IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FREIGHT TRAIN ADVERTISING, LLC, Plaintiff, v.	)	11 C 2803
CHICAGO RAIL LINK, LLC, Defendant.	)	Judge Virginia M. Kendall

MEMORANDUM OPINION AND ORDER

This case arises out of a contract for the placement of a large advertisement on a railroad bridge above a highway in Illinois. The Plaintiff Freight Train Advertising, LLC, ("FTA"), entered into a Track Lease with Defendant Chicago Rail Link, LLC, ("CRL"), under which FTA would lease a section of a bridge in the City of Chicago to display its Mobile Signage Unit upon which advertisement space could be rented. After FTA placed its Unit on the bridge, the Illinois Department of Transportation requested that CRL take down FTA's Unit, pursuant to a 1961 Agreement between IDOT and several railroads that they would not erect any signs for advertising purposes on the railroad bridges. FTA brought suit against CRL for fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment and breach of contract, alleging that FTA suffered actual damages of at least $300,000 and consequential damages of at least $7,000,000 in the form of lost advertising revenue.

This case is now before the Court on CRL's Motion for Summary Judgment, or Alternatively for Partial Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. (Doc. 36). CRL argues that FTA materially breached the contract by failing to secure the permits and legal

authorities' approval to place its advertising displays, and therefore FTA cannot maintain an action for breach of contract against CRL. In addition, CRL seeks summary judgment on FTA's remaining claims because they are premised on FTA being a successor-in-interest to the railroads that were parties to the 1961 Agreement with IDOT and CRL insists it was a bona fide purchaser who was not bound by the 1961 Agreement; in addition, CRL argues, that 1961 Agreement would not apply to FTA's Mobile Signage Unit. In the alternative, FTA argues that FTA's claim for negligent misrepresentation must fail because the facts do not support that CRL was in the business of solely providing information rather than providing a product with ancillary information. For the reasons discussed below, CRL's Motion is granted in part with respect to FTA's claim of negligent misrepresentation and denied in part with respect to FTA's remaining claims; accordingly, the parties should prepare for trial.

I. MATERIAL UNDISPUTED FACTS[1]

FTA is a Limited Liability Company organized under the laws of the State of Texas with its principal place of business in Carrollton, Texas. (FTA 56.1 Resp. ¶ 2). FTA consists of Brad Berkley as its President and Ray Sipperley who holds an interest through Ray's Railroad Company. (*Id.* ¶ 8). CRL is a Limited Liability Company that provides common carrier railroad transportation for compensation, as a "railroad operator" pursuant to 49 U.S.C. § 10102(5), with its principal place of business in Denver, Colorado. (*Id.* ¶ 3, 4). Jurisdiction and venue are proper. *See* 28 U.S.C. § 1332; 28 U.S.C. § 1391(a). Illinois state law controls. (Doc. 1, Ex. A, Lease § 21.11).

[1]For the purposes of this Opinion, CRL's Rule 56.1(a)(3) Statement of Material Facts, (Doc. 37), is referred to as "CRL 56.1 ¶ _." FTA's Local Rule 56.1(b)(3)(B) Response to CRL's Rule 56.1(a)(3) Statement of Material Facts, (Doc. 41), is referred to as "FTA 56.1 Resp. ¶ _." FTA also submitted an Additional Statement of Material Facts in Opposition to Summary Judgment pursuant to Local Rule 56.1(b)(3)(C),(Doc. 43), which is referred to as "FTA Add'l 56.1 ¶ _." CRL's Response to FTA's Statement of Additional Facts, (Doc. 47). is referred to at "CRL Add'l 56.1 Resp. ¶ _."

On August 26, 2010, FTA[2] entered into an agreement entitled the Track Lease with CRL. (*Id.* ¶ 9). Pursuant to the Track Lease, FTA leased from CRL a strip of property on a bridge in the City of Chicago overlooking a highway, on which to construct a short railroad track upon which to park and display a railcar with a Mobile Signage Unit. (*Id.* ¶ 10). CRL was aware that FTA intended to use the Mobile Signage Unit for advertising purposes. (CRL Add'l 56.1 Resp. ¶ 3). In fact, under the Lease, CRL would be compensated by both a monthly rental payment and 30% of the net profits obtained by FTA from renting the space for advertisements. (Doc. 1, Ex. A, Lease §§ 3.1, 3.2). Under the Track Lease, FTA agreed to:[3]

> comply with any and all law, by-law, order, ordinance, ruling, regulation certificate, approval, consent or directive and any applicable federal, state, or municipal government, government department, agency or regulatory authority or any court of competent jurisdiction, including without limitation, those pertaining to environmental matters, advertising and signage, and including, without limitation, regulations and laws found in Chapter 17-12 of the Chicago Municipal Code and the Illinois Highway Advertising Control Act of 1971 (collectively, "Laws") and other

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[2] FTA was previously named Radiant OOH, LLC, which is the Party named as the Lessee in the Track Lease. For simplicity, the Court refers to FTA as the Party to the Track Lease.

[3] FTA moves to strike several of CRL's Rule 56.1(a)(3) Statement of Material Facts. (Doc. 42). FTA moves to strike CRL's 56.1 Statement ¶ 11 summarizing the Track Lease on the grounds that it is complex and unsupported by the record. Indeed, ¶ 11 contains 3 long sentences, the first of which summarizes two separate Sections of the Track Lease; and the second which states that "this provision was extensively negotiated by the parties" but the antecedent of "this" is not clearly identified and therefore could refer to either Section summarized. Nonetheless, FTA responds that it admits the third sentence of the paragraph, but then refers to a fourth sentence, of which there is none. In refuting the nonexistent fourth sentence, FTA refers to a Track Lease term that CRL summarized in its third sentence. The Court is left to presume that the parties agree that "this provision was extensively negotiated by the parties" but neither cites to the record and again, the antecedent of "this provision" is not clearly identified for the Court. Therefore, CRL's 56.1 Statement ¶ 11 violates L.R. 56(a) and FTA's Response violates L.R. 56(b)(3). *See also Malec v. Sanford*, 191 F.R.D. 581, 583 (N.D. Ill. 2000) (holding "[t]hree operative concepts animate [Rule 56.1]: facts, short, and specific."). The Court may disregard statements and responses that do not properly cite to the record and can choose "to ignore and not consider" information that is provided but does not comply with Local Rule 56.1. *See Cichon v. Exelon Generation Co.*, LLC., 401 F.3d 803, 809-810 (7th Cir. 2005). Furthermore, the Seventh Circuit has consistently held that district courts should mandate and enforce strict compliance with Local Rule 56.1. *See Metro. Life Ins. Co. v. Johnson*, 297 F.3d 558, 562 (7th Cir. 2002); *Bordelon v. Chicago Sch. Reform Bd. of Trs.*, 233 F.3d 524, 527 (7th Cir. 2000); *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994). Pursuant to Local Rule 56.1 and for the purpose of clarity, the Court strikes CRL's 56.1 Statement ¶ 11 in its entirety and instead cites directly to the terms of the Lease (Doc. 1, Ex. A, Lease).

> [CRL] requirements relating to the use of the Track.

(Doc. 1, Ex. A, Lease § 4.3). Notably:[4]

> If [FTA]'s use of the "Track" . . . violates the "Laws", as defined in Section 4.3 [above], either Party may terminate this Agreement upon giving the other Party not less than sixty (60) days written notice to terminate for any reason whatsoever in that Party's sole discretion and regardless of performance or non-performance of any covenants and agreements . . . and without regard to any loss or damage incurred by either Party as a result of such termination or cancellation.

[4]FTA moves to strike several more of CRL's Rule 56.1(a)(3) Statement of Material Facts, (Doc. 42), to which CRL responded, (Doc. 48). The purpose of Rule 56.1 statements is to identify the relevant evidence supporting the material facts, not to make factual or legal arguments, *see Cady v. Sheahan*, 467 F.3d 1057, 1060 (7th Cir. 2006), and thus the Court will not address the parties' arguments made in their Rule 56.1 statements and responses. Also, the requirements for responses under Local Rule 56.1 are "not satisfied by evasive denials that do not fairly meet the substance of the material facts asserted." *Bordelon v. Chicago Sch. Reform Bd. of Trs.*, 233 F.3d 524, 528 (7th Cir. 2000). Further, the Court may disregard statements and responses that do not properly cite to the record. *See Cichon*, 401 F.3d at 809-810. Finally, "hearsay is inadmissible in summary judgment proceedings to the same extent that it is inadmissible in a trial." *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir.1997). A local rule "of a federal district court is written by and for district judges to deal with special problems of their court," and therefore a district judge's interpretation of a local rule is entitled to considerable weight and great deference. *See Midwest Imports, Ltd. v. Coval*, 71 F.3d 1311, 1316 (7th Cir.1995). Furthermore, the Seventh Circuit has consistently held that district courts should mandate and enforce strict compliance with Local Rule 56.1. *See Ammons*, 368 F.3d at 817; *Metro. Life Ins. Co. v. Johnson*, 297 F.3d 558, 562 (7th Cir. 2002); *Bordelon v. Chicago Sch. Reform Bd. of Trs.*, 233 F.3d 524, 527 (7th Cir. 2000); *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994). Consequently, the Court rules on the following CRL 56.1 Statements in the following manner: ¶ 11 is stricken as improperly presented and insufficiently supported by the record; ¶ 12 is stricken as an over-generalization of the contract clause and therefore a mischaracterization of the record; ¶ 13 is stricken as a mischaracterization of the contract clause; ¶ 14 is stricken as an over-generalization of the contract clause; ¶18 is stricken as argumentative and a mischaracterization of the record; ¶ 19 is not stricken: as stated by CRL in its objection to FTA's Motion to Strike, the Statement names the railroads that were parties to the 1961 Agreement with IDOT; ¶ 21 is stricken as argumentative and for misstating the record: the City of Chicago Order does not cite any section of the City of Chicago Municipal Code; ¶ 23 is stricken as argumentative; ¶ 24 is stricken as argumentative. ¶ 25 is not stricken: FTA admits that it did not contact any state or local authority prior to the Mobile Signage Unit's roll-out, and does not refute this assertion with evidence that FTA had contact after the roll-out but before IDOT's demand; ¶ 26 is stricken as argumentative; ¶ 29 is not stricken. As for ¶ 34 and ¶ 35, which summarize deposition testimony from FTA's expert Art Spiros, (Doc. 39, Ex. 11), and Exhibits 12 and 13, which are copies of recorded land deeds on which he relied in his deposition, the Court does not rely on these statements or exhibits to reach its conclusion that issues of material fact remain and therefore denies ruling on their admissibility as the issue is moot for purposes of this motion. Although FTA's expert testified to his reliance on the land deeds in preparing his report (which is not provided to the Court), FTA disputes their admissibility due to lack of authentification and CRL must address that objection for its admission at trial. Exhibit 14 is not stricken: a page from a common dictionary does not pose a problem of hearsay, foundation and authentication; regardless, the Court has not relied upon it in its analysis.

(Doc. 1, Ex. A, Lease § 1.2). The Track Lease was also:[5]

> made subject to the rights granted by or through [CRL] for any surface, subsurface or aerial uses antedating this Agreement, including but not limited to the construction, maintenance, operation, renewal and/or relocation of fences, pipelines, communication lines, power lines, railroad tracks and signals, and any and all applicable appurtenances. [CRL] accepts and reserves the right to grant additional uses of the same or similar nature subsequent to the execution of this Agreement, without payment of any sum for damages, so long as such use does not unreasonably interfere with the use of Track by [FTA] for a Mobile Signage Unit.

(Lease § 21.7). In addition, FTA agreed to:

> defend, indemnify, release and hold harmless [CRL] from any and all costs, obligations, liabilities, duties, fines, penalties, judgments and/or attorney's fees that Lessor may incur as a result of addressing or defending any alleged or actual violation of any Laws related to [FTA]'s use of the Track and associated property.

(Lease §8). In addition, FTA agreed to:

> obtain[ ], without expense to [CRL], all necessary public authority and permission, including applicable permits, for the maintenance and operation of the Track.

(Lease §4.2). The Mobile Signage Unit was rolled out to its location on the bridge's tracks on or around January 10, 2011. (FTA 56.1 Resp. ¶ 17). Of the communications amongst CRL, FTA and the Illinois Department of Transportation that followed the roll-out, the parties dispute the admissibility, relevance and import. The parties also fail to present the emails in a chronological or coherent manner or in conformity with Local Rule 56.1. Nonetheless, the parties do not dispute that on January 28, 2011, Andy Rabadi, a Senior Railroad Engineer with the Illinois Department of

[5] CRL mischaracterizes Track Lease § 21.7 when it asserts in CRL's 56.1 Statement ¶ 12 that "FTA agreed to be subject to all pre-existing conditions, liens and rights that impacted or may have impacted the track that was covered by the Track Lease." This assertion overstates the term that the Track Lease is subject to the "rights granted by . . . CRL . . . for any uses antedating this Agreement" and that "[CRL] . . . reserves the right to grant additional uses . . . so long as such use does not unreasonably interefere with the use of Track by [FTA}." Accordingly, ¶ 12 is stricken for violating Rule 56(c)(1)(A) and instead the Court cites and relies upon the exact language of the Track Lease.

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