

**SUPPORTING MOTIONS FOR SUMMARY JUDGMENT  
AND RESPONSES THERETO WITH ADMISSIBLE EVIDENCE**  
(prepared April 5, 2010)

Too 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 admissible evidence. 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. The following is typical language used in opinions issued by Judge Jacobvitz 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 as to any material fact and that the movant is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c) 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. Hearsay evidence cannot be considered on a motion for summary judgment. *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir. 1994). Any documentary evidence submitted in support of summary judgment must either be properly authenticated or self authenticating under the Federal Rules of Evidence. *Goguen v. Textron, Inc.*, 234 F.R.D. 13, 16 (D. Mass. 2006). Furthermore, 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.

B. Parsing the Summary Judgment 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 will be disregarded, assuming the presence in the courtroom of all testifying witnesses.

2. A Motion Not Property Supported Will Be Denied Even in the Absence of a Response. If a summary judgment motion is not properly supported by admissible evidence, it will be denied even if no response is filed.

3. Authentication. Each document offered in support of the motion for summary judgment must be authenticated, unless the party opposing the motion proffers the same document in support of that party's response.

(a) Lay a Foundation. 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.

(b) Examples. To authenticate a state court pleading, unless the other party has admitted its authenticity, the pleading needs to be certified. Unauthenticated loan documents and other documents attached to a summary judgment motion or brief will 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. Hearsay. Hearsay evidence will be disregarded unless an exception to the hearsay rule applies to the evidence. In an affidavit designed to admit documents under the business records exception to the hearsay rule, lay a foundation in the affidavit that the documents are admissible under the business records exception.

5. Argument is Not Evidence. Argument in a legal memorandum or brief is not evidence; nor is oral argument evidence.

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

7. Conclusory Statements In Affidavits 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 witness is in fact 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.

8. 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.

9. 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.

10. Make Sure Each and Every Material Fact is Supported by Admissible Evidence. The Court will 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:

(1) To identify each of the movant's facts for which the responding party contends there remains a genuine issue, and to submit admissible evidence to establish that there exists a genuine issue as to each such fact; and

(2) To set forth a concise statement of any additional facts the responding party asserts are material and should be considered, and to submit admissible evidence in support of each such fact.