February, 2013

Drafting NY Civil-Litigation Documents Part 22—Summary-Judgment Motions Cont'd

Gerald Lebovits

NEW YORK STATE BAR ASSOCIATION
Journal
FEBRUARY 2013
VOL. 85 | NO. 2

Made for Each Other

Social Media and Litigation

by Andrew B. Delaney and Darren A. Heitner

Also in this Issue

BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part XXII — Summary-Judgment Motions Continued

In the last issue, the *Legal Writer* discussed the burdens of proof when a plaintiff or a defendant moves for summary judgment. The *Legal Writer* also discussed the nuances to writing affidavits — the backbone of summary-judgment motions.

In this issue of the *Journal*, we continue our summary-judgment motions overview. We'll continue discussing affidavits, specifically expert-witness affidavits. We'll also discuss attorney affirmations, moving for partial summary judgment, opposing summary judgment, cross-moving to amend pleadings, cross-moving for summary judgment, replying to opposition papers, and opposing cross-motions for summary judgment.

Expert-Witness Affidavits

If you'd need an expert at trial to prove your claim or defense, you'll likely need an expert's affidavit for your summary-judgment motion or your opposition to a summary-judgment motion. In the affidavit, the expert's opinion should be supported with evidence. The expert's opinion cannot be conclusory or speculative.[1] Experts must explain the basis for their opinions and demonstrate their reliability. Experts must articulate their skill, training, education, knowledge, and experience.[2]

The best practice is to disclose to your adversary any expert witness before moving for summary judgment or before filing the note of issue (or notice of trial). At the summary-judgment phase, if you fail to disclose the expert witness, a court — depending on which department you're in — might not consider your expert's affidavit.[3]

Affirmations

Litigators typically submit affirmations as part of their summary-judgment motions or their opposition papers.

Affirmations are similar to affidavits. Both subject to the penalties of perjury someone who makes a false statement. Affirmations are different from affidavits in that affirmations dispense with the need for the individual to take an oath before a notary public.

Attorneys, physicians, osteopaths, and dentists are exempt from filing affidavits. They may submit affirmations.[4] The legislature assumes that these licensed professionals are subject not only to the penalties of perjury if they make a false statement but that they are also subject to disciplinary proceedings based on their New York license.

Litigators use attorney affirmations to set out the story of their clients' cases and to explain the documentary and testimonial evidence on which they're relying in moving for or opposing summary judgment.

Consecutively number each paragraph in the affirmation. Each paragraph should cover one topic, one fact, or one issue.

You may use an attorney affirmation to offer evidence in admissible form, such as sworn examination before trial (EBT) transcripts or documents whose authenticity is undisputed.[5] Identify in your attorney affirmation those exhibits you're including in your motion or opposition papers. *Example:* "Plaintiff's Exhibit 1." *Or:* "Defendant's Exhibit A." If you're discussing your adversary's exhibits in your attorney affirmation, refer the court to the exact exhibit. Make it easy for the court to go to the right exhibit and follow your argument.

Attorneys sometimes use attorney affirmations to proffer evidence of which they have no personal knowledge. Unless the attorney has first-hand knowledge of the facts, an attorney's affirmation has no probative value. Don't vouch for the facts contained in your affirmation. Only persons with knowledge can attest to facts.

Litigators use attorney affirmations to set out the story of their clients' cases.

Litigators often include in their attorney affirmations legal arguments and authority. The better practice is to make legal arguments in a brief or memorandum of law. Attorneys may not vouch for the truth of the law.

Some judges take motions on submissions — without oral argument. If the court takes the motion on submission, you won't have an opportunity to persuade orally.

Some judges require you to request oral argument when you move for summary judgment. Make sure to follow the judge's rules.

Some judges schedule oral argument for all motions or just for some motions like summary-judgment motions. At oral argument, consider it

CONTINUED ON PAGE 56

your "last and best chance to convince the court . . . . Do not forego that [oral-argument] opportunity."[6]

Regardless whether you orally argue the motion, your papers should speak for themselves.

At oral argument, you can't come up with arguments different from those in your motion papers.

Moving for Partial Summary Judgment

The court may not grant partial summary judgment to the non-moving party in a matrimonial action.

In all other cases the court may, under CPLR 3212(e), grant partial summary judgment to part of one cause of action or to one or more causes of action.

It's partial because the court may grant summary judgment on the plaintiff's first cause of action but deny summary judgment on the plaintiff's second cause of action. As the moving party, you as the defendant may move for partial summary judgment on the plaintiff's first cause of action but not move for summary judgment on the plaintiff's second cause of action.

It's partial because the court may also grant summary judgment on part of the plaintiff's first cause of action but deny summary judgment on another part of the plaintiff's first cause of action, "as long as the part on which summary judgment is granted can be logically separate."[7] This might happen when the plaintiff's first cause of action is based on two theories with respect to the same wrong.

An example of partial summary judgment for part of a claim is moving for summary judgment on liability but seeking a trial on damages.

The court may grant partial summary judgment "on such terms as may be just."[8] The court has a "broad range of procedural tools: severance, stay, separate trial, [and] the imposing of conditions."[9]

Although CPLR 3212(e) discusses partial summary judgment as to "one or more causes of actions," partial summary judgment also applies to defenses. A plaintiff may move for partial summary judgment as to the defendant's first defense but not as to the defendant's second defense.

The rules get tricky when a defendant counterclaims. A defendant's counterclaim doesn't bar the court from granting summary judgment to the plaintiff.

The court might grant summary judgment to the plaintiff when the defendant's counterclaim isn't inextricably intertwined with the plaintiff's claim. The court might not grant summary judgment to the plaintiff when the defendant's counterclaim is inextricably intertwined with the plaintiff's claim. A defendant's counterclaim is inextricably intertwined with a plaintiff's claim when there's "so intimate a relationship between the main claim and the counterclaim that the latter falls substantively if the main claim prevails."[10]

If the court determines that a defendant's counterclaim is inextricably intertwined, the court will allow the plaintiff's claim and the defendant's counterclaim to proceed to trial; thus, the court would deny the summary-judgment motion.

If the court determines that a defendant's counterclaim isn't inextricably intertwined, the court may grant summary judgment on the plaintiff's main claim and stay entry of the judgment until the counterclaim is resolved at trial.[11]

If the plaintiff's main claim exceeds the counterclaim, the court may grant summary judgment for the plaintiff for the remainder and the plaintiff may have the right to seek immediate enforcement of the judgment. The court may hold the rest in abeyance for possible offset by whatever the defendant proves on the counterclaim.[12] If the defendant doesn't succeed on the counterclaim, the court may grant summary judgment for the plaintiff for the rest of the main claim.

If a defendant's counterclaim exceeds the plaintiff's claim and the court grants summary judgment for the plaintiff on its main claim, the court could protect the defendant by staying the entry or enforcement of the plaintiff's judgment until the counterclaim is resolved at trial.[13] If the plaintiff is solvent — ensuring that the plaintiff will pay the judgment if the defendant wins on the counterclaim — no need would exist for the court to stay the entry or enforcement of the judgment.[14] A plaintiff's solvency is important to the court's fashioning of its order and judgment.

When the defendant's counterclaim is independent of the plaintiff's claim — meaning that they aren't inextricably intertwined — the court may issue a conditional order. The court has "wide discretion in imposing conditions upon the grant of partial summary judgment so as to avoid possible prejudice to the party against whom that judgment is granted."[15] But the court's discretion "is not unlimited, and is to be exercised only if there exists some articulable reason for concluding that the failure to impose conditions might result in some prejudice, financial or otherwise

Opposing a summary-judgment motion with an attorney affirmation that contains unsubstantiated assertions, conclusory allegations, or speculation isn't enough to win.

. . . should that party subsequently prevail on the unsettled claims."[16] The court may require the defendant to post a bond staying enforcement of the plaintiff's summary judgment.[17] The bond would be conditioned on the defendant's making good on whatever the plaintiff is still entitled to after the defendant's claim is adjudicated.[18]

Opposing a Summary-Judgment Motion

Once your adversary moves for summary judgment, you'll need to consider whether to oppose the motion. Talk to your client. Explain the "stakes involved."[19] Also tell your client how much it will cost to oppose the motion.[20] Make sure your client understands the chances of success and failure in opposing the motion.[21] If you need affidavits from witnesses, tell your client what's required.[22] Give your client options: settle the case, seek additional disclosure, oppose the motion, oppose the motion and cross-move for summary judgment, and oppose the summary-judgment motion in part and assent to part of the motion.[23]

A formal response to a summary-judgment motion is an opposition. You may submit an affirmation in opposition to the summary-judgment motion. Refer in your attorney affirmation to any affidavit you're attaching in opposition. You should also refer to any helpful information you've obtained through disclosure. Those documents include EBT transcripts, responses to interrogatories, and notices to admit. Attach as exhibits to your opposition all the documents to which you refer in your attorney affirmation.

One way to oppose your adversary's motion is on procedural grounds. Object to the evidence in your adversary's motion; argue that the evidence isn't in admissible form; then oppose your adversary's motion on the merits.[24]

If the plaintiff moved for summary judgment, as the defendant you oppose the motion by explaining how the plaintiff hasn't met its initial burden. Also demonstrate, with evidence, that a triable issue of material fact exists. If the defendant moved for summary judgment, the plaintiff in opposing the motion should set out the material facts in dispute that warrant a trial to resolve the dispute. If the defendant has met its initial burden on summary judgment and proved an affirmative defense, the plaintiff should try to negate any element of the defendant's defense.

Opposing a summary-judgment motion with an attorney affirmation that contains unsubstantiated assertions, conclusory allegations, or speculation won't be enough to defeat the motion.[25]

Any affidavit you attach to your opposition must come from someone with personal knowledge of the facts.[26] Your affiant should authenticate the document(s) to which the affiant refers in the affidavit.[27] Attach those documents as exhibits. The documents you submit must be in admissible form. (The *Legal Writer* will discuss evidence in admissible form in the next issue of the *Journal*.)

On a summary-judgment motion, courts will not resolve issues of credibility.[28] The court will not decide from the affidavits you've attached whether your witnesses are telling the truth or whether your adversary's witnesses are telling the truth. The court will instead decide whether the discrepancy between the witnesses' stories creates a material issue of fact. If you demonstrate in your opposition papers that material issues of fact exist, the court will deny your adversary's motion.

Cross-Moving to Amend Your Pleadings

You might need to cross-move to amend your pleadings when you've omitted from your pleadings an essential element of a claim or defense.[29] Amending the pleadings might render your adversary's summary-judgment motion academic. Consult CPLR 3025(b) before moving to amend your pleadings.

Along with your notice of cross-motion and supporting papers, include a copy of your proposed amended pleadings. If you're seeking to amend the pleading after the note of issue was filed (or notice of trial, in lower courts like New York City Civil Court), you'll also need to explain the merit to amending your pleading and the reasonable excuse for the delay in moving for amending the pleading.[30] Tell the court how your adversary wasn't prejudiced by your delay in moving to amend the pleading.

Cross-Moving for Summary Judgment

Cross-moving for summary judgment is different from cross-moving to amend your pleadings. Cross-moving for summary judgment means that you're seeking a judgment on the papers.

Cross-move against the party who initially moved for summary judgment. If the plaintiff initially moved for summary judgment, the defendant may cross-move against the plaintiff.

When a case has multiple plaintiffs and defendants, here's how you can cross-move for summary judgment. Consider a case with plaintiffs Adams and Block and defendants Crane and Daniels. If Adams initially moves for summary judgment against Crane, Daniels may cross-move against Adams for summary judgment even if Adams's motion was against Crane. Adams, however, is required to serve Daniels with the initial motion, even though Adams isn't moving for summary judgment against Daniels. Likewise, if Crane initially moves for summary judgment against Block, Adams may cross-move against Crane.

Under CPLR 2215, you're permitted to cross-move with or without supporting papers. You might want to include an affirmation piecing together the facts of your case, the affidavits, and the exhibits you attach to your motion. Include in a cross-motion for summary judgment a notice of cross-motion, supporting affidavit(s), and other documents to support your position.

The papers you submit in your cross-motion might be similar or

almost identical to your opposition to your adversary's summary-judgment motion. Many litigators combine their cross-motion papers with their opposition papers. They label their documents this way: "Defendant's Cross-Motion for Summary Judgment and Affirmation in Opposition to Plaintiff's Summary-Judgment Motion." *Or:* "Plaintiff's Cross-Motion for Summary Judgment and Affirmation in Opposition to Defendant's Summary-Judgment Motion." Other litigators file two separate documents instead of combining the two.

Comply with CPLR 2215 service deadlines.

Your cross-motion for summary judgment is returnable on the same date as your adversary's opening motion. The court will hear both motions on the same date. The motions might have separate return dates if the court orders different dates or if the attorneys stipulate to different dates.[31]

Replying to Opposition Papers

You've moved for summary judgment and your adversary opposed your motion. Now it's time to reply to your adversary's opposition papers. Label your papers accordingly: "Defendant's Reply to Plaintiff's Affirmation in Opposition to Defendant's Summary-Judgment Motion." *Or:* "Plaintiff's Reply to Defendant's Affirmation in Opposition to Plaintiff's Summary-Judgment Motion."

After receiving your adversary's opposition papers, you might realize that your adversary has raised a triable issue of fact. If so, you may withdraw your summary-judgment motion. A court might impose sanctions if it finds that your motion is frivolous.

If your adversary hasn't opposed your summary-judgment motion, there's no need to file a reply. The court might, on default, grant your motion if it's unopposed, but only if your papers persuade the court that you've made out your prima facie case and that you're entitled to judgment as a matter of law.

You may not cure deficiencies in your summary-judgment motion by making new arguments or submitting new proof in your reply.

If your adversary opposed your motion, reply if there's a need to reply. Don't reply simply to have the last word.[32] Limit your reply to the matters your adversary raised in its opposition papers. You may not cure deficiencies in your summary-judgment motion by making new arguments or submitting new proof in your reply. If you've omitted something minor from your motion, a court will allow you to correct that error in a reply.[33] Don't repeat the same things you've argued in your summary-judgment motion. Don't waste the court's time.

If your adversary's proof in its opposition papers is inadmissible, address the argument of inadmissibility in your reply. Argue to the court that it shouldn't consider your adversary's proof.

A reply is authorized only if you've complied with CPLR 2214(b). Your adversary or the court may permit you more time to reply.

Some judges, especially in New York Supreme Court, require that you deliver to the judge all the papers (motion, opposition, and reply) several days before the return date. Know your court. Know your judge's rules.

Opposing a Cross-Motion for Summary Judgment

CPLR 2215, which covers cross-motions, doesn't address opposition papers to cross-motions.

Some practitioners oppose cross-motions as a matter of course. Some practitioners oppose cross-motions because a response might be necessary. Opposition papers might be necessary if your adversary's cross-motion papers are based on matters you didn't raise in your original summary-judgment motion. You'll need to address those matters. The court might grant your adversary's cross-motion because you failed to oppose the cross-motion.

In the upcoming issue of the *Journal*, the *Legal Writer* will continue with summary-judgment motions and will discuss, among other things, the evidence — and its admissibility — in support of or in opposition to a summary-judgment motion. ■

Gerald Lebovits (GLebovits@aol.com), a New York City Civil Court judge, teaches part time at Columbia, Fordham, and NYU law schools. He thanks court attorney Alexandra Standish for researching this column.

1. 1 Byer's Civil Motions § 77:108 (Howard G. Leventhal 2d rev. ed. 2006; 2012 Supp.), *available at* http://www.nylp.com/online_pubs/index.html (last visited Nov. 26, 2012).

2. David Paul Horowitz, 2012 Motion Practice Update, N.Y. St. Jud. Inst., 12th Jud. Dist. Legal Update Program 1, 10 (Apr. 18, 2012).

3. *See Kozlowski v. Alcan Aluminum Corp.*, 209 A.D.2d 930, 931, 621 N.Y.S.2d 240, 241 (4th Dep't 1994) ("We reject plaintiffs' contention that the affidavit submitted by defendant's expert should not be considered because defendant failed to disclose the expert's identity in a reasonable time pursuant to CPLR 3101(d)(1)(i)."). *But see Constr. by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 863, 866 N.Y.S.2d 702, 704 (2d Dep't 2008) ("The Supreme Court did not improvidently exercise its discretion in declining to consider the affidavits of the purported experts proffered by Lowe, since Lowe failed to identify the experts in pretrial disclosure and served the affidavits after the note of issue and certificate of readiness attesting to the completion of discovery were filed in this matter.").

4. CPLR 2106.

5. *See Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 563, 427 N.Y.S.2d 595, 598, 404 N.E. 2d 718, 721 (1980) ("The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', *e.g.*, documents, transcripts.").

6. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 37:475, at 36-48. (2006; Dec. 2009 Supp.).

7. David D. Siegel, New York Practice § 285, at 485 (5th ed. 2011).

8. CPLR 3212(e).

9. Siegel, *supra* note 7, at § 285, at 485.

10. *Id.* at § 285, at 487; Byer's Civil Motions, *supra* note 1, at § 77:17 (citing *Pease & Elliman, Inc. v. 926 Park Ave. Corp.*, 23 A.D.2d 361, 362, 260 N.Y.S.2d 693, 695 (1st Dep't 1965) ("It was proper for Special Term to permit the severance of the second cause of action and the counterclaim interposed with respect thereto, and to direct the entry of judgment on the other causes of action as to which no defense either by way of pleading or affidavit had been submitted. Here, the severed action and related counterclaim are unrelated to the causes on which the plaintiff is entitled to recover. Hence, plaintiff should be awarded judgment unless it affirmatively appears that defendant will be prejudiced. Such might be the case if it appeared that plaintiff is financially unstable. There is no showing of legal prejudice and hence no basis for withholding judgment in favor of the plaintiff on the two causes of action as to which there is no factual issue."), *aff'd*, 17 N.Y.S.2d 992 271 N.Y.S.2d 992, 218 N.E.2d 700 (1966).

11. Siegel, *supra* note 7, at § 285, at 485-86.

12. *Id.* at § 285, at 486.

13. *Id.*

14. *Id.*

15. *Id.* (quoting *Robert Stigwood Org. v. Devon Co.*, 44 N.Y.2d 922, 923, 408 N.Y.S.2d 5, 6, 379 N.E.2d 1136, 1137 (1978).

16. *Id.*

17. *Id.* § 285, at 487.

18. *Id.*

19. Barr et al., *supra* note 6, § 37:464, at 36-47.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. The *Legal Writer* explained in Part XXI of this series the burdens of proof when a party moves for summary judgment or opposes the motion. *See Drafting New York Civil-Litigation Documents: Part XXI — Summary-Judgment Motions Continued*, 85 N.Y. St. B.J. 64 (Jan. 2013).

25. Horowitz, *supra* note 2, at 16 (citations omitted); Byer's Civil Motions, *supra* note 1, at § 77:08.

26. For more on affidavits, see part XXI of this series.

27. Barr et al., *supra* note 6, at § 37:464, at 36-47.

28. Horowitz, *supra* note 2, at 13 (citations omitted).

29. Barr et al., *supra* note 6, at § 37:522, at 36-51.

30. *Id.*

31. 22 NYCRR 202.8, Uniform Civil Rules for the Supreme Court and the County Court.

32. Gerald Lebovits, The Legal Writer, *Or Forever Hold Your Peace: Reply Briefs*, 82 N.Y. St. B.J. 64, 64 & 58 (June 2010).

33. Horowitz, *supra* note 2, at 17 (citing *Brightly v. Liu*, 77 A.D.3d 874, 875, 910 N.Y.S.2d 114, 115 (2d Dep't 2010) (permitting plaintiff to correct affirmation and submit signed, notarized affidavit from the same chiropractor because chiropractor was not a physician)); *Riley v. Segall, Netuerov & Singer*, 82 A.D.3d 572, 572, 918 N.Y.S.2d 488, 488 (1st Dep't 2011) (holding that court should have considered the summary-judgment motion on its merits even though defendants omitted an exhibit, a letter, in its motion papers filed with the court but included it in its reply when plaintiffs received a copy of the exhibit as part of its copy).