

V I R G I N I A :

IN THE GENERAL DISTRICT COURT OF ARLINGTON COUNTY

RAM AVRAHAMI,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. 95-7479
	:	
U.S. NEWS & WORLD REPORT, INC.,	:	
	:	
Defendant.	:	

DEFENDANT'S RESPONSE TO PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT

Plaintiff Ram Avrahami ("Avrahami") has filed with this Court a document entitled "Plaintiff's Motion for Summary Judgment" ("Avrahami's Motion"), citing as authority Rule 3:18 of the Rules of the Supreme Court of Virginia. Avrahami's Motion should be denied because it is procedurally groundless and wholly devoid of factual support. Rule 3:18 does not apply to courts not of record, and there is no factual record on which to even consider summary judgment in General District Court. U.S. News & World Report, Inc. ("U.S. News") does not address herein the substantive merits of Avrahami's Motion but reserves the right to do so in the event the Court so directs and the motion is properly noticed for a hearing.

BACKGROUND

On or about July 21, 1995, Avrahami filed a two-count Motion for Judgment in this Court, alleging that U.S. News violated Virginia Code section 8.01-40 and committed common-law conversion by renting a mailing list containing Avrahami's name to the Smithsonian magazine which name the Smithsonian then used to send to him a direct mail solicitation. On the return date of August 21, 1995, a trial date of November 27, 1995 was set. Thereafter, U.S. News moved to stay this action on the grounds that a Declaratory Judgment action in the Circuit Court of Arlington County was pending.<1> Avrahami opposed the motion, arguing that

he wanted his day in General District Court -- the forum he chose. The Court denied U.S. News' Motion to Stay. Thereafter, the trial date was continued to February 6, 1996.

On January 16, 1996, counsel for U.S. News received a copy of Avrahami's Motion for Summary Judgment.<2> From the moment he filed suit in General District Court, Avrahami has prosecuted his claims in the media, seeking as much public attention as possible. He has appeared on CNN, National Public Radio, and given interview after interview to the media. Avrahami's thirst for publicity coupled with the fact that the summary judgment rule clearly does not apply in this case, make Avrahami's filing of this motion suspect -- it was filed for dissemination to the press rather than to advance the litigation. In fact, it now appears based on newly discovered facts that Avrahami has engineered a lawsuit to further his political cause.

Avrahami, while professing to want his day in General District Court, seeks to avail himself of the Circuit Court Rules for discovery and motions.<3> U.S. News will defend against Avrahami's claims and fully respond to each of his allegations, but it will do so in the appropriate manner, at the trial set for February 6, 1996. However, if this Court decides that it will set a different procedure, permit motions for summary judgment, and rule on papers, U.S. News seeks guidance from the Court as to how to proceed. Will the parties be permitted discovery in accordance with the rules governing civil actions in courts of record? Will U.S. News be permitted to serve a Request for Admission on the plaintiff and file Grounds of Defense? Will the Court set a briefing schedule? Will the Court set a hearing for oral argument? U.S. News will follow the procedure this Court deems appropriate. However, at this point, Avrahami has failed to even notice his motion for hearing. Therefore, if the Court decides that it will address the substantive legal issues by way of Avrahami's Motion and if the Court so desires, U.S. News will submit an opposition brief on the merits. In any event, U.S. News respectfully submits that Avrahami's Motion should be denied because it is procedurally groundless and wholly unsupported on the record.

A. No Provision Exists in General District Court  
for the Remedy Avrahami Seeks.

Rule 3:18, on which Avrahami relies in filing his motion for summary judgment, does not apply to the General District Courts.

Instead, Rule 3:18 specifically applies "to all civil actions at law in a court of record . . . ." Rule 3:1. The General District Courts of the Commonwealth are courts not of record. Va. Code Ann. # 16.1-69.5(a) (Michie 1988). The only provision for summary judgment that applies in the General District Courts is Rule 7B:2, which provides that summary judgment may be awarded when a plaintiff or defendant fails to obey a court order requiring the filing of certain pleadings.

Because no provision for the remedy exists in General District Court, it would be error for this Court to grant Avrahami's Motion. See *Shevel's Inc.--Chesterfield v. Southeastern Assoc., Inc.*, 228 Va. 175, 320 S.E.2nd 339 (1984), which addressed an analogous situation and found that it was error for the court in a chancery action to grant summary judgment because Rule 3:18 did not apply to chancery actions. In *Shevel's Inc.--Chesterfield*, the Supreme Court of Virginia stated:

Summary judgment is a drastic remedy which is available only where there is no material fact genuinely in dispute. It was unknown at common law. It applies only to cases in which no trial is necessary because no evidence could affect the result. Rule 3:18, which alone governed summary judgments at the time of trial, applies only to actions at law. Rule 3:1. There was, at that time, no provision for summary judgment in chancery causes, and thus it was error to grant it.

*Id.* (citations omitted).

As in *Shevel's, Inc.--Chesterfield*, no provision for summary judgment exists in this case. Thus, it would be error for the Court to grant Avrahami's Motion.

B. Due to the Abbreviated Nature of the Proceedings in General District Court, There Is No Record on Which This Court Can Grant Summary Judgment

Even if Rule 3:18 applied to courts not of record, there is simply nothing on the record before this Court on which Avrahami can rely in support of his motion. Trial is necessary to establish the record in this case. Rule 3:18 provides that the Court may consider pleadings, orders made at a pretrial conference, and

admissions in the proceeding. Anticipating that the parties will present their cases at trial, the Rules of the General District Court allow very limited discovery, in the form of subpoenas duces tecum only, and do not require any pleading other than a Motion for Judgment or Warrant. Rule 7B:4(a). Indeed, the only pleading in this case is Avrahami's Motion for Judgment; the Court did not order U.S. News to file Grounds of Defense, and no discovery has occurred.

Avrahami's Motion is an attempt to avoid the difficulties of proof he faces at trial. For example, he relies on a letter allegedly received from the Smithsonian magazine, attached to Avrahami's Motion for Judgment, and an excerpt of a document, attached to Avrahami's Motion as Exhibit C. Avrahami's reliance on this alleged evidence is misplaced. Both are hearsay within hearsay and certainly not the proper subject of which this Court should take "judicial notice," as Avrahami suggests. Avrahami's Motion at 4 n.3. Judicial notice can be taken of information that is either (1) common knowledge, or (2) easily ascertainable by reference to a reliable source. *Lassen v. Lassen*, 8 Va. App. 502, 507, 383 S.E.2d 471, 474 (1989) (Judicial notice "cannot be resorted to for the purpose of supplementing the record."). Neither of Avrahami's attachments fall within these categories.

Thus, Avrahami's Motion for Summary Judgment is supported only by Avrahami's Motion for Judgment. A plaintiff cannot obtain summary judgment by relying solely on his Motion for Judgment. U.S. News has the right to test the plaintiff's case and to present its defense. That right will be violated if this Court considers summary judgment at this stage.<4> Avrahami has used every opportunity to try his case in the press. Now it's time to put on his evidence and follow the rules of Court.

#### CONCLUSION

For the foregoing reasons, defendant U.S. News & World Report, Inc. respectfully requests that this Court not consider Plaintiff's Motion for Summary Judgment, or, in the alternative, set a briefing schedule and time for argument on the merits of the motion.

Dated: February 2, 1996

Respectfully submitted,  
U.S. NEWS AND WORLD REPORT, INC.  
By Counsel

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: /s/

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Footnotes:

<1> These same issues and parties are before the Circuit Court of Arlington County in U.S. News & World Report, Inc. v. Avrahami, At Law No. 95-1318, which is set for trial on June 6, 1996. No answer has been filed in that action. U.S. News intends to seek leave of Court to amend U.S. News' Motion for Declaratory Judgment to reflect newly discovered facts.

<2> U.S. News first learned of "Plaintiff's Motion for Summary Judgment" in a phone call from a New York Times reporter who had already received a faxed version. Once she reported back to Avrahami's counsel that U.S. News had not received a copy of the motion, Avrahami's counsel was kind enough to forward a copy to counsel. Avrahami's priorities are obvious. The motion was filed, apparently knowing there is no such provision in the rules, for the purposes of generating additional press attention for Avrahami and his cause. Even though U.S. News has obvious access to the media, it has chosen not to engage in a battle of press releases, preferring instead to try this matter in the courtroom.

<3> In addition to his Motion for Summary Judgment, Avrahami has filed Requests for Admission, which are not provided for in the General District Court; a subpoena duces tecum, which he has attempted to serve outside the jurisdictional reach of the Court; and seeks to have the Court take "judicial notice" of facts rather than prove those facts in court. U.S. News sought to have this matter stayed and tried in the Circuit Court. Avrahami opposed the

motion to stay and wanted "his day in the General District Court." Now it appears he wants it both ways. U.S. News has always maintained that the case should be tried in the Circuit Court where both parties can create a full and complete record for the trier of facts, which will have to be done in any event when this case moves to the Circuit Court.

<4> For example, there are many other facts that will be developed at trial, some of which are:

- Size and scope of the Direct Mail Industry, nationwide and in the Commonwealth of Virginia;
- Historically, a Presidential Commission has reviewed the Direct Mail Industry and concluded that the industry was self-policed to the point no federal legislation was required;
- Self-policing is accomplished, in part, through the Direct Mail Association and its Mail Preference Service which is available to those persons desiring not to receive unsolicited mail;
- The Mail Preference Service list has grown to 3.3 million names;
- Avrahami is aware of the Mail Preference Service;
- U.S. News received Avrahami's name from Consumers Union (publisher of Consumer Reports);
- Consumer Reports has an opt-out procedure noted in every edition of its magazine;
- Avrahami failed to avail himself of the Consumer Reports opt-out procedure;
- Before utilizing any list for solicitation purposes, U.S. News compares its list of subscribers to the Mail Preference Service list.

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