LITIGATION
INFORMATION MEMO
OCTOBER 18, 2022

The Courts Relax the Rules: What Litigants Need to Know About Summary Judgment Now

Background:

On Feb. 1, 2021, a new Uniform Rule went into effect for the New York State trial courts addressing summary judgment motions—Section 202.8-g. The rule requires that any party moving for summary judgment includes "a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried" (22 NYCRR § 202.8-g [former]). In such a case, the papers opposing a motion for summary judgment **shall** include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party (*see id.* at § 202.8-g [b] [emphasis added]). The Uniform Rule further directs that "[e]ach numbered paragraph in the statement of material facts required to be served by the moving party **will be deemed to be admitted** unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party" (*id.* at § 202.8-g [c] [emphasis added]).

This rule led to some harsh consequences, including a Supreme Court in Clinton County that held that a non-moving party's failure to comply resulted in an admission of all facts set forth in the moving party's statement of material facts (*see Reus v ETC Hous. Corp.*, 72 Misc. 3d 479, 484 [Sup. Ct., Clinton County 2021], *aff'd* 203 AD3d 1281 [3d Dept 2022]).

On July 1, 2022, Section 202.8-g was amended to effectively eliminate this fatal consequence. The trial courts now expressly have the discretion to deal with noncompliance. Notably, this Section now provides:

- The statement of material facts is no longer required in all cases, but is limited to the cases in which the court directs;
- A failure to specifically controvert a numbered paragraph in a statement of material facts no longer automatically constitutes an admission. Such a failure "may" result in an admission for purposes of the motion; and
- Where the court has directed a statement of material facts, but the moving party fails to so provide, the court has the discretion to deny the motion without prejudice, permit an adjournment to allow compliance, or some other related action, in its discretion. Similarly, where a party opposing summary judgment has failed to provide a counter statement, the court may adjourn to allow compliance or, after notice and an opportunity to cure, deem the assertion in the statement to be admitted for purposes of the motion, or again some other related action, in its discretion.

How could this effect you?

Were you successful in opposing a motion for summary judgment because the moving party failed to submit a statement of material facts? Or were you successful in moving for summary judgment because

the non-moving party failed to properly respond to your motion and the statement of material facts? If so, and an appeal is pending, be prepared to address whether the Appellate Division should apply the rule as it stood at the time the motion was decided.

It is highly unlikely that an Appellate Court will follow the old rule and its strict consequences considering, among other things, that it was only in effect for approximately 18 months.

Furthermore, the Appellate Division, Third Department recently addressed the interpretation of the old rule in *Leberman v Instantwhip Foods, Inc.* (207 AD3d 850 [3d Dept 2022]). Interestingly, the Third Department issued this decision on July 7, 2022, but made no mention of the amended rule that became effective on July 1, 2022. In any event, the Third Department held that, despite the mandatory language included in the original version of §202.8-g ("shall"), the trial courts still had the discretion ("may") to deem facts admitted based on, among other things, a party's failure to follow the procedures of §202.8-g (*see id.* at 852). This interpretation of the "old" rule is in line with the plain language of the "new" rule.

What to consider:

In view of the foregoing, it is unlikely that an Appellate Court will apply and interpret the old rule as written. Consequently, if your motion was granted or your opponent's was denied under the old rule, the Appellate Division will not affirm on that basis.

The Appellate Division will, however, consider alternative grounds for affirmance even if the trial court did not rely on those grounds, so long as they were raised, i.e., preserved before the trial court (*see e.g., Arista Dev., LLC v Clearmind Holdings, LLC*, 207 AD3d 1127, 1129 [4th Dept 2022]; *Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1183 [4th Dept 2017]). Stated differently, if you did not rely exclusively on your opponent's failure to comply with 22 NYCRR § 202.8-g during motion practice, you can raise any and all other arguments that you did raise, even if those contentions were not addressed by the trial court.

Additional considerations:

Be mindful that certain trial courts may still require material statements of fact, and some judges have incorporated that requirement into their own individual rules. Moreover, even if the judge's individual rules are silent, it would be good practice to include a footnote or other related reference in your moving papers to respectfully remind the trial court of the new change and that you are prepared to provide a statement of material facts if the court prefers one. Keeping in mind that some judges have many different roles and do not routinely entertain summary judgment motions, a reminder can remove any risk of rejection of your papers.

If you have any questions about the contents of this information memorandum, please contact Timothy McMahon or any member of Bond's litigation practice.

BOND SCHOENECK & KING ATTORNEYS