CASE LAW NOTE

Second Circuit Distinguishes Abandonment from Default in Summary Judgment

In *Jackson v. Federal Express*, 766 F.3d 189 (2d Cir. 2014), the U.S. Court of Appeals for the Second Circuit addressed a twist on the rule — now codified in Civil Rule 56(e) — that a court may not grant summary judgment by default when a motion is unopposed. The twist in *Jackson*? The plaintiff did respond to the motion, but only argued against summary judgment as to one of the claims in question. The trial court said it was dismissing the unargued claims "in the absence of opposition." On appeal, the plaintiff argued that this violated Rule 56(e).

The Second Circuit affirmed. It acknowledged that, under Rule 56(e), when no response is made, the trial court must examine the motion to make sure it is well-grounded. But, the Second Circuit held, when a represented party responds but addresses only certain claims, the trial court may infer that the party has abandoned the unargued claims.

The Second Circuit's analysis proceeds from solid ground. Parties are always free to abandon claims. When a claim is explicitly abandoned, there is no need for the court to do anything. It clearly is not the intent of Rule 56(e) to require judges to parse the merits of explicitly abandoned claims.

The question raised in *Jackson* is whether Rule 56(e) — which effectively precludes courts from inferring abandonment when there is no response at all — also precludes courts from inferring abandonment from a partial response. The Second Circuit interpreted Rule 56(e) as not creating a per se bar in this setting, but then confined the circumstances under which an inference of abandonment would be appropriate.

It clearly is not the intent of Rule 56(e) to require judges to parse the merits of explicitly abandoned claims.

While the Second Circuit's approach allows trial courts to infer abandonment of unargued claims, many judges may prefer to seek confirmation. For judges who hear oral argument on summary-judgment motions, the opportunity will arise automatically. For others, some follow-up inquiry would be required.

Of course, judges do have a way to avoid the problem altogether. Judges who require parties to seek a brief conference with the court before filing a summary-judgment motion can use the opportunity to identify claims the plaintiff no longer intends to pursue — no motion or briefing needed.

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