

Proposed Amendments to Rule 56

Rule 56 is amended as follows:

Rule 56. Summary Judgment

(a) ~~[For Claimant. A party seeking to recover upon a claim, counterclaim or cross-claim, or to obtain a declaratory judgment, may]~~ **By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed** at any time after:

(1) the expiration of the initial time within which to file an answer; or ~~[after service of]~~

(2) **the opposing party serves** a motion for summary judgment ~~[by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof].~~

(b) ~~[For]~~ **By a Defending Party.** A party against whom ~~[a claim, counterclaim or cross-claim is asserted, or a declaratory judgment]~~ **relief** is sought~~[,]~~ may~~[,]~~ **move** at any time ~~[after the filing of a complaint, move]~~, with or without supporting affidavits, for a summary judgment ~~[in the party's favor as to]~~ **on** all or ~~[any]~~ part ~~[thereof]~~ **of the claim.**

(c) **Serving the Motion [and]; Proceedings [Thereon].** A hearing ~~[upon]~~ **on a** motion may be requested as prescribed by Rule 7(c). **The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day.** The judgment sought ~~[shall]~~ **should** be rendered ~~[forthwith]~~ if the pleadings, ~~[depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,]~~ **the discovery and disclosure materials on file, and**

any affidavits show that there is no genuine issue as to any material fact and that the [moving party]movant is entitled to [a] judgment as a matter of law.

(d) Case Not Fully Adjudicated on **the** Motion. [~~if on motion under this rule]~~

(1) Establishing Facts. If summary judgment is not rendered [~~upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion;~~] **on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine** by examining the pleadings and [~~the~~] evidence before it and by interrogating [~~counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy;~~] **the attorneys. It should then issue an order specifying what facts** – including [~~the extent to which the amount] items of damages or other relief [is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.]~~ **– are not genuinely at issue. The facts so specified must be treated as established in the action.**

(2) Establishing Liability. An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages or other relief.

(e) [Form of] Affidavits; Further Testimony [~~-- Defense Required. Supporting and~~].

(1) In General. A supporting or opposing [affidavits shall]**affidavit must** be made on personal knowledge, [shall] set [~~forth such~~] out facts [as] **that** would be admissible

in evidence, and ~~[shall]~~ show ~~[affirmatively]~~ that the affiant is competent to testify ~~[to]~~ **on** the matters stated ~~[therein. Sworn or certified copies of all papers or parts thereof].~~ **If a paper or part of a paper is** referred to in an affidavit ~~[shall]~~, **a sworn certified copy must** be attached ~~[thereto]~~ **to** or served ~~[therewith]~~ **with the affidavit**, except that all papers and documents which are part of the official record of the action pursuant to Title IX of these rules may be referred to in an affidavit without attaching copies, and ~~[shall]~~ **will** be considered by the court without additional certification. The court may permit ~~[affidavits]~~ **an affidavit** to be supplemented or opposed by depositions, answers to interrogatories, or ~~[further]~~ **additional** affidavits.

(2) Opposing Party's Obligation to Respond. When a motion for summary judgment is **properly** made and supported ~~[as provided in this rule]~~, an ~~[adverse]~~ **opposing** party may not ~~[rest upon the mere]~~ **rely merely on** allegations or denials ~~[of the adverse party's]~~ **in its own** pleading ~~[, but the adverse party's];~~ **rather, its** response~~;~~ **must** – by affidavits or as otherwise provided in this rule~~;~~ **must** – set ~~[forth]~~ **out** specific facts showing ~~[that there is]~~ a genuine issue for trial. If the ~~[adverse]~~ **opposing** party does not so respond, summary judgment **should**, if appropriate, ~~[shall]~~ be entered against ~~[the adverse]~~ **that** party.

(f) When Affidavits Are Unavailable. ~~[Should it appear from the affidavits of]~~ **If a** party opposing the motion **shows by affidavit** that ~~[the party cannot]~~, for **specified** reasons ~~[stated]~~, **it cannot** present ~~[by affidavit]~~ facts essential to justify ~~[the party's]~~ **its** opposition, the court may ~~[refuse the application for judgment or may]:~~

(1) deny the motion;

(2) order a continuance to [~~permit~~] **enable** affidavits to be obtained [~~or~~], depositions to be taken, or **other** discovery to be [~~had or may make such~~] **undertaken**;
or

(3) **issue any** other **just** order [~~as is just.~~].

(g) Affidavits [~~Made in Bad Faith~~. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented] **Submitted in Bad Faith**. **If satisfied that an affidavit under this rule is submitted** in bad faith or solely for [~~the purpose of~~] delay, the court [~~shall forthwith~~] **must** order the **submitting** party [~~employing them~~] to pay [~~to~~] the other party [~~the amount of~~] the reasonable expenses [~~which the filing of the affidavits caused the other party to incur~~], including [~~reasonable~~] attorney's fees, [~~and any~~] **it incurred as a result**. **An** offending party or attorney may [~~be adjudged guilty of~~] **also be held** in contempt.

(h) Annexation of Statement.

(1) [~~Upon~~] **On** any motion for summary judgment, there [~~shall~~] **must** be annexed to the motion 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. Failure to submit [~~such a~~] **this** statement may constitute grounds for denial of the motion.

(2) The papers opposing a motion for summary judgment [~~shall~~] **must** include correspondingly numbered paragraphs responding to the numbered paragraphs in the statement of the [~~moving party~~] **movant**, and if necessary, additional paragraphs [~~containing~~] **including** a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried.

(3) All material facts set ~~[forth]~~**out** in the statement required to be served by the ~~[moving party shall]~~**movant will** be deemed admitted unless controverted by the statement required to be served by the opposing party.

(4) Each statement by the movant or opponent pursuant to Rule 56(h)(1) and (2), including each statement controverting any statement of material fact, ~~[shall]~~ **will** be followed by citation to evidence which would be admissible.

(As amended Oct. 3, 1984, eff. Jan. 1, 1985; July 28, 1988, eff. Nov. 1, 1988; Jan. 25, 2000, eff. May 1, 2000; Nov. 29, 2005, eff. Jan. 1, 2006; _____, **2008, eff.** _____, **2009.**)

Advisory Committee Note

Rule 56 has been amended stylistically to conform to the 2007 amendments to the Fed. R. Civ. P. CIT Rule 56 does not, however, mirror Fed. R. Civ. P. 56. Specifically, CIT Rule 56(a) continues to permit parties to file a motion for summary judgment after the time for filing has expired rather than adopting the time frame contained in Fed. R. Civ. P. 56(a)(1). Also, as there is no comparable Fed. R. Civ. P., CIT Rule 56(h) continues to require movants to file a numbered statement of material facts not in genuine dispute and opposing parties to counter with a correspondingly numbered statement of material facts as to which a genuine dispute exists.