

Evidence and Practice Tips

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Utilizing Summary Judgment to Avoid the Time and Expense of Discovery

Summary judgment is a powerful tool that can drastically reduce litigation costs when there is affirmative evidence demonstrating that a plaintiff cannot recover for his or her claim(s). It is crucial, however, to understand the distinction between a Celotex-type and a traditional motion for summary judgment, as that distinction impacts whether the plaintiff may be entitled to additional discovery, which can then delay the resolution of the case and cause the defendant to incur additional costs.

Section 2-1005 of the Illinois Code of Civil Procedure governs summary judgment motions. This Section provides:

(b) For defendant. A defendant may, at any time, move with or without supporting affidavits for a summary judgment in his or her favor as to all or any part of the relief sought against him or her.

735 ILCS 5/2-1005.

A defendant moving for summary judgment under Section 2-1005 may meet its initial burden in one of two ways. The first method is by affirmatively disproving an element of the nonmovant's case, which is commonly referred to as a "traditional" motion for summary judgment. *Jiotis v. Burr Ridge Park Dist.*, 2014 IL App (2d) 121293, ¶ 25. This requires proving a set of facts that "the defendant would not be required to prove at trial." *Id.* The second method is by establishing that the plaintiff's evidence is insufficient to avoid judgment as a matter of law, referred to as a "Celotex-type" motion. *Id.* This second method stems from the decision in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (interpreting Federal Rule of Civil Procedure 56), and Illinois courts recognize that a similar interpretation applies to the Illinois Code's counterpart. *See Jiotis*, 2014 IL App (2d) 121293, ¶ 25.

Whether a motion for summary judgment is classified as traditional or *Celotex*-type matters because, unlike a traditional motion for summary judgment, a *Celotex*-type motion is appropriate only after the plaintiff had an opportunity to conduct discovery. *Willett v. Cessna Aircraft Co.*, 366 Ill. App. 3d 360, 369 (1st Dist. 2006). In addition, the plaintiff does not need to comply with the requirements of Illinois Supreme Court Rule 191(b) to stay a *Celotex*-type motion for the purpose of discovery. *Jiotis*, 2014 IL App (2d) 121293, ¶ 26.

A traditional motion for summary judgment may be granted with only limited discovery or none at all. If a defendant brings forth sufficient evidence, generally in the form of an affidavit, which affirmatively disproves one or more elements

of the plaintiff's claim(s), the plaintiff will not be entitled to stay the motion and seek discovery unless it complies with the strict requirements of Rule 191(b). *See Jiotis*, 2014 IL App (2d) 121293, ¶ 28.

To meet the burden of producing sufficient evidence to prevail in a traditional motion, the defendant may rely only on affidavits and documents that contain admissible evidence. *See Gardner v. Navistar Int'l Transp. Corp.*, 213 Ill. App. 3d 242, 247 (4th Dist. 1991). For that reason, a defendant seeking summary judgment must lay the foundation for the introduction of documents into evidence and be prepared to address any evidentiary objections. For instance, the defendant must ensure that if any statements made in an exhibit are hearsay, that the foundation is laid to establish an exception to the rule against the admissibility of hearsay. The defendant must also attach sufficient evidence to demonstrate that the document in support of its motion for summary judgment is what the proponent claims. *Id.*

If the defendant presents sufficient evidence to establish a fact that disproves an element of the plaintiff's case, the plaintiff may file a motion to stay to seek discovery to obtain evidence that contradicts any affidavits attached to the defendant's motion. If appropriate, the defendant should challenge that motion to stay by identifying and demanding compliance with Rule 191(b), which outlines the procedure to follow when material facts are not obtainable in relation to a pending motion for summary judgment and requires "naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn," when the affidavits are unobtainable by reason of "hostility or otherwise." Ill. S. Ct. R. 191(b).

If the plaintiff meets the requirements of Rule 191(b), the court may order limited discovery to permit the plaintiff to respond to the motion for summary judgment. *See Jiotis*, 2014 IL App (2d) 121293, ¶ 28. Otherwise, the defendant should move to strike the plaintiff's motion to stay. *Id.*; *see also Gill v. Chicago Park Dist.*, 85 Ill. App. 3d 903, 906-07 (1st Dist. 1980).

In contrast, a *Celotex*-type motion generally requires discovery to establish that the plaintiff's evidence is insufficient. The reason for that requirement is to avoid the use of Rule 191(b) as a tactical weapon for the defendant before the plaintiff has had the opportunity to learn even the identity of witnesses who can provide material facts.

However, even if the court identifies the motion for summary judgment as a *Celotex*-type, it still has discretion to determine whether to limit discovery. The plaintiff generally must inform the court what other discovery is needed in order to properly respond to a motion for summary judgment. Thus, if the plaintiff cannot identify what discovery is necessary at that juncture or cannot identify why he or she does not have such information, the court has discretion to limit further discovery and may consider the motion for summary judgment. Further, while the strict requirements of Rule 191 may be relaxed for a plaintiff responding to a *Celotex*-type motion, the trial court has discretion to enforce the rule and may still require that Rule 191(b) requirements be met. This may be the case, for instance, if the plaintiff has already had time to conduct discovery and/or fails to identify why he or she cannot comply with the rule.

Due to the potentially different amount of discovery allowed, a traditional motion for summary judgment, if appropriate, can be especially efficient in limiting litigation costs to better serve clients by preventing unnecessary discovery. However, after filing either type of motion for summary judgment, defense counsel should diligently review any responses or motions to ensure that the plaintiff is properly complying with Rule 191(b) to avoid delays by unnecessary discovery requests or motions to stay. If the plaintiff fails to comply with Rule 191(b), the defendant may consider moving to strike the insufficient affidavit or motion.



Conclusion

Knowing when to bring a motion for summary judgment and what evidence to use in support of such a motion is paramount to limiting unnecessary costs and expenses for a client. Such an approach may resolve partial or all claims without the necessity of engaging in complete discovery. Filing a traditional motion for summary judgment is more likely to limit discovery and reduce litigation costs, but even a *Celotex*-type motion for summary judgment can be a useful tool in speeding the resolution of a case without extensive discovery. Further understanding how to oppose the nonmovant's insufficient Rule 191(b) affidavit or motions to stay or seek discovery likewise will assist in limiting unnecessary costs.

About the Authors

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