Procedure, §2727 at 536 (1973) quoting Bauman, A Rationale for Summary Judgment, 33 Ind. L.J. 467, 483-484 (1958).

Here, the plaintiff has submitted portions of a deposition of the defendant in which she admits facts which constitute a prima facie case of assault and battery. In opposition, defendant through her counsel offers nothing more than legal arguments in an attempt to justify the actions the defendant admittedly committed. Mere allegations by counsel of the existence of genuine issues of material fact in the face of sworn testimony or affidavits do not establish such issues of fact. Consequently, the court must determine if the plaintiff is entitled to judgment as a matter of law.

The defendant relies on two theories in justification of her conceded assault and battery: self-defense and provocation, but cites no authority in support for either. The Restatement (Second) of Torts §65 (1965), provides that a person is "privileged to use reasonable force . . . to defend himself against unprivileged harmful or offensive contact . . . which he reasonably believes that another is about to inflict intentionally upon him." Nothing in the defendant's deposition suggests the defendant actually believed or had any basis for believing that the plaintiff was about to inflict any offensive contact upon her. Indeed, the plaintiff does not even allege that she had such a belief. Defense counsel suggests, however, that the defendant feared she "might be attacked" after the plaintiff allegedly interfered with a discussion the defendant was having with her former beau, who was now favoring the plaintiff. This, however, is merely defense counsel's statement and no sworn statement of the defendant has been presented to the court in which she suggests that she harbored such fear.

Although the court has flexibility with regard to the evidence that may be considered in deciding a summary judgment motion, C. Wright & A. Miller, Federal Practice and Procedure §2721 (1978), that flexibility is not so great as to allow the court to consider bare representations of counsel when they are met by sworn testimony as has been presented. See Pritz v. Hackett, 440 F.Supp. 592 (D. Wis. 1977), and Kinoy v. Mitchel, 67 F.R.D. 1, 15 (D.N.Y. 1975) (the court barred the introduction of privileged exhibits in camera for the purpose of summary judgment motion stating "our system of justice does not encompass ex parte determinations on the merits of

cases in civil litigation.")

Rule 56(e) commands that a party opposing a properly supported motion for summary judgment, and defendant's motion is properly supported, "may not rest upon the mere allegations or demands of his pleading, but his response by affidavits or otherwise . . . must set forth specific facts that there is a genuine issue for trial. If he does not so respond [as the plaintiff has not done here], summary judgment, if appropriate, shall be entered against him."

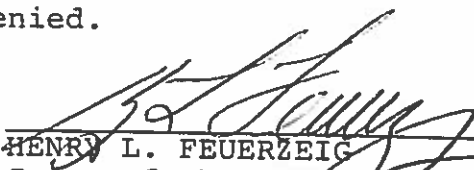
The motion in limine to prevent Harry Daniel from testifying will be denied. Although his failure to attend a scheduled deposition may be inconvenient, there has been no showing that his absence was in any way the result of the defendant's actions. Moreover, plaintiff has now had ample time to depose the witness. To prevent the defense from calling him, if he still will be needed at the hearing on damages, would be unjust.

ORDER

ORDERED that plaintiff's motion for summary judgment on the issue of liability is granted and the jury trial now set for the week of March 14, 1983 will be limited to the issue of damages, with jury to be selected at 9:00 a.m. on March 14, 1983, and it is further

ORDERED that plaintiff's motion in limine to preclude the testimony of Harry Daniel is denied.

ATTEST:


HENRY L. FEUERZEIG
Judge of the Territorial Court

VIOLA E. SMITH
Administrator/Clerk of the Court