

SUPPORTING MOTIONS FOR SUMMARY JUDGMENT AND RESPONSES THERE TO WITH ADMISSIBLE EVIDENCE

Many motions for summary judgment are denied because the movant failed to properly support the motion with admissible evidence. Further, a motion for summary judgment may be granted even though the responding party controverts various facts if the response is not supported by evidence that would be admissible at trial. When drafting or responding to a motion for summary judgment, it is important to bear in mind what is necessary to properly support the motion or the response.

A. Summary Judgment Standard. Fed.R.Civ.P 56, made applicable in adversary proceedings by Bankruptcy Rules 7056 and 9014, governs motions for summary judgment. The following is typical language used in opinions articulating the standard, under current law, for testing the sufficiency of a motion summary judgment.

It is appropriate for the Court to grant summary judgment if the pleadings, discovery materials, and any affidavits before the Court show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(a) made applicable to the adversary proceeding by Fed. R. Bankr.P. 7056. “[A] party seeking summary judgment always bears the initial responsibility of informing the . . . court of the basis for its motion, and . . . [must] demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Courts must review the evidentiary materials submitted in support of a motion for summary judgment to ensure that the motion is supported by evidence. If the evidence submitted in support of the summary judgment motion does not meet the movant’s burden, then summary judgment must be denied. New Mexico Local Bankruptcy Rule 7056-1 provides that the movant’s statement of material facts as to which the movant contends no genuine fact exists must “refer with particularity to those portions of the record upon which the movant relies.” NM LBR 7056-1.

Rule 56, Fed.R.Civ.P, was amended effective December 1, 2010. The 2010 amendments to Rule 56, among other things, provide that:

- (i) The Court may consider only materials cited by the parties in support of or opposition to the motion, or in the Court’s discretion may also consider other materials cited in the record;
- (ii) In its discretion, the Court may give a party an additional opportunity to support an assertion of fact or an objection to an assertion of fact; or
- (iii) In its discretion, the Court may consider a fact as undisputed for purposes of the motion if a party fails to object that the material cited does not properly support the fact, even if the fact is not properly supported.

B. The Requirement that the Motion Must Be Supported by Admissible Evidence. The above standard includes the following requirements for submission of materials in support

of the motion.

1. Admissible Evidence Required. Any materials supporting the motion for summary judgment that would not be admissible in evidence at trial over a proper objection, assuming the presence in the courtroom of all testifying witnesses, will be disregarded, unless the Court in its discretion either (a) gives a party an additional opportunity to support an assertion of fact or an objection to an assertion of fact, or (b) considers a fact as undisputed for purposes of the motion where the other party failed to object that the material cited does not properly support the fact.

2. A Motion Not Properly Supported May Be Denied Even in the Absence of a Response. If a summary judgment motion is not properly supported by admissible evidence, the Court may deny the motion even if no response is filed. In general, default orders granting summary judgment will not be entered.

3. Authentication of Documents. Each document offered in support of the motion for summary judgment generally must be authenticated, unless the party opposing the motion proffers the same document in support of that party's response, or the Court in its discretion decides to consider the document where the other party failed to object on grounds of failure to authenticate the document. The movant must lay a foundation in an affidavit to establish that the affiant has the requisite personal knowledge and competence to authenticate the documents attached to the affidavit. An affidavit by counsel often will not be sufficient to authenticate a document because counsel typically will not have the personal knowledge and competence necessary to authenticate it. A state court pleading may be authenticated by proffering a certified copy or by an affidavit signed by counsel in the state court case certifying that counsel has personal knowledge of the contents of the pleading filed in the state court case, has carefully reviewed the entire proffered pleading, and the proffered pleading is a true and correct copy of the pleading filed of record in the state court case. Unauthenticated loan documents and other documents attached to a summary judgment motion or brief may be disregarded, unless the opposing party has otherwise admitted the contents of the documents. Typically, the documents, if not self-authenticating, should be attached to a proper affidavit.

4. Argument is Not Evidence. Neither argument in a legal memorandum or brief, nor argument in oral argument, is evidence.

5. Information and Belief Statements. Statements in affidavits made on information and belief are not admissible evidence.

6. Conclusory Statements May Be Disregarded. To support a conclusory statement it may be necessary to include sufficient factual information to establish that the conclusion is in fact based on personal knowledge and that the witness is competent to so testify, even when the affiant states that the affidavit is made on personal knowledge. For example, an unsupported statement that it is not practical to partition a parcel of property may be insufficient because it constitutes a conclusory statement of an ultimate fact that is a mixed question of fact and law.

7. Judicial Notice. When considering a motion for summary judgment, the Court may take judicial notice of certain adjudicative facts if requested by a party or *sua sponte*. If a party believes the Court improperly took judicial notice of a something *sua sponte*, the party should timely file a motion to alter or amend the judgment or the objection to the judicial notice may be deemed waived on appeal.

8. Citations to the Record. If a party relies on a portion of the record to support a fact, the party must cite specifically to the portion of the record upon which the party relies. The Court is not required to scour the record to find support for the fact in question, but is not precluded from doing so.

9. All Material Facts Must be Supported by Admissible Evidence. The Court may find that the movant has not established there is no genuine issue as to a fact if the fact is not supported by admissible evidence. If that fact is sufficiently material it could result in denial of summary judgment. Before filing a motion for summary judgment, review the supporting materials against the statement of undisputed facts to make sure each and every fact identified as an undisputed fact is supported by admissible evidence.

C. Responses to Motions for Summary Judgment Must Be Supported by Admissible Evidence to Controvert a Fact Established by Movant's Evidence. A party opposing summary judgment should bear in mind the same principles set forth above to support the response to the motion for summary judgment. If the movant properly supports the motion for summary judgment with admissible evidence, the burden shifts to the other party to (i) identify each of the movant's facts as to which the responding party contends there remains a genuine issue, (ii) to submit admissible evidence to establish that there exists a genuine issue as to each such fact, (iii) to set forth a concise statement of any additional facts the responding party asserts are material and should be considered, and (iv) to submit admissible evidence in support of each such fact. A non-movant may not rely on its complaint or to materials not in the record to controvert a fact proposed by the movant, and unsupported statements such as "denied" or "disputed" are insufficient.

D. Effect of Savings Clauses in Rule 56(e). Although the Court may give a party a further opportunity to submit evidence in admissible form in support of or in opposition to a motion for summary judgment, and may consider as evidence otherwise inadmissible materials to which no objection is made, parties should not count on the Court doing so.