Florida Law Review

Volume 7 | Issue 3 Article 8

September 1954

Procedure: Summary Judgment for Nonmoving Party

Harvey T. Deinzer

unit, provided representation without discrimination is maintained, the NLRB in the instant case adheres to the familiar "separate but equal" doctrine.[20] The United States Supreme Court has indicated that this doctrine is outmoded in at least one area of inter-racial litigation.[21] The impact of such a clear indication of the Court's temper upon future litigation in the labor law field can only be the subject of speculation.

GEORGE VEGA, JR.

PROCEDURE: SUMMARY JUDGMENT FOR NONMOVING PARTY

Carpineta v. Shields, 70 So.2d 573 (Fla. 1954)

Plaintiff sued in a civil court of record for recovery of a real estate commission. After the answer was in and following the taking of depositions, plaintiff moved for summary judgment; the court found that there was no genuine issue of material fact and ordered summary judgment for defendant. On appeal to the circuit court, the judgment was reversed on the ground that defendant had not requested summary judgment. On certiorari, HELD, in the absence of a timely and meritorious objection by plaintiff, defendant is entitled to summary final judgment even though better practice may require the filing of a cross-motion. Judgment quashed.

Summary process is an accepted part of procedural law and has been authorized by statutes and by court rules. The federal rule[1] was the model for the Florida rules[2] on summary judgment. A proposed amendment to the federal rules[3] touches upon the matter of issuing a summary judgment in favor of a nonmoving party; of course it would not affect the present Florida rules.

---

[20]*E.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896).

[21]Brown v. Board of Education, 347 U.S. 483 (1954).

[1]FED. R. CIV. P. 56.

[2]FLA. C.L.R. 43 and FLA. EQ. R. 40, which have been substantially consolidated in 1954 FLA. R. CIV. P. 1.36. For recognition of Fed. Rule 56 as a pattern *see* Boyer v. Dye, 51 So.2d 727, 728 (Fla. 1951).

[3]The proposal would add to Rule 56(c), "Such judgment, when appropriate, may be rendered for or against any party to the action."

The Florida Supreme Court, placing the attainment of justice above subservience to technicalities,[4] recognizes this principle in evaluating the summary judgment rule.[5] But the special value of a summary judgment is in its function of expediting litigation[6] and avoiding the delay and expense incident to trial.[7] No amount of saving in time or cost, however, could justify disregard of the right to jury trial.[8] Although summary judgment does not per se deprive the losing party of this right,[9] deprivation of jury trial could result if the party in whose favor a summary judgment was ordered were not entitled to such a judgment as a matter of law.[10] Assuming that the substantive law favors the moving party, the adverse party cannot object that a summary judgment deprives him of a trial when "the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact."[11]

Besides literal interpretations of this standard of "no genuine issue,"[12] other bases for granting summary judgments have been utilized. Thus summary judgment may be granted even when disputed facts exist if the evidence is so preponderantly in favor of a party that a directed verdict would be proper at trial.[13] An additional reason advanced is founded on estoppel, that is, if both parties move for summary judgment, each is estopped from objecting to an order

---

[4]1954 FLA. R. CIV. P. A.

[5]Lomas v. West Palm Beach Water Co., 57 So.2d 881 (Fla. 1952).

[6]*Cf.* Yost v. Miami Transit Co., 66 So.2d 214, 216 (Fla. 1953).

[7]*Cf.* National Airlines, Inc. v. Florida Equipment Co., 71 So.2d 741, 744 (Fla. 1954).

[8]*Cf.* National Airlines, Inc. v. Florida Equipment Co., *supra* note 7; Yost v. Miami Transit Co., *supra* note 6; Williams v. Lake City, 62 So.2d 732, 733 (Fla. 1953).

[9]Port of Palm Beach Dist. v. Goethals, 104 F.2d. 706 (5th Cir. 1939).

[10]Williams v. Lake City, *supra* note 8; see 1954 FLA. R. CIV. P. 1.36(c).

[11]1954 FLA. R. CIV. P. 1.36(c); *cf.* Weisberg v. Perl, 73 So.2d 56 (Fla. 1954).

[12]Wilson v. Bachrach, 65 So.2d 546 (Fla. 1953); Anderson v. Maddox, 65 So.2d 299 (Fla. 1953); Gibbs v. Hartford Accident & Indemnity Co., 62 So.2d 599 (Fla. 1952); Williams v. Board of Pub. Instr., 61 So.2d 493 (Fla. 1952); Enes v. Baker, 58 So.2d 551 (Fla. 1952); Lomas v. West Palm Beach Water Co., 57 So.2d 881 (Fla. 1952); Ryan v. Unity, Inc., 55 So.2d 117 (Fla. 1951); *cf.* National Airlines, Inc. v. Florida Equipment Co., 71 So.2d 741, 744 (Fla. 1954); Yost v. Miami Transit Co., 66 So.2d 214, 216 (Fla. 1953).

[13]Johnson v. Studstill, 71 So.2d 251 (Fla. 1954); Brooks-Garrison Hotel Corp. v. Sara Inv. Co., 61 So.2d 913 (Fla. 1952); Richmond v. Florida Power & Light Co., 58 So.2d 687 (Fla. 1952); Sawyer Industries, Inc. v. Advertects, Inc., 54 So.2d 692 (Fla. 1951); *cf.* Dezen v. Slatcoff, 65 So.2d 484 (Fla. 1953).

favoring the other even if each has a reasonable basis for his position.[14]

Summary judgment procedure is not defensible as a substitute for either equity or law trials, even though a jury trial is not demanded.[15] The substantive limitation of summary judgment to a situation in which there is "no genuine issue as to any material fact" is reinforced by the procedural limitation that the judicial determination as to whether a summary judgment is appropriate should be based upon "the pleadings,[16] depositions,[17] and admissions[18] on file, together with the affidavits,[19] if any."[20] It is doubtful, however, whether oral testimony is admissible.[21]

The process by which the court determines whether a summary judgment is appropriate is partially explicable. The Florida Supreme Court has recently adopted the statement of a federal judge on the points to be considered.[22] Any doubt as to the existence of a material factual issue should be resolved against the granting of the motion.[23] The nonexistence of a genuine issue does not depend upon bad faith alone in the disputation of facts,[24] nor can genuineness be determined apart from a consideration of the facts in a particular case.[25] When the court recognizes the existence of a disputed issue of material fact, it must reject any evidence that would not be admissible at a trial, and must decide against the granting of summary judgment unless the remaining opposing evidence meets the absurdity test.[26] On appeal

[14]Dezen v. Slatcoff, *supra* note 13; Bratter v. Halperin, 62 So.2d 412 (Fla. 1953); *cf.* Silva v. Exchange Nat. Bank, 56 So.2d 332 (Fla. 1951).

[15]*Cf.* Weisberg v. Perl, 73 So.2d 56 (Fla. 1954).

[16]Booth v. Board of Pub. Instr., 67 So.2d 690 (Fla. 1953); Wilson v. Lee Memorial Hospital, 65 So.2d 40 (Fla. 1953).

[17]Embrey v. Southern Gas & Elec. Corp., 63 So.2d 258 (Fla. 1953); Goodman v. Miami Beach Ry., 57 So.2d 445 (Fla. 1952).

[18]Manning v. Clark, 71 So.2d 508 (Fla. 1954); Bradley v. Associates Discount Corp., 67 So.2d 913 (Fla. 1953).

[19]Carver City Homes, Inc. v. Edwards Sash, Door & Lumber Co., 59 So.2d 742 (Fla. 1952).

[20]1954 FLA. R. CIV. P. 1.36(c); see Lomas v. West Palm Beach Water Co., 57 So.2d 881 (Fla. 1952).

[21]*But see* Boyer v. Dye, 51 So.2d 727, 728 (Fla. 1951).

[22]Johnson v. Studstill, 71 So.2d 251 (Fla. 1954), quoting from Judge Fahy's summary in Dewey v. Clark, 180 F.2d 766, 772 (D.C. Cir. 1950).

[23]The "slightest doubt" guide in Williams v. Lake City, 62 So.2d 732 (Fla. 1953), was interpreted accordingly in Manning v. Clark, *supra* note 18.

[24]Boyer v. Dye, 51 So.2d 727 (Fla. 1951).

[25]Johnson v. Studstill, 71 So.2d 251 (Fla. 1954).

[26]*Ibid.* In the words of federal judge Fahy, "unless the evidence . . . is too incredible to be accepted by reasonable minds . . . ." *Id.* at 252.

from a summary judgment ordered by the trial court, the higher court will form an independent judgment, based on the entire record.[27] Whether the appellate court, in reversing a summary judgment, may appropriately order a different judgment can be resolved only by looking to the same principle that will determine the question of whether a trial court may order summary judgment for a nonmoving party. The latter question was answered affirmatively by the Florida Supreme Court in the instant case.

The Florida Court had earlier applied this rule in *Silva v. National Exchange Bank of Tampa*,[28] supporting its decision by an analogy to a directed verdict. In the instant case the Court faced this question squarely. Its decision to permit summary judgment for a nonmoving party followed the majority federal practice[29] and constituted an adoption of the principles underlying the majority federal position.[30]

This conclusion overlooked the strict language of the rule on summary judgments.[31] The manner of its adoption suggests the per-

---

[27]*E.g.*, Yost v. Miami Transit Co., 66 So.2d 214 (Fla. 1953); *cf.* Ocean Villa Apts. Inc. v. Fort Lauderdale, 70 So.2d 901, 902 (Fla. 1954).

[28]56 So.2d 332 (Fla. 1951).

[29]American Auto Ins. Co. v. Indemnity Ins. Co., 108 F. Supp. 221 (E.D. Pa. 1952); St. Louis Fire & Marine Ins. Co. v. Witney, 96 F. Supp. 555 (M.D. Pa. 1951); Hennessey v. Federal Security Admn'r, 88 F. Supp. 664 (D. Conn. 1949); Northland Greyhound Lines, Inc. v. Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees, 66 F. Supp. 431 (D. Minn. 1946); Hooker v. New York Life Ins. Co., 66 F. Supp. 313 (N.D. Ill. 1946). The question was recognized, but not decided, by the U.S. Supreme Court in Fountain v. Filson, 336 U.S. 681 (1949). Two decisions representing the federal minority position are Truncale v. Blumberg, 8 F.R.D. 492 (S.D.N.Y. 1948); and Pinkus v. Reilly, 71 F. Supp. 993 (D. N.J. 1947). The distinction is largely formal, since the judgments were merely withheld pending the formal filing of a cross-motion. An oral cross-motion advanced by plaintiff at the time of hearing is sufficient when all the parties have regarded the evidence and argument as exhausted, Tripp v. May, 189 F.2d 198 (7th Cir. 1951).

[30]At p. 574.

[31]1954 FLA. R. CIV. P. 1.36(a) states that "a party seeking to recover . . . may . . . move . . . for a summary judgment or decree in his favor upon all or any part thereof." Rule 1.36(b) contains similar language as to the defending party. Rule 1.36(c) provides for the issuance of a summary judgment or decree if the facts then at hand "show that . . . the moving party . . . is entitled to a judgment or decree . . . ." Case decisions, though not involving the question of summary judgment for a nonmoving party, have been framed in terms of "moving party." See Manning v. Clark, 71 So.2d 508 (Fla. 1954); Wilson v. Bachrach, 65 So.2d 546 (Fla. 1953); Williams v. Lake City, 62 So.2d 732 (Fla. 1953).

suasiveness of federal practice,[32] especially since the federal position has been rationalized partly by appeal to Federal Rule 54 (c),[33] which Florida has not adopted. The Florida Court's basic justification was common sense — the Court could see "no sound reason why" summary judgment should not issue, under proper safeguards, to a nonmoving party.[34]

The Court's approval of summary judgment for a nonmoving party was a limited one; since the limitations were stated in general terms,[35] their meaning must be derived from federal interpretations of this question[36] and from fundamental principles of protection applied by the Florida Supreme Court in respect to summary judgment cases generally. Essentially, if all the conditions that would justify granting summary judgment in opposition to a cross-motion are met, the mere absence of the formality of a motion in opposition will not defeat a summary judgment.

The principal considerations supporting the granting of a summary judgment are the nondeprivation of a trial, the ability of the judge to determine the nonexistence of an issue of material fact or the speciousness of a controversy, and the consideration by the judge of all of the facts and issues relevant to the controversy.[37] The issuance of a summary judgment in favor of a nonmoving party would prejudice the moving party if he did not have the opportunity for adequate hearing in the trial court. Prejudice is especially clear when the nonmoving party raises a new defense or a new theory of cause of action in respect to which the moving party has not had an opportunity to prepare himself. The ten-day rule is designed to allow for preparation for defense and argument.[38]

---

[32]See Northland Greyhound Lines, Inc. v. Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees, *supra* note 29; 6 MOORE, FEDERAL PRACTICE 2088 (2d ed. 1953).

[33]FED. R. CIV. P. 54(c) provides that, except in default situations, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings"; see Hennessey v. Federal Security Admn'r, 88 F. Supp. 664 (D. Conn. 1949); Hooker v. New York Life Ins. Co., 66 F. Supp. 313 (N.D. Ill. 1946).

[34]At p. 574.

[35]*Ibid.*, "in the absence of a timely and meritorious objection . . ." and "if it [the court] finds that the facts are properly construed against the prevailing party show that he is entitled to a summary final judgment as a matter of law . . . ."

[36]See note 29 *supra* for citations of federal majority decisions.

[37]National Airlines, Inc. v. Florida Equipment Co., 71 So.2d 741 (Fla. 1954).

[38]1954 FLA. R. CIV. P. 1.36(c) provides that the motion "shall be served at least 10 days before the time fixed for the hearing." The possibility of prejudice to the