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Rule 12 procedural defenses: follow the yellow brick road

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In our last columns, we reviewed rules, strategies and common-sense considerations involving Rule 12(b)(6) motions. Other Rule 12 motions are procedurally unique. Indeed, it appears that many attorneys consider them largely unregulated. But there are rules, and if you follow the yellow brick road, you may well get to the land of dismissal. Ignore them at your peril.

Most attorneys know that a Rule 12(b)(6) motion is limited to the allegations of the complaint. They also know that a motion for summary judgment under Rule 56 requires a complete record, with affidavits, admissible documents, and a fully supported statement of undisputed material facts pursuant to Superior Court Rule 9A(b)(5).

But when it comes to everything in between — motions raising subject matter or personal jurisdiction, improper venue or challenges to service — attorneys seem to revert to the "good old days," when you just filed a motion, memorandum and whatever affidavits you wished.

But there is actually law on the proper procedure for these motions. There is also common sense and good advocacy, of the sort that this series of columns is always advising: figure out what will most effectively communicate with and persuade your audience — the judge.

> *Don't view Rule 12 as entitling you to pursue an undisciplined presentation of the facts.*

First, the law. On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing facts sufficient to support jurisdiction over the defendant. See *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 767 (1994), citing *Droukas v. Divers Training Acad., Inc.*, 375 Mass. 149, 151 (1978). See also *Williams v. Episcopal Diocese of Mass.*, 436 Mass. 574, 577 n.2 (2002) (subject matter jurisdiction). "The burden is one of production, not one of persuasion." *Cepeda v. Kass*, 62 Mass. App. Ct. 732, 738 (2004). The court "shall accept as true all prima facie evidence of personal jurisdiction unless contradictory evidence is introduced, in which case the plaintiff must 'establish jurisdiction by a preponderance of the evidence at an evidentiary hearing or at trial.'" *Abate v. Fremont Investments*, 470 Mass. 821, 830-31 (2015) (try title action), quoting *Cepeda*, 62 Mass. App. Ct. at 736-738.

The bottom line is has the plaintiff provided enough? "[T]he most typical method of resolving a motion to dismiss for lack of personal jurisdiction allows the court 'to consider only whether the plaintiff has proffered evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction.'" *Cepeda*, 62 Mass. App. Ct. at 737, quoting *Boit v. Gar-Tech Prod, Inc.*, 967 F.2d 671, 675 (1st Cir. 1992).

For you, as moving party, this means that your motion to dismiss will flush out the plaintiff's jurisdictional facts. Once that occurs, though, the court takes essentially the same approach as on summary judgment, asking only whether the plaintiff's facts, if believed, would establish jurisdiction. The moving party may support its motion with affidavits, but you must be realistic: If any of your affiants' facts are contested, the court must disregard them.

Now, the practicalities. If you are content that gaps in the plaintiff's facts will establish lack of jurisdiction, then you may want to avoid complicating matters by putting forward lengthy affidavits that may be counter-productive, by creating factual disputes that you ultimately contend are not material to jurisdiction.

Keep your factual presentation brief, limited to clearly undisputed facts. Any "atmospheric" benefit that longer affidavits may create will often be greatly outweighed by negative impacts. For instance, a longer affidavit with debatable assertions makes it look like you think the issue turns on facts that are actually contested. Don't undermine your own credibility by hyperbole or purely rhetorical trimmings.

Fairly often, however, the moving party will not be content with relying solely on gaps in the plaintiff's facts. Perhaps the plaintiff has omitted certain facts that show jurisdictional problems not apparent on the face of the plaintiff's papers. In this circumstance, like it or not, you are edging closer and closer to the equivalent of a summary judgment motion. If you can call your motion a Rule 56 motion, you should.

To be sure, that will probably generate cries of "too soon" from the plaintiff, but there is nothing in Rule 56 to say that you must wait until later in the case, particularly if you are raising a threshold question like jurisdiction.

And if the plaintiff has a legitimate argument that it is indeed too soon to litigate jurisdiction, you are well advised to work on creating an adequate factual record, perhaps with limited discovery, before trying to litigate the matter. In all likelihood, a judge is not going to force premature resolution of fact-intensive issues without giving the plaintiff a chance, even if that includes discovery.

Face it, if you are trying to get the court to consider facts beyond the plaintiff's facts, you are effectively in the same procedural posture as with a summary judgment motion. Yet many lawyers — perhaps thinking that Rule 12 entitles them to file a motion to dismiss without the complications that a Rule 56 motion brings — do not follow the process set forth in Superior Court Rule 9A(b)(5) for establishing the facts in a summary judgment case.

That approach puts a burden on the court to sift through affidavits and attachments without help from the parties, to establish what is contested and uncontested. Superior Court Rule 9A(b)(5) sets up a process to do that task in an orderly way.

It is the court's message (to say the least) about what works for the "audience" — the judge. Why would you ignore that message and give your audience more work, if it is going to come out your way? As we urge throughout this series, you must always consider what your audience wants and how best to facilitate a decision-making process that will turn out your way.

There is an alternative in some cases. You may want to consider asking the court to bifurcate the jurisdictional fact-finding from a determination on the merits. You might conduct limited discovery on the jurisdictional question and potentially even ask the court for an evidentiary hearing before litigation of the merits, at least in non-jury cases. Cf. Massachusetts Rule of Civil Procedure 16. "As with personal jurisdiction, a judge has discretion to hold a hearing prior to trial to determine subject matter jurisdiction. Mass. R. Civ. P. 12(d), as amended, 451 Mass. 1401 (2008)." *Abate v. Fremont Investments*, 470 Mass. 821, 830-31 (2015) (title action).

If the matter is properly triable to the court, "there is no impediment to a judge holding a hearing to determine the accuracy of alleged jurisdictional facts," in which case the plaintiff "is required to establish those elements by a preponderance of the evidence standard. *Id.*, 470 Mass. at 830 and n. 18."

So don't view Rule 12 as entitling you to pursue an undisciplined presentation of the facts. As always, be clear about the procedural context. Make a decision about whether you are relying solely on gaps in the plaintiff's case or are presenting your own version of the facts. If the latter, follow well-established procedures for winnowing out the truly uncontested facts. Don't make up your own procedure and, in effect, ask the court to figure out any factual disputes without your best input.

Follow our tips for effective advocacy, not the siren song of entitlement.

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