

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
SUPPLEMENTAL AFFIDAVIT OF
STEVEN MCRAE (ECF NO. 35)**

**EXPEDITED RESPONSE
REQUESTED**

Pursuant to BCR 7.2, defendant Kyle Russell Curtis submits this brief in support of his motion to strike the supplemental affidavit of Steven McRae, filed on September 3, 2020 (ECF No. 35).

RELEVANT BACKGROUND

Defendant Kyle Russell 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 moves to strike that affidavit.

ARGUMENT

I. The Supplemental Affidavit Should Be Struck.

As explained below, Mr. McRae's supplemental affidavit should be struck because it (1) is an improper surreply for which Mr. McRae did not seek leave of Court, (2) contains inadmissible evidence, and (3) does not address new arguments raised in Mr. Curtis's reply brief.

A. The supplemental affidavit is an improper surreply for which Mr. McRae did not seek leave of Court.

Mr. McRae's supplemental affidavit is an improper attempt to file a surreply 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). For this reason, this Court, as well as federal courts in this state, routinely denies motions for leave to file a surreply, and strikes surreplies filed without leave of court. *See, e.g., Wortman v. Hutaff*, No. 10 CVS 4082, 2013 WL 5872961, at *15 (N.C. Super. Ct. Oct. 29, 2013); *DiPaulo v. Potter*, 733 F. Supp. 2d 666, 670 (M.D.N.C. 2010) (noting that "parties do not have a right to file a surreply"); *Spivey v. Rsch. Triangle Reg'l Pub. Transp. Auth.*, No. 5:14-cv-44-FL, 2015 WL 5513320, at *1 (E.D.N.C.

Aug. 10, 2015) (striking a surreply that was filed without leave of court), *adopted*, 2015 WL 5455919 (E.D.N.C. Sept. 16, 2015), *aff'd*, 633 F. App'x 839 (4th Cir. 2016); *Ivanoka-Nikolova v. E. Carolina Univ.*, No. 4:08-cv-209-BR, 2011 WL 2462468, at *5–6 (E.D.N.C. June 17, 2011) (disregarding an improperly filed surreply).

Here, Mr. McRae filed the equivalent of a surreply without even attempting to seek leave of Court. To be sure, the supplemental affidavit purports to “respond[] directly to Mr. Curtis’s allegations in his new affidavit.” (ECF No. 35 ¶ 3.) The supplemental affidavit is improper under the Business Court Rules and, accordingly, should be struck from the record.

B. The supplemental affidavit contains otherwise inadmissible evidence.

In addition to the deficiencies noted above, Mr. McRae’s supplemental affidavit should be struck because it relies on unauthenticated, inadmissible evidence.

First, the affidavit relies on recordings of purported Discord “group chat sessions” located on a Google Drive. (*See* ECF No. 35 ¶¶ 8–9.) Mr. McRae, however, cannot authenticate the recordings simply by filing an affidavit; rather, he would need evidence from a witness who observed the recordings. *See* N.C. Gen. Stat. § 8C-1, Rule 901(b)(1). Here, Mr. McRae has offered no evidence connecting the recordings to Mr. Curtis, or even Mr. Curtis’s IP address, which he must do to use the recordings as substantive evidence. *See, e.g., State v. Little*, 253 N.C. App. 159, 169, 799, S.E.2d 427, 433 (2017). Without proper authentication, there is no way to know if the recordings have been edited, among other things.

Second, the affidavit relies on a YouTube video. (ECF No. 35 ¶ 10.) Like the Discord recordings, Mr. McRae has failed to authenticate the video.

Unlike the Federal Rules of Evidence, under North Carolina's evidentiary rules, YouTube videos are not self-authenticating. *Compare* Fed. R. Evid. 902(11), *with* N.C. Gen. Stat. § 8C-1, Rule 902 (containing no such corollary provision). Even under the Federal Rules, however, authentication of a YouTube video requires that the proponent provide certification that satisfies the requirements of the business-records hearsay exception. *See* Fed. R. Evid. 803(6); *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014). For example, one federal court found that a YouTube video had not been authenticated because the plaintiffs had "not proffered the certificate of YouTube's custodian or other qualified person verifying that the page had been maintained as a business record in the course of regularly conducted business activities." *Randazza v. Cox*, No. 2:12-cv-2040-JAD-PAL, 2014 WL 1407378, at *4 (D. Neb. Apr. 10, 2014). Mr. McRae has not attempted to authenticate the YouTube video that he relies on as substantive evidence in his affidavit.

These portions of Mr. McRae's supplemental affidavit are inadmissible and should be struck.¹

¹ To the extent that Mr. McRae attempts to rely on Discord recordings or YouTube videos cited in earlier affidavits, those affidavits should be disregarded on the same grounds.

C. The supplemental affidavit does not address new arguments made in Mr. Curtis’s reply brief.

Finally, in the event that Mr. McRae requests leave to file his supplemental affidavit as a late surreply, that request should be denied because the affidavit does not address arguments newly raised in Mr. Curtis’s reply. *See DiPaulo*, 733 F. Supp. 2d at 670.

In his affidavit, Mr. McRae states that the Discord recordings and YouTube video contradict Mr. Curtis’s sworn testimony that he “did not receive notice of this lawsuit from [his] mother,” and that he first obtained a copy of the complaint several months later. (ECF No. 35 ¶ 7 (quoting ECF No. 33.1 ¶ 5).) Mr. Curtis’s affidavit, however, made clear that he *learned of* the lawsuit from a YouTube stream in which Mr. McRae was discussing the lawsuit; he simply did not receive a copy of the complaint until several months later. (ECF No. 33.1 ¶ 5.) Thus, even if Mr. McRae had properly authenticated the Discord recordings and YouTube video—which he has not—the contents of the affidavit, which focus on Mr. Curtis’s knowledge of the lawsuit, would in no way contradict any argument made in Mr. Curtis’s reply brief. After all, actual notice of a lawsuit is insufficient to overcome defective service. (*See* ECF No. 33 at 5–6.) Accordingly, there is no basis on which to allow Mr. McRae to file a surreply.

II. Mr. McRae Should Respond to this Motion Before the Hearing on Mr. Curtis’s Motion to Set Aside.

The Court has scheduled a hearing on Mr Curtis’s amended motion for the morning of Friday, September 11. Mr. Curtis’s motion to strike attacks the

admissibility of materials that Mr. McRae has submitted in opposition to the motion to set aside. Accordingly, Mr. McRae should respond to the motion to strike before the hearing. Mr. Curtis requests that the Court require Mr. McRae to file and serve his response to Mr. Curtis's motion to strike before Wednesday, September 9, at 9:00 p.m.

CONCLUSION

For the reasons stated in this brief, the Supplemental Affidavit of Steven McRae in Opposition to Defendant's Amended Motion to Set Aside should be struck and not considered by the Court in ruling on Mr. Curtis's amended motion to set aside.

This 6th 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 6th 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 6th day of September, 2020.

By: /s/ Scottie Forbes Lee
Scottie Forbes Lee