UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 15-0002-HPA
Docket No. 15-0003-HPA
Docket No. 15-0004-HPA

In re:

DON RAGAN CRUM, doing business as
DON CRUM STABLES,
KENDALL CRUM, and
STEPHEN RALEY,

Respondents.

ORDER DENYING SUMMARY JUDGMENT AND RESCHEDULING DATE OF COMMENCEMENT OF HEARING

I. INTRODUCTION

The instant matter was initiated by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA, Complainant) against Don Ragan Crum, d/b/a Don Crum Stables, Kendall Crum and Stephen Raley (Respondents) alleging violations of the Horse Protection Act, 15 U.S.C. § 1821 et seq.

II. ISSUE

The primary issue in controversy is whether, considering the record, summary judgment may be entered in favor of Complainant.

III. PROCEDURAL HISTORY

On October 9, 2014, Complainant filed its complaint against Respondents, who filed an answer on October 30, 2014. On November 7, 2014, counsel for Complainant moved for the entry of a Decision and Order on one count of the complaint, and Respondent Don Crum filed an

opposition. On December 3, 2014, Complainant withdrew the motion. The parties exchanged exhibits and witness lists, and I set a hearing to commence on April 7, 2015.

Pursuant to Complainant's motion, by Order issued March 19, 2015, I continued the hearing. The hearing has been rescheduled to commence the week of February 15, 2016. On November 9, 2015, Complainant filed a motion for summary judgment, and documents in support thereof. On November 19, 2015, Respondents filed opposition to the motion, and also filed a motion to strike or otherwise exclude some of the documents filed with Complainant's motion. On December 8, 2015, Complainant filed opposition to Respondents' motion. On December 15, 2015, Respondents moved to strike Complainant's opposition to Respondent's opposition.

For the reasons discussed below, I find it appropriate to DENY Complainant's motion for summary judgment. I further find it appropriate to DEFER ruling on Respondents' motion regarding the admissibility of Complainant's submissions in support of its motion for summary judgment. The motion for summary judgment is denied without regard to the probity of that proffered evidence, pursuant to the mandate to review the record in a light favorable to the opposing party.

I hereby GRANT Respondent's motion to strike Complainant's reply. Complainant did not ask prior leave to file a reply to a response, in accordance with 7 C.F.R. § 1.143(d). Accordingly, I Complainant's motion is stricken from the record for purposes of my consideration.

IV. LEGAL STANDARDS

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("the Rules") set forth at 7 C.F.R. subpart H, apply to the

adjudication of the instant matter. An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); Federal Rule of Civil Procedure 56(c)).

An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670, 1198 WL 247700 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183, 2001 WL 1006180 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U. S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380, 1993 WL 325496 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn

up at trial. *Conaway v. Smith*, 853 F.2d 789, 793, 1988 WL 79269 (10th Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

In 1970, Congress passed the HPA, prohibiting the showing, sale, auction, exhibition, or transport of sored horses. See, H.R. Rep. No. 9101597, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News 4870, 4871-72. In passing the HPA, Congress observed that the practice of deliberately injuring show horses to improve their performance was "cruel and inhumane." 15 U.S.C. § 1823. The Act defines the deliberate injuring of show horses as "soring", and includes the application of an irritating or blistering agent to any limb of a horse; of injecting any tack, nail, screw or chemical agent on any limb of a horse; or using any practice on a horse that reasonably can be expected to cause the animal suffering, pain, distress, inflammation, or lameness when "walking, trotting, or otherwise moving". 15 U.S.C. § 1821(3)(A)(B)(D).

APHIS was charged with enforcing the HPA through inspections by USDA employed Veterinarian Medical Officers ("VMO"), but when the program was underfunded, Congress allowed the horse industry to train is own inspectors, called Designated Qualified Persons ("DQP"). See, H.R. No. 94-1174, 94th Cong., 2d Sess. (1974) at 4-5, 6, reprinted in 1976 U.S. Code Cong. & Admin. News 1696, 1699, 1701 (15 U.S.C. § 1823(c); 15 U.S.C. § 1823(e)). In 1979, USDA promulgated regulations that set forth the requirements that DQPs must meet in order to inspect horses. 9 C.F.R. § 11.7. DQPs also must be licensed by a Horse Industry Organization (HIO) certified by the USDA. 9 C.F.R. § 11.7

In 1976, Congress revised the definition of "sore" to eliminate requirements that the soring be done with the intent to affect the horse's gait, and prohibited the showing of a sore

horse or allowing a sore horse to be shown. See, H.R. Rep. No. 94-1174 at 2, reprinted in 1976 U.S. Code Cong. & Admin. News 1696; 15 U.S.C. § 1824(2). The 1976 amendment also added a statutory presumption that a horse is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or hind limbs. 15 U.S.C. §§ 1821(3), 1825(d)(5). Courts have confirmed that intent to sore a horse or knowledge that a horse is sore is not a condition precedent to liability. A horse owner need only allow a "sore" horse to enter a horse show, and he need not have knowledge that the horse is sore, or be the source of the soring. *Stamper v. Sec'y of Dep't of Agric.*, 722 F.2d 1487, 1489 (9th Cir. 1984); *McCloy v. Sec'y of Dep't of Agric*, 351 F.3d 447, 451, 2003 WL 22854655 (10th Cir. 2003); *Thornton v. Sec'y of Dep't of Agric.*, 715 F.2d 1508, 1511-1512 (11th Cir. 1983).

It has been held that the presumption of soreness set forth in the HPA may be rebutted. *Landrum v. Block*, No. 81-1035 (M.D. Tenn. June 25, 1981), 40 Agric. Dec. 922 (1981). The 11th Circuit Court of Appeals also acknowledged that the presumption of soreness is rebuttable. *Zahnd v. Sec'y of Dep't of Agric.*, 479 F.3d 767, 772, 2007 WL 519721 (11th Cir. 2007).

In 1992, Congress attempted to require more proof of soring than digital palpation by a VMO when it limited how USDA could use funds to enforce the HPA. Congress directed "that none of these funds shall be used to pay the salary of any Departmental veterinarians or Veterinary Medical Officer who, when conducting inspections at horse shows, exhibitions, sales, or auctions under the Horse Protection Act, as amended (15 U.S.C. 1821-1831), relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under such Act." See, Pub. L No. 101-341, 105 Stat. 873, 881-82 (1992).

In addition, APHIS has established a "scar rule" which applies to horses born on or after October 1, 1975. 9 C.F.R. § 11.3 provides:

(a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.

(b) The posterior surfaces of the pasterns (flexor surface) including the sulcus or "pocket"may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.

9 C.F.R. § 11.3.

V. DISCUSSION

The complaint alleges that on March 30, 2013, Respondents Don Crum d/b/a Don Crum Stables and Stephen Raley entered or allowed the entry of a horse known as Jose Beam at the Mississippi Charity Horse Show (the Show) in Jackson Mississippi for the purpose of showing or exhibiting the horse, and that Respondents Don Crum, d/b/a Don Crum Stables and Kendall Crum showed or exhibited the horse on that day at the Show, while the horse was sore, in violation of section 5(2)(B) of the HPA (15 U .S.C. § 1824(2)(B)). Respondents have unequivocally denied that the horse was sore, and intend to produce evidence in support of their position.

Complainant's motion rests upon its contention that a VMO for USDA examined the horse Jose Beam at the Show and concluded that the horse was in violation of the scar rule, and therefore sore. Respondents have moved to exclude the Declaration of Dr. Bart Sutherland, the Declaration of Stevie Harris, the affidavit of Michael Person, Complainant's exhibits CX-1, CX-2, CX-3, CX-4, CX-7, CX-8, and Complainant's reliance upon RX-7, in part, asserting the right to cross-examine proponents of the documents, and to otherwise be satisfied of their authenticity and reliability. I defer ruling on those objections until the hearing, because it is likely that the proffered evidence will be probative, relevant and admissible. However, viewing the evidence in

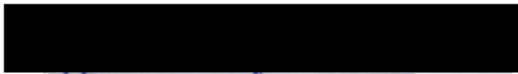
the light most favorable to the Respondents for the purposes of the instant motion, I accord weight to Respondent's contention that the findings of the VMO are not consistent, given his contradictory conclusions that the horse was not sore, but was nevertheless in violation of the scar rule.

I am unable to make the appropriate credibility assessments about the evidence so as to satisfy the standard for granting summary judgment. I conclude that summary judgment is inappropriate where the primary factual underpinnings of the matter are in dispute, and Complainant's evidence in support of its motion has been challenged. Therefore, Complainant's motion for summary judgment is DENIED.

In addition, the date that the hearing in this matter shall commence must be changed. When I set the hearing date, I inadvertently identified a federal holiday. Accordingly, the hearing shall commence on Wednesday, February 17, 2016, and continue until concluded at a location in Houston, Texas, to be identified under separate Order at a later date.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

So Ordered this 15th day of January, 2016, in Washington, D.C.



Janice K. Bullard
Administrative Law Judge