JUDGE WARONICKI'S CIVIL JURY DIVISION PROCEDURES FOR PLEADING, SCHEDULING AND HEARING NON-DEFAULT SUMMARY JUDGMENT MOTIONS

Introduction

Effective May 1, 2021, the Florida Supreme Court amended Rule 1.510 to harmonize Florida's summary judgment standard with the federal standard. The new standard for Summary Judgment in Florida is to "…be construed and applied in accordance with the federal summary judgment standard articulated in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)." *In re Amends. To Fla. Rule of Civ. Pro. 1.510*, 309 So.3d 192, 196 (Fla. 2021); *see also* Fla. R. Civ. P. 1.510(a) ("The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard."). These cases are commonly referred to as the *Celotex* trilogy.[1] Under the current standard, the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part" of the rules aimed at 'the just, speedy and inexpensive determination of every action.'" Celotex, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

In adopting the federal standard, the Florida Supreme Court emphasized that it intended for the new rule to promote "efficiency" in the civil justice system. *In re Amends. to Fla. R. of Civ. P. 1.510,* 309 So.3d 192, 194 (Fla. 2020). The Court's goals in adopting the new rule were "simply to improve the fairness and efficiency of Florida's civil justice system, to relieve parties from the expense and burdens of meritless litigation." *Id*. Following the amendment, the Court has observed an increasing number of summary judgment motions filed, together with requests for hearing time. As a result, summary judgment hearings fill a significant portion of the Court's special set calendar. Unfortunately, the Court has observed some inefficiencies associated with pleading, scheduling, and hearing non-default summary judgment motions resulting in lost hearing time, continuances, and/or the need to schedule additional hearing time for the Court to consider all of the issues.

Therefore, these procedures are published to assist counsel for the moving and non-moving parties appearing in Division CV-E for summary judgment proceedings by addressing routine issues that arise while litigating summary judgment motions and communicate the Court's expectations of counsel concerning pleading, scheduling and hearing non-default summary judgment motions that will increase efficiency. These procedures are not intended to relax or supplant the Florida Statutes, the Florida Rules of Court, local rules of Court, administrative orders, case specific court orders, the Rules Regulating the Florida Bar (including, without limitation, the Rules of Professional Conduct), or any other substantive or procedural law

[1] *Celotex* trilogy refers to three United States Supreme Court opinions issued in 1986: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The trilogy can be summarized as follows: *Celotex* held that, the moving party does not have to disprove the non-moving party's case. If the non-moving party has zero evidence in support of its case, then summary judgment is appropriate; *Anderson* is the "scintilla of evidence" case. It said that the non-moving party's evidence has to be of a certain quality—enough that a jury could rely upon to reach a verdict in the non-moving party's favor; *Matsushita* said that, if all you have is circumstantial evidence, then the inferences arising from it must be enough to rebut the plausible inferences in the moving party's evidence.

(collectively, the "Applicable Law, Rules and Procedure"). All Applicable Law, Rules and Procedure are intended to prevail, unless expressly stated otherwise.

Basic Black-Letter Principles

Citation to Materials Supporting/Opposing Factual Positions

All materials referenced in support of or opposition to the motion must be in the record, filed on the docket. Materials which have already been filed on the docket need not be refiled. If a deposition transcript is referenced, a complete copy must be filed on the docket which includes all exhibits.

The movant and nonmovant must cite to particular parts of materials in the record in the motion and response. Fla. R. Civ. P. 1.510(c)(1)(A). To increase the efficiency and ease in confirming whether materials are "in the record", the Court suggests that any materials the movant and nonmovant put in the record be timely filed with a "Notice of Filing Documents/Materials in Support of/Opposition to Summary Judgment" cover pleading that identifies the documents/materials being added to the record. The Court also suggests that any references to the materials in support of/opposition to the motion be in the form of a specific citation to the docket line, pdf pages, page/line of the deposition transcript, and the page number/paragraph number of pleadings and affidavits.

Facts Supporting or Opposing the Summary Judgment Motion Must be Admissible in Evidence

Affidavits. If affidavits or declarations are being used to support or oppose a motion, the rule states that they must be "made on personal knowledge, ***set out facts that would be admissible in evidence***, and show that the affiant or declarant is competent to testify on the matters stated." Fla. R. Civ. P. 1.510(c)(4) (emphasis added). The summary judgment rule expressly allows for the court to award fees and costs and hold counsel in contempt if the court finds – "after notice and a reasonable opportunity to respond" – that the affidavit or declaration was made in bad faith. Fla. R. Civ. P. 1.510(h).

Admissibility. Whether it is an affidavit or declaration, depositions, documents or other materials, the rule is explicit that "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fla. R. Civ. P. 1.510(c)(2). At the summary judgment stage, the parties need not submit evidence in a **form** admissible at trial. However, the **content or the substance** of the evidence must be admissible. *Hardy v. S.F. Phosphates Ltd.*, 185 F.3d 1076, 1082 n. 5 (10th Cir. 1999) (emphasis added). For example, a witness to a car accident could not submit his testimony at trial via affidavit because that statement would be hearsay. However, at the summary judgment stage, the affidavit is proper because its content – the eyewitness account of the affiant – is admissible. The Court frequently is required to rule on hearsay objections to statements contained in affidavits or depositions. Hearsay statements in an affidavit or deposition cannot be used to support or defeat a motion for summary judgment unless these hearsay statements are subject to an exception to the hearsay rule. *See Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 470 (3d Cir. 1989).

The Court Can Only Look at Things "In the Record"

The rule contains a provision that says "[t]he court need consider only the cited materials, …but it may consider other materials in the record." Fla. R. Civ. P. 1.510(c)(3). Whether cited or not to support or oppose a motion, rule is clear that only materials in the record can be considered by the judge. Fla. R. Civ. P. 1.510(c). This court does not consider this to be an invitation for the movant or nonmovant to sandbag at a summary judgment hearing — to make arguments based on something not in the record or conversely raising things at a hearing that were not cited in the motion or response (but are in the record) and requesting the court to consider such things. The movant and nonmovant are supposed to provide everything they are relying upon in support or opposition to the motion well in advance of the hearing based upon the timing considerations within Rule 1.510. In the event any party advocates the court consider such things not cited in the motion or response, the court will consider the objecting party's request for more time to address the new issue based upon the following language of Rule 1.510(e):

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by rule 1.510(c), the court may:
>
> (1) ***give an opportunity to properly support or address the fact,***
> …
> (4) issue any other appropriate order. (emphasis added).

The Summary Judgment Timeline

The rule states you can move for summary judgment as soon as 20 days "from the commencement of the action." Fla. R. Civ. P. 1.510(b). Rule 1.050 states that an action "shall be deemed commenced when the Complaint or Petition is filed." Technically, a defendant can file a motion for summary judgment 20 days after the Complaint is filed, however, the Court will not hear premature motions (see below).

40 Days. At the time of filing a motion for summary judgment, the movant must serve the movant's supporting factual position as provided in subdivision (1) above." Fla. R. Civ. P. 1.51(c)(5). The "supporting factual position" is the "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials. Fla. R. Civ. P. 1.510(c)(1)(A). The rule states the moving party "must serve the motion for summary judgment at least 40 days before the time fixed for the hearing." Fla. R. Civ. P. 1.510(b).

20 Days. A non-moving party "must serve a response that includes the nonmovant's supporting factual position as provided in subdivision (1) above" at least 20 days before the time fixed for the hearing. Fla. R. Civ. P. 1.510(c)(5).

The Nonmovant Must Serve a Response

The rule expressly states that "the nonmovant ***must*** serve a response" and it "***must*** include the nonmovant's supporting factual position as provided in subdivision (1) above." Fla. R. Civ. P. 1.510(c)(5) (emphasis added).

If a party fails to properly support or address a fact as required by subdivision (c)(1), the amended rule provides discretionary options for the trial court:

> **(e) Failing to Properly Support or Address a Fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by rule 1.510(c), the court may:
>
> (1) give an opportunity to properly support or address the fact;
>
> (2) **consider the fact undisputed for purposes of the motion;**
>
> (3) grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

Fla. R. Civ. P. 1.510(e) (2021) (second emphasis added).

However, the amended summary judgment rule does not provide that summary judgment may be granted based solely on the nonmovant's failure to respond or otherwise properly support or address a fact as required by subdivision (c)(1). Rather, the rule provides that "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by rule 1.510(c), the court may, "among other things, "consider the fact undisputed for purposes of the motion," or "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it[.]" Fla. R. Civ. P. 1.510(e) (2022); *see also Lloyd S. Meisels, P.A., v. Dobrofsky*, 341 So.3d 1131. 1134-36 (Fla. 4th DCA 2022) (recognizing that pursuant to rule 1.510(c)(5), the requirement of filing a response is mandatory, and if one is not filed, rule 1.510(e) "provides discretionary options for the trial court," including "grant[ing] summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it").

Premature Summary Judgment Motions

The Florida Supreme Court clearly stated in the opinion adopting the amended summary judgment rule that it is "important to emphasize that, before being subjected to summary judgment because of the absence of evidence, the nonmovant must have been afforded 'adequate time for discovery.'" 317 So.3d 72, at 77 (quoting *Celotex*, 477 U.S. at 322). The "old soil" of the federal case law interpreting federal rule 56 "transplanted" into the amended state summary judgment

standard is clear that premature motions for summary judgment should not be permitted. The Fifth Circuit explained:

International Shortstop, Inc. v. Rally's Inc., 939 F.2d 1257, 1267 (5th Cir. 1991).

The amended summary judgment rule incorporates that principle in subsection (d). That subsection says:

> If a nonmovant ***shows by affidavit*** or declaration that, ***for specified reasons***, it cannot present facts essential to justify its opposition, the court may:
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

Fla. R. Civ. P. 1.510(d) (emphasis added).

The Fifth Circuit in *International Shortstop* explained that such an affidavit "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts." 939 F.2d at 1267. The court reasoned that, "[i]f the additional discovery will not likely generate evidence germane to the summary judgment motion, the district court may, in its discretion, proceed to rule on the motion without further ado." *Id.* Conversely, the same court held that where discovery is sought which is in the movant's possession, that is a circumstance where the court should almost always grant the continuance:

> Oftentimes…the evidence which the non-moving party could offer to create a factual dispute is in the exclusive possession of the moving party. Where the party opposing the summary judgment informs the court that its diligent efforts to obtain evidence from the moving party have been unsuccessful, "a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course."

International Shortstop, 939 F.2d at 1267 (quoting *Sames v. Gable*, 732 F.2d 49, 51 (3d Cir. 1984)).

An appropriate affidavit or declaration should be attached to a motion to continue the hearing that explains:

- what discovery the nonmovant has not been able to conduct;
- what the nonmovant expects to discover;
- why the nonmovant has not been able to obtain the discovery so far; and
- how the anticipated discovery will defeat the summary judgment motion.

Scheduling a Summary Judgment Hearing

The procedure for scheduling a summary judgment hearing should be no different than scheduling any other routine motions or matters in this division. Please see standard procedures for further details on scheduling.

Statement of Material Facts Requirement[2]

(a) Statements of Material Facts.

(1) A motion for summary judgment and the opposition to it shall each be accompanied by a separate and contemporaneously filed and served Statement of Material Facts. The movant's Statement of Material Facts shall list the material facts that the movant contends are not genuinely disputed.

(2) A non-movant's Statement of Material Facts shall clearly challenge any purportedly material fact asserted by the movant that the non-movant contends is genuinely in dispute. A non-movant's Statement of Material Facts also may thereafter assert additional material facts that the opponent contends serve to defeat the motion for summary judgment.

(3) The movant shall respond to any additional facts asserted in the opponent's Statement of Material Facts even if the movant does not serve a reply memorandum. The due date for the Reply Statement of Material Facts is the due date for the reply memorandum below.

(b) Form Required for Statements of Material Facts.

(1) All Statements of Material Facts. All Statements of Material Facts (whether filed by the movant or the non-movant) shall be filed and served as separate documents and not as exhibits or attachments. In addition, the Statements of Material Facts shall:

(A) Not exceed ten (10) pages;

(B) Consist of separately numbered paragraphs, limited as far as practicable to a single material fact, with each fact supported by specific, pinpoint references or citations as to particular parts of record material, including depositions, documents, electronically stored information, affidavits, stipulations (including those made for purposes of the motion only), admissions, and interrogatory answers (e.g., Docket Line 20, Exhibit D, Smith Affidavit, ¶; Exhibit 3, Jones deposition, p. 12/lines 4-9).

The pinpoint citations shall reference pages (and line numbers, if appropriate, of exhibits, designate the number and title of each exhibit, and provide the docket line number of all previously filed materials used to support the Statement of Material Facts. When a material fact requires specific evidentiary support, a general citation to

[2] Local Rule 56.1 (a) and (b) U.S. District Court, Southern District of Florida (Rev. 12/1/22).

an exhibit without a page number or pincite (e.g., "Smith Affidavit" or "Jones Deposition" or "Exhibit A") is non-compliant.

(2) Non-Movant's Statement of Material Facts.

(A) In addition to complying with the requirements of sub-section (b)(1), a non-movant's Statement of Material Facts shall correspond with the order and paragraph numbering format used by the movant, but it shall not repeat the text of the movant's paragraphs.

(B) A non-movant's Statement of Material Facts shall use, as the very first word in each paragraph-by-paragraph response, the word "disputed" or "undisputed."

(C) If a non-movant's Statement of Material Facts disputes a fact in the movant's Statement of Material Facts, then the evidentiary citations supporting the non-movant's position must be limited to evidence specific to that particular dispute.

By way of example:

Movant's Statement of Material Facts

1. Blackacre is a vacant property located at 123 Main Street. Exhibit A ¶ 1.

2. Sarah Jones owns Blackacre. Exhibit B ¶12.

Non-Movant's Opposing Statement of Material Facts

1. Undisputed that Blackacre is located at 123 Main Street. Exhibit A ¶ 1. Disputed that the property is vacant. Exhibit C at 5.

2. Disputed as phrased. Undisputed that the last recorded deed to Blackacre names Sarah Jones. Exhibit B ¶12.

(D) Any additional facts that a non-movant contends are material to the motion for summary judgment shall be numbered and placed immediately after the non-movant's response to the movant's Statement of Material Facts. The additional facts shall use separately numbered paragraphs beginning with the next number following the movant's last numbered paragraph. The additional facts shall be separately titled "Additional Facts" and may not exceed five (5) pages (beyond the ten- (10) page limit for the opponent's Statement of Material Facts.

(3) Reply Statement of Material Facts.

(A) If a non-movant's Statement of Material Facts includes additional facts, then the movant shall respond to each additional fact in a separately served Reply Statement of Material Facts.

(B) The Reply Statement of Material Facts shall correspond with the order and paragraph numbering format used in the non-movant's additional facts, identifying with the very first word in each as "disputed" or "undisputed" at the beginning of each paragraph in the statement, and if disputed, citing to particular parts of materials in the record in the same manner as required by subsections (b)(1) and (b)(2).

(C) The movant may file and serve a reply memorandum of law, which is separate and distinct from the required Reply Statement of Material Facts addressing the non-movant's additional facts.

(D) The due date for the Reply Statement of Material Facts and Reply Memorandum of Law is at least 10 days before the time fixed for the hearing.

Proposed Orders Following Hearing

The amended rule requires that "[t]he court ***shall*** state on the record the reasons for granting or denying the motion [for summary judgment]." Fla. R. Civ. P. 1.510(a) (emphasis added). The Florida Supreme Court said that the findings have to be specific:

> To comply with this requirement, it will not be enough for the court to make a conclusory statement that there is or is not a genuine dispute as to a material fact. The court must state the reasons for is decision with enough specificity to provide useful guidance to the parties and, if necessary, to allow for appellate review. On a systemic level, we agree with the commenters who said that this requirement is critical to ensuring that Florida courts embrace the federal summary judgment standard is practice and not just on paper.

2021 WL 1684095, at 11.

With large hearing and trial dockets, a renewed emphasis on active case management by trial courts, and none of the full-time dedicated law clerks and support staff employed by federal courts, this Court requires the parties to prepare and submit to the Court proposed orders granting or denying the summary judgment motion following the hearing. The Court will give the movant(s) and nonmovant(s) specific instructions at the close of the hearing, but, in general, counsel for the parties should expect and be prepared to comply with the following requirements:

- generally, the court will establish a reasonable deadline for filing the proposed orders within 7 days following the hearing;

- a copy of the filed respective proposed orders must be emailed to the Court's Judicial Assistant in Word format by the same deadline as the filing of the proposed orders;

- not as an additional written argument;

- the proposed orders granting/denying the summary judgment motion should contain at, a minimum the following three well-defined sections: (1) summary of facts with citations to particular parts of materials in the record supporting each fact with such specificity the Court could readily locate the portion of the materials supporting such factual positions in the record (i.e., depositions page(s)/line(s), location of materials, records, affidavits, and pleadings in the record by docket/line number together with page and paragraph number), (2) Applicable Law (i.e., general summary judgment standard caselaw, case specific caselaw relevant to any summary judgment issues or legal issues inherent to the cause of action/theory of liability), (3) Legal Conclusions (containing the application of the law to the facts, summary judgment analysis, and specific reasons for granting or denying the motion); and

- the proposed orders should also contain a section identifying, in the event the Court fails to grant all the requested relief, "any material fact – including an item of damages or other relief – that is not genuinely in dispute and treating the fact as established in the case." Fla. R. Civ. P 1.510(g). This provision allows the Court to "salvage some of the judicial effort involved in the denial of a motion for summary judgment and to streamline the litigation process by narrowing the triable issues." *D'Iorio v. Winebow, Inc.*, 68 F. Supp. 3d 334, 356 (E.D.N.Y. 2014) (citation omitted). The standard for finding a material fact undisputed is the same as the standard for summary judgment on the merits. Fed. R. Civ. P. 56, adv. comm. Notes (2010 amends.). Whether to enter an order treating an undisputed material fact as established is discretionary. *Id.* In the event the Court enters an order stating any material fact is not genuinely in dispute and treating the fact as established in the case, such established fact(s) would be incorporated into the Pre-Trial Stipulation required by the Court's *Case Management Order Setting Case for Trial and Pretrial Conference and Requiring Matters to be Completed Prior to Pretrial Conference* within the "concise statement of those facts which are admitted and will require no proof at trial."