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THE PROPRIETY OF RENDERING A SUMMARY JUDGMENT IN FAVOR OF A NON-MOVANT UNDER WYOMING AND FEDERAL RULES OF CIVIL PROCEDURE

Rule 56, Federal Rules of Civil Procedure, and Rule 56, Wyoming Rules of Civil Procedure provide an excellent device for the disposition of actions in which there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.[1] Due to an extensive use of the summary judgment rule, a question has arisen on many occasions as to the scope of Rule 56, namely, whether a court may properly grant summary judgment to a party opposing the motion for a judgment even though the opposing party has not filed a formal cross-motion. Although neither the United States Supreme Court, nor the Wyoming Supreme Court have specifically ruled on the point, a conflict has arisen among the lower federal courts, and state courts which have incorporated the federal rules, as to whether a court has the inherent power to go beyond merely overruling a movant's motion for summary judgment and render a judgment in favor of a deserving, but merely opposing, party.

It is interesting to note that an amendment to Federal Rule 56 (c) was proposed by the Advisory Committee in 1955[2] which would expressly allow a federal court to render a summary judgment for the deserving party on the motion of either party, however no action was ever taken on it. The failure of the proposal to be adopted would seem indicative of a subsequent trend toward formality in the pleadings, but as will be shown herein, no such trend has ever materialized. While the federal courts have yet to expressly solve the problem, several states have adopted specific provisions into their rules of procedure allowing a summary judgment in favor of a deserving non-movant.[3]

Some courts have interestingly seized upon "informal" motions or motions of another nature, and have interpreted these as being the equivalent of a cross-motion for a summary judgment. An oral cross-motion, without notice, has been held sufficient,[4] although at least one court has voiced its disapproval of such procedure.[5] A summary judgment was also held proper where, upon a plaintiff's motion, the defendant, admitting there was no genuine issue of a material fact, "joined" in the request that the cause be determined on the plaintiff's motion for a summary judgment.[6]

Decisions in the state courts, having procedure patterned after the federal rules, are about evenly divided as to the soundness of rendering a summary

1. Fed R. Civ. P. 56(c); which is identical with Rule 56(c), Wyo. Rules of Civ. Proc.
2. Advisory Committee on Rules of Civil Procedure, Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts (1955).
3. Rule 3212(f), New York Civ. Law and Prac.; Rule 56(c), North Dakota Rules of Civil Proc.; Rule 610(d), Maryland Rules of Civ. Proc.; Wis. Stat. 270. 653(3) (1961).
4. Tripp v. May, 189 F.2d 198, (7th Cir. 1951).
5. Sequoia Union High School Dist. v. United States, 245 F.2d 227, (9 Cir. 1957).
6. Commercial Credit Corp. v. California Shipbuilding Corp., 71 F. Supp. 936, (S.D. Cal. 1947).

judgment against a movant.[7] A New Jersey case, *Seire V. Police and Fire Pen. Com.*[8] is illustrative of the decisions that deny the propriety of the proposition at the state level. The *Seire* case held that it was error for a lower court to enter a summary judgment for the defendants upon the plaintiff's motion, stating that in the absence of a formal application for a cross-motion by the defendants, and appropriate notice thereof, the lower court was limited to a denial of the plaintiff's motion. The court stressed the requirement of notice to the adverse party being made before the court had acquired its initial power to entertain and rule on a motion for, and subsequently grant a summary judgment.

The Florida and Kentucky courts represent the view that it is unnecessary for a party entitled to a judgment as a matter of law to formally file a cross-motion. The Florida Court, in *Carpineta v. Shields*,[9] expressed the view that:

> There can be no sound reason why, when one party has moved for a summary judgment, the court in absence of a timely and meritorious objection, cannot dispose of the whole matter by granting a judgment to either party if it finds that the facts as properly construed against the prevailing party show that he is entitled to a summary judgment as a matter of law, even though it may be better practice to file a cross-motion.[10]

The Kentucky Court of Appeals has said that, where overruling one party's motion for a summary judgment would entail a determination of the other party being entitled to relief, a motion by the prevailing party would be a useless formality.[11]

The federal courts which have dealt with the problem, unlike the more equally divided state courts, have leaned clearly toward an affirmative stand,[12] although there is some authority to the contrary.[13] The courts that have favor-

7. Courts allowing: Carpineta v. Shields, 70 So. 2d 573, 48 ALR2d 1185, (1954, Fla.); Collins v. Duff, 283 SW2d 179, (1955, App. Ken.). Courts denying: Seire v. Police and Fire Com. of Orange, 4 N.J. Sup. 230, 66 A.2d 746 (1949); Durham v. I.C.T. Ins. Co., 283 SW. 2d 413, (1955, Civ. App. Tex.).
8. 66 A.2d 746, Supra note 7.
9. 70 So. 2d 573, Supra note 7.
10. Id. at 574.
11. Collins v. Duff, Supra note 7.
12. Northland Greyhound Lines, Inc. v. Amalgamated Assoc. of St. Elec. R. and Motor Coach Employees, 66 F. Supp. 431, (D.C. Minn. 1946); Hooker v. New York Life Ins. Co., 66 F. Supp. 313, (D.C. Ill. 1946) revd. on other grounds 161 F. 2d 852; Hennessey v. Fed. Sec. Admr., 88 F. Supp. 664, (D.C. Conn 1949); American Auto Ins. Co. v. Idemnity Ins. Co., 108 F. Supp. 221, (E.D. Pa. 1952); United States v. Franklin Fed. Savings and Loan Assoc., 140 F. Supp. 286, (M.D. Pa. 1956); Dickhoff v. Shaughnessy, 142 F. Supp. 535, (S.D. N.Y. 1956); Farmers Ins. Exchange v. Allstate Ins. Co., 143 F. Supp. 213, (E.D. Mich. 1956); Local 33, Int. Hod Carriers, Etc. v. Mason Tender, Etc., 291 F.2d 496, (2nd Cir. 1961); Potomac Ins. Co. v. Boles, 205 F. Supp. 879, (D.C. Ind. 1962); United States v. Mojoc Const. Corp.) 190 F. Supp. 622, (E.D. N.Y. 1960).
13. Truncale v. Blumberg, 8 F.R.D. 492, (S.D. N.Y. 1948), app. dismd. 182 F.2d 1021, (2nd Cir. 1948); Pinkus v. Reilly, 71 F. Supp. 993, (D.C. N.J. 1947) affd. 170 F.2d 786, (3rd Cir. 1948); Stuart Inv. Co. v. Westinghouse Elec. Corp., 11 F.R.D. 277, (D.C. Neb. 1951).

ed rendering a summary judgment for a non-movant have generally supported their decisions upon one or more of the following theories: that such procedure would be in harmony with the purpose of Rule 56 in expediting the disposition of actions where there is no genuine issue of fact requiring trial;[14] that it is consistent with Rule 54(c) which gives the court the power to enter final judgment to which a prevailing party is entitled, even though a party has not demanded such relief in his pleadings;[15] that there is no practical need for the mere mechanics of a cross-motion where there can be no prejudice to the opposing party;[16] that the Rules are to be interpreted liberally so that a party's mistake, inadvertance, or mechanical failure as to form should not put a limitation on the court to do justice;[17] and that it is the "sensible and practical thing to do."[18] However, the authority most often cited[19] by the courts is Professor Moore's well written treatise in favor of rendering a summary judgment for a non-movant who would have been entitled to such judgment had he so moved.[20]

The opposite view taken by federal courts is typified in *Truncale v. Blumberg*.[21] In the *Blumberg* case, the court, although taking note of the implications of Rule 54(c), and also that Rule 56 should be made as flexible and expeditious as possible, refused an adjudication on the merits favorable to a party merely opposing a motion for a summary judgment. The court supported its stand by reasoning that since the necessity for a cross-motion had been considered by the 1948 Advisory Committee for the Formulation of Amendments to Rules, and the Committee made no change, that was an indication such relief should not be granted in the absence of cross-motion. It is interesting to note in passing that the writer of the *Blumberg* decision, Judge Medina, reversed his stand on the issue upon becoming a circuit judge.[22] A Circuit Court opinion written by Judge Medina is interesting: ". . . It is most desirable that the court cut through mere outworn procedural niceties and make the same decision as would have been made had the defendant made a cross-motion for a summary judgment."[23]

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14. Hooker v. New York Life Ins. Co., 66 F. Supp. 313, (D.C. Del. 1946) revd. on other grounds 161 F.2d 852; United States v. Franklin Fed. Savings and Loan Assoc., 140 F. Supp. 286, (M.D. Pa. 1956); Hennessey v. Fed, Sec. Admr., 88 F. Supp. 664, (D.C. Conn. 1949).
15. Hooker v. New York Life Ins. Co., supra note 14, Hennessey v. Fed. Sec. Admr., supra note 14.
16. Hennessey v. Fed. Sec. Admr., supra note 14.
17. Ibid.
18. American Auto Ins. Co. v. Indemnity Ins. Co., 108 F. Supp. 221, (E.D. Pa. 1952).
19. Potomac Ins. Co. v. Boles, 205 F. Supp. 879, (D.C. Ind. 1962); Northland Greyhound Lines Inc. v. Amalgamated Assoc. of St. Elec. R. and Motor Coach Employees of America, 66 F. Supp. 431, (D.C. Minn. 1946); Hooker v. New York Life Ins. Co., supra note 14; Dickhoff v. Shaughnessy, 142 F. Supp. 535, (S.D. N.Y. 1956); Farmers Ins. Exchange v. Allstate Ins. Co., 143 F. Supp. 213, (E.D. Mich. 1956); Hennesey v. Fed. Sec. Admr., supra note 14.
20. 6 Moore's Federal Practice 2088 (2nd ed. 1953).
21. 8 F.R.D. 492, (S.D. N.Y. 1948).
22. Local 33, Int. Hod Carriers, Etc. v. Mason Tenters, Etc., 291 F.2d 496, (2nd Cir. 1961).
23. Id at 505.

A 1943 District Court of Wyoming case, *United States v. Fremont County*,[24] reveals at least some tendancy toward the affirmative side of the question. The *Fremont County* case involved a suit by the United States to quiet title to certain Indian lands and to restrain county officials from assessing and attempting to sell the lands for taxes. The United States had moved for a summary judgment on the pleadings, and counsel for both parties agreed that the matter could be disposed of effectively on the motion. The District Court had denied the plaintiffs relief, but had taken notice of the fact that there were no controverted questions material to the controlling principles and that the case could be decided upon strictly legal issues in connection with a motion by the defendants for dismissal, and hence granted a dismissal on the merits. On appeal[25] the Tenth Circuit Court of Appeals reversed the judgment on the merits, but did not discuss the propriety of rendering a summary judgment in favor of the defendant. However, for two reasons, the *Fremont County* case may not be said to be clear cut authority in favor of the proponents of rendering a summary judgment for a non-movant: first, it should be noted that the court did not specifically discuss whether such procedure was proper under Rule 56, indeed, Rule 56 was not mentioned in the opinion; and secondly, it is apparent that the court was at least dealing with an informal request by the defendant for a summary judgment.

If a court is willing to assume the power of rendering a summary judgment against a moving party, it is apparent that a court should exercise such power only where the moving party has an opportunity to meet the proposition fully as to whether there is actually no genuine issue to be tried and that the winning party is entitled to a summary judgment as a matter of law. This is best illustrated by the United States Supreme Court in the case of *Fountain v. Filson*.[26] The *Filson* case was brought by Filson who claimed an interest in certain property, alleging that Fountain had acquired title to the property subject to a resulting trust in favor of Filson. The defendant, on the ground that New Jersey law would not permit the imposition for a resulting trust under the circumstances disclosed in the complaint, moved for a summary judgment which was granted by the District Court. The Court of Appeals, while agreeing that Filson was not entitled to a resulting trust, remanded the case to the District Court with instructions to enter a personal judgment in a certain amount in favor of Filson. The Circuit Court based its decision on the fact that Filson's complaint prayed for "other relief" in addition to the resulting trust claim, and this, coupled with the setting out of facts alleging a basis for a personal judgment, and an examination of the pretrial depositions, prompted the court to give the personal judgment relief. The Supreme Court in reversing the personal judgment, while expressly withholding a ruling on the propriety of

24. 53 F. Supp. 395, (D.C. Wyo. 1943).
25. 145 F.2d 329, (10th Cir. 1944), cert. denied 323 U.S. 804, 89 L. Ed 641, 65 S. Ct. 563, (1945).
26. 336 U.S. 681, 93 L. Ed 971, 69 S. Ct. 754, (1949).

an order for a summary judgment in favor of a non-moving party, pointed out that the order for personal judgment was made upon appeal on a new issue to which the opposing party had no opportunity to present a defense, since the only claim considered on the original motion for a summary judgment was the claim for a resulting trust.

Despite the dangers illustrated by the *Filson* case, it seems apparent that the rendering of a summary judgment for an opposing party in the absence of a cross-motion is in keeping with the spirit and purpose of Rule 56, that of expediting the disposition of actions in which there is no genuine issue of fact requiring a trial. The present trend of the courts, as well as the weight of authority, indicates that the advantages to be gained from an expedient disposition of many actions greatly exceeds the relatively slight danger of prejudicing a moving party. Thus, it seems that the answer to the question, whether a summary judqment is proper for a non-moving party, is in the affirmative.

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