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08-CV-082

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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE
Washington, DC 20544

By E-mail

Re: Comments on Proposed Rule 56(d)

Dear Mr. McCabe:

I suggest that the following sentence be added to proposed Rule 56(d), or inserted in the comment:

> A nonmovant may seek relief under this provision while arguing in the alternative that the nonmovant has produced sufficient evidence requiring denial of the motion.

This suggestion will make it clear that the nonmovant may argue that she has sufficient evidence to defeat summary judgment, but that in the alternative, the nonmovant may request more time to complete discovery.

Assume that a plaintiff has some evidence supporting her case, but that she knows where more evidence may be found. Assume further that a defendant files a motion for summary judgment, perhaps before the discovery deadline, or perhaps before the plaintiff has filed a motion to compel. The plaintiff would naturally wish to oppose summary judgment on the merits, but as an alternative, should that fail, the plaintiff would want to obtain more time to complete fact-gathering.

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Some courts have refused to permit nonmovants to utilize current Rule 56(f) as an argument in the alternative. The First Circuit has repeatedly asserted that it will recognize a Rule 56(f) request only to the extent that the nonmovant acknowledges that her case is currently is too weak to withstand summary judgment. In other words, the nonmovant is not permitted to take the position that her case can surmount the summary judgment hurdle, but that in the alternative, the nonmovant needs additional discovery. Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 23 (1st Cir. 1999) ("Ordinarily, a party may not attempt to meet a summary judgment challenge head-on but fall back on Rule 56(f) if its first effort is unsuccessful"); see C.B. Trucking, Inc. v. Waste Mgmt., Inc., 137 F.3d 41, 44 (1st Cir. 1998).

Proposed Rule 56(d) and First Circuit precedent place nonmovants in an extremely unfair catch-22. If they challenge summary judgment on the merits, they waive their right to request additional time. If they request additional time, they do so with the tacit acknowledgement that their cases are currently too weak to withstand summary judgment. In order to seek Rule 56(d) relief, nonmovants must acknowledge that the further information sought is "essential" to their opposition to summary judgment. This is tantamount to stipulating that the nonmovant's case should get dismissed, to the extent that additional discovery is not permitted, or to the extent that discovery reveals nothing new. The Rule, as it has been applied or misapplied, is blind to the very real possibility that the nonmovant currently has some evidence with which it may oppose summary judgment, but that in the event such evidence is deemed insufficient, the nonmovant has a lead on where additional evidence may be located. The rule should be amended to accommodate such a commonplace situation, and permit requests for additional discovery in the event that a facial opposition to a Rule 56 motion fails.

Thus, the Committee should it make absolutely clear that the First Circuit line of cases have lost their validity.

Sincerely,

Robert S. Mantell

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