ESSAY QUESTION NO. 4

Answer this question in booklet No. 4

Alex hired Weldon to develop a video game, *VisionQuest 3000*. Their written contract stated that by a certain date "Weldon will deliver a CD-ROM of a production-ready prototype to Alex's house" and that "Weldon will design games exclusively for Alex through the end of 2010."

Weldon completed the prototype CD and delivered it to Alex's house on the due date. Alex was not home, but his girlfriend was; she took the CD, promptly lost it, and forgot about it.

Two weeks later, Alex called Weldon and asked why Weldon did not deliver the prototype CD. Weldon said that he did, but offered to "burn a copy off of his hard drive" and run it over to Alex's house. Weldon brought the new CD over and played it for Alex, but the game locked up halfway through.

Alex, through counsel, filed suit in Anchorage Superior Court, claiming that Weldon breached the contract by (1) failing to timely deliver the prototype CD, (2) failing to produce a production-ready prototype, and (3) designing video games for another company. Weldon timely answered, through counsel, and denied the allegations in Alex's complaint.

Alex then moved for summary judgment on all three claims. His supporting affidavit stated that he was in Hawaii on the due date, but that "Weldon failed to timely deliver the CD-ROM in accordance with the contract." In support of his motion Alex also filed the affidavit of a computer expert that stated that the expert had examined the CD that Weldon provided to Alex (after the phone call), that it had a programming error that caused the lockup, and that the expert had learned from sources that Weldon is working for another video game company.

Weldon opposed Alex's summary judgment motion. His opposition explained the circumstances of his original delivery of the CD. Weldon attached to his opposition memorandum, as an exhibit, a receipt for the prototype CD of *VisionQuest 3000* signed by Alex's girlfriend on the date the prototype was due. Weldon's opposition memorandum admitted that the second CD locked up. But he filed an unsigned affidavit stating that the original prototype worked flawlessly and that after he delivered it his computer was infected with a virus which caused the programming glitch on the second CD. His affidavit denied designing video games for another company.

Alex filed a reply. His reply stated that Weldon's affidavit should not be considered because it was unsigned. He also stated that he was prepared to call witnesses to prove Weldon violated the anti-compete clause. Despite

having it pointed out to him that his affidavit was unsigned, Weldon failed to sign it.

Explain how a court evaluates a summary judgment motion, and for each of Alex's claims discuss whether he has established a prima facie entitlement to summary judgment and whether Weldon's opposition is sufficient to defeat summary judgment.

GRADERS GUIDE

***** QUESTION NO. 4 *****

SUBJECT: CIVIL PROCEDURE

Analyze whether the summary judgment motion and supporting documents establish a prima facie entitlement to summary judgment under Alaska Civil Rule 56 on each of Alex's three breach-of-contract claims; independently analyze whether the opposition and its supporting documents suffice to defeat a prima facie showing on each of those claims. Include an explanation of the general standards for evaluating summary judgment motions.

This question tests the applicant's knowledge of one of the more common areas of civil procedure, summary judgment practice.

1. General Standards for Evaluating Summary Judgment Motions (30 points)

Movant's Burden. Under Civil Rule 56(c), summary judgment may be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law."

Non-Movant's Burden. If the moving party meets his burden of showing that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law, then "the non-movant is required, in order to prevent summary judgment, to set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of fact exists." *Parker v. Tomera*, 89 P.3d 761, 765 (Alaska 2004) (quoting *Dep't of Highways v. Green*, 586 P.2d 595, 606 n.32 (Alaska 1978)). The non-movant does not have to show that he will prevail at trial, but only has to produce "'*any* evidence sufficient to raise a genuine issue of material fact,' so long as it amounts to 'more than a scintilla of contrary evidence[.]'" *Maines v. Kenworth, Inc.*, 155 P.3d 318, 323 (Alaska 2007) (citing and quoting cases omitted).

How the Court Should View the Record. A court evaluating a summary judgment motion is to view the facts and all reasonable inferences that can be drawn from the facts in favor of the non-moving party (Weldon). *Burnett v. Covell*, 191 P.3d 985, 987 (Alaska 2008) (citing cases).

2. The First Breach-of-Contract Claim. (30 points)

Alex claims that Weldon did not timely deliver the prototype CD to his house. Alex supports this claim with his own affidavit. Civil Rule 56(c) requires that summary judgment affidavits be based on personal knowledge. Alex's affidavit does not show that he has personal knowledge about whether Weldon timely delivered the CD to his house – in fact he admits in the affidavit that he was away from his house on the due date, on vacation, so it appears that he does not. Alex's affidavit also suffers from another defect as to this claim – it is conclusory, setting forth no real details as to Weldon's alleged non-compliance, but rather just stating what amounts to a pure conclusion of law. This may be viewed as insufficient to carry Alex's burden. *See Husky Oil N.P.R. Operations, Inc. v. Sea Airmotive, Inc.*, 724 P.2d 531, 534 n.1 (Alaska 1986). Alex cannot rely on the allegations in his own complaint to prove his entitlement to summary judgment. *Morris v. Rowallan Alaska, Inc.*, 121 P.3d 159, 165 (Alaska 2005). Alex fails to meet his burden of showing that he is entitled to judgment on this issue as he has proferred no admissible evidence in support of his claim.

Because Alex did not meet his burden, Weldon need not have done anything in opposition other than to note that fact. But Weldon's opposition did in fact controvert Alex's allegations, and the question requires the examinee to evaluate each side's compliance with the rules of summary judgment practice. Weldon's opposition memorandum and accompanying documents are sufficient to create a genuine issue of material fact.

Weldon's opposition memorandum itself, of course, could not create a genuine issue of fact, because a party opposing summary judgment may not rely on statements in its motion work to do so. *Meyer v. Dep't of Revenue, C.S.E.D.*, 994 P.2d 365, 369-70 (Alaska 1991). Weldon's affidavit, which might otherwise have sufficed to create a factual issue, cannot be relied upon because it is unsigned and Alex has specifically objected to the court relying on the affidavit, on that basis. *Murat v. F/V Shelikof Strait*, 793 P.2d 69, 74-76 (Alaska 1990). But the signed receipt from Alex's girlfriend, showing that Weldon did deliver the prototype CD to Alex's house on the due date, should be sufficient to create a genuine issue of fact. On the one hand, Civil Rule 56(e) requires that "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith," and documents supporting or opposing summary judgment must be documents that would also be admissible at trial. The receipt lacks proper authentication. But Alex has not objected on this basis, and trial courts retain discretion to rely on such materials in granting or denying summary judgment when the opposing party does not object on this basis, and should do so here. *Murat*, 793 P.2d at 75-76.

The court should deny Alex's motion for summary judgment on the claim that Weldon breached the contract by failing to timely deliver the prototype, both because Alex failed to establish that there were no genuine issues of fact, and because Weldon's opposition did create a genuine issue of fact by attaching the signed receipt from Alex's girlfriend.

3. The Second Breach-of-Contract Claim. (25 points)

Alex claims that Weldon breached the contract by failing to produce a production-ready prototype. Alex's motion meets his initial burden of establishing that there are no genuine issues of fact and that he is entitled to judgment as a matter of law. The motion is supported by the affidavit of the computer expert who states that he examined the second CD which Weldon provided to Alex (which was presumably identical to the first CD that Alex's girlfriend lost) and that it has a programming glitch. The affidavit is based on personal knowledge and contains non-conclusory allegations. Moreover, Weldon admits in his opposition memorandum that when Alex inserted the second CD into his computer to play it, that it locked up halfway through. Although statements in motions and briefs may not be relied upon to defeat a motion for summary judgment, when one party moves for summary judgment arguing that a particular factual proposition is undisputed, and the other party concedes that in their briefing or motion work, this concession will operate as an "admission" within the meaning of Civil Rule 56, and can support summary judgment. *See, e.g., Burnett v. Covell,* 191 P.3d 985, 990-91 (Alaska 2008)**.**

Weldon's affidavit in support of his opposition explains that the original prototype worked flawlessly and that the problem with the second CD was caused by a computer virus that affected his computer *after* he delivered the prototype on its original due date, and if signed would ordinarily be sufficient to create a genuine issue of material fact. But the affidavit is unsigned, and Weldon has failed to rectify this deficiency even after it was brought to his attention. In this situation, the court should disregard the affidavit. *See Maines v. Kenworth Alaska, Inc.*, 155 P.3d 318, 323-24 (Alaska 2007). Weldon's opposition and affidavit are insufficient to create a genuine issue of material fact and the court should grant Alex summary judgment on this claim.

4. The Third Breach-of-Contract Claim. (15 points)

Alex claims that Weldon breached the contract by violating the non-compete clause and designing video games for another company. But his only proof of this is the affidavit of his computer expert, who says that he has learned from sources that Weldon is working for another video game company. An affidavit must be based on personal knowledge, not on hearsay. Civil Rule 56(c)**.** Moreover, the affidavit only says that Weldon is "working for" another video game company, and the non-complete clause prohibits him from *designing*

video games for another company, not from working for them generally – he could be doing janitorial work at the other company for all that can be gleaned from the loose language of the computer expert's affidavit. Alex has not shown that he is entitled to summary judgment on this claim.

Assessing Weldon's opposition in terms of its compliance with summary judgment rules, Weldon's affidavit containing a specific denial of designing video games for another company would ordinarily be sufficient to create a genuine issue of fact, except for the fact that it is unsigned and Alex has specifically brought this defect to the attention of the court. But this defect is immaterial, given Alex's failure to carry his initial burden. And Alex's point in his reply is not well-taken – summary judgment practice does not allow parties moving for or opposing summary judgment to call live witnesses at an evidentiary hearing. *Jourdan v. Nationsbanc Mortgage Corp.*, 42 P.3d 1072, 1081 (Alaska 2002).

Conclusion. The court should deny Alex's summary judgment motion on his first and third breach-of-contract claims, grant Alex summary judgment on his second breach-of-contract claim, and set the case on for trial as to the issues in the first and third claims.