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A Summary On Summary Judgment

By Patrick M. Kinnally

Overview

Section 5/2-1005(c) of the Illinois Compiled Statutes states that summary judgment "... shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[1]

This is where you start. Read the statute. What is its purpose? It is trying to provide a method by which parties in a dispute can establish that there is no reason for an entire evidentiary hearing or trial, either as to liability, damages or a major issue in the case. In other words, summary judgment should be awarded if the evidence presented in the motion would require the entry of a directed verdict at trial.[2]

If you are going to file a motion for summary judgment, you must know *why* you are doing it. There are two reasons: either to completely delete a part of the other party's case; or, to win the entire case. Hence, a motion for summary judgment can knock out your opponent's entire case, a portion of it, or a major issue.[3] It is a potent litigation tool.

On the surface, the stakes may not seem high if you lose. Some have said you can take an extra bite at the apple by filing a motion for summary judgment. Even if you lose, you will have a trial. This is wrong thinking.

Like any motion, a motion for summary judgment educates your opponent. Education is for the classroom, not the courtroom. Unless your purpose is to inform the court of the law in advance of trial, motion practice is only successful if you win. This is true because filing motions informs your opponent of your theory of the case, as well as your strategy. If you lose the motion, your opponent enjoys the advantage of knowing what your defenses or theories are, and how you intend to implement them. But there is another reason: filing motions informs the court and opposing counsel of the strengths and weaknesses of your client's position. If you are trying to settle the case, then bringing the motion may be justified. But if you are not, then showing weaknesses may cause the litigation to drag on. It is often better to say nothing than to say something in an unconvincing fashion. Weaknesses are better left for the spontaneity of trial, as opposed to the deliberative process inherent in motion practice. An affirmative defense can achieve much more than a failed summary judgment motion or a motion to dismiss.

When I consider filing a motion for summary judgment, I try to do so from the inception of the case. That is where you start when drafting a summary judgment motion. Look at the complaint, the answer and affirmative defenses. At a minimum, these must establish each element of the cause of action or defense. Motions for summary judgment are fact-specific. This is because the

court must determine whether there exists a genuine issue of material fact. And, in doing that, the court must look at the facts as contained in the pleadings, depositions, admissions, and affidavits. A genuine issue of material fact exists if "a fair-minded person may draw different inferences from undisputed facts."[4]

Most people say summary judgments are won and lost on affidavits. This is true only because affidavits are a principal source upon which many summary judgment motions rely. Summary judgments are lost because lawyers don't know how to draft affidavits consistent with Rule 191. The decision in *Webber v. Armstrong Industries, Inc.*,[5] will show you how a poorly drafted affidavit will promote a premature conclusion of your case in the summary judgment context, regardless of the equities of your case. Another good example of a poorly drafted affidavit causing a premature conclusion to your summary judgment case is found in *Landeros v. Equity Property and Development.*[6] In *Landeros*, the plaintiff lost a summary judgment motion because his opinion witness' affidavit was phrased using conclusory terminology. A viable claim may have been lost due to bad drafting. Summary judgments are won where adequate research is performed, complaints are artfully drafted, depositions are purposefully taken, and requests to admit are utilized. Affidavits are icing. Other discovery vehicles are the cake.[7]

A lot of lawyers take depositions, but often the lawyer doesn't understand the purpose for the deposition. With each deponent, you are hopefully trying to establish a part of your case, seal the opposing party's position, and gain information. Those are finite functions, not indeterminate ones. Supreme Court Rules 207 and 216 lay out a procedure for memorializing this testimony. If you follow these rules, you can file the deposition with your motion for summary judgment. You don't need to file the whole deposition, just the parts that make the point you need to prove and that establish its authentication. A discovery deposition can be used for impeachment, as an admission, and for any purpose an affidavit can be used. An evidence deposition, if relevant, can be used as substantive evidence in its entirety. In order to use the deposition, however, it must be properly signed. Remember those *errata* sheets? They have a purpose, and it's not to test your high school Latin knowledge.

Rule 216 is the most important discovery resource in the Supreme Court Rules. You can make your opponent admit facts or the genuineness of documents. You can make your opponent do that in 28 days. Denials must be made on facts, not on information and belief or on conclusions. The reply "investigation continues" does not work. And, all facts, including "ultimate" ones, must be admitted or denied.[8] On the other hand, legal conclusions are not proper fodder for a request to admit. No other discovery device gives you this kind of speed and decisiveness. Requests to admit are under-utilized because lawyers are not taught about them in law school, and because you can't put them on a word processor for your next case. Each is fact-specific and unique to the case. You have to think about them and work on them. The interrogatory answers in response to your Rule 213 request can be utilized in a similar fashion to the extent they are concrete and exact.

Affidavits/Counter Affidavits(Rule 191)

"(a) Requirements. Motions for summary judgment under Section 2-1005 of the Code of Civil Procedure and motions for involuntary dismissal under Section 2-619 of the Code of Civil Procedure must be filed before the last date, if any, set by the trial court for the filing of dispositive motions. Affidavits in support of and in opposition to the Code of Civil Procedure, and affidavits submitted in connection with a special appearance to contest jurisdiction over

the person, as provided by Section 2-301(b) of the Code of Civil Procedure, shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto, sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts of admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used.

(b) When Material Facts Are Not Obtainable by Affidavit. If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or making the depositions of any of the persons so named, or for producing papers or documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of papers and documents so furnished, shall be considered with the affidavits in passing upon the motion."

There is no magic to this rule. It is fairly clear. If you follow it, your affidavit may be considered, provided it is relevant to the case (*i.e.*, establishes that no material fact exists concerning the elements of the cause of action or a defense sought to be advanced).

Courts do not like affidavits that are canned; in other words, drafted by an advocate for a client in order to achieve a pre-conceived end, or full of legal phrases and terminology which many affiants do not understand. Put yourself in the position of your audience - the trial court. Affidavits which employ common words are more believable. This is because they are the declarations of common persons, not lawyers. More importantly, legal conclusions in an affidavit do <u>not</u> create an issue of fact. Remember that. Use it to your advantage.[9]

Also, many affidavits are poorly drafted. Either the affiant does or does not have personal knowledge of the fact sought to be established. Posturing an affidavit in a conclusory fashion or attaching documents to the affidavits which are not sworn to as to veracity, or not certified as to authenticity, will result in the court not considering them. It is worthwhile to remember that discovery devices which corroborate each other internally are more credible than a single source document. Since summary judgment is a drastic means of disposing of litigation, and courts strictly construe them against the movant, affidavits, unless corroborated, are not favored unless they address generally accepted facts. Remember, in a summary judgment motion, the court may take judicial notice of many facts, such as ordinances, publications, court rules, statutes, common law, the laws of foreign countries, uniform acts, court records, municipal records, corporate records, land patents, surveys, handwriting, deeds, *etc.*

Treat affidavits as if they are witnesses. In other words, an affidavit should say what the witness would state if you were at trial. Give it a life, not another paragraph of rhetoric. And, if you are the recipient of a summary judgment motion, you must make your affidavit something the court will want to read. But, don't just rely on an affidavit.

Timing

Perception is as important in a summary judgment motion as it is in anything else. Keep it simple and to the point. A motion for summary judgment should contain a statement of facts to be proved, and incorporation of the discovery or pleadings which you wish to be considered as evidence, marked as exhibits, including affidavits. You do not need to submit your entire legal file. The court will thank you for not doing this. The discovery you utilize as exhibits should let the judge know enough factual material so the propositions you need to prove are clear and undisputed. Accompanying the motion should be a legal memorandum.

The Code of Civil Procedure says a party can make a summary judgment motion at any time after the other party has appeared, or the period in which an appearance should be filed has expired.10 In the 16th Judicial Circuit, a summary judgment motion, since it is potentially claim-dispositive, must be filed and heard within 90 days prior to the trial date. Also, it cannot be heard until 10 days after it is filed. Otherwise, it is not timely and the court will not entertain it. The 18th Judicial Circuit has a similar, but different rule. In Cook County, Rule 2.1(f) mandates filing 45 days before the trial date. Check your circuit court rules as to timing.

Two timing rules that apply to summary judgment motions are often overlooked. Supreme Court Rule 191(b) provides the method by which a summary judgment may be continued. It says if a party needs evidence that is currently unavailable, then the party may file an affidavit stating why the evidence is not available and what he expects an affiant to say in the affidavit. This is an important maxim. It gives the party who does not have evidence to meet his burden of proceeding time to obtain the evidence. This does not mean you can rely on the rule and not file the affidavit. And, it does not mean the lawyer can be the affiant.11 The affidavit should include the name of the witness who is unavailable, the reason for the unavailability or hostility, what the person will say, and the reason for the belief. Remember, a deposition in this regard can qualify as an affidavit. So could a Rule 213 response if properly sworn to and authenticated.

The final timing rule is Rule 192. Basically, this rule provides for judicial case management. It informs the judge what he can do on partial motions for summary judgment. Some judges may not have heard of this. If you tell the judge about this, they will appreciate it.

Rule 192 says the trial court may enter a summary judgment on less than all of the issues in the case. And, the court can either enter judgment on the motion, postpone entry on that judgment, or stay enforcement on that judgment until the remaining issues in the case are decided.12 Moreover, if a party objects to the entry of summary judgment but admits it owes an amount less than the movant's demand, then the trial court can enter and enforce a judgment for the difference.

Think about that. What a tremendous weapon! If X claims Y owes $100,000, and Y admits that she owes $60,000, then the trial court can enter judgment for $60,000 and enforce it. Right now, not in a year's time. Fighting over $40,000 may not be as attractive to a client as fighting over $100,000.

Style

A note on style. I have seen motions for summary judgment that are thick,

burdensome creatures. These come with appendices, tables of contents and other trappings. They are accompanied by legal memoranda which are corpulent. Also, much time is requested for argument and oration on these tomes. In my view, these motions are like B-movies.

To present a motion for summary judgment as described above is a mistake. There may be exceptions, but they are scarce. In this arena, less is probably more. If you present a motion for summary judgment and the moving papers alone are a half inch thick, don't you think the trial judge is going to wonder why there is not a material issue of fact in such a motion? That may sound partisan, but it is a fact and, if so, you start out, before the court has even read your motion, a few paces behind your opponent. That's not good.

In preparing summary judgment motions in a commercial case or on any other topic, I follow the "3 C" rule. These are: conciseness, cogency and care. All three of these attributes should be goals you strive for in preparing such a motion. All have equal value. Your motion must be simple and to the point. Don't embellish. The presentation should be one that is readily understandable, logical, and results in a conclusion which flows from the law applicable to the facts.

In my world, cogency has to do with diligence and anticipation. First, as to the former, I try to formulate my legal memorandum to give the court precedent which is as close to the facts presented as I can find. Don't limit yourself to Illinois law in this regard. An exegesis on when a motion for summary judgment should be granted is unnecessary. Judges know this standard. Provide the court with copies of any opinions you cite. The court will appreciate that. So will her clerk, if she has one.

Next, my concern is: what is my opponent going to do? You need to place yourself in your opponent's position. Be her advocate in the privacy of your office. Figure out what she would do. Argue her case. Always believe your opponent is smarter and more wily than you are. This way you can make an argument which is a winner, or determine not to file a motion at all.

The final "C" standard is two-pronged: one spur deals with your professional conduct and, the other, the court. I have seen a lot of motions for summary judgment which should not have been made. They are losers from the outset. To make such a motion is a waste of everyone's time, increases the cost of litigation and, if not grounded in fact or the law, probably violates ethical rules of our profession. Also, it does not help client relations because it creates in your client the expectation of victory, which is dashed when the motion is denied. Also, these motions cost your clients money. When you lose, the client feels the money may have been misapplied. Finally, it educates your opponent. All of these are bad lawyering.

Trial judges who follow the law are not disposed to grant motions for summary judgment unless you convince them to. Why? Because it is a drastic remedy. Litigants are accorded the fundamental right to present their claims to a jury or judge. This is a precious right which trial judges do not pretermit merely for the sake of expediency. They guard it, jealously, as well they should.

Remember, appellate review is de novo, so you are writing a motion for two sets of eyes. Present a motion and brief that you would want to read and agree with as to the law. A motion for summary judgment is based on the claim that you are entitled to judgment as a matter of law. It is not due to the righteousness of your cause, but because you are legally correct. That must be your focus. If it is, you will be successful.

Burden of Proof

The burden of proof in a summary judgment motion initially centers on the burden of production rather than the risk of non-persuasion. In other words, initially, it does not depend on who you are (plaintiff or defendant), but what facts you are required to muster to establish you are entitled to judgment as a matter of law. In Barber-Colman v. A.K. Midwest Ins. Co.,13 the court observed if you are opposing the summary judgment motion, you do not have to prove your case. You must present some factual basis that shows you are entitled to judgment.14 What this means to the person seeking summary judgment is that, as the movant, he must anticipate what the other party's proof will be. If you don't, you are merely fooling yourself.

If you move for summary judgment, you need only show that the uncontradicted facts entitle you to judgment as a matter of law. You must presume your opponent will attempt to create a disputed fact issue. Therefore, you need more than pleadings to win a summary judgment motion (i.e., requests to admit, depositions, affidavits)15. Otherwise, you would be filing a motion for judgment on the pleadings.

Once the party seeking summary judgment produces the evidence necessary to establish entitlement to judgment as a matter of law, the burden of production shifts to the party opposing the motion, who may not merely rely on the pleadings, but is required to come forth with some facts which create a material disputed issue of fact. At this point, with respect to summary judgment, it depends whether you are a plaintiff or defendant. If you are the former and opposing the motion, you must provide some factual basis that arguably contradicts the pleadings and affidavits of your opponent as well as shows the elements of your cause of action which would, if believed, entitle you to judgment as a matter of law. If you don't produce such evidence, you are going to lose the motion. This does not mean you get a second chance. It's just the contrary. As the movant, in summary judgment practice you must always anticipate what your opponent will do. This is especially true if you are the plaintiff, since ultimately you bear the risk of non-persuasion.

In practice, let's consider a situation that occurs with some frequency. Plaintiff A sues his Insurer, claiming there is coverage under the insurance policy Insurer issued to A. Insurer, in its answer, says A did not have coverage because A committed fraud in the application process. In discovery, it is shown that A did not commit fraud. Insurer now claims that A has no coverage because it did not cooperate with it in the claim process. Insurer should not be permitted to change its litigation position. Why? Because of the "mend the hold doctrine."16 This little used estoppel theory says that in contract litigation, once a party refuses to perform a contract on a specific ground and raises such in his pleadings and defense, he waives all other contentions as to why he should not perform his contractual undertakings.17

In commercial litigation, this scenario presents a fertile area for a motion for summary judgment as to a major issue in the litigation, namely, the legal position of Insurer as to why coverage does or does not exist. Once that is determined by the court, Insurer is locked into a position it cannot alter. This should result in quick adjudication of such litigation.

Standard of Review

Lawyers often argue on appeal that the trial judge abused his or her discretion in granting summary judgment. They are wrong, for a trial court does not grant summary judgment as a matter of discretion. Rather, the trial judge

enters summary judgment as a matter of law. It is that simple. There are cases that appear to say something different.18 Those decisions are wrong. The appellate court will review the trial court's ruling de novo, and its role is to determine if the trial court correctly ruled that no genuine issue of material fact exists and, if none exists, if judgment was correctly entered for the moving party as a matter of law.19

Conclusion

Summary judgment can be an early demise for an unsuspecting litigant. Its primary function is to let a trial court fathom whether there is any question of material fact to be tried by the court or a jury and, if not, whether your client is entitled to judgment as a matter of law. Therefore, summary judgment motions can be an efficient vehicle to save judicial resources as well as legal fees and costs. At the same time, if utilized carelessly, this procedure can give an early view to an opponent's case, theory(ies), and strategy. The utilization of, and responses to, motions for summary judgment should be undertaken with thoughtfulness, care and a command of the discovery rules that can make summary judgment a reality for your clients.

1 (735 ILCS 5/2-1005(c))
2 Pyne v. Witmer (1989) 129 Ill.2d 351.
3 (735 ILCS 5/2-1005(d)).
4 Consolino v. Thompson (1984) 127 Ill.App.3d 31.
5 Webber v. Armstrong Industries, Inc., 235 Ill.App.3d 790 (4th Dist. 1992).
6 Landeros v. Equity Property and Development, (1st Dist. 2001) 321 Ill.App.3d 57
7 Depositions (Rules 207 & 212)
8 Walker v. Valor Insurance, (1st Dist. 2000) 314 Ill.App.3d 55.
9 See Landeros v. Equity Property and Development, (1st Dist. 2001) 321 Ill.App.3d 57
10 (735 ILCS 5/2-1005(a))
11 Delgatto v. Brandon Assoc. Ltd., (1989) 131 Ill.2d 183
12 Samuels v. Chicago Housing Authority, (1990) 207 Ill.App.3d 10, 151 Ill.Dec. 963
13 Barber-Colman v. A.K. Midwest Ins. Co., (1992) 236 Ill.App.3d 1065
14 Id. at 1071
15 See Cuthbert v. Stempin (1979) 78 Ill.App.3d 562
16 Larson v. Johnson, (1953) 1 Ill.App.2d 36, 116 N.E.2d 187. Also see Horwitz Matthews, Inc. v. City of Chicago, 78 F.3d 1248 (7th Cir. 1996); Harbor Ins. Co. v. Continental Bank, 922 F.2d 357; Townsend v. Postal, (1931) 262 Ill.App. 483; Schuyler County v. Missouri Bridge & Iron, 100 N.E. 239 (1912); Larson v. Johnson, 1 Ill.App.2d 36, 116 N.E.2d 187 (1953); Rural Electric v. ICC, 73 Ill.Dec. 951 (1983); IK Corp. v. 1 Financial, 146 Ill.Dec. 198
17 Harbor Ins. Co. v. Continental Bank, (7th Cir. 1991) 922 F.2d 357, 362, citing County of Schuyler v. Missouri Bridge & Iron, 256 Ill.348, 353, (1912).
18 Lindemeier v. City of Rockford, (2d Dist. 1987), 156 Ill.App.3d 76
19 Jones v. Chicago HMO Ltd. of Illinois, (2000) 191 Ill.2d 278, 291.

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