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Drafting New York Civil-Litigation Documents: Part XX—Summary-Judgment Motions: An Overview

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Drafting New York Civil-Litigation Documents: Part XX — Summary-Judgment Motions: An Overview

In the last issue, Part XIX of this series, the Legal Writer finished discussing motions to dismiss. We continue this series on civil-litigation document drafting with how to write summary-judgment motions: moving for summary judgment, opposing summary-judgment motions, and cross-moving for summary judgment. We’ll explore each party’s burden in moving, opposing, or cross-moving for summary judgment; the documents you’ll need in support of your motion; and offer tips on writing to get the court to rule for you.

Preliminary Information About Summary-Judgment Motions

Before moving, opposing, or cross-moving for summary judgment, you’ll want to know some basic information about summary-judgment motions.

Begin by consulting CPLR 3212 before moving for summary judgment. On a summary-judgment motion, a court decides whether to grant a judgment for you without a trial. Without having a trial, you could win the entire lawsuit on the papers, that is, the admissible evidence you submit with a summary-judgment motion. The admissible evidence might consist of affirmations, affidavits, examination before trial (EBT) transcripts, photographs, diagrams, maps, records, reports, contracts, bills, admissions, checks, receipts, DVDs, disclosure responses and failures to disclose, stipulations, and like things that are admissible at trial, such as authenticated or certified documents.

Any party may move for summary judgment in any type of action. The one exception is found in CPLR 3212(e). A court may not grant summary judgment in the non-moving party’s favor in a matrimonial action.1 CPLR 3212(e) prohibits this type of “reverse summary judgment.”2

The earliest you may move for summary judgment is after issue has been joined3 — after the defendant serves its answer to the plaintiff’s complaint (or after the plaintiff serves its reply to the defendant’s counterclaim).4 A court may set a date after which no party may move for summary judgment. That date may not “be earlier than 30 days after the filing of the note of issue.”5 Make sure to check the judge’s rules for moving for summary judgment. In a scheduling order, a court might set a specific date by which you must move for summary judgment.6 If the court doesn’t set a date, a party may move for summary judgment “no later than 120 days after the filing of the note of issue,”7 except with leave of court on good cause shown.8 The Court of Appeals strictly enforces the 120-day rule unless you show good cause for your delay in moving for summary judgment.9

If a court shortens the time period in which you may move for summary judgment and your motion is untimely under the court’s rules, your motion will still be untimely even if you’ve moved within the statutory 120-day rule.9

If one party timely moves for summary judgment and another party untimely cross-moves for summary judgment, the party who missed the deadline may not “piggyback” on the timely motion.10 Moving for summary judgment is appropriate when no dispute exists about the material facts of the case. Whether a fact is material depends “on the law and its application to the claims and defenses in the pleadings.”11 You’ll be entitled to summary judgment if you establish the elements of a claim or a defense as a matter of law.
The court will construe the evidence in the light most favorable to the non-moving party.

Advantages to Moving for Summary Judgment
The best-case scenario is winning your summary-judgment motion. Winning your motion means winning the case without having a trial. If the court grants your summary-judgment motion, you’ll save effort, money, and time by not having to prepare for trial.

Your summary-judgment motion might persuade your opponent to settle the case right away. Adversaries might see the strengths to your case and the weaknesses in their own case. Your adversary might determine that its chance of success in opposing the motion or in proceeding to trial is minimal. Your adversary will also have to consider the effort, money, and time in preparing opposition papers to your motion. Likewise, your adversary will consider the effort, money, and time in preparing for trial even if you won’t succeed with your summary-judgment motion. If your client will appear to trial jurors as an unsympathetic witness, having a jury decide your case based on your summary-judgment papers might be more beneficial than having the court construe the evidence. Your adversary might also see the strengths to your case and the weaknesses in their own case. Your adversary might determine that its chance of success in opposing the motion or in proceeding to trial is minimal.

The court will construe the evidence in the light most favorable to the non-moving party.

Even if you lose the motion, preparing the motion prepares you for trial. You’ll know what proof, in the form of documents and witnesses, you’ll need to prove your case. You’ll know what’s irrelevant to your case. You’ll determine what additional proof you’ll need to prove your case. Depending on the evidence your opponent submits in opposition to your motion, you’ll also get to see what evidence your opponent will use at trial. You’ll see the “quality and quantity of your opponent’s proof.” You’ll also get to see the legal arguments your opponent will make at trial.

The worst-case scenario is losing your motion. But even if you lose your motion, your motion will prepare the judge for trial. Your summary-judgment motion will be your opportunity to educate and persuade the court of your client’s position. In your motion, you’ll need to educate the court about the law and facts in your case. This is true if the judge who decides your motion will also preside at your trial. Many counties in New York, however, have different judges hearing motions and different judges conducting trials. Know the rules and practices of the court in your county. Knowing which judge will decide your motion and which judge will be presiding at trial is critical.

Moving for partial summary judgment has an additional advantage: The court “can eliminate specific claims, defenses, and even parties from the action before trial.”

In the next issue, the Legal Writer will discuss moving for partial summary judgment.
Disadvantages to Moving for Summary Judgment

Preparing the summary-judgment motion might mean expending effort, money, and time. You’ll have to prepare the paperwork for the motion. You’ll need to compile information you’ve obtained through disclosure. You’ll need to talk to your client and any witnesses to obtain affidavits. Depending on the judge’s or court’s rules, you’ll need to write a memorandum of law and prepare for oral argument.

Moving for summary judgment might discourage settlement. Once your adversary prepares the opposition papers, your adversary might not settle. Your adversary, in its own mind, is now prepared for trial. No incentive exists to settle the case.

Your adversary might easily defeat your summary-judgment motion. If your adversary can show that one material issue of fact exists for trial, the court will likely deny your motion. (The burdens in moving for summary judgment and in opposing a summary-judgment motion are discussed below.)

The judge who’ll decide your motion might be predisposed to denying summary judgment. Many judges believe that granting summary judgment is an extreme remedy. In granting the motion, the court denies one of the parties the right to proceed to trial. Thus, make sure that you “investigate the philosophy, attitude, and track record of the judge who will consider the motion.”22 Sometimes, a judge will tell you early on in the litigation that your case is weak. It might be futile to invest time and money in moving for summary-judgment when you already know how the court will rule.

The court might grant summary judgment even if the defendant never asks for it. This is known as searching the record.

You might be at a disadvantage if you move for summary judgment. By moving for summary judgment, you’re showing your hand to your adversary — the proof you have to win your case. Unlike criminal litigation, few surprises exist in civil litigation. For tactical reasons, however, you might not want to reveal everything at this point in the litigation. If you reveal it in your summary-judgment motion, no element of surprise will arise at trial. But you might want to wait until before trial or during trial to reveal the information. Be careful not to break any ethical, court, and civil-practice rules by waiting until the last minute to reveal the information. You might face sanctions or preclusion, or both, of merely opposing the motion. Cross-moving for summary judgment, which the Legal Writer will explain further in the upcoming issue, means that your adversary is seeking a judgment in its favor.

Even if your adversary doesn’t cross-move for summary judgment, the court might grant summary judgment to your adversary. Be careful because your summary-judgment motion might come back to bite you. Under CPLR 3212(b), the court may grant summary judgment to a party without a party’s needing to cross-move for summary judgment “[i]f it shall appear that any party other than the moving party is entitled to a summary judgment.” In practical terms, this means that if you, the plaintiff, move for summary judgment against the defendant, the court might grant summary judgment to the defendant even if the defendant never cross-moved for summary judgment; the court might grant summary judgment even if the defendant never asks for it. This is known as searching the record. If the plaintiff moves for summary judgment and attacks the defendant’s answer, the court will “go behind the answer to examine the sufficiency of the complaint. If the complaint is defective, [the complaint] and not the answer is dismissed, and the plaintiff, although the movant, becomes the victim.”23 Perhaps that’s why one scholar calls searching the record “the doctrine of extreme disappointment.”24

Even though the court might search the record sua sponte and grant summary judgment for the non-moving party, the court might not grant summary judgment sua sponte.25 A party needs to make a motion, on paper, with proof to substantiate its request for relief for summary judgment. A court, therefore, may not grant summary judgment when
of the defense.

Many attorneys submit their own affirmations. Unless the attorney has first-hand knowledge of the facts, an affirmation from a party’s attorney has no probative value. Judges prefer that attorneys not make legal arguments in their affirmations. No attorney can swear to the truth of their legal arguments.

In the next issue of the Journal, the Legal Writer will discuss, among other things, writing the affidavits, the burdens each party has in moving, opposing, or cross-moving for summary judgment, and the various nuances to opposing a motion, replying to opposition papers, and cross-moving for summary judgment.

The Evidence and Proof in Your Summary-Judgment Motion

Extract from the pleadings, EBT transcripts, written admissions, and discovery responses all the evidence you’ll need for your summary-judgment motion. On a summary-judgment motion, the court may consider the documents and lay a foundation for them in the affidavit(s). Label and attach the documents as exhibits.

The affidavit must be from someone with personal knowledge of the facts. The affiant may rely on inadmissible hearsay (as opposed to hearsay that’s admissible because it falls under an exception). Make sure to include in the affidavit the statement that the affiant has personal knowledge of the information contained in the affidavit.

Your affidavits must comply with CPLR 2101. The Legal Writer explained in the last issue about affidavits on a motion to dismiss. Affidavits in summary-judgment motions must contain a caption. At the end of the affidavit, it must have the affiant’s signature with the affiant’s printed name under the signature. Consult CPLR 2106 if you’re submitting an affirmation from an attorney, physician, osteopath, or dentist.

no party has moved for summary judgment.

If the plaintiff has several claims but moves for summary judgment on one claim but not on all claims, the court may search the record only with respect that one claim.26

The court may search the record on a motion under CPLR 3212 as well as under CPLR 3211, a motion to dismiss. (The Legal Writer has already discussed in this series motions to dismiss under CPLR 3211(b).) The court may search the record if a plaintiff moves to dismiss a defense under CPLR 3211(b). After searching the record, the court may determine that the cause of action in the complaint is inadequate and dismiss the complaint instead of dismissing the defense.

2. Id.
3. CPLR 3212(a).
5. Byer’s Civil Motions, supra note 1, at § 77:01.
7. Id.; see also CPLR 3212(a).
12. Siegel, supra note 4, at § 279, at 478-79.
13. Id. § 281, at 481.
14. Id.