

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
SUSAN K. GAUVEY
U.S. MAGISTRATE JUDGE

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Re: Feldman's Medical Center Pharmacy, Inc. v. CareFirst,
Inc., Civil No. SKG-10-254

Dear Counsel:

Currently pending before the Court is Defendant CareFirst Inc.'s ("CareFirst") motion to strike the statement of undisputed material facts in support of Plaintiff Feldman's Medical Center Pharmacy, Inc.'s ("FMCP") motion for summary judgment or, in the alternative, for an extension of time to respond to the statement ("Motion to Strike"). (ECF No. 107). Defendant's motion is hereby DENIED IN PART and GRANTED IN PART. Plaintiff's statement of undisputed material facts ("SUMF") shall stand, but Defendant shall have until close of business on Monday, June 27, 2011 to respond in accordance with the guidance set forth herein.

CareFirst asserts that FMCP's SUMF, which consists of 176

separately numbered paragraphs, is improper on the grounds that it consists predominantly of non-material facts. (ECF No. 107, 1). CareFirst does not specifically object to individual assertions in FMCP's SUMF, but cites by way of example FMCP's recitation of the background of hemophilia (ECF No. 100, Ex. 2, ¶¶ 1-23) and the history of the pharmacy industry (ECF No. 100, Ex. 2, ¶¶ 53-64). (ECF No. 108, 2). CareFirst maintains that it should not be required to "wade through those assertions or to dispute them or else risk entry of an Order that the facts are judicially established." (Id.). In response, FMCP argues that Rule 56 of the Federal Rules of Civil Procedure imposes no requirement that each fact provided in support of a motion for summary judgment must be material. (ECF No. 118, 4).

Given that FMCP does not refute CareFirst's argument that many of the facts in its SUMF are not material, the issue presented here is whether a statement of facts supporting a motion for summary judgment, as provided for under Rule 56(c), may contain only material facts and, if only material facts are permitted, what is the remedy, if any, for the movant's inclusion of non-material facts?

Rule 56 codifies the summary judgment standard, providing that "the Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56 does not require the movant to provide a separate statement of facts in support of its motion for summary judgment, nor does it explicitly establish that if a movant chooses to make such a submission, the statement of facts must contain only facts that are "material." See Fed. R. Civ. P. 56; see also Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2725 (explaining that "a fact or facts are material if they constitute a legal defense, or if their existence or nonexistence might affect the result of the action, or if the resolution of the issue they raise is so essential that the party against whom it is decided cannot prevail").

Although FMCP recognizes that "only material facts are relevant to the outcome of the motion for summary judgment," it maintains that "Rule 56 does not say that all facts cited in support of a motion for summary judgment also must be material." (ECF No. 118, 4). While this statement may be technically correct, it is logically inconsistent; clearly it is preferable for a movant to ensure that assertions submitted as part of its "statement of undisputed material facts" are at least arguably

material. By clearly and concisely presenting the facts that it asserts cannot be genuinely disputed and pointing directly to the record materials that support the assertions, a movant facilitates an efficient and well-informed judicial decision.

Local rules for many federal district courts require the moving party to include a statement of facts which sets forth in separately numbered paragraphs a concise statement of each material fact as to which it contends there is no genuine issue to be tried. Some local rules set forth a structured format requiring the non-moving party to respond to the movant's statement fact-by-fact, while others do not require the respondent to address each fact. Many other districts, including the District of Maryland, do not require the moving party to submit a statement of undisputed facts with its motion. See Federal Judicial Center, Memorandum to Judge Michael Baylson re: Report on Summary Judgment Practice Across Districts with Variations in Local Rules (April 2, 2008) (stating that thirty-seven federal district courts do not require the moving party to submit a statement of undisputed facts with its motion). The legislative history of Rule 56 is particularly illustrative given the lack of clear guidance in the text of Rule 56 and the Local Rules with regard to the issue presented here.

On December 1, 2010, significant amendments to Rule 56 took effect, including the addition of subdivision (c), which "establishes a common procedure for several aspects of summary judgment motions synthesized from similar elements developed in the cases or found in many local rules." Fed. R. Civ. P. 56, Committee Note, 2010 Amendments. Rule 56(c)(1) provides that:

A party asserting that a fact cannot be or is genuinely disputed must support this assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials, or;

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that the adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). Thus, the amended Rule explicitly addresses the evidentiary support required to support an assertion of fact, but does not impose requirements with respect to the nature of the assertions themselves.

Before ultimately submitting the current language in Rule 56(c) to the Supreme Court for review, however, the Civil Rules Advisory Committee considered a detailed provision that would have established a uniform 3-part procedure for a summary judgment motion. See Civil Rules Committee Report (May 2009) at 21. This "point-counterpoint" rule would have required that a "movant must file a motion identifying each claim or defense - or the part of each claim or defense - on which summary judgment is sought; a statement of material facts identified in separately numbered paragraphs; and a brief." Id. Then, the opposing party would be required to file a correspondingly numbered response to each fact, and might identify additional material facts. Id. The movant then could reply to any additional fact stated by the nonmovant. Id. According to the Civil Rules Committee Report, "[t]his proposed procedure was based on local rules in some 20 districts." Id. Following extensive public comments and testimony, the Committee eliminated the provision, explaining that "although the point-counterpoint procedure is worthy, and often works well, the time has not come to mandate it as a presumptively uniform procedure for most cases." Id. The Committee cited division in the trial bar and comments from district judges that point-counterpoint procedures often made more work, required more time to decide a motion, were inefficient, and created extra expense. Id. at 22. Judges commented that the separate statements of facts were "supernumerary, lengthy, and formalistic," and that "motions often asserted hundreds of facts and became the focus over lengthy debates over relevance and admissibility." Id. at 22-23 (discussing comments of Judge Claudia Wilken of the Northern District of California and Judge David Hamilton of the Southern District of Indiana).

The proposed amendments to Rule 56(c) also included a provision that "[a] party may accept or dispute a fact either generally or for purposes of the motion only." Id. at 25. The Committee ultimately withdrew this provision, however, stating that it had been added "primarily out of concern for early reports that the point-counterpoint procedure may elicit inappropriately long statements of undisputed facts." Id. The Committee further explained that,

A party facing such a statement might conclude that many of the stated facts are not material and that it is more efficient and less expensive simply to accept them for purposes of the motion rather than undertake the labor of attacking the materials said to support the facts and combing the record for counterpoint citations. Elimination of the point-counterpoint proposal removes the primary reason for including this provision.

Id.

The Committee also reasoned that the provision created a tension with subdivision (g). Id. Rule 56(g) provides that "[i]f the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case." Fed. R. Civ. P. 56(g).

This possibility apparently is CareFirst's primary concern with regard to FMCP's statement of 176 facts. See (ECF No. 108, 2) ("While at first glance this may seem like a tempest in a teapot, the unfortunate reality is that CareFirst must proceed with some caution. FMCP's counsel has made it clear on several occasions that FMCP intends to file another (and rather significant) lawsuit against multiple defendants, including CareFirst. Given that overt threat of further litigation, CareFirst cannot simply ignore the facts set forth in the SUMF just because they do not appear to be material in this action . . . CareFirst cannot run the risk of ignoring possible misstatements in the SUMF because Feldman's might well try to cite those as judicially established facts in the upcoming litigation.").

The Committee Note to subdivision (g) directly addresses CareFirst's concern, emphasizing that,

The court must take care that this determination does not interfere with a party's ability to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of detailed response to all facts stated by the movant. This position should be available

without running the risk that the fact will be taken as established under subdivision (g) or otherwise found to have been accepted for other purposes.

Fed. R. Civ. P. 56, Committee Note, 2010 Amendments.

Thus, the Court finds that CareFirst is free to accept FMCP's assertions of fact for purposes of the motion only. In accordance with the Committee Note to Rule 56(g), the Court will not deem established, for the purposes of the case generally or otherwise, any facts accepted by CareFirst for the purpose of the motion only.

CareFirst filed its combined cross-motion and opposition to FMCP's motion for summary judgment on April 1, 2011 in accordance with the parties' stipulation regarding deadlines for briefing for dispositive motions. (ECF No. 109). Contemporaneously, CareFirst submitted its own statement of 21 undisputed material facts. (ECF No. 112). CareFirst shall have until close of business on Monday, June 27, 2011 to supplement its SUMF by responding to FMCP's SUMF in accordance with the guidance set forth herein.

Despite the informal nature of this letter, it will constitute an Order of the Court and will be docketed accordingly.

Sincerely yours,

/s/

Susan K. Gauvey
United States Magistrate Judge