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Outside Counsel

Objecting To Admissibility Of Summary Judgment Motion Evidence

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TO THE lay public, the phrase I object! is virtually synonymous with litigator, so critical is the lawyer's duty to protect the client from the introduction of improper evidence offered at trial. Those more familiar with the legal world recognize that much litigating is done on papers, and that many litigators retire after productive careers without ever having tried a case or having uttered that famous phrase in open court.

Most litigators are familiar with the requirement that summary judgment motions be supported by evidentiary proof in admissible form establishing the material facts. [1] It may however come as something of a surprise to many that evidence improperly offered in connection with summary judgment motions can and indeed must be met with timely objection lest, as at trial, the objection be deemed waived and error not preserved for appeal.

Reported decisions turning on a failure toobject before the motion court to the admissibilityof evidence are sufficiently uncommon to have preserved the relative obscurity of the requirement, but constitute more than sufficient authority to seal the fate of the litigant who, unaware of the rule, allows excludable motion evidence to be submitted without challenge.

In the interest of heightening awareness of this requirement and, more generally, advocating parity to the extent practicable in the treatment of evidence offered upon motion with that of evidence offered at trial, this article reviews New York State case law dealing with objections to motion evidence, identifies shortcomings in the present approach, and proposes ways in which these deficiencies might be addressed.

The broader topic of what constitutes evidentiary facts in admissible form on a summary judgment motion is reserved for subsequent articles.

Schwartz v. Aetna Life Insurance and Annuity Company, [2] a 1995 decision of the Appellate Division, Fourth Department, affirmed the granting ofsummary judgment to the non-moving plaintiff notwithstanding that each party had submitted and relied upon unsworn medical records.

Over a dissent arguing that neither party had submitted proof in evidentiary form as required on a motion for summary judgment, the majority found that the reports had been properly considered, inasmuch as neither party has objectedto the admissibilityof the medical records submitted by the other.[3]

In *Hartford Accident & Indemnity Company v. Transamerica Insurance Company*,[4] the motion court was held to have properly considered, as evidence of coverage, a certificate of insurance which, although hearsay offered by an attorney without personal knowledge of the facts, was properly to be considered by the court absent an objection to its admissibility.[5]

White v. Merchants Despatch Transp. Co., [6] sustained the sufficiency of defendants' prima facie showing of entitlement tosummary judgment, supported by documentary evidence consisting of affidavits attesting to what was shown on defendants' corporate books of account, and of copies of defendants' balance sheets, where [n]o objection was made by plaintiff that the facts shown by the books were not proven by the books themselves rather than by statements drawn off from such books. No question was raised as to the manner of proving the contents of the books.[7]

Both *Schwartz* and *Hartford* relied upon *Borchardt v. New York Life Insurance Company*,[8] which reversed the motion court's order that had denied defendant's summary judgment motion on the basis, among other things, that it failed to provide a proper foundation for matter contained in exhibited hospital records.

The plaintiff's failure toobjectto the lack of foundation was cited as a factor requiring reversal.

Similarly, the *Borchardt* court rejected the motion court's conclusion that lack of certification of the hospital records pursuant to CPLR 2306 rendered those records inadmissible, again pointing to the plaintiff's failure toobjecttoadmissibility (particularly in view of the fact that certification could have been obtained).

Thus, not only is interposition of a timely objection toadmissibilityof motion evidence essential to preserve evidentiary defects for appeal (as in *Schwartz, Hartford Accident*, and *White*), reversible error may be found where inadmissible evidence submitted upon a summary judgment motion without objection is excluded by the motion court sua sponte (as in *Borchardt*).

Improvements

While these decisions make the necessity for timely objection quite clear, they beg the question how, from a mechanical standpoint, evidentiary objections ought to be asserted on a summary judgment motion.

It will little avail an attorney, reading an adversary's papers, to rise and declaim objection, hearsay to the office walls, although this doubtless occurs. Certainly the inference is that objections to evidence offered in connection with the moving papers should be raised in opposing affidavits; presumably objections to evidence contained in opposing papers would be raised in reply affidavits (objectionable evidence in reply papers would then seem to require a sur-reply).

Absent authority to the contrary, and there appears to be none, this is the way objections should be asserted. To avoid any question on appeal as to whether objection was made, the objection should be raised by affidavit and not merely in a memorandum of law, as such memoranda are not part of a record on appeal.

In the writer's view, however, this procedure is not entirely satisfactory, as it creates an anomalous situation analogous to a trial court reserving its rulings on all evidentiary objections until the conclusion of the proof.

Under current practice, unless the movant fails to make a prima facie showing, the sufficiency of which generally would be decided only in the order determining the fully submitted motion, the party opposing the motion must assemble and lay bare affirmative proof to establish the existence of genuine issues of material fact.[9]

Needless to say, it is the rare situation where the opponent will be so confident of a finding that the movant has failed to make a prima facie showing as to rely solely on that ground in opposing the dispositive motion.[10]

Once the opposing affidavits laying bare the proof are served, the movant almost invariably will feel constrained to respond with reply papers. Thus, in a case in which the movant has in fact failed at the outset to make a proper evidentiary showing, which failure will ultimately mandate denial of the motion even without regard to the sufficiency of the opposing papers,[11] the deferral of determination of objections to the evidence until the decision on the fully submitted motion can result in an enormous and unnecessary expenditure of both litigant and judicial resources.

Two possible approaches for addressing this problem are suggested. One is to adopt a modified version of the procedure commonly employed for resolving disputes arising during examinations before trial, whereby the court may be contacted on short notice for a ruling on the propriety of a given question or the adequacy of the response.

Under this approach, the opponent of a summary judgment motion or the movant in receipt of opposing papers who believes that evidence offered by the adversary is inadmissible could address that objection to the court on due notice to the adversary, so to obtain a ruling on the matter prior to the date a formal response to the motion or opposition is due.

The court could be empowered to direct a limited voir dire of the affiant or the proponent of an exhibit in question where need is demonstrated. If the objection is sustained and the motion or opposition thereby rendered facially insufficient, the motion could be summarily dismissed or treated as unopposed, as the case may be, with resulting efficiencies to litigants and court.

A more formalized alternative procedure would be to authorize a cross-motion for dismissal (as opposed to denial) of the summary judgment motion on the ground of failure to make the required prima facie showing in the moving papers.

The making of the cross-motion would suspend the obligation to serve other opposing papers, much as the making of a pre-answer dismissal motion suspends a defendant's time to answer pending service of an order denying the motion (CPLR 3211(f)).

Such a cross-motion would be determined first, as a motion addressed to jurisdiction is generally given priority over substantive motions. Again drawing upon CPLR 3211(f) as a model, denial of the cross-motion would require service of any additional opposing papers within a brief specified time.

Concerns that the adoption of these or similar procedures could result in dilatory motion practice or additional burdens upon the courts may be anticipated.

While no procedural safeguard can be made immune from abuse in all instances, the time and resources these proposed procedures contemplate should be modest, especially when compared with those that must now be expended by a litigant required to lay bare its proof in opposing even a deficient summary judgment motion and by the court in reviewing a fully developed record on such a motion.

Requirements of good faith affirmations and the prospect of sanctions for frivolous practice could help discourage applications lacking merit. Moreover, the prospect of scrutiny up front of the proof submitted by a litigant to the motion court might well engender greater respect for the evidentiary aspect of motions, from which is established the essential factual context for any assessment of the merits.

1. *Zuckerman v. City of New York*, 49 NY2d 557, 562, (1980); *Friends of Animals Inc. v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067 (1979).
2. 214 AD2d 975, (Fourth Dept. 1995).
3. Id.
4. 141 AD2d 423, (First Dept. 1988).
5. Id. at 425.
6. 256 App. Div. 1044, (Fourth Dept. 1939).
7. Id. at 1044.
8. 102 AD2d 465, (First Dept. 1984), aff'd, 63 NY2d 1000, rearg. den., 64 NY2d 776.
9. *Archambault v. Martinez*, 120 A.D.2d 632, (Second Dept. 1986); *HNC Realty Co. v. Bay View Towers Apartments Inc.*, 64 AD2d 417, (Second Dept. 1978).
10. Indeed, the act of laying bare opposing proof may provide a motion court with grounds for overruling a duly asserted evidentiary objection. In a New York County Supreme Court decision recently reported in the *New York Law Journal*, an authentication objection to the admissibilityof photograph and videotape evidence (attested to by defendant's counsel instead of by defendant) that had been submitted in support of a pre-answer dismissal motion, was overruled by the motion court because, among other things, the plaintiff himself relied upon the contents of the videotape in opposition to the same motion. *Douglas v. American Broadcast Company, NYLJ,* Feb. 15, 1996, pp. 27-28 (Supreme Court, New York Co. (Miller, J.)). While this is not the only reason stated in the decision for overruling the evidentiary objection, *Douglas* is troublesome to the extent it may be read to suggest that evidentiary objections addressed to the movant's prima facie showing might be vitiated if the opponent also responds on the merits and refers to the offending exhibit in that context. A prima facie showing, by definition, must stand on its own without reference to the opposing papers.
11. *Winegard v. New York University Medical Center*, 64 NY2d 851, (1985); *Costa v. 1648 Second Avenue Restaurant Inc.*, 634 NYS2d 108 (First Dept. 1995); *McCue v. Battaglia*, 211 AD2d 625, 621 (Second Dept. 1995).