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A GLANCE AT SUMMARY JUDGMENT

By THOMAS J. BROWNING*

EDITOR'S NOTE: A motion for summary judgment is one of the most frequently used pre-trial motions. The following article was written as a quick-reference index for the Judges of the Cobb Superior Court in ruling on these motions.

In keeping with our policy of presenting articles to aid the practicing attorney, as well as the academician, we are including the article in this year's Survey. This is the authority practicing attorneys will no doubt face from the Georgia judiciary on a motion for summary judgment.

I. PURPOSE

Purpose of Summary Judgment: A primary purpose of the summary judgment procedure is to allow a party to pierce the allegations of the pleadings and show the truth to the court and receive judgment where there is no genuine issue of material fact, although an issue may be raised by the pleadings. *Parson v. Central of Georgia Ry.*, 129 Ga. App. 218, 219, 199 S.E.2d 396, 398 (1973).

II. CONSTRUCTION, INFERENCES AND PRESUMPTIONS

Scrutiny Of Papers: The papers of the movant are to be carefully scrutinized while those of the opposing party are treated with considerable indulgence. *Colonial Stores v. Turner*, 117 Ga. App. 331, 334, 160 S.E.2d 672, 674 (1968).

Unrebutted Pleadings - Taken As True: The allegations of both the petition and answer must be taken as true in a summary judgment motion unless the movant successfully pierces the allegations so as to show that no material issue of fact remains. *Gregory v. Vance Publishing Corp.*, 130 Ga. App. 118, 119, 202 S.E.2d 515, 517 (1973); *Alexander v. Boston Old Colony Ins. Co.*, 127 Ga. App. 783, 784(2), 195 S.E.2d 277, 278(2) (1972).

Evidence Construed Favorably To Opposing Party: The evidence must be construed most favorable to the opposing party, even though the testimony may be vague or contradictory. *Gregory v. Vance Publishing Corp.*, 130 Ga. App. 118, 120, 202 S.E.2d 515, 518 (1973).

Favorable Inference To Opposing Party: The opposing party is given the benefit of all favorable inferences that may be disclosed by the evidence. *Burnette Ford, Inc. v. Hayes*, 227 Ga. 551, 552-53, 181 S.E.2d 866, 867 (1971) (citations omitted).

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Duty Of Judge - "Is There Any Issue?" The duty of the trial judge on a motion for summary judgment is to determine whether there is any genuine issue of any material fact. *Black v. Hamilton*, 133 Ga. App. 881, 882, 212 S.E.2d 449, 450 (1975) (citations omitted).

Burden Of Movant - Lack of Issue: The burden is upon the moving party to establish the lack of a genuine issue of fact and the right to a judgment as a matter of law, and any doubt as to the existence of such an issue is resolved against the movant. *Holland v. Sanfax Corp.*, 106 Ga. App. 1, 5, 126 S.E.2d 442, 445 (1962).

Mystery For Jury: Where more than one inference can be drawn from the evidence, the duty of solving the mystery should be placed upon the jury, not the court. *Haag v. Stone*, 127 Ga. App. 235, 237, 193 S.E.2d 62, 64 (1972) (citations omitted).

Even Though Directed Verdict Possible: A case resting on negligence has a considerable burden, sometimes the movant cannot obtain summary judgment even though he may be able to secure a directed verdict at trial. *Turner v. Noe*, 127 Ga. App. 870, 871, 195 S.E.2d 463, 464 (1973) (citations omitted).

Even Though May Not Recover On Trial: On summary judgment the burden is on the movants to pierce the allegations of the complaint and to establish that as a matter of law the plaintiff could not recover. If they fail to do so, *even though on the trial* the plaintiff might not be able to recover, summary judgment would not be proper. *Johnson v. Tucker*, 129 Ga. App. 648, 650, 200 S.E.2d 489, 491 (1973) (emphasis added).

III. BURDEN ON THE MOTION

Conclusively Eliminates Material Issue - Movant Has Burden Of Disproving What Other Party Has Burden: The movant has the burden of producing evidence which conclusively eliminates all material issues even as to those issues on which the opposing party would have the burden of proving on trial before a jury. *Herrington v. Stone Mountain Memorial Ass'n.* 119 Ga. App. 658, 661, 168 S.E.2d 633, 636 (1969).

Movant Establishing Issue of Respondent: The movant has the burden even as to issues upon which opposing party would have the trial burden. *Helmer v. Hegidio*, 133 Ga. App. 168, 170, 210 S.E.2d 332, 334 (1974); *Ham v. Ham*, 230 Ga. 43, 45, 195 S.E.2d 429, 430 (1973).

Disproving Plaintiff's Case: Where a defendant moves for summary judgment upon the action to recover, or to establish the claim, the burden is upon him to disprove the plaintiff's case in a material part even to the extent of affirmatively proving a negative. *Home Mart Building Centers Inc. v. Jones*, 133 Ga. App. 822, 212 S.E.2d 476, 477 (1975).

Relying on Movant Not To Remove Issues: The respondent may resist the motion for summary judgment by doing nothing, relying on the failure of the movant to remove all issues from the case; or by presenting issuable facts. *Alexander v. Boston Old Colony Ins. Co.*, 127 Ga. App. 783, 784-85, 195 S.E.2d 277, 279 (1972).

Must Present Case In Full: On such motion, each party must present his case in full. *Summer-Minter & Assoc., Inc. v. Giordano*, 231 Ga. 601, 604, 203 S.E.2d 173, 176 (1974).

Establish Lack Of Issue: The burden is on the moving party to establish the lack of a genuine issue of fact and the right to judgment as a matter of law. *Holland v. Sanfax Corp.*, 106 Ga. App. 1, 4, 126 S.E.2d 442, 445 (1962).

The Same Thoroughness As On Trial: One must prepare for a summary judgment hearing with the same thoroughness and expectation of finality contemplated for any trial. *Summer-Minter & Assoc., Inc. v. Giordano*, 231 Ga. 601, 606, 203 S.E.2d 173, 177 (1974).

IV. ADMISSIBILITY OF EVIDENCE

Admissibility: Rules as to the admissibility of evidence are applicable in summary judgment proceedings, since the statute provides that all affidavits, depositions, etc. shall set forth such facts as would be admissible in the evidence, and shall show affirmatively that the affiant is competent to testify as to the matter stated therein. GA. CODE ANN. §81A-156(e) (Rev. 1972); *Wheat v. Montgomery*, 130 Ga. App. 202, 204, 202 S.E.2d 664, 667 (1973).

Evidence Governed By General Rules of Admissibility: The admissibility of evidence on motion for summary judgment is governed by the rules relating to form and admissibility of evidence generally, so that evidence inadmissible on a hearing of the case would be inadmissible on the motion. *Ryle v. Ryle*, 130 Ga. App. 680, 682, 204 S.E.2d 339, 341 (1974) (citations omitted). Depositions, interrogatories, and affidavits, are admissible under the general rules of evidence. *Ryle v. Ryle*, 130 Ga. App. 680, 682, 204 S.E.2d 339, 341 (1974) (citations omitted).

V. OPINION EVIDENCE

Opinion Testimony Of Ultimate Fact: Opinion testimony of an ultimate material fact is never sufficient as a basis for the grant of a motion for summary judgment. *Allstate Ins. Co. v. Holcombe*, 132 Ga. App. 111, 116, 207 S.E.2d 537, 540 (1974) (citations omitted).

Based On Opinion Evidence: Summary judgment cannot be based on opinion evidence alone. *Ginn v. Morgan*, 225 Ga. 192, 167 S.E.2d 393, 394 (1969).

VI. CREDIBILITY OF WITNESS

Questions of Credibility: Questions of credibility cannot be resolved on summary judgment. *Ramsey v. Thomas*, 133 Ga. App. 869, 871, 212 S.E.2d 444, 445 (1975) (citations omitted).

VII. AFFIDAVITS

Responding Affidavit - Pleadings Alone: When a motion for summary judgment is made and supported under GA. CODE ANN. §81A-156 (Rev. 1972), an adverse party may not rest upon the mere allegations or denials of his pleadings. His response, by affidavit or otherwise as provided in this code section must set forth facts showing that there is a genuine issue for trial. *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 85, 210 S.E.2d 34, 38 (1974).

Affidavit Filed With Motion - One Day To File Opposing Affidavit: Affidavits for summary judgment shall be served with the motion. Responding affidavits shall be served no later than one day before the hearing. The court has discretion to permit opposing affidavits at some other time. *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 88, 210 S.E.2d 34, 40 (1974).

Considering Additional Affidavits - Order Needed: Where an additional affidavit is accompanied by an order permitting them, such should be considered as evidence at the hearing. *T & W Farm Supply, Inc. v. McCall*, 132 Ga. App. 613, 208 S.E.2d 622, 623 (1974).

VIII. MERITS AND ABATEMENT

To Test Merits Of Claim - Not Abatement: Summary judgment is designed to test the merits of the claim. Those defenses under rule 12(b)(1) through rule 12(b)(5) (lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process) and rule 12(b)(7) (failure to join a party under rule 19) of the Federal Rules of Civil Procedure, are not proper subjects for motions for summary judgment. *Ogden Equipment Co. v. Talmadge Farms, Inc.* 232 Ga. 614, 615, 208 S.E.2d 459, 459-60 (1974) (citations omitted).

Merits - Matters In Bar: A motion for summary judgment applies to the merits of the claim or to matters in bar, but not matters in abatement. *Larwin Mortgage Investors v. Delta Equities, Inc.*, 129 Ga. App. 769, 770, 201 S.E.2d 187, 188 (1973).

Matters In Abatement - Court's Jurisdiction: The court does not have jurisdiction to consider matters in abatement in summary judgment. *Boyd Motors, Inc. v. Radcliff*, 128 Ga. App. 15, 195 S.E.2d 291, 291-92 (1973).

IX. SUFFICIENCY OF MOTION

Summary Judgment As To All Counts - No Partial Granting: Where a complaint is couched in more than one count and the motion is directed toward the entire complaint, any material issue remaining in any count requires the motion to be denied as to the entire complaint. *W. T. Grant Co. v. Goodman*, 133 Ga. App. 321, 211 S.E.2d 199 (1974); *Dehler v. Golden Age Retirement, Inc.*, 133 Ga. App. 322, 211 S.E.2d 199, 200 (1974).

As To Entire Complaint - Judgment As To One Count: In the interest of saving time in litigation it is practical for a trial judge to enter judgment on the pleadings as to one count, even though the movant may not be entitled to a judgment on both counts. Here the supreme court finds that the trial judge might have properly denied the general motion because one count of the complaint was good; however, there was no error in considering the motion for judgment on the pleadings as it applied to each count. *First Nat'l Bank in Elberton v. Osborne*, 233 Ga. 602, 604, 212 S.E.2d 785, 787 (1975).

Note Although this case deals with judgment on the pleadings, the principle should apply to summary judgment. Thus, the trial court is vested with discretion to deny the motion if any count is sufficient or, in the interest of time, treat the motion as to the insufficient count and grant partial summary judgment.

Negates One Element: The defendant, having made the motion for summary judgment, must produce evidence which conclusively negates at least one essential element entitling plaintiff to a recovery under every theory fairly drawn from the pleadings and evidence. *Parson v. Central of Georgia Ry.*, 129 Ga. App. 218, 219, 199 S.E.2d 396, 398 (1973) (citations omitted).

After Filing Motion - Amendment Of Complaint: Summary judgment should be denied where defendant amended his answer after filing of the motion for summary and the movant failed to present any evidence to refute allegations to the amendment. *Alexander v. Boston Old Colony Ins. Co.*, 127 Ga. App. 783, 785, 195 S.E.2d 277, 278 (1972).

X. THE RECORD CONSIDERED

Documents In Record To Be Considered: Motions for summary judgment are granted where the following show that no genuine issue as to any material fact exists; (1) pleadings, (2) depositions, (3) answers to interrogatories, (4) admissions on file, and (5) affidavits. *Warner v. Arnold*, 133 Ga. App. 174, 175-76, 210 S.E.2d 350, 351-52 (1974).

Sealed Depositions: Where a party has filed summary judgment and there remains sealed depositions it would be error to grant the motion without reviewing all papers of record as well as any materials prepared for the

motion. GA. CODE ANN. §81A-156(c) (Rev. 1972); *Jackson v. Couch Funeral Home, Inc.*, 133 Ga. App. 695, 696, 206 S.E.2d 718, 720 (1974).

Permitting Oral Testimony: Whether or not oral testimony is to be received on a motion for summary judgment is a matter within the sound discretion of the trial court. *Blackstone Industries, Inc. v. Andre*, 232 Ga. 715, 208 S.E.2d 815, 816 (1974).

Consider The Entire Record: The trial judge should always search the entire record before granting a summary judgment and should not limit himself to the matters presented at the hearing. *Jackson v. Couch Funeral Home, Inc.*, 133 Ga. App. 695, 696, 206 S.E.2d 718, 720 (1974).

XI. OTHER MOTIONS CONVERTED

Judgment On Pleadings: A motion for judgment on the pleadings is converted to one for summary judgment when matters outside the pleadings are considered. *Hanson v. Byers*, 120 Ga. App. 298, 299, 170 S.E.2d 315, 317 (1969).

Judgment On The Pleadings Treated Like Summary Judgment: If a motion for judgment on the pleadings is treated like a motion for summary judgment, it is reviewable as a motion for summary judgment. *Southern Guaranty Ins. Co. v. Beasley*, 106 Ga. App. 64, 65, 126 S.E.2d 260, 261 (1962) (dictum).

XII. MOVING FOR JUDGMENT MORE THAN ONCE

Frequency Of Motion For Summary Judgment: A party may move for summary judgment more than one time in the same case. *Gregory v. Vance Publishing Corp.*, 130 Ga. App. 118, 119, 202 S.E.2d 515, 517 (1973).

XIII. ATTORNEY'S FEES: THE LAWYERS REWARD

Attorney's Fees - Not On Summary Judgment: Reasonable attorney's fees are a matter of fact and cannot be resolved on summary judgment. *Scruggs v. Dorminey*, 129 Ga. App. 453, 456, 199 S.E.2d 922, 925 (1973).