

STATE OF NORTH CAROLINA
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 8163

STEVEN MCRAE,

Plaintiff,

v.

KYLE RUSSELL CURTIS,

Defendant.

**BRIEF IN SUPPORT OF MOTION TO
STRIKE THE DECLARATIONS OF
BENJAMIN POTTS AND MEGAN
JOYCE (ECF NOS. 38 & 39)**

Pursuant to BCR 7.2, defendant Kyle Russell Curtis submits this brief in support of his motion to strike the declarations of Benjamin Potts and Megan Joyce, filed on September 9, 2020 (ECF Nos. 38, 39).

RELEVANT BACKGROUND

This is Mr. Curtis's second motion to strike improper, late filings made by plaintiff Steven McRae.

Mr. Curtis has moved to set aside the entry of default and partial default judgment entered against him in this case. (ECF Nos. 9, 17.) Mr. Curtis filed his amended motion to set aside on July 28, 2020 (ECF No. 30); Mr. McRae filed a response on August 11, 2020 (ECF No. 32); and Mr. Curtis filed a reply on August 24, 2020 (ECF No. 33). After the close of briefing, the Court noticed a hearing on the amended motion to set aside for September 11. (ECF No. 34.)

On September 3, Mr. McRae filed an affidavit, which he styled as Supplemental Affidavit of Steven McRae in Opposition to Defendant's Amended Motion to Set Aside. (ECF No. 35.) Mr. Curtis moved to strike that affidavit on the

grounds that it (1) was an improper surreply for which Mr. McRae did not seek leave of Court, (2) contained inadmissible evidence, and (3) did not address new arguments raised in Mr. Curtis’s reply brief.

On September 9—less than 48 hours before the hearing on Mr. Curtis’s amended motion to set aside—Mr. McRae submitted two declarations in opposition to that motion. Mr. Curtis moves to strike those declarations.

ARGUMENT

I. The Declarations Should Be Struck Because They Are Not Timely.

The declarations submitted by Mr. McRae are improper and, like the supplemental affidavit, were filed without leave of Court.

Under the Business Court Rules, proper motion practice consists of only a motion and accompanying brief, a response, and a reply. *See* BCR 7.5, 7.6, 7.7. “All materials, including affidavits, on which a motion or brief relies *must be filed with the motion or brief.*” BCR 7.5 (emphasis added). As the Court has previously explained, “[s]ur-reply briefs are not permitted by this Court’s rules and generally are disfavored.” *Worley v. Moore*, No. 15-CVS-1316, 2016 WL 8453484, at *2 (N.C. Super. Ct. July 14, 2016) (denying a motion for leave to file a surreply).

Here, Mr. McRae filed two declarations after the close of briefing without even attempting to seek leave of Court. These declarations are improper under Business Court Rule 7.5, which requires affidavits to be submitted with a brief. Here, Mr. McRae had a chance to submit the declarations with his brief in response to Mr. Curtis’s amended motion to set aside, but failed to do so. Instead, he waited

until the eleventh hour—again, less than 48 hours before the hearing—to file the declarations. The declarations should be struck from the record.

II. The Declaration of Megan Joyce Contains Inadmissible Testimony.

In addition to being late, the declaration of Megan Joyce, like Mr. McRae's supplemental affidavit, contains inadmissible evidence.

Portions of Ms. Joyce's declaration improperly speculate that the font in Mr. Curtis's bank statement was altered. (ECF No. 39 ¶¶ 12–13.) That statement is impermissible expert testimony to which Ms. Joyce, a legal assistant, has neither a proper foundation nor personal knowledge. *See* N.C. Gen. Stat. § 8C-1, Rules 602, 701.

III. In the Alternative, the Court Should Continue the Hearing on Mr. Curtis's Amended Motion to Set Aside.

The Court has scheduled a hearing on Mr. Curtis's amended motion to set aside for the morning of Friday, September 11. Mr. Curtis has moved to strike Mr. McRae's supplemental affidavit, the declaration of Benjamin Potts, and the declaration of Megan Joyce. Mr. Curtis believes that those motions are meritorious, and that the supplemental affidavit and declarations should not be considered when the Court rules on Mr. Curtis's amended motion to set aside.

If the Court is not inclined to strike the supplemental affidavit and declarations, Mr. Curtis requests that the Court continue the hearing and grant him an opportunity to respond to the allegations in the affidavit and declarations.

Mr. Curtis vigorously denies any and all allegations of forgery in Mr. Potts's and Ms. Joyce's declarations. If those allegations are considered, Mr. Curtis respectfully requests an opportunity to respond to and refute the allegations.

CONCLUSION

For the reasons stated in this brief, the declarations of Benjamin Potts and Megan Joyce should be struck and not considered by the Court in ruling on Mr. Curtis's amended motion to set aside.

This 10th day of September, 2020.

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CERTIFICATE OF COMPLIANCE WITH BUSINESS COURT RULE 7.8

The undersigned, in accordance with Business Court Rule 7.8, certifies that the foregoing brief (exclusive of the case caption, signature blocks, and required certificates) contains fewer than 7,500 words, as reported by word-processing software.

This 10th day of September, 2020.

/s/ Scottie Forbes Lee
Scottie Forbes Lee

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing has been served on all counsel of record in accordance with Business Court Rule 3.9 through electronic filing with the North Carolina Business Court.

This the 10th day of September, 2020.

By: /s/ Scottie Forbes Lee
Scottie Forbes Lee