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MILs: Just an MSJ in Disguise?

Sarah F. Dooley, Esq.
Duffy + Fulginiti

Recently, I encountered two motions *in limine* filed by defense counsel in a case that contained the same exact text, argument, and law from a prior filed (and denied) motion for summary judgment. Even the proposed orders were essentially the same:

> AND NOW, this ____ day of _____, 2018, upon consideration of Defendant's Motion for Summary Judgment and any response thereto, it is hereby ORDERED that Defendant's motion is hereby GRANTED. IT IS FURTHER ORDERED that Defendant was not in possession of the building at the time of the incident and that Defendant did not have any duties beyond the terms of the lease and thus, all claims and cross-claims are dismissed.
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> AND NOW, this 4th day of March, 2019, upon consideration of Defendant's Motion *in Limine* and any response thereto, it is hereby ORDERED that Defendant's motion is hereby GRANTED. IT IS FURTHER ORDERED that plaintiff and co-defendants are precluded from making argument that Defendant was in possession of the building at the time of the incident.
>
> AND NOW, this 4th day of March, 2019, upon consideration of Defendant's Motion *in Limine* and any response thereto, it is hereby ORDERED that Defendant's motion is hereby GRANTED. IT IS FURTHER ORDERED that plaintiff and co-defendants are precluded from making argument that Defendant had any duties beyond the terms of the lease.

What are we as plaintiffs' lawyers to do in this situation?

First, start with the Rule. Pennsylvania Rule of Civil Procedure 1035.3 specifically allows for 30 days for a party to file a response to a summary judgment motion. If you are in Philadelphia County, you typically only have 10 days to respond to a motion *in limine* per the pre-trial order. Second, look at the law. The controlling case on this kind of scenario is *Eaddy v. Hamaty*.[1] In *Eaddy*, the defendant, Dr. Hamaty, made an oral summary judgment motion at a pre-trial conference, based on the insufficiency of an expert report.[2] The trial court held a hearing on the oral motion 14 days later, during which the plaintiff asked for a continuance so he could supplement the expert report.[3] The trial court denied the request and granted the motion for summary judgment.[4] On appeal, the Superior Court noted, among other things, that the trial court failed to follow Rule 1035.3, which permits 30 days for a response to a motion for summary judgment.[5] The

plaintiff was not permitted to supplement the record in a response, nor was he afforded the 30 days to respond, which the Superior Court found to be an abuse of discretion and vacated the order.[6] The case was remanded and the trial court was specifically directed to allow the plaintiff to have 30 days to respond to the summary judgment motion.[7]

Defendants often re-file their previously denied motions for summary judgment as motions *in limine* in a backdoor attempt to get the issue in front of the trial judge one more time before jury selection. However, a motion *in limine* is a "procedure for obtaining a ruling on the admissibility of **evidence** prior to or during trial, but before the evidence has been offered."[8] "The purpose of a motion *in limine* is two-fold: 1) to provide the trial court with a pre-trial opportunity to weigh carefully and consider potentially prejudicial and harmful evidence; and 2) to preclude evidence from ever reaching a jury that may prove to be so prejudicial that no instruction could cure the harm to the defendant, thus reducing the possibility that prejudicial error could occur at trial which would force the trial court to either declare a mistrial in the middle of the case or grant a new trial at its conclusion."[9]

Often, the issue re-argued in the motion *in limine* is not **evidence**, and, as such, is not a proper subject and/or basis for a motion *in limine*. In reality, the defense is once again seeking to dismiss the claim against it, which is a clear summary judgment issue. Further, a subsequent judge cannot reverse the order of a judge of the "same level."[10] In *EEOC v. Schott N. Am., Inc.*,[11] the defendants raised identical issues in their motion *in limine* as they had in their motion for summary judgment. In denying the motion *in limine*, the court stated that defendants should not use a motion *in limine* as a motion for reconsideration.[12] Furthermore, a motion *in limine* should not "serve as piecemeal litigation, taking as many bites at the apple as necessary to achieve the litigant's desired end."[13]

In responding to a motion for summary judgment disguised as a motion *in limine*, be sure to attach the case management order, the pre-trial order, and the order denying the original summary judgment motion. ◆

[1] *Eaddy v. Hamaty* 694 A.2d 639 (Pa. Super. Ct. 1997).

[2] *Id.* at 640.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 643.

[6] *Id.* at 644.

[7] *Id.*

[8] *Commonwealth v. Johnson*, 582 A.2d 336, 337 (Pa. Super. Ct. 1990), *aff'd Commonwealth v. Johnson*, 626 A.2d 514 (Pa. 1993).

[9] *Commonwealth v. Noll*, 662 A.2d 1123, 1125 (Pa. Super. Ct. 1995).

[10] *See Keffer v. Bob Nolan's Auto Serv.*, 59 A.3d 621 (Pa. Super. Ct. 2012) (judges of coordinate jurisdictions sitting in the same case should not overrule each other's decisions).

[11] 2009 U.S. Dist. LEXIS 8546, 4-6 (M.D. Pa. 2009).

[12] *Id.*

[13] *Id.*

Editor's Note: *Sarah Dooley is an attorney at Duffy + Fulginiti, where she focuses her practice on representing the catastrophically injured. She is also a member of the Verdict Editorial Board. You may contact Ms. Dooley at: sdooley@duffyfirm.com.*