

APPELLATE TIP: EARLY MOTIONS FOR SUMMARY JUDGMENT AND ARIZ.R.CIV.P. 56(D)

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An early motion for summary judgment in a case can be very helpful and efficient in resolving issues that are subject to clear legal argument, or to resolve an issue that involves minimal discovery that just cannot be addressed by a motion to dismiss/motion for judgment on the pleadings. When moving for summary judgment before the final discovery deadline, however, it is important to be aware of Rule 56(d).

Rule 56(d), of the Arizona Rules of Civil Procedure (formerly 56(f)) is a mechanism that permits a party opposing a motion for summary judgment to stay their response in order to obtain further discovery to support their arguments. The purpose of Rule 56(d) is to insure that a diligent party is given a reasonable opportunity to prepare that party's case. *Simon v. Safeway, Inc.*, 217 Ariz. 330 (App. 2007). Rule 56(d) provides: "If an opposing party cannot present evidence to justify its opposition [to a motion for summary judgment], it may file a request for relief and expedited hearing. ... The request must be accompanied by: a supporting affidavit establishing specific and adequate grounds for the request and addressing, if applicable, the following: (i) the particular evidence that is beyond that party's control; (ii) the location of the evidence; (iii) what the party believes the evidence will reveal; (iv) the methods to be used to obtain it; and, (v) an estimate of the time the conduct of the additional discovery will require." In addition, it must also be accompanied by "a good faith consultation certificate complying with Rule 7.1(h)."

Accordingly, when contemplating filing an early motion for summary judgment in case, it is important to be clear on a few things with opposing counsel and the Court:

- Determine if any dispositive issue can be resolved early in your case without the need for extensive discovery practice (such as a single deposition, or a few RFAs/NUIs).
- Inform opposing counsel that you are seeking limited discovery in order to file an early dispositive motion at the outset of the case (and do so in either a letter or in some other kind of written form such as in an e-mail).
- Attempt to fashion an early discovery schedule with the Court on the particular issue you intend on filing an early MSJ on, so that there are specific discovery deadlines on that issue.
- If your motion can be supported by testimony from your client or agents of your client and discovery is not needed from the other side to maintain your arguments, be very clear in your initial or supplemental disclosure statement, with detail, the knowledge that your defendant and disclosed witnesses have and what they will testify to in this case. It may even be advisable, depending on the facts of your case, to suggest in your disclosure statement that those particular individuals will be providing an affidavit in support of an early motion for summary judgment.

By following these suggestions, you may eliminate most of the good faith arguments that opposing counsel may raise in support of a Rule 56(d) motion, as it will provide you with a clear record (in the form of your letters, any court scheduling orders, and disclosure statements) that Plaintiff was on notice of the issue you intend on raising in your early MSJ, that they had every opportunity to conduct discovery based on those issues, and knew of the deadline to conduct that discovery by the close of the Court's specific discovery deadline (if applicable). Again, this is particularly important if you do not actually need evidence from opposing counsel and your clients or their agents can provide you with all you need to move for summary judgment (i.e., in the form of an affidavit).

Finally, it is worth noting that the same points apply if Plaintiff's counsel has moved for an early MSJ. While rare, it is important to evaluate every case to determine if the facts are such that you may be facing a clear MSJ from Plaintiff's counsel prior to the close of discovery in a case. If Plaintiff's counsel has not followed the suggested steps above, and you feel you need additional discovery to support your arguments, you may want to seek Rule 56(d) relief. If

you find yourself in this situation, it is also important to keep in mind that “a request for relief under Rule 56(d)(1) does not by itself extend the date for an opposing party to file its responsive memorandum.” Ariz.R.Civ.P. 56(d)(2). Therefore, it is important to include in your request for Rule 56(d) relief that the Court continue your deadline to file a responsive MSJ until after your requested discovery has occurred, to ask for this relief on an expedited basis, and to still file a timely responsive MSJ if you have not obtained relief from the Court in this regard.