MASSACHUSETTS Lawyers Weekly

Examples of meritorious summary judgment motions

By: Douglas H. Wilkins and Daniel I. Small February 13, 2020

Our last two columns addressed the real problem of overuse of summary judgment. *Under*use is vanishingly rare. Even rarer (perhaps non-existent) is the case in which underuse ends up making a difference in the long run.

But there are lessons to be learned by identifying cases in which you really should move for summary judgment. It is important to provide a reference point for evaluating the wisdom of filing a summary judgment motion.

Here are some non-exclusive examples of good summary judgment candidates.

Unambiguous written document: Perhaps the most common subject matter for a successful summary judgment motion is the contracts case or collections matter in which the whole dispute turns upon the unambiguous terms of a written note, contract, lease, insurance policy, trust or other document. See, e.g. *United States Trust Co. of New York v. Herriott*, 10 Mass. App. Ct. 131 (1980).

The courts have said, quite generally, that "interpretation of the meaning of a term in a contract" is a question of law for the court. *EventMonitor, Inc. v. Leness*, 473 Mass. 540, 549 (2016).

That doesn't mean all questions of contract interpretation — just the unambiguous language. When the language of a contract is ambiguous, it is for the fact-finder to ascertain and give effect to the intention of the parties. See *Acushnet Company v. Beam, Inc.*, 92 Mass. App. Ct. 687, 697 (2018). Ambiguous contracts are therefore not fodder for summary judgment.

Ironically, there may be some confusion about what "unambiguous" means. "To determine whether the language at issue is ambiguous, we look both to the contested language and to the text of the contract as a whole." *Balles v. Babcock Power, Inc.*, 476 Mass. 565, 572 (2017).

Even if a party's reading "is linguistically possible," that "does not make it a reasonable interpretation of the parties' agreement." *Merrimack College v. KPMG LLP.*, 88 Mass. App. Ct. 803, 806 (2016), citing *Downer & Co., LLC v. STI Holding, Inc.*, 76 Mass. App. Ct. 786, 792-794 (2010).

Sometimes unambiguous documents establish liability, although a dispute remains over the amount of damages. *Friedman v. DeLuca*, 6 Mass. App. Ct. 967, 968 (1980). Summary judgment may or may not be wise in that situation, depending upon whether a trial will occur anyway and, if so, whether the scope of that trial will be materially shorter or more efficient if liability has already been determined. Plus, there may be strategic considerations, pros and con, to having a trial just on damages.

Factually lean affirmative defenses: There are some affirmative defenses that rely on very few uncontestable facts. Claim or issue preclusion and statute of limitations are good examples, because they may turn on, respectively, the court's judgment in another case or the date on which the cause of action arose.

To be sure, the "discovery rule" may generate factual disputes over when the plaintiffs did know or reasonably should have known of their cause of action, but the absence of evidence on that point may still warrant summary

judgment, because plaintiffs have the burden of proof to prove the discovery date. See generally *Harrington v. Costello*, 467 Mass. 720, 725 (2017).

Favored subject matter: Just as the courts have identified areas in which summary judgment is "rare" (see Dec. 16 column, "Summary judgment motions: how often are they meritorious?"), so they have identified areas in which it is favored.

For example, because free speech may be chilled by defamation cases, the courts have "favored" summary judgment to prevent the defense of a lawsuit itself to chill First Amendment freedoms. *Cefalu v. Globe Newspaper Co.*, 8 Mass. App. Ct. 71, 74 (1979), cert. denied, appeal dismissed, 444 U.S. 1060 (1980).

Some issues in defamation cases are for the court, including whether a statement is capable of a defamatory meaning, whether the plaintiff is a public figure and, if so, whether there is evidence of actual malice, and whether the plaintiff has evidence of special damages in cases in which slander per se is not present.

Declaratory judgment and injunctive relief: Since declaratory judgment cases often involve "determinations of right, duty, status or other legal relations under" written documents, or "determination of the legality of the administrative practices and procedures of any" government agency, they can raise pure issues of law that do not involve disputes of fact. See G.L.c. 231A, §2; *Charlesbank Apartments, Inc. v. Boston Rent Control Admin.*, 379 Mass. 635 (1980). Injunctive cases can arise in a similar way, permitting summary judgment.

Collections cases: When collections cases are not resolved by default judgment, they often present no disputed facts, at least on the question of the debtor's or guarantor's liability. Be aware, though, that obtaining such a judgment on liability only may not save any trial time. The court might not even grant summary judgment if the amount due is contested, and is unlikely to do so if there is any chance of a determination that the amount due is less than or equal to the amount paid.

Negligence and employment cases: We previously pointed out that the cases say that summary judgment is "rare" in negligence and employment cases. Nevertheless, summary judgment motions occur more frequently than this may suggest. Perhaps that simply reflects the large volume of cases in these categories. In our next column, we will address the problem of identifying cases in these categories that may warrant summary judgment.

Conclusion

We have given some examples of meritorious summary judgment motions, in part to emphasize the contrast between Rule 56's core concerns and some of the motions we discussed in the last two columns. You should ask yourself: "Is my motion within the true scope of Rule 56?" If it is, go for it.

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