

to Respondents' Appeal, p. 8). As a result, respondents agreed to produce some of the subpoenaed information, and the hearing examiner narrowed the scope of the remaining specifications. The hearing examiner reasonably exercised—rather than abused—his wide discretion in ordering compliance with the subpoenas.

Respondents also request that they be awarded the cost of producing the documents. The Commission's rules make no provision for such a procedure, nor do we believe it is necessary here. If respondents wish to relieve themselves of the burdensome costs which they assert will be involved in complying with these subpoenas, they can do so by permitting Commission counsel access to the subpoenaed files to do the work of selecting the documents to be produced. This was the effect of a court order issued in *FTC v. Emanuel Gladstone*, Civil No. 13,903 (N.D. Ga.), Order issued August 25, 1970 (Tr. pp. 3-4), and a similar procedure appears appropriate here if respondents so choose.

In this matter Chairman Kirkpatrick did not participate, and Commissioner MacIntyre abstained from voting.

ORDER DENYING INTERLOCUTORY APPEAL

Respondents having filed an interlocutory appeal from the hearing examiner's November 5, 1971 Order Ruling on Motion to Quash Subpoenas Duces Tecum; and

The Commission having considered said appeal and the answer of counsel supporting the complaint in opposition thereto, and having determined, in accordance with the views appeal should be denied;

It is ordered, That respondents' appeal from the hearing examiner's November 5, 1971 order be, and it hereby is, denied.

Chairman Kirkpatrick not participating, and Commissioner MacIntyre abstaining.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order and Opinion, March 9, 1972

Order denying respondent's interlocutory appeal from hearing examiner's ruling denying a Motion to Dismiss and/or for Summary Decision.

OPINION OF THE COMMISSION

This matter is before the Commission on the request of International Magazine Service of the Mid-Atlantic, Inc. (IMS) to file an interlocutory appeal from the hearing examiner's denial of a Motion to Dismiss and/or for Summary Decision. For reasons set forth

below, we find that respondent's request fails to make the necessary showing required by Section 3.23 of the Commission's Rules of Practice to justify permitting the interlocutory appeal.¹

IMS' Motion to Dismiss and/or for Summary Decision sought dismissal of five allegations in the complaint, Paragraphs 4(e) and 5(e), 4(f) and 5(f), 6(a), 6(c), and 7, on the ground they failed to state a cause of action. Respondent claims the examiner erred in failing to dismiss these paragraphs, citing four examples of error. First, respondent argues that Paragraph 6(c) fails to allege a violation because it relates to the collection of money owed IMS and not to practices inducing members of the public to sign subscription contracts. Second, IMS challenges Paragraph 4(f) and 5(f), which allege that it gives a false reason when declining to cancel a subscription, on the ground that such action is not illegal where IMS is under no obligation to cancel. Third, Paragraph 6(a) (which alleges IMS stated subscription costs as "50 cents per week" over a period of 60 months) is challenged on the ground that it does not allege any misrepresentation. Fourth, Paragraph 7 is challenged on the ground that it does not allege specific circumstances under which IMS' alleged refusal to extend a 72-hour cancellation privilege is a violation of law.

Respondent also sought summary decision on the allegations contained in complaint Paragraphs 4(c)-5(c), 4(d)-5(d), 4(e)-5(e), 4(f)-5(f), 6(c)(1), 6(e) and 7(b) and supported this portion of the motion with the sworn affidavits of its president. Complaint counsel did not file opposing affidavits, but did file an unsworn answer to the motion stating that they would produce witnesses and documents at trial to contradict the alleged facts contained in respondent's affidavits. Respondent argues that complaint counsel were required to answer with sworn affidavits under Section 3.24 of the Commission's Rules of Practice and that complaint counsel's unsworn statements failed to raise an issue of fact, thereby warranting summary decision.

In requesting permission to file an interlocutory appeal in this matter, respondent argues that its motion involves approximately half the allegations in the complaint and that the trial would be much shorter if the motion had been granted. It contends that the correctness of the examiner's ruling should thus be determined before the hearings commence. We do not agree that these circumstances necessitate an interlocutory appeal. The same circumstances arise when any motion to dismiss or for summary decision is denied. While

¹ Section 3.23 provides that permission to file an interlocutory appeal will not be granted:

except upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice.

the examiner's ruling may affect the final decision, it is not essential that its correctness be determined before the hearing. Further, the ruling does not involve substantial rights of respondent. The only possible prejudice to respondent is having to go to trial on the complaint allegations it is challenging here. If complaint counsel prove their case, respondent will have ample opportunity after an initial decision is rendered to reassert its challenge to the examiner's ruling.

Nevertheless, while denying this appeal we recognize that respondent's request to appeal arose in part due to the Commission's new summary decision rule. Therefore, in order to prevent a recurrence of this problem, we wish to indicate the procedures to be followed in the future under this rule.²

Rule 3.24 provides in relevant part:

(1) Any party to an adjudicatory proceeding may move with or without supporting affidavits for a summary decision in his favor upon all or any part of the issues being adjudicated. * * *

(2) Any other party may, within ten (10) days after service of the motion, file opposing affidavits. * * *

(3) Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matter stated therein. The hearing examiner may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. *When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial. If no such response is filed, summary decision, if appropriate, shall be rendered.*

(4) Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the hearing examiner may refuse the application for summary decision or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is appropriate and a determination to the effect shall be made a matter of record. (Emphasis added.)

We will consider the following questions which are raised by the provisions of this rule: (1) under what circumstances are affidavits

²Our ruling today is made without prejudice to respondent's right to file with the hearing examiner a motion for reconsideration of his denial of summary decision in light of this opinion. In entertaining such a motion the hearing examiner should exercise his discretion to permit complaint counsel to file opposing affidavits, should they choose to do so, despite the fact that the time for filing opposing affidavits has passed. We believe continuance may be justifiable in this case if complaint counsel's failure to file was based on an excusable misinterpretation of the new rule.

or other evidentiary material required to meet a motion for summary decision; and (2) are counsel affidavits sufficient to oppose a summary decision motion.

Requirement of Opposing Affidavits

In our view, the rule must be read to require opposing affidavits or other evidentiary-type material so long as the affidavits and material filed in support of the motion for summary decision demonstrate that the moving party is entitled to judgment as a matter of law. Any other interpretation of this rule could defeat its purpose of eliminating delays in adjudication arising from mere assertions of factual issues which are not well grounded. To allow sworn affidavits to be opposed by unsworn assertions of counsel could very well frustrate the rule's utility. We note also that Rule 3.24 closely follows the provisions of Federal Rule 56, and the controlling Federal cases are unanimous in holding that counter-affidavits are required to avoid summary judgment where the movant's affidavits are sufficient.³

Failure of an opposing party to file counteraffidavits, however, does not automatically entitle the moving party to summary decision. Summary decision under Rule 3.24 would be improper where the movant's affidavits are insufficient.⁴ The movant has the burden of establishing the nonexistence of any genuine issue of material fact, and all doubts are resolved against him.⁵

In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970), the Supreme Court held that if the moving party fails to shoulder his burden, his motion should be denied even though the opposing party has presented no evidentiary materials in opposition.⁶ Also, the courts have emphasized that summary judgment is improper where credibility is crucial or where various inferences can be drawn, even where no adequate counteraffidavits are filed.⁷

³ *E.g.*, *Grimm v. Westinghouse Electric Corp.*, 300 F. Supp. 984, 991 (N.D. Calif. 1969); *General Teamsters Union Local 249 v. Motor Freight Express, Inc.*, 48 F.R.D. 294, 295 (W.D. Pa. 1969); *Dawkins v. Green*, 285 F. Supp. 772, 774 (N.D. Fla. 1968), *rev'd on other grounds*, 412 F.2d 644 (5th Cir. 1969); *H. Daroff & Sons, Inc. v. Strickland Transp. Co.*, 284 F. Supp. 510, 511-13 (E.D. Pa. 1968); *Hartford Accident & Indemnity Co. v. Lloyd*, 713 F. Supp. 7 (W.D. Ark. 1959); *cf. Lundeen v. Cordner*, 354 F.2d 401, 406-07 (8th Cir. 1966), *motion to amend judgment denied*, 356 F.2d 1969 (8th Cir. 1966); *Lewis v. Quality Coal Corp.*, 243 F.2d 769 (7th Cir.), *cert. denied*, 355 U.S. 882 (1957).

⁴ *United Fruit Co.*, Dkt. 8795 (hearing examiner's order dated March 8, 1971).

⁵ *Sprague v. Vogt*, 150 F.2d 795, 800 (8th Cir. 1945).

⁶ *Accord, Dawkins v. Green*, 412 F.2d 644 (5th Cir. 1969); *Peckham v. Ronrico Corp.*, 171 F.2d 653 (1st Cir. 1948).

⁷ *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 628 (1944); *United States v. DeWitt*, 265 F.2d 393, 400 (5th Cir.), *cert. denied*, 361 U.S. 866 (1959); *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

Counsel Affidavits

The language of Rule 3.24(a)(3) and cases interpreting Federal Rule 56 indicate that counsel affidavits (*e.g.*, stating that certain witnesses will be called and relating to their expected testimony) would not be sufficient to prove or disprove the existence of a genuine issue of material fact.⁸ Counsel affidavits generally would not satisfy the requirements of Rule 3.24(a)(3), since affidavits reciting what counsel expected to prove at trial would be hearsay when offered to prove or disprove the existence of any factual issue. Consequently, they would not be admissible in evidence, nor would the affiant counsel be competent to testify to the matters stated therein at trial.

Counsel affidavits would not be subject to these objections, however, where used under Rule 3.24(a)(4) to show why sufficient opposing affidavits could not be presented. If such opposing affidavits cannot be produced, Paragraph (4) gives the hearing examiner discretion to refuse the application for summary decision or to order a continuance to allow evidentiary materials to be obtained. If, however, the effort required to produce affidavits would result in undue burden or undue delay in trial, it would be within the examiner's discretion to deny summary decision.

Rule 3.24(a)(4) tracks Federal Rule 56(f), and the courts have held that summary judgment should be denied on the basis of Rule 56(f) where knowledge of the controlling facts is exclusively or largely under the control of the moving party.⁹ The same procedure should apply under Rule 3.24 as well.

Thus, counsel affidavits generally will not satisfy the requirements of Rule 3.24 except when used to show (1) that opposing affidavits cannot be produced, (2) that the facts in issue are in the control of the moving party, or (3) that the effort required to obtain affidavits or other evidentiary material would unduly delay trial.

Other Evidentiary Materials

Rule 3.24 refers to several types of evidentiary material which may be employed by counsel in connection with a motion for summary decision, such as answers to interrogatories, admissions on file, affidavits, pleadings, and depositions.¹⁰ Although not specifically mentioned in

⁸ *E.g.*, *Bumgarner v. Joe Brown Co.*, 376 F.2d 749 (10th Cir.), *cert. denied*, 389 U.S. 831 (1967).

⁹ *United States ex. rel. Kolton v. Halpern*, 260 F.2d 590, 591 (3rd Cir. 1958) (*dicta*); *Dombrowski v. Epperdy*, 185 F. Supp. 478, 484 (S.D.N.Y. 1960), *aff'd*, 321 F.2d 463 (2d Cir. 1963).

¹⁰ It should be noted that the use of depositions under Rule 3.24 is not limited by the provisions of Rule 3.33 which prohibit taking depositions of persons expected to testify at trial. For purposes of meeting a motion for summary decision, such depositions would be appropriate so long as the trial would not be unduly delayed thereby.