

Memorandum

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #2

January 24, 2019

Via Email: rulecomments@nycourts.gov

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Subject: Recommendation by the Unified Court System's Advisory Committee on Civil Practice as to Rule 19-a of the practice rules of the Commercial Division of Supreme Court

We thank the OCA for extending the time for comment to January 28, 2019, which allowed the NYSBA CPLR Committee to meet and discuss its concerns about the proposal to extend Rule 19-a of the practice rules of the Commercial Division of Supreme Court to all civil cases in all New York State civil courts and make the service of the statements specified in the rule mandatory.

Rule 19-a of the practice rules of the Commercial Division of Supreme Court provides that Commercial Division justices may direct a party moving for summary judgment to provide a paragraph by paragraph statement of the material facts as to which there are no genuine issues to be tried (with citations to the record) and the party opposing the motion to provide a paragraph by paragraph response thereto (admitting or controverting the "facts" cited by the movant and citing to the record where a fact listed by the movant is disputed). At subsection (c), the Rule provides that

Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

In its recommendations to adopt certain Commercial Division Rules throughout the civil courts (July 2018), the Unified Court System's Advisory Committee on Civil Practice ("Advisory Committee") recommends that Rule 19-a apply to any motion for summary judgment in all types of civil cases in all of New York's civil courts but that the submission of the movant's statement and the responding statement by the party opposing the motion, as specified in the rule, be mandatory rather than at the direction of the court.

After report and discussion, and upon vote by its members at its January 18, 2019 meeting, the NYSBA Committee on the Civil Practice Law and Rules ("CPLR Committee") opposes the Advisory Committee recommendation as to Rule 19-a.

Considerations raised in the CPLR's meeting included the following.

The recommendation of the Advisory Committee would engraft on CPLR 3212 an additional document to be submitted in support of a motion for summary judgment. CPLR 3212 provides what are the necessary factual documents to be served by the movant. Specifically, 3212 (b) provides:

A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.

Nowhere does CPLR 3212 mention any of the documents described in Rule 19-a. Only the State legislature with the approval of the Governor can amend the CPLR to provide another document that must be filed in support of, and in opposition to a motion for summary judgment.

Additionally, if the recommendation of the Advisory Committee was accepted, the party opposing a motion for summary judgment may be unfairly prejudiced as follows: the party opposing the motion (a) provides by affidavit facts which dispute a purported fact which the movant contends in its Rule 19-a is a material fact as which there is no genuine issue to be tried, but (b) inadvertently fails to dispute the "fact" in its Rule 19-a response. Under Rule 19-a, the purported fact is deemed admitted by the party opposing the motion, despite its affidavit disputing the "fact."

Such a result would contradict the following terms of CPLR 3212(b):

the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

While the possibility of such an inadvertent failure is unlikely where the movant serves a simple, straightforward Rule 19-a statement, the risk is heightened where the movant has served a long and complex statement under Rule 19-a.

Additionally, if Rule 19-a is extended to all civil cases as the Advisory Committee proposes, such would add undue and costly burdens to summary judgment motions which already require care in preparing affidavits in support and opposition and supporting, opposing, and reply memoranda of law.

Finally, while the CPLR Committee opposes any extension of Rule 19-a beyond the Commercial Division, if the Advisory Committee decides to promote such extension, the CPLR Committee urges that any such extension does not include making the service of the statement and responding statement described in the rule mandatory but, as Rule 19-a currently reads, only upon instruction of the court handling the case. The judge handling a case should have the flexibility of deciding that he or she would not benefit from the filing of the statements described in Rule 19-a.

Co-Chairs of the Committee

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