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FAST FIVE

RHODE ISLAND APPELLATE PRACTICE

Before you file or respond to a motion for summary judgment, consider the following guidance from three recent Rhode Island Supreme Court decisions.

(1) TO SURVIVE SUMMARY JUDGMENT, A NON-MOVING PARTY MUST COME FORWARD WITH COMPETENT EVIDENCE TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT.

The Rhode Island Supreme Court's decision in *McGovern v. Bank of America, N.A.*, No. 2013-184-Appeal, serves as a useful reminder that a party who opposes a motion for summary judgment has an obligation to come forward with competent evidence to establish a genuine issue of material fact.

In *McGovern*, a foreclosure case, the defendant moved for summary judgment and supported its motion with competent evidence, in the form of an affidavit and an authenticated copy of the plaintiff's payment history to demonstrate that the plaintiff was in arrears on his loan and had failed to cure the default prior to foreclosure. *Id*. at 3-4, 6. In opposing the defendant's motion, the plaintiff provided two affidavits, neither of which indicated he was current on his loan payments. *Id*. at 4-5. Instead, plaintiff attempted to rely on the assertion in his complaint that his mortgage was not in arrears. *Id*. at 7.

The Supreme Court concluded that the plaintiff's assertion was insufficient to withstand summary judgment. Indeed, it is well settled that a non-moving party "cannot rest on allegations, denials in the pleadings, conclusions, or legal opinions." *Id*. (citing *Plainfield Pike*

Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp., 994 A.2d 54, 57 (R.I. 2010)); *see also* *Ingram v. Mortgage Electronic Registration Systems, Inc*., No. 2012-269-Appeal at 7. Rather, the non-moving party "must present evidence of a substantial nature predicated on more than mere conclusory statements." *McGovern*, No. 2013-184-Appeal at 7 (citing *Riel v. Harleysville Worcester Ins. Co*., 45 A.3d 561, 570 (R.I. 2012)).

Faced with such evidence, plaintiff was required to come forward with competent evidence of his own to establish a genuine issue of fact. *See Plainfield Pike Gas & Convenience, LLC*, 994 A.2d at 57 (The "party opposing a motion for summary judgment has the burden of proving by competent evidence the existence of a disputed issue of material fact.").

(2) SUPREME COURT CAUTIONS LITIGANTS THAT UNAUTHENTICATED DOCUMENTS ARE NOT COMPETENT EVIDENCE WORTHY OF CONSIDERATION ON SUMMARY JUDGMENT.

In *McGovern v. Bank of America, N.A.*, No. 2013-184-Appeal, the Rhode Island Supreme Court also reminded litigants that it had previously cautioned that unauthenticated documents are "not usually competent evidence worthy of consideration by the court in ruling on a motion for summary judgment." *Id*. at 10 (quoting *Superior Boiler Works, Inc. v. R.J. Sanders, Inc*., 711 A.2d 628, 632 n.3 (R.I. 1998)).

The Supreme Court has taken a "flexible and pragmatic approach" to Rule 901 of the Rhode Island Rules of Evidence's requirement that evidence be authenticated. Under that approach, "a document's authenticity [may] be established in any number of different ways." *Id*. (quoting *Rhode Island Managed Eye Care, Inc. v. Blue Cross & Blue Shield of Rhode Island*, 996 A.2d 684, 691 (R.I. 2010)).

When submitting evidence in connection with a motion or opposition to summary judgment, authentication can be accomplished "'by submitting an affidavit of a person with

personal knowledge of the documents who can attest to their authenticity and qualify them as admissible evidence.'" *Id*. at 10-11 (quoting *Superior Boiler Works, Inc*., 711 A.2d at 632 n.3)).

(3) SUPREME COURT RECOGNIZES THE REPLY-LETTER DOCTRINE FOR AUTHENTICATION PURPOSES.

In addressing the plaintiff's failure to authenticate the evidence submitted in connection with his opposition to the defendant's motion for summary judgment, the Rhode Island Supreme Court in *McGovern v. Bank of America, N.A.*, No. 2013-184-Appeal, recognized for the first time the "Reply Letter Doctrine," one of the means by which evidence may be authenticated under the Rhode Island Rules of Evidence. *Id*. at 10 n.12 (citing Advisory Committee Notes to R.I. R. Evid. 901(b)(4)).

The Reply Letter Doctrine allows "'a letter [to] be authenticated by content and circumstances indicating it was in reply to a duly authenticated one.'" *Id*. (quoting Advisory Committee Notes to Rule 901(b)(4) of the Federal Rules of Evidence)). For the rule to apply, the proponent of the evidence must "'prove that the first letter was dated, was duly mailed at a given time and place, and was addressed to [the sender of the reply-letter].'" *Id*. at 10 n.12 (quoting 2 McCormick on Evidence § 224 at 95 (7th ed. 2013)).

(4) PARTY THAT MOVES FOR JUDGMENT ON PLEADINGS AND ATTACHES EVIDENCE OUTSIDE THE PLEADINGS IS ON NOTICE THAT MOTION MAY BE CONVERTED TO A MOTION FOR SUMMARY JUDGMENT.

A Rule 12(c) motion for judgment on the pleadings "'provides the trial court with the means of disposing of a case early in the litigation process when the material facts are not in dispute after the pleadings have been closed and only questions of law remain to be decided.'" *Ingram v. Mortgage Electronic Registration Systems, Inc*., No. 2012-269-Appeal at 5 (quoting *Haley v. Town of Lincoln*, 611 A.2d 845, 847 (R.I. 1992)).

While a Rule 12(c) motion must be decided on the basis of the pleadings,

> [i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

R.I. Super. Ct. R. 12(c). If a party introduces materials that serve as the basis for the court's conversion of a motion for judgment on the pleadings into a motion for summary judgment, that party cannot complaint that it lacked notice that the motion would be converted. *Ingram*, No. 2012-269-Appeal at 5 (citing *Ouimette v. Moran*, 541 A.2d 855, 856 (R.I. 1988)).

(5) DID YOU KNOW?

While negligence cases are usually inappropriate for summary judgment, "a court may resolve the duty element without a trier of fact because 'the existence of a duty is nonetheless a question of law.'" *Woodruff v. Gitlow*, No. 2012-67-M.P. at 8 (citing *Wyso v. Full Moon Tide, LLC*, 78 A.3d 747, 750 (R.I. 2013)).

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