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October 19, 2015

VIA ELECTRONIC CASE FILING

The Honorable Joseph F. Bianco
Unites States District Court Judge
United States District Court
Eastern District of New York
100 Federal Plaza
Central Islip, NY 11722

Re: **Zarda v. Altitude Express, Inc. and Raymond Maynard**
Case No.: 10-CV-04334 (JFB) (AYS)

Your Honor:

We are counsel for Defendants in the above-referenced matter. We respectfully submit the following in opposition to Plaintiff's pending motion *in limine*. [ECF Doc. No. 233] For all the reasons set forth below, Plaintiff's application should be denied in its entirety.

Mr. Zarda's Declaration is not admissible as evidence in trial

First and foremost, Plaintiff's pending application endeavors to establish the admissibility of Mr. Zarda's April 7, 2013 declaration. In doing so, Plaintiff fails to recognize the fact that affidavits submitted in support of summary judgment are hearsay under Fed. R. Evid. 801, and therefore, not admissible at trial. *See Bernhardt v. Interbank of New York*, 92-CV-4550, 2008 WL 255992 (RJD), at *5 (E.D.N.Y. 2009) (advising that "affidavits are ordinarily not admissible at trial"); *El-Bakly v. Autozone, Inc.*, No.: 04-CV-2767, 2008 WL 1774962, at *3 (N.D. Ill. Apr. 16, 2008) (holding that affidavits or witnesses generally are not admissible into evidence at trial to resolve disputed issues of fact even if the affidavit was used during summary judgment because they are hearsay under Fed. R. Evid. 801).

Plaintiff's declaration was submitted in opposition to Defendants' motion for summary judgment, proving that the only purpose for Mr. Zarda's declaration was to defeat summary judgment. As such, Mr. Zarda's declaration is nothing more than a self-serving document, which, as discussed below, is rifled with statements that contradict his own deposition testimony. Mr. Zarda's declaration was never notarized nor does it include an address. Moreover, the copy Plaintiff's counsel provided as part of the proposed trial exhibits does not even contain Mr. Zarda's signature. (Pl. Ex. 49) Accordingly, Mr. Zarda's declaration is not reliable. Mr. Zarda's declaration, as a whole, is not admissible as evidence in trial.

Despite Plaintiff's assertions, there exists no hearsay exemption or exception to allow for the admission of Mr. Zarda's declaration. Plaintiff's counsel erroneously asserts that portions of Mr. Zarda's declaration are admissible based upon the "present sense impression" hearsay exception. Fed. R. Evid. 803(1) provides that a present sense impression is:

> [a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

Here, Mr. Zarda's declaration was submitted on April 7, 2013, years after any conduct alleged in his declaration. Thus, Mr. Zarda's memorialization of these alleged events did not occur during, or even immediately after, the event as required by Fed. R. Evid 803(1). Rather they were memorialized years later. Not only does Plaintiff's counsel exhibit faulty legal reasoning in his pending motion, but he fails to support his argument. Rather, in support of his present sense impression argument, he cites a case that addresses a different hearsay exception. *See United States v. Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972) (discussing the state of mind exception to the hearsay rule).

Further, as I suspect Your Honor has become aware, Mr. Antollino has a particular style of writing. It is evident that Mr. Zarda's self-serving declaration is crafted in Mr. Antollino's writing style, creating the impression that Mr. Zarda's declaration is not be comprised of his own impressions at all, but rather Mr. Antollino's.

Alternatively, Plaintiff relies upon the Residual Hearsay Exception. Fed. R. Evid. 807 provides in relevant part:

> (a) Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

> (1) the statement has equivalent circumstantial guarantees of trustworthiness;
> (2) it is offered as evidence of a material fact;
> (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
> (4) admitting it will best serve the purposes of these rules and the interests of justice.
>
> (b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Plaintiff's arguments fail. First, Mr. Zarda's declaration was not created under circumstances that guarantee trustworthiness. As discussed above, it was generated years after the events occurred and prepared by Mr. Antollino for the sole purpose of defeating Defendants' summary judgment motion. Second, the statements contained in the declaration cannot be offered as evidence of a material fact because, again, they were offered years after the events occurred. Third, Mr. Antollino does not have any method of being able to introducing Mr. Zarda's declaration. In choosing to continue with the case after Mr. Zarda's death, Mr. Antollino took the risk of not being able to admit certain evidence. The Federal Rules of Evidence do not fall to the sideline simply because no other possibility exists for a document to be introduced during trial. Fourth, despite the fact that Mr. Zarda's declaration was included as part of each parties' exhibit list, they were created prior to Mr. Zarda's death as part of the Joint Pre-Trial Order, which was submitted in June 2014. Lastly, Mr. Antollino maintains that this case involves novel and important issues. However, Plaintiff's Title VII claim has already been dismissed and this case proceeded under the NYSHRL. Discrimination based upon sexual orientation under NYSHRL is not novel.

Likewise, Plaintiff's assertion of Fed. R. Evid. 804(b)(1)(B) is also inapplicable in this matter. Rule 804(b)(1)(B) provides in relevant part that a statement of an unavailable witness "is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination." Plaintiff cites to the fact that Defendants conducted Mr. Zarda's deposition and claims that we had the opportunity to examine Mr. Zarda. However, Plaintiff's argument fails to recognize that Mr. Zarda's declaration was submitted after the close of discovery. Therefore, the only

opportunity Defendants would/could have had to question Mr. Zarda on the statements made in his declaration would have been at trial.

In support of his argument, Mr. Antollino states that "the defense went to great lengths to tell the jury stories about Don's cruises and trips to Norway. We should be given the chance to explain what he was feeling inside while he was doing these things." [ECF Doc. No. 233] Defendants obtained this information during Mr. Zarda's deposition, and Mr. Zarda's conduct after his termination is relevant towards his state of mind and his alleged damages or lack thereof. Mr. Antollino was free to question Mr. Zarda at the conclusion of our deposition, but failed to engage in such questioning. He cannot now recreate the wheel in an attempt to cover up his own short comings. Therefore, Plaintiff's reasoning, once again, falls short and fails to set forth a valid argument as to the admissibility of Mr. Zarda's declaration.

Moreover, significant portions of Mr. Zarda's Declaration do not rely on any facts produced during the prior three (3) years of litigation. Additionally, Mr. Zarda's declaration contains statements that contradict his deposition testimony. For example, in paragraph 23 Plaintiff states: ". . . I did not want to be presumed to be heterosexually attracted to her, so I in front of Rosana (and others in the aircraft if they should have happened to hear) stated that she should not to worry about me because I am gay. (Zarda Decl. ¶ 23). Despite substantial questioning on this issue, this represents the first occasion where Plaintiff asserted that he disclosed he was gay to Orellana in the airplane and that others were around to hear him do so. (Zarda Dep. pg. 139-140, 173, 228-229). Such a tactic proves that Mr. Zarda's declaration was submitted for the mere purpose of surviving summary judgment, is not reliable and not admissible at trial.

Duncan Shaw, Wayne Burrell and Curt Kellinger were all disclosed to Plaintiff's in the Joint Pre-Trial Order

Plaintiff's pending motion attempts to preclude Defendants from calling witnesses which we identified in the pre-trial order. [ECF No. 233] Defendants intend to call Duncan Shaw, Wayne Burrell and Curt Kellinger as part of their case-in chief. Each of these witnesses were identified in the Joint Pre-Trial Order, which was signed by Mr. Antollino. [ECF Doc. No. 169] At the time the parties submitted the Joint Pre-Trial Order, Mr. Antollino wrote to the Court and objected to the witnesses identified by Defendants. [ECF Doc. No. 159] To which, Defendants replied and the Your Honor held a telephone conference on the matter. [ECF Doc. Nos. 160, 163] Thereafter, Mr. Antollino was given until August 5, 2014 to submit his objections to Defendants witnesses. Mr. Antollino failed to do so; thereby, waiving any objection

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to these witnesses. Mr. Antollino attempts to state that the Federal Rules prevent Defendants from calling witnesses identified in the Joint Pre-Trial Order; however, he fails to specify which rule would preclude Defendants from calling witness. Mr. Antollino, during trial, cannot now object to witnesses that were properly identified prior to trial. Additionally, all three (3) witnesses figured prominently in Mr. Zarda's deposition testimony, their names were not hidden and appeared throughout discovery.

Therefore, Defendants respectfully request Your Honor deny Plaintiff's application in its entirety. Defendants' counsel remains available should Your Honor require any additional information regarding this submission.

Respectfully submitted,

ZABELL & ASSOCIATES, P.C.

Saul D. Zabell
SDZ/lej

cc: Gregory Antollino, Esq. (*via* Electronic Case Filing); client