MASSACHUSETTS LAWYERS WEEKLY

Summary judgment motions: how often are they meritorious?

By: Douglas H. Wilkins and Daniel I. Small December 12, 2019

"Because it's there."

That might have been a great reason for George Mallory to try to climb Mount Everest. But just because a summary judgment deadline looms in the tracking order for your case is not such a great reason to file a summary judgment motion.

Remember that the Superior Court time standards were adopted more than 30 years ago to provide one-size-fits-all case management to deal with the huge caseloads at the time. Some major developments in the meantime have affected summary judgment law.

Summary judgment does not fit in all cases. That may seem obvious, but many attorneys appear to start from the assumption that they will file a summary judgment motion by the deadline so that they won't lose the right to do so.

The time standards tracking order may promote or reinforce that belief. We suggest, however, that that approach leads to summary judgment motions that are very unlikely to resolve the case, may actually hurt your case, will cost the client significant money, and will result in substantial delays of three to five months or more.

Counsel need to take a detached, critical look at the strength of their potential arguments on summary judgment. As an ethical minimum, counsel needs to have a realistic discussion with the client about the cost, delay and likelihood of success, when asking the client for authority to file a summary judgment motion.

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If the motion is a stretch, counsel and the party need to be aware of the likely loss of credibility with the court, giving the other side a free dry run of the case, and the loss of leverage with the other side in the event the motion is denied.

The courts have given clear direction about the obstacles to summary judgment in particular types of cases. For example:

Negligence: Summary judgment is rare in negligence cases "'[B]ecause of the jury's "unique competence in applying the reasonable man standard,"' summary judgment is rarely appropriate with respect to the merits of a negligence case." *Appleby v. Daily Hampshire Gazette*, 395 Mass. 32, 37 (1985) (citations omitted); "Generally, questions of causation present issues for the jury to decide." *Solimene v. B. Grauel & Co., KG*, 399 Mass. 790, 794 (1987). "The Third Restatement is specific and deliberate in its belief that courts too often take cases away from a jury in determining negligence through the rubric of a finding of no duty, when it is truly one of whether the actor exercised reasonable care." See T. Weigand, "Duty, Causation and Palsgraf: Massachusetts and the Restatement (Third) of Torts," 96 Mass. L. Rev. 55, 60 (April 2015), citing Restatement (Third) of Torts, §7, cmt. i.

Motive and intent: In *Flesner v. Technical Communications Co.*, 410 Mass. 805, 810 (1991), the Supreme Judicial Court said: "In cases where motive, intent, or other state of mind questions are at issue, summary judgment is often inappropriate. See *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989) ('the generally accepted rule is that the

"granting of summary judgment in a case where a party's state of mind … constitutes an essential element of the cause of action is disfavored"') [Citations omitted]. In such cases, '[m]uch depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances, the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue.' *Croley v. Matson Navigation Co.*, 434 F.2d 73, 77 (5th Cir. 1971)."

Employment discrimination: "An employer seeking summary judgment in a discrimination case faces a high burden because 'the question of the employer's state of mind (discriminatory motive) is elusive and rarely is established by other than circumstantial evidence.'" *Scarlett v. City of Boston*, 93 Mass. App. Ct. 593, 597 (2018), quoting *Sullivan v. Liberty Mut. Ins. Co.*, 444 Mass. 34, 38 (2005) (quotation omitted). "'[S]ummary judgment remains "a disfavored remedy in the context of discrimination cases based on disparate treatment … because the ultimate issue of discriminatory intent is a factual question" … . A defendant's motive "is elusive and rarely is established by other than circumstantial evidence," therefore "requir[ing] [a] jury to weigh the credibility of conflicting explanations of the adverse hiring decision." … .'" *Bulwer v. Mount Auburn Hospital*, 473 Mass. 672, 689 (2016) (citations omitted).

Motions filed by plaintiffs or others with the burden of proof: Because the jury can disbelieve virtually any witness, it is a "rare[]" case where the plaintiff can "establish[] his case by evidence that the jury would not be at liberty to disbelieve." *Hanover Ins. Co. v. Sutton*, 46 Mass. App. Ct. 153, 166-67 (1999) and cases cited.

Claims that appear unlikely to prevail: "A court should not grant a party's motion for summary judgment 'merely because the facts he offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial.'" *Goulart v. Canton Hous. Authy.*, 57 Mass. App. Ct. 440, 441 (2003), quoting from *Attorney Gen. v. Bailey*, 386 Mass. 367, 370, cert. denied, *Bailey v. Bellotti*, 459 U.S. 970 (1982). *Reardon v. Parisi*, 63 Mass. App. Ct. 39, 40 (2005) (negligence).

To be sure, your case may fall into one of these categories and yet be one of the "rare" cases in which summary judgment is appropriate. In our next column, we discuss some of the questions that conscientious counsel should consider before filing a summary judgment motion.

Judge Douglas H. Wilkins sits on the Superior Court. Prior to taking the bench, he was a trial attorney in private practice and at the Attorney General's Office. Daniel I. Small is a litigation partner in the Boston and Miami offices of Holland & Knight. A former federal prosecutor, he is the author of "Preparing Witnesses" (ABA, 4th Edition, 2014), and teaches CLE programs around the country. He can be contacted at dan.small@hklaw.com.