

Unrebutted or uncontested affidavit Prima Facie Evidence - facts deemed admitted!

Case law:

"The law creates a presumption, where the burden is on a party to prove a material fact peculiarly within his knowledge and he fails without excuse to testify, that his testimony, if introduced, would be adverse to his interests." *Meier v CIR*, 199 F 2d 392, 396 (8th Cir. 1952) quoting 20 Am Jur, Evidence Sec 190, page 193.

Non Rebutted Affidavits are "Prima Facie Evidence in the Case," *United States vs. Kis*, 658 F.2d, 526, 536-337 (7th Cir. 1981);

Cert Denied, 50 U.S. L.W. 2169; S.Ct. March 22, 1982. "Indeed, no more than (Affidavits) is necessary to make the Prima Facie Case."

Seitzer v. Seitzer, 80 Cal. Rptr. 688 "Uncontested Affidavit taken as true in support of Summary Judgment."

Melorch Builders v. The SUPERIOR COURT of San Bernardino County (Serbia) 207 Cal.Rptr. 47 (Cal.App.4 Dist. 1984) "Uncontested Affidavit taken as true in Opposition of Summary Judgment."

"Silence can only be equated with fraud where there is a legal or moral duty to speak, or where an inquiry left unanswered would be intentionally misleading. . . We cannot condone this shocking behavior... This sort of deception will not be tolerated and if this is routine it should be corrected immediately." *U.S. v. Tweel*, 550 F.2d 297, 299. See also *U.S. v. Prudden*, 424 F.2d 1021, 1032; *Carmine v. Bowen*, 64 A. 932.

"Silence is a species of conduct, and constitutes an implied representation of the existence of facts in question. When silence is of such character and under such circumstances that it would become a fraud, it will operate as an Estoppel." *Carmine v. Bowen*, 64 U.S. 932

"Fraud in its elementary common law sense of deceit... includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public,... and if he deliberately conceals material information from them he is guilty of fraud." *McNally v. U.S.*, 483 U.S. 350, 371-372, Quoting *U.S. v Holzer*, 816 F.2d. 304, 307.

"Uncontested affidavit" moved the court to hear the case. *United States v. Lopez*, No. 07-3159 (10th Cir. 03/04/2008).

..."finding uncontested affidavit of debtor's attorney that he provided telephonic notice of debtor's bankruptcy case sufficient to hold creditor in violation of § 362(h)." *Johnson*, No. 05-8089 (10th Cir. 08/28/2007).

"Based on that uncontested affidavit, the court found that Col. Hardesty had personally and properly appointed Lt. Col. Harmon to Pvt. Wright's court-martial." *Wright v. Commandant, USDB*, No. 03-3214 (10th Cir. 04/09/2004).

"According to the uncontested affidavit of Dennis Farrington, Vice President/Management Supervisor at Hill, Holliday, the commercial became obsolete as of September 30, 1984, when the new model Fords were introduced, and would not be "aired in any form after that date." Kazmaier's prayer for injunctive relief is therefore moot." *Kazmaier v. Wooten*, 761 F.2d 46 (1st Cir. 04/30/1985).

"Whether or not Thrift now has the original prescription forms submitted to UPA for reimbursement, Thrift submitted an uncontested affidavit stating that, as with Thrift's other claims, UPA failed to pay for the \$3,456.07 owed to Thrift upon Thrift's submission of the original claim forms." *Thrift Drug Inc. v. Universal Prescription Administrators*, 131 F.3D 95 (2d Cir. 12/11/1997)

..."the government conceded that a single sale was the only connection between the property and the predicate offense; on the day of the transaction the drugs were brought to the claimant's home at the insistence of the government informant; the uncontested affidavit of the claimant indicated that the drugs were present in the home for no more than a few hours; and there was no evidence that the house was used to store drugs. *Id.* at 1065. On these facts, the court found that there was no "substantial connection" between the claimant's home and the predicate offense." *United States v. Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258 (2nd Cir. 11/17/1989)

"The district court relied on the uncontested affidavit of Robert A. Michlik, the PBGC case officer responsible for processing the termination of the Plan, for the finding that 74 Plan participants were eligible for pension benefits as of September 20, 1978." *In re Syntex Fabrics Inc.*, 698 F.2d 199 (3rd Cir. 01/19/1983).

"This motion was supported by an uncontested affidavit detailing that de Santibanes had essentially no contacts with Virginia or with the plaintiffs, including that he had never resided in Virginia, did not own any property in the State, does not receive income from any business with operations in the State, and has never sent nor received correspondence from the State. The plaintiffs did not contest the information in the affidavit by way of affidavit or testimony." *Lolavar v. Santibanes*, 430 F.3d 221 (4th Cir. 12/01/2005).

"According to their uncontested affidavit... Carmichael simply cannot demonstrate any causal connection between Price Waterhouse's conduct and his prolonged imprisonment or torture." *Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 01/07/1988).

"The city responded to appellant's motion for attorney's fees with an (uncontested) affidavit from City Secretary Gorsline. That affidavit, together with the other factors identified in the chronology contained in the district court's opinion, established that as early as March 20, 1985, the city had decided to reword its election ballots." *Sorola v. City of Lamesa*, 808 F.2d 435 (5th Cir. 01/27/1987).

"On the basis of this uncontested affidavit, we can take it as established, for summary judgment purposes, that the bank records were reasonably available." Barrett v. United States and Internal Revenue Service, 795 F.2d 446 (5th Cir. 07/28/1986).

"The uncontested affidavit of Stevenson's vice-president established that..." Albertson v. Stevenson, 749 F.2d 223 (5th Cir. 12/26/1984).

" The uncontested affidavit establishing appellant's reform or cure was made by appellant's wife at approximately the same time as the affidavits of the other employees. The case for discharge presented to the Merit Systems Review Board for decision, therefore, included an uncontested showing that Bonet was totally reformed or cured." Bonet v. United States Postal Service, 712 F.2d 213 (5th Cir. 08/19/1983).

"The un rebutted affidavit of a MetLife representative establishes..." Justofin v. Metropolitan Life Insurance Co., 372 F.3d 517 (06/25/2004).

"The court's decision on the second summary judgment motion parallels its decision on the first. Again, it held that plaintiff had failed to comply with Rule 56(c)(2) when he filed new material in response to the motion and held, as a result, that defendant's statement of undisputed facts was deemed admitted." Gallipo v. City of Rutland (2004-041)

"Motion a request that the CT order something such as dismissing the case, not same as a pleading.

Dismissal on other grounds i.e. when facts are undisputed and DF is entitled to JGT as a matter of law (Summary JGT under R56) statute of limitation, claim or issue preclusion, etc.

Answer - a pleading that responds to allegations of the complaint and may add new matter as well. R8(b)(c)(d)

Admissions allegations not denied are deemed admitted.

Denials: those allegations properly denied are joined, meaning they are in dispute and ripe for adjudication." CIVIL PROCEDURE SPRING