UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Roger Hall, et al.,	)	
	)	
Plaintiffs,	)	Status Conference to be Held on Jan. 25, 2008.
	)	
v.	)	Civil Action 04-00814 (HHK/JMF)
Central Intelligence Agency,	)	ECF
	)	
Defendant.	)	
	)	

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE, IN PART, PLAINTIFF HALL'S DECLARATION

The Defendant, Central Intelligence Agency ("CIA" or the "Agency") has moved, pursuant to Fed. R. Civ. P. 12(f) and 56(e), to strike, in part, Plaintiff Hall's declaration submitted with his Cross Motion for Partial Summary Judgment and in Opposition to the Agency's Motion for Summary Judgment ("Cross Motion"). Doc. No. 73-2. Specifically, the Agency requested that paragraphs 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 25, 26, 27, 28, 32, 33, 34, and 36 be struck, for the reasons set forth in its Motion to Strike ("MTS").

Even after being presented with a second opportunity to complete the record–via his Opposition to the Agency's MTS ("MTS Opp.")–Mr. Hall still fails to meet his burden of showing that his declaration (1) should be fully considered by the Court, and (2) supports his position that a genuine issue of material fact exists which would favor the Court's denial of the Agency's Motion for Summary Judgment.

I. Background

The Agency filed its MTS Mr. Hall's declaration because the document was, and remains, deficient in both form and substance. Specifically, Mr. Hall made assertions (1) about

the possible existence of documents about which he had no personal knowledge (*see* MTS, sec. II.A.); (2) based on inadmissible evidence (*see* MTS, sec. II.B.); and (3) based on claims unsupported by the record or documentation (*see* MTS, sec. II.C.). The Agency's rationale in filing its MTS was, in part, to minimize irrelevant and/or immaterial issues and documents in the record.[1] *See* Fed. R. Civ. P. 1 (requiring a "just, speedy and inexpensive determination of every action.").

Mr. Hall's Opposition to the MTS is accompanied by over 1,500 pages of documents that he presents as 33 separate exhibits. *See* USDC Pacer Doc. No. 83. It is curious that Mr. Hall would append so many documents to his Opposition to the MTS when he only refers to 10 of these exhibits in his brief. Specifically, the Opposition only refers to attachments 3, 5, 15, 19, 23, 26, 27, 30-32. *See* Opp. pp. 6, 15 and 16. It is unnecessary, at this juncture, to examine whether each of these documents accurately stands for the proposition that Plaintiff claims they support.[2] What is needed is an explanation about why Plaintiff wishes to cloud the record even further.

In the MTS Opposition, Mr. Hall first challenges the timeliness of the Agency's MTS. MTS Opp. p. 2. That question is a red herring for the reason outlined below in section II.A. The gravamen of Mr. Hall's Opposition to the MTS is an attempt to show that the CIA's searches were inadequate by establishing himself as an expert on POW/MIA issues. *Id*. pp. 4-9. In the

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[1] Plaintiff's accusations about the Agency's alleged nefarious motives for filing its MTS are unfortunate and unfounded. *See* Opp. p. 2.

[2] If the MTS is granted, no further examination will be necessary. If it is not, the Agency will address the validity of the documents, insofar as they may impact the case, in its Reply in Support of its Motion for Summary Judgment.

alternative, he argues, should the Court find that he is not an expert, his declaration should be deemed admissible under Federal Rules of Evidence Rule 701, as opinion testimony, or under Rule 807, as a Residual Exception to the hearsay rule. *Id*. pp. 9-14. At this juncture, the question of whether he may be deemed an expert is irrelevant, as discussed in section II.B. *infra*. He also attempts to prove that his statements are admissible as they do not constitute hearsay. Opp. pp. 14-15. This argument too is unavailing as explained in section II.B, *infra*. Finally, he demands to take discovery if his declaration is stricken. *Id*. pp. 16-18. This Court has already denied Plaintiffs' request for discovery via an Order dated April 11, 2007, and there is no need to revisit the issue at this time, as discussed in section II.C, below. Accordingly, the Agency's MTS should be granted.

II. Argument

A. CIA's Objections to Mr. Hall's Declaration are Warranted and Timely.

Mr. Hall admits that his declaration was submitted to the Court in support of *both* his Cross Motion and in opposition to the Agency's MSJ. MTS Opp. at 3. Yet he would have the Court hold him to a lower standard as a non-movant, because, as he suggests, the Court should be "indulgent" with a non-movant's papers. *Id*. at 3-4. This argument fails for two reasons. First, he has admitted that his affidavit is filed to support his Cross Motion. Simply put, his Cross Motion renders him a moving party. Second, if he is suggesting that because he is not the party to move first for disposal of certain issues, then he may make representations without a proper basis or documentation, he completely misapprehends Rule 56(e). The Rule, on its face, requires "[s]upporting *and* opposing affidavits [to] be made on personal knowledge, and set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is

competent to testify . . . ." Fed. R. Civ. P. 56(e) (emphasis added). Here, he failed to meet the Rule's standards and the Agency was left with no choice but to file its MTS. Plaintiff's suggestion that he should be held to a lower standard when making representations, under the penalty of perjury, to the Court, is simply untenable.

Mr. Hall also claims that the CIA's MTS was not timely filed. MTS Opp. pp. 2. He alleges that "the Hall Declaration which is presently before this court in [sic] is drawn largely from the declaration that Hall put before this Court in *Hall v. Central Intelligence Agency*, Civil Action No. 98-1319 ("Hall I"), an earlier civil action." *Id*. (emphasis added). He argues therefore, that, since the Agency did not object to those materials in *Hall I*, it has waived the right to object to those same materials now in this case. *Id*. Moreover, Mr. Hall claims that in *Hall I*, Judge Friedman relied on the disputed portions of his declaration when rejecting the CIA's contention that it had adequately searched for the requested documents and ordering the CIA to conduct further searches. *Id*. To support his position, Mr. Hall cites authority holding that, "[a]s is true of material introduced on a summary judgment motion, uncertified or otherwise inadmissible documents may be considered by the court if not challenged. The objection must be timely or it will be deemed waived." *Cattrett v. Johns-Manville Sales Corporation*, 826 F.2d 33, 38 (D.C. Cir. 1978). His argument fails for three reasons, however.

First, it is unclear from the record that the disputed material in his declaration is "largely" the same as the declaration presented to this Court in *Hall I*, because Mr. Hall has not attached the *Hall I* declaration(s) to which he refers.[3] In addition, the Docket Report from *Hall I* indicates

[3] The pertinent filings by the parties from *Hall I* are listed but copies are unavailable via the Court's ECF system.

that Mr. Hall submitted several memoranda with affidavits, declarations and exhibits in opposition to the Agency's Motion for Summary Judgment, adding to the difficulty in determining to what material from *Hall I* Mr. Hall refers. Thus, his assertions remain unsupported and he has not established that the disputed material is the same as what was presented in *Hall I*. Further, while Mr. Hall contends that the disputed material was relied upon by Judge Friedman in ordering the CIA to conduct further searches in *Hall I*, it appears from the Judge's Order that the court in fact relied on the declarations by William McNair of the CIA to determine that "additional searches may or may not be required." *See* Aug. 10, 2000 Opinion in *Hall I*, USDC Pacer Doc. No. 54 pp. 8-9 ("The McNair declarations, however, lack a few essential details that the Court needs in order to evaluate whether the search was sufficient.")

Second, *Hall I* and the present case are separate cases, in that not all decisions made by Judge Friedman are binding on this Court.[4] The *Catrett* decision, to which Mr. Hall refers for the proposition that the Agency has waived its objection, does not control the present situation. In that case, failure to object constituted a waiver of objection, in that case. *Catrett*, 826 F.2d at 38. Mr. Hall presents no authority for the proposition that a party waives an objection not made in a prior, related case, before another Judge. Here, the CIA's alleged failure to object to an unidentified document in *Hall I*, if true, may only constitute waiver of the right to object to that document in *Hall I*, and does not constitute a blanket waiver of objection for future cases involving some of the same issues, before a different Judge.

Third, and most important, the Agency's MTS was, in fact, filed timely. Federal Rule of

[4] It is not the Agency's position that certain decisions made in *Hall I* may not have a *res judicata* or *collateral estopple* effect on this case. However, Plaintiffs have made no such arguments here.

Civil Procedure 12(f) states that a motion to strike may be made "[u]pon motion made by a party before responding to a pleading . . . ." CIA's MTS was filed on July 24th, 2007, before responding to Plaintiffs' Cross Motion and Opposition, thereby complying with the timeliness requirement of Rule 12(f). The Motion to Strike was timely and should be granted.[5]

B. Hall Fails to Rebut the Presumption of Good Faith Searches by the Agency.

Regardless of whether Mr. Hall is considered an expert on POW/MIA issues, he still must meet the requirement of Rule 56(e). In other words, to survive a motion for summary judgment, he must show "specific facts" raising a genuine issue for trial. Fed. R. Civ. P. 56(e). He may "not rely on mere allegations or denials," but must show with specificity that a genuine issue exists for trial. *Id.*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Instead, Mr. Hall's declaration consists merely of repetitive and vague assertions that documents must exist in CIA files. *See* Hall Decl. attached to Cross Motion, generally. Attached to his supplemental declaration are a voluminous amount of exhibits, the vast majority (23 out of 33) of which he never explains or refers to in the MTS Opposition. *See* Background Sect. *supra*, for specifics. Therefore, it remains unclear why the Court should view any of the remaining exhibits as relevant. Presumably, they are included to prove additional records must exist in CIA files. However, as the case law makes clear, as long as the search was reasonable, the Agency is not required to prove it located all responsive records, even when a requested

[5] There is also substantial authority for the proposition that "[t]he question of whether a motion to strike is timely rests within the discretion of the trial judge." *See e.g., Horton v. Hussmann Corp.*, 2007 WL 2885166, 3 (E.D.Mo. 2007); 10B Wright, Federal Practice and Procedure § 2738.

document indisputably exists or once existed. *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 892, n.7 (D.C. Cir 1995). Without "tangible evidence" to impugn agency affidavits, a plaintiff cannot survive a summary judgment motion. *Carney v. U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994) (plaintiff's affidavit was insufficient to rebut the presumption of good faith searches even though the plaintiff allegedly conducted over a hundred interviews and significant research); *Miller v. U.S. Dept. of State*, 779 F.2d 1378, 1384-85 (8th Cir 1985) (defendant's search was adequate even though it did not locate documents specifically referenced by the requester.)

Moreover, as further detailed in the MTS, Mr. Hall's declaration also does not meet the Rule 56(e) requirement that affidavits be based on personal knowledge and admissible in evidence as they are based on hearsay or, in some instances, not based on any identifiable source at all. MTS pp. 3-5. Mr. Hall makes much of the fact that he is an "expert" and therefore his statements are exempt from the personal knowledge requirement under Rule 602 of the Federal Rules of Evidence. MTS Opp. pp. 8. Even if he were qualified as an expert, a point which the Agency does not concede, he misreads Rule 602, as it states not that expert opinion testimony is exempt from the personal knowledge requirement, but rather that to be admissible its probative value must substantially outweigh its prejudicial effect on the fact finder. Fed. R. Evid. 703. For the reasons already detailed in the MTS at 3-5, the disputed portions of Mr. Hall's declaration lack probative value and should be stricken.

Mr. Hall's arguments that, even if he were not qualified as an expert, the testimony in his declaration is otherwise admissible under Federal Rule of Evidence 701, as opinion testimony by a lay witness, or Rule 807, as a residual exception to hearsay rule, fail on similar grounds. While

it is true that opinion testimony and hearsay are allowed under limited circumstances, opinion testimony must still be found to be "helpful" to a determination of fact in the case under 701, and hearsay evidence might be admissible if it comes with guarantees of trustworthiness, is offered as evidence of a material fact, and is more probative than other evidence available to the proponent. Fed. R. Evid. 807. Mr. Hall's declaration fails on all the forgoing grounds. For reasons detailed in CIA's MTS, the lack of specificity in the declaration is such that it is not helpful in a determination of fact in the case as required by Rule 701, and it is not probative on the issue of the adequacy of CIA searches as required by Rule 807. Therefore, the Agency's MTS should be granted.

C. Mr. Hall is Not Entitled to Discovery Under Fed. R. Civ. P. 56(f).

Finally, Mr. Hall once again requests that the Court allow him discovery in this matter. *See* MTS Opp. at 16-18. The Court has already denied Plaintiffs's request to conduct discovery by its Memorandum Opinion and Order dated April 11, 2007. *See* USDC Pacer Doc. No. 68. The Court held that until it had ruled on CIA's outstanding motion for dismissal in the case, discovery was premature. Furthermore, if Agency affidavits established the sufficiency of the search, then discovery would not even be necessary. Mem. Op. and Order p. 3.

In his most recent demand for discovery, Mr. Hall relies on Fed. R. Civ. P. 56(f) which allows limited discovery when a party cannot present facts essential to opposing a summary judgment motion. Fed. R. Civ. P. 56(f). However, Mr. Hall's argument fails to meet the requirements of Rule 56. First, Plaintiffs in this matter are unable to demonstrate that they cannot present evidence in opposition to the Agency's motion for summary judgment because they have, in fact, already done so. *See Hermes v. Hein*, 742 F.2d 350, 355-56 (7th Cir. 1984)

(denying request for further discovery filed seven months after full briefing of motion because plaintiff had been afforded ample opportunity to conduct discovery prior to the filing of the motion); *Fed. Rep. of Germany v. Elicofon*, 536 F. Supp. 813, 828 (E.D.N.Y. 1978) (denying 56(f) request for discovery because party had already submitted three lengthy affidavits in opposition to the pending motion which counsel had vigorously argued compelled denial of summary judgment). In fact, Plaintiffs have filed a motion for summary judgment of their own. *See White v. Fraternal Order of Police*, 909 F.2d 512, 517 (D.C. Cir. 1990) (ruling on motion for summary judgment without 56(f) discovery not abuse of discretion because party opposed motion arguing that evidence already submitted created factual question); *King v. Dept. of Justice*, 830 F.2d 210, 232, n. 157 (D.C. Cir. 1987) (56(f) discovery request denied because party's filing of her own motion for summary judgment implied her acknowledgement that record was adequate for such a ruling). Accordingly, Mr. Hall cannot make the showing required by Rule 56(f) that he needs discovery to effectively oppose CIA's motion for summary judgment.

Even if Plaintiffs had not filed their Cross Motions, parties desirous of taking discovery pursuant to Rule 56(f) are required to file an affidavit showing "specified reasons [he] cannot present facts essential to justify [his] opposition [to summary judgment] . . . ." Fed. R. Civ. P. 56(f). Mr. Hall relies on the *First Chicago* and the *Miller* cases to argue that the courts have found such an affidavit not to be necessary. However, his reliance on these cases is misplaced. In the *First Chicago* case, the court held that the defendant's outstanding interrogatories, document requests and subpoenas were sufficient to provide notice that further discovery was needed. *First Chicago International v. United Exchange Co.*, 836 F2d 1375, 1381 (D.C. Cir.

1988). In *Miller*, the court held that in opposing summary judgment, ordinarily a party should file an affidavit under Fed. R. Civ. P. 56(f). However, in that case, the party's failure to do so was excused, as he reasonably interpreted a magistrate's order to imply that such an affidavit was not necessary. *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 846 (3rd Cir. 1992). Clearly, neither case applies to the instant matter as there are no outstanding discovery requests pending here, or orders issued by this Court implying that such an affidavit was unnecessary.

Mr. Hall's current declaration also fails to meet the standard set out by Rule 56(f) or by the courts. It is neither specific as to what discovery he needs nor does it state what that discovery would likely produce. *See* Decl. attached to Cross Motion. Rather it is replete with unsubstantiated opinions and allegations. *Id*. Courts have been clear that to obtain discovery pursuant to Rule 56(f), the party seeking discovery must show that "the necessary facts exist but for some good reason he is unable to produce them on Motion" and that "conclusory allegations unsupported by factual data will not create a triable issue of fact." *Exxon Corp. v. FTC*, 663 F. 2d 120, 126-27 (D.C. Cir. 1980), *citing Donofrio v. Camp*, 470 F.2d 428, 431 (D.C. Cir. 1972). As Mr. Hall's supplemental declaration fails to address the issue of discovery at all, it does not meet the standards set out in Rule 56(f) and should not be the basis of a renewed request for discovery. Accordingly, his request for discovery fails.

III. Conclusion

For the foregoing reasons, the Agency's Motion to Strike, in Part, Mr. Hall's Declaration should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2007, I caused the foregoing *Reply in Support of Defendant's Motion to Strike* to be served on counsel of record via the Court's ECF system.

/s/

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