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Summary Judgment

Joann R. Locke

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COMMENTS

SUMMARY JUDGMENT

JOANN R. LOCKE

Washington procedure is noticeably defective in the lack of a device which will dispose quickly and easily of all those actions where no material issue of fact actually exists although issues are formally set up in the pleadings. The urgent need for some such device was shown recently in the case of *Weyerhaeuser Sales Co. v. Holden.*[1] Plaintiff desired to end the case summarily, as he felt sure there was no defense to his action. However, his attempt to make existing procedure serve this purpose failed. All of defendant's answer except a cross-complaint had been stricken, and plaintiff had filed a reply to this cross-complaint setting up certain affirmative defenses. After the pleadings were closed, plaintiff filed a request, under Rules of Practice and Procedure, 21, for an admission of all allegations in four paragraphs of the reply. This being unanswered by defendant, plaintiff's motion for judgment on the pleadings was granted by the trial court. The Washington Supreme Court reversed the case, holding that plaintiff's request for

[1] 132 Wash. Dec. 695, 203 P.(2d) 685 (1949).

admission of facts was improper, as it is not the function of the admission to serve as a form of pleading by which the general averments of an adversary's pleading are admitted or denied, and issues for trial thereby raised. The court quoted *Moore's Federal Practice*: "The procedure for obtaining admission of fact is to be used to obtain admission of facts as to which there is no real dispute and which the adverse party can admit cleanly, without qualifications. . . . It is not intended to be used to cover the entire case and every item of evidence."[2]

Washington procedure does not provide an adequate remedy in this situation because the motion for admission of facts usually cannot cover an entire case, and a motion for judgment on the pleadings cannot go behind the formal pleadings to the facts in the case. This inadequacy is further demonstrated by the case of *Pugsley v. Stebbins*[3] where the court was forced to say that judgment on the pleadings should not be granted where a plea of former adjudication was put in issue by the reply, although the reply was insufficient to avoid the adjudication.

Other jurisdictions have found a successful remedy in the summary judgment procedure which promptly disposes of actions where there is no genuine issue as to any material fact. Under this rule a party may pierce the allegations of fact in the pleadings and obtain relief where the facts set forth in detail in affidavits, depositions, and admissions on file show there are no factual issues to be tried.[4]

History

Summary judgment procedure originated in England in 1855, but it applied only to claims on bills of exchange and promissory notes.[5] The scope of the English rule was increased in 1873 to include all types of actions except a few designated torts and breach of promise of marriage.[6]

In the several states having summary judgment statutes, the usual practice is to specify the types of actions in which summary judgment is permissible. The New York statute, which is typical, permits sum-

[2] Moore, Federal Practice 2658 (1st ed. 1938).
[3] 87 Wash. 187, 151 Pac. 501 (1915).
[4] 3 Moore, *op. cit., supra* note 2 at 3175, quoted in Engl. v. Aetna Life Insurance Co., 139 F.(2d) 469 (C.C.A. 2nd 1943). *See also* Michel v. Meier, 8 F.R.D. 464 (W.D. Pa. 1948).
[5] The Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict., c. 67. See Shientag, *Summary Judgment*, 4 Ford. L. Rev. 186 (1935).
[6] Eng. Rules of Supreme Court, O.3, r.6, O.14, O.15, Ann. Prac. 1945, pp. 15, 176, 219.

mary judgment in actions for recovery of a debt or liquidated demand arising on a contract or judgment, recovery of an unliquidated claim arising on contract, recovery of statutory claims, specific performance, recovery of specific chattels, lien or mortgage foreclosure, and accounting.[7] The trend has been to extend the scope of summary procedure.[8] The federal procedure is the most extensive of any jurisdiction in that it is equally available to plaintiffs and defendants in all kinds of civil actions.[9]

There is little question today as to the constitutionality of the procedure, as it has been clearly shown that no one is deprived of a trial who is entitled thereto.[10] "To say that a false denial, which defendant cannot justify, must nevertheless put plaintiff to his proof before a jury, although the result will be a directed verdict for plaintiff as a matter of law, is to exalt shadow above substance."[11]

Relationship to Other Pleading Devices

A very helpful adjunct to summary judgment is the discovery procedure.[12] Discovery may be necessary in obtaining information, admissions, or documents in order to lay the stage for a summary judgment.[13] Through the use of these two procedures, much of a case may often be

[7] N. Y. Civil Practice Rule 113. See Finch, *Summary Judgment Procedure,* 19 A.B.A.J. 504 (1933); Sheintag, note 5 *supra,* at 186; Clark and Samenow, *The Summary Judgment,* 38 Yale L. J. 423 (1929). For similar state statutes see Conn. Prac. Bk. 1934, §§ 52-57; Ill. Ann. Stat. (Smith-Hurd), c. 110, § 181 (1); Mich. Stat. Ann. (Henderson 1936), § 27.989.

[8] See Clark, *Summary Judgments,* 25 J. Am. Jud. Soc'y 20 (1941), Handbk. Nat. Conf. Jud. Councils 55 (1942), 2 F.R.D. 364 (1943); Ritter and Magnuson, *The Motion for Summary Judgment and Its Extension to All Classes of Actions,* 21 Marq. L. Rev. 33 (1936); Millar, *Three American Ventures in Summary Civil Procedure,* 38 Yale L. J. 193 (1928).

[9] Fed. R. Civ. P., 56. *See* Engl v. Aetna Life Insurance Co., 139 F.(2d) 469 (C.C.A. 2nd 1943); Houghton Mifflin Co. v. Stackpole Sons, Inc., 31 F. Supp. 517 (S.D. N. Y. 1940), *mod.,* 113 F.(2d) 627 (C.C.A. 2nd 1940). For states following the federal rule see Ariz. Code Ann. (1939), §§ 21-1210-21-1216; Colo. Stat. Ann. (Michie 1935), 1941 Replacement Volume, Rule 56; N. M. Stat. Ann. (1941), § 19-101 (56); Wis. Stat. (1943), § 270-635.

[10] See Clark, Handbook of the Law of Code Pleading 564 (2nd ed. 1947) and cases cited therein.

[11] Hanna v. Mitchell, 202 App. Div. 504, 196 N.Y. Supp. 43 (1922), *aff'd,* 235 N.Y. 534, 139 N.E. 724 (1923); *accord,* Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902); General Investment Co. v. Interborough Rapid Transit Co., 235 N.Y. 133, 139 N.E. 216 (1923).

[12] See Washington discovery procedure: Rule 7, Rem. Rev. Stat. § 308-7 (Suppl. 1945) [P.P.C. 45 § 93-13]; Rule 18, Rem. Rev. Stat. § 308-18 (Supp. 1943) [P.P.C. § 93-35]; Rule 21, Rem. Rev. Stat. § 308-21 (Supp. 1943) [P.P.C. § 93-41]; Rem. Rev. Stat. § 1230-1 [P.P.C. § 42-13]; Rem. Rev. Stat. § 1262 [P.P.C. § 44-1]. See also Van Cise, *The Federal Discovery Practice Should Be Adopted By All States,* 24 Wash. L. Rev. 21 (1949).

[13] Melville, *Use of Summary Judgments and the Discovery Procedure,* 24 Dicta 193 (1947).

disposed of before trial, even though it may be impossible to eliminate all controversial issues.[14]

Summary judgment is also closely connected with pretrial procedure. Under the federal summary procedure, if it appears that there are factual issues, the case goes to trial after the court has specified which facts are really in issue.[15] This procedure is similar to and has the same purpose as the pretrial procedure in Rule 16 except that it is compulsory rather than discretionary under Rule 56(d).[16] A motion for summary judgment may thus have the same result as if the pretrial procedure had been followed. Conversely, pretrial procedure may result in a summary judgment, as it has been held that the decision on a motion for summary judgment should be made on the whole record, including an order made upon the findings of a pretrial conference.[17]

Washington has only the discovery and pretrial procedures, and it is suggested that our system would work better were all of these well-integrated devices available.[18]

Need for Summary Judgment in Washington

The great value of summary judgment lies in the fact that it puts an end to useless and expensive litigation where there is no genuine issue of material fact.[19] The evil which the pleaders of old found in the speaking demurrer has become, by the modern speaking motion, a virtue in clearing calendars from ill-founded pleadings.[20] It also permits speedy determination of issues of law.[21] The procedure thus enables the whole judicial process to function more quickly and with less complexity.[22]

The objection that summary judgment will result in "fishing expeditions" is not well taken because the movant must state *his* facts, and thus gets no undue advantage.[23] The procedure is not likely to be used for dilatory purposes because a party will not risk a speedy determination of the case unless he has some grounds for believing it will be in

[14] *Ibid.*
[15] Fed. R. Civ. P., 56 (d).
[16] Leonard v. Socony-Vacuum Oil Co., 130 F.(2d) 535 (C.C.A. 7th 1942); 3 Moore, *op. cit., supra* note 2 at 3175.
[17] Biggins v. Oltmer Iron Works, 154 F.(2d) 214 (C.C.A. 7th 1946); Continental Illinois National Bank & Trust Co. v. Ehrhart, 1 F.R.D. 199 (E.D. Tenn. 1940).
[18] See Clark, *op. cit, supra* note 10 at 566, 567; Clark, note 8 *supra,* at 366.
[19] Creel v. Lone Star Defense Corp., 171 F.(2d) 964 (C.C.A. 5th 1949).
[20] Reynolds Metals Co. v. Metals Disintegrating Co., 8 F.R.D. 349 (N.J. 1948).
[21] Melville, note 13 *supra,* at 193.
[22] Clark and Samenow, note 7 *supra,* at 423. See also Ritter and Magnuson, note 8 *supra,* at 33.
[23] Ritter and Magnuson, note 8 *supra,* at 33.

his favor, and because a time-saving pretrial adjudication will be made if any issues are found.[24] A study conducted in New York in 1929 and 1930 showed that the procedure there had reduced delays and had not given rise to the abuses feared, *i.e.*, arbitrary exclusion of reasonable defenses or improper use of the motion to anticipate the adversary's line of proof.[25]

The Committee on Judicial Administration of the Washington State Bar Association has recommended the adoption of federal Rule 56 as adopted by the Supreme Court in 1938.[26] The federal rule has been changed slightly by an amendment taking effect in 1948, but it is not felt that this would affect the recommendation.[27] The committee stated: "Rule 56 contains a desirable provision authorizing entry of summary judgment. . . . This practice has been found beneficial in relieving congested trial calendars. . . ."[28] This recommendation might well be carefully reconsidered. As the rule could easily be adopted by the Washington court under its rule-making power, legislation is unnecessary.[29] The court has adopted federal rules several times in the past.[30]

It is hoped that the following statement and analysis of the federal rule will demonstrate the scope and usefulness of the summary procedure, and will, perhaps, show the reader why it has proved so effective a device in the federal courts.

FEDERAL RULE 56

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

[24] Clark, note 8 *supra*, at 366, 367.

[25] Cohen, *Summary Judgments in the Supreme Court of New York*, 32 COL. L. REV. 825 (1932). See also Saxe, *Summary Judgments in New York—A Statistical Study*, 19 CORN. L. Q. 237 (1934).

[26] Committee on Judicial Administration of the Washington State Bar Association, *Changes Suggested in Washington Practice and Procedure*, 14 WASH. L. REV. 154, 172 (1939).

[27] (a) was amended to let plaintiff move for summary judgment at any time after twenty days rather than only after answer served. (c) was amended to clarify an ambiguity discussed in *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944).

[28] Committee on Judicial Administration of the Washington State Bar Association, note 26 *supra*, at 172.

[29] REM. REV. STAT. § 13-1 [P.P.C. § 110-53].

[30] Rule 18, REM. REV. STAT. § 308-18 (Supp. 1943) [P.P.C. § 93-35] is taken from FED. R. CIV. P., 16; Rule 20, REM. REV. STAT. § 308-20 (Supp. 1943) [P.P.C. § 93-39], from FED. R. CIV. P., 22; Rule 21, REM. REV. STAT. § 308-21 (Supp. 1943) [P.P.C. § 93-41], from FED. R. CIV. P., 36, 37(c).

(b) *For Defending Party.* A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

As explained before, any party may move for summary judgment under the federal rule.[31] However, once a defendant has moved for summary judgment under subdivision (b), plaintiff cannot dismiss the action as of right.[32] Under Rule 12(b) and 12(c), a speaking motion to dismiss for failure to state a cause of action or a speaking motion for judgment on the pleadings may be treated by the court as a motion for summary judgment.[33]

Although summary judgment for "part" of a claim might seem to be authorized by subdivisions (a) and (b), subdivision (d) shows that summary judgment may not be given for any part of a claim less than the whole, and, therefore, a motion for summary judgment as to part of a claim will result only in the pretrial procedure of subdivision (d).[34] But of course a party may obtain summary judgment against those parties as to whom there is no genuine issue of material fact, although factual issues remain as to other parties.[35]

Unlike the practice in most jurisdictions, the motion under the federal practice is not required to be supported or opposed by affidavits. The motion may be heard on affidavits and pleadings; on pleadings, depositions, admissions, and affidavits if desired; on oral testimony or depositions, the pleadings, and such facts, as admissions, which may appear of record.[36]

There seems to be a conflict in the lower federal courts as to whether summary judgment may be given for the movee without a cross-motion. The better view is that "since the purpose of summary judgment is to expedite the disposition of actions in which there is no genuine issue of fact requiring trial, it would seem that the court may properly enter summary judgment in favor of the party entitled to it [although there is no cross-motion]."[37] The New York rule is better here in that it

[31] Engl v. Aetna Life Insurance Co., 139 F.(2d) 469 (C.C.A. 2nd 1943).

[32] FED. R. CIV. P., 41(a)(1)(i).

[33] *See* West v. Winston, 8 F.R.D. 311 (E.D. Penn. 1948); *In re* Watauga Steam Laundry, 7 F.R.D. 657 (E.D. Tenn. 1947).

[34] Biggins v. Oltmer Iron Works, 154 F.(2d) 214 (C.C.A. 7th 1946); Michel v. Meier, 8 F.R.D. 464 (W.D. Pa. 1948).

[35] Divine v. Levy, 36 F. Supp. 55 (W.D. La. 1940).

[36] 3 MOORE, *op. cit.* note 2 *supra*, at 3183. *See, e.g.*, Gifford v. Travelers Protective Ass'n, 153 F.(2d) 209 (C.C.A. 9th 1946); Deming v. Turner, 63 F. Supp. 220 (D.C. 1945).

[37] Hooker v. New York Life Insurance Co., 66 F. Supp. 313 (N.D. Ill. 1946), *rev'd on other grounds*, 161 F.(2d) 852 (C.C.A. 7th 1947), *cert. denied*, 332 U.S. 809 (1947);

specifically provides that summary judgment may be granted to either party regardless of who made the motion.[38]

(c) *Motion and Proceedings Thereon.* The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Under this subdivision, judgment will be entered for a party "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial."[39] The motion should be denied if, under the evidence, reasonable men might reach different conclusions.[40] Credibility of witnesses and weight to be given the evidence are issues of fact which make the granting of summary judgment improper.[41] But the court has a duty to enter a summary judgment where there is no genuine issue of fact,[42] although the motion may be denied for an amendment.[43]

Under this rule it is not the court's function to decide issues of fact, but only to determine whether there is an issue of fact to be tried.[44] The existence of an important or difficult question of law is, of course, no bar to summary judgment.[45] The affidavits filed by the parties may be considered for the purpose of ascertaining whether an issue of fact is presented, but cannot be used as a basis for deciding the fact issue.[46]

The courts are critical of the moving papers, and all doubts as to the existence of a genuine issue of fact are resolved against the party mov-

accord, United States v. County of Erie, 8 F.R.D. 493 (W.D. N. Y. 1940). *Contra*: Truncale v. Blumberg, 8 F.R.D. 492 (S.D. N. Y. 1948); Pinkus v. Reilly, 71 F. Supp. 993 (N.J. 1947), *aff'd,* 170 F.(2d) 786 (C.C.A. 3rd 1948).

[38] N. Y. CIVIL PRACTICE RULE 113, as amended in 1944.

[39] Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944); *accord,* Associated Press v. United States, 326 U.S. 1 (1945); Sarnoff v. Ciaglia, 165 F.(2d) 167 (C.C.A. 3rd 1947); Doehler Metal Furniture Co. v. United States, 149 F.(2d) 130 (C.C.A. 2nd 1945).

[40] Michel v. Meier, 8 F.R.D. 464 (W.D. Pa. 1948).

[41] Boro Hall v. General Motors Corp., 164 F.(2d) 770 (C.C.A. 2nd 1947).

[42] Sheaf v. Minneapolis, St. P. & S. S. M. R. R., 162 F.(2d) 110 (C.C.A. 8th 1947).

[43] Downey v. Palmer, 114 F.(2d) 116 (C.C.A. 2nd 1940).

[44] Tobelman v. Missouri-Kansas Pipe Line Co., 130 F.(2d) 1016, 1018 (C.C.A. 3rd 1942); Ramsouer v. Midland Valley R. R., 44 F. Supp. 523 (Ark. 1942).

[45] *See* Fink v. Northwestern Mutual Life Insurance Co., 29 F. Supp. 972 (E.D. Mich. 1939).

[46] Michel v. Meier, 8 F.R.D. 464 (W.D. Pa. 1948).

ing for summary judgment.[47] The courts are not as critical of the opposing papers, and, even though the pleading is so defective as not to state a sufficient claim or defense, the motion will be denied and the party allowed to amend if all the opposing papers show a genuine issue of fact.[48]

A conflict has arisen in the federal courts as to how much the opposing party must show to defeat a motion for summary judgment. One group feels that the party need not produce his evidence, but need only indicate that it is possible such evidence may be available. Judge Frank, dissenting in *Madeirense Do Brazil S/A v. Stulman-Emrick Lumber Co.*,[49] said: "My colleagues' basic reason for their decision appears to be this: The seller should have disclosed in its affidavits any evidence it had . . .; its silence should therefore be penalized. In other words, to induce discovery, my colleagues are using a harsh rule on a motion for summary judgment." The court in *Arnstein v. Porter*,[50] speaking through Judge Frank, seemed to nullify much of the usefulness of Rule 56 when it said: "Rule 56 was not designed thus to foreclose plaintiff's privilege of examining defendant at a trial. . . ."

The opposing viewpoint is well expressed by Judge Clark, speaking for the court in *Engl v. Aetna Life Insurance Co.*:[51] "Formal denials . . . which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment . . . we have from the plaintiff . . . only in effect an assertion that at trial she may produce further evidence, which she is now holding back. . . . So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions." The Supreme Court, in the case of *Griffin v. Griffin*,[52] indicated in accordance with this view that proof of the existence of some evidence to resist the motion would be required. Judge Clark feels that the conflict has arisen from a failure by his opponents to understand

[47] Walling v. Fairmount Creamery Co., 139 F.(2d) 318 (C.C.A. 8th 1943); Weisser v. Mursam Shoe Corp., 127 F.(2d) 344 (C.C.A. 2nd 1942); Michel v. Meier, note 46 *supra*.

[48] Kane v. Chrysler Corp., 80 F. Supp. 360 (Del. 1948).

[49] 147 F.(2d) 399, 407 (C.C.A. 2nd 1943), *cert. denied*, 325 U.S. 861 (1945); *accord*, Bozant v. Bank of New York, 156 F.(2d) 787 (C.C.A. 2nd 1946); Doehler Metal Furniture Co. v. United States, 149 F.(2d) 130 (C.C.A. 2nd 1945); Hemler v. Union Producing Co., 40 F. Supp. 824, 834 (W.D. La. 1941).

[50] 154 F.(2d) 464, 471 (C.C.A. 2nd 1946), *aff'd*, 158 F.(2d) 795 (C.C.A. 2nd 1947).

[51] 139 F.(2d) 469, 473 (C.C.A. 2nd 1943); *accord*, Madeirense Do Brazil S/A v. Stulman-Emrick Lumber Co., 147 F.(2d) 399 (C.C.A. 2nd 1943), *cert. denied*, 325 U.S. 861 (1945); Home Art v. Glensder Textile Corp., 81 F. Supp. 551 (S.D. N.Y. 1948); Peckham v. Ronrico Corp., 7 F.R.D. 324 (P.R. 1947), *rev'd*, 171 F.(2d) 653 (C.C.A. 1st 1948). See also Judge Clark, dissenting in Arnstein v. Porter, note 50 *supra*.

[52] 327 U.S. 220, 236 (1946).

the integration of the devices for discovery and pretrial with the summary procedure.[53]

Subdivision (c) of Rule 56 provides that an issue as to amount of damages is no bar to summary judgment, but it does not provide any procedure for assessing the amount of damages where that is the only issue. Moore has suggested that a party against whom summary judgment is granted is in "default" for failure to present a sufficient defense, and that therefore the rule as to assessment of damages on default[54] should apply.[55] The New York rule here provides that an assessment shall be ordered to determine the amount, for immediate hearing to be tried by a referee, the court, or the court and a jury, whichever is appropriate.[56]

An order denying a motion for summary judgment is not a final judgment as it does not dispose of the case, but only finds that there is a substantial issue of fact warranting a trial,[57] and, therefore, is not appealable.[58] An order granting a motion is, of course, appealable, as it is a final judgment.[59]

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

This subdivision, which results in pretrial procedure, is designed as ancillary to a motion for summary judgment; its primary purpose would seem to be to salvage some results from the judicial effort in-

[53] CLARK, *op. cit., supra* note 10 at 566, 567. See also Kennedy, *The Federal Summary Judgment Rule—Some Recent Developments,* 13 BROOKLYN L. REV. 5 (1947); Comment, *Scope of Summary Judgment Under the Federal Rules of Civil Procedure,* 55 YALE L. J. 810 (1946).

[54] FED. R. CIV. P., 55(b) (2) (f).

[55] 3 MOORE, *op. cit., supra* note 2 at 3186.

[56] N. Y. CIVIL PRACTICE RULE 113(f).

[57] Van Alen v. Aluminum Co. of America, 43 F. Supp. 833 (S.D. N. Y. 1942).

[58] Drittel v. Friedman, 154 F.(2d) 653 (C.C.A. 2nd 1946); Jones v. St. Paul Fire & Marine Insurance Co., 108 F.(2d) 123 (C.C.A. 5th 1939).

[59] Bozant v. Bank of New York, 156 F.(2d) 787 (C.C.A. 2nd 1946).

volved in considering the motion.[60] A duty is imposed on the court to sift the issues and to specify which material facts are really in issue, thus facilitating the trial.[61] But although the rule affords the court an opportunity to withdraw sham issues from trial, it does not authorize motions the sole object of which is to adjudicate issues of fact which do not dispose of any claim or part thereof.[62]

An order entered under this subdivision is not ordinarily a final or appealable judgment, as it is merely a pretrial adjudication that certain issues be deemed established for the trial.[63]

(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

The affidavit should follow substantially the same form as though the affiant were giving testimony in court.[64] General allegations which do not show the facts in detail are insufficient.[65] Where the affidavit includes incompetent evidence the court will disregard such evidence and will give full consideration to the competent evidence.[66] Although the rule allows reply affidavits, the tendency is to discourage them by making a party state all his facts and anticipate defenses.[67] On the question of personal knowledge, the affidavit will be sufficient if it states that matters therein are true to the best of affiant's knowledge and belief.[68]

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[60] Yale Transport Corp. v. Yellow Truck & Coach Manufacturing Co., 3 F.R.D. 440 (S.D. N. Y. 1944).

[61] Biggins v. Oltmer Iron Works, 154 F.(2d) 214 (C.C.A. 7th 1946), quoting 3 MOORE, *op. cit., supra* note 2 at 3175.

[62] Yale Transport Corp. v. Yellow Truck & Coach Manufacturing Co., 3 F.R.D. 440 (S.D. N. Y. 1944).

[63] Leonard v. Socony-Vacuum Oil Co., 130 F.(2d) 535 (C.C.A. 7th 1942); *accord,* Biggins v. Oltmer Iron Works, 154 F.(2d) 214 (C.C.A. 7th 1946).

[64] *See, e.g.,* Walling v. Fairmount Creamery Co., 139 F.(2d) 318 (C.C.A. 10th 1943); Banco de Espana v. Federal Reserve Bank, 114 F.(2d) 438 (C.C.A. 2nd 1940); Seward v. Nissen, 2 F.R.D. 545 (Del. 1942), quoting Shientag, note 5 *supra,* at 198.

[65] Engl v. Aetna Life Insurance Co., 139 F.(2d) 469 (C.C.A. 2nd 1943).

[66] Dickheiser v. Pennsylvania R. R., 5 F.R.D. 5 (E.D. Pa. 1945), *aff'd,* 155 F.(2d) 266 (C.C.A. Pa. 1946), *cert. denied,* 329 U.S. 808 (1947).

[67] Shientag, note 5 *supra,* at 193.

[68] *See, e.g.,* Frederick Hart & Co. v. Recordgraph Corp., 169 F.(2d) 580 (C.C.A. 3rd 1948); Banco de Espana v. Federal Reserve Bank, 114 F.(2d) 438 (C.C.A. 2nd 1940); Person v. United States, 112 F.(2d) 1 (C.C.A. 8th 1940), *cert. denied,* 311 U.S. 672 (1940); Mellen v. Hirsch, 8 F.R.D. 248 (Md. 1948), *aff'd,* 171 F.(2d) 127 (C.C.A. 9th 1948); United States v. Kehoe, 4 F.R.D. 306 (M.D. Pa. 1945).

In the absence of counter-affidavits, the movant's affidavits should be accepted as true.[69] But the absence of counter-affidavits is not material if the moving party has not established the non-existence of an issue, as the burden of proof is on him.[70]

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Where knowledge of essential facts is exclusively in the possession of the movant, a typical case coming under this subdivision, the court will usually permit the opposing party to obtain discovery.[71] Where the defending party has not been able to locate a witness or to obtain a deposition, the court should grant a continuance.[72] If the court feels that the adverse party may be able to establish a defense if afforded an opportunity to cross-examine, the motion may be denied.[73]

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

CONCLUSION

Summary judgment is only one, but an important one, of the many devices which are indicative of the trend toward modernization of procedure to attain a maximum of justice with a minimum of time and expense. The federal rules are the result of the best modern thinking in this direction, and the value and practicability of the summary procedure developed in these rules has been graphically proved by its highly successful use in the federal courts. A device such as this which

[69] Geller v. Transamerica Corp., 53 F. Supp. 625 (Del. 1943).
[70] Griffith v. William Penn Broadcasting Co., 4 F.R.D. 475 (E.D. Pa. 1945).
[71] Goldboss v. Reimann, 44 F. Supp. 756 (S.D. N. Y. 1942).
[72] Shultz v. Manufacturers & Traders Trust Co., 30 F. Supp. 443 (W.D. N. Y. 1939).
[73] Arnstein v. Porter, 154 F.(2d) 464 (C.C.A. 2nd 1946), *aff'd*, 158 F.(2d) 795 (C.C.A. 2nd 1947); Tobelman v. Missouri-Kansas Pipe Line Co., 130 F.(2d) 1016 (C.C.A. 3rd 1942).

assures plaintiffs of a speedy and relatively inexpensive judgment where there is no valid defense, and which discourages defendants from raising such a defense in the first place surely deserves careful and thoughtful consideration by courts and legislatures.