

How to Use the Motion for Summary Judgment Packet

When you examine the motion for summary judgment packet, you will find 5 things: (1) a Debt Collector's motion for summary judgment with attachments including statement of facts, affidavit, financial statements and Motion for Fees; (2) Consumer Joe's affidavit; (3) Consumer Joe's Motion to Strike Evidence; (4) Consumer Joe's Response to Motion for Summary Judgment; and (5) Consumer Joe's Response to Motion for Fees.

The First Thing You Should Do

If a motion for summary judgment has been filed in your case against you, the very first thing you need to do is to find the rule of civil procedure which controls it (it's probably mentioned in the debt collector's brief) and read it. Read the rule and figure out how much time you have to respond to the motion for summary judgment. Figure out the specific date it's due on and write that down in your calendar. You don't want to miss that date (and in some jurisdictions if you do it's all over). If for some reason it looks like you can't be finished on time, you'd better ask the court for more time *before* that date. As I say, in some jurisdictions the court doesn't even have power to give you permission to file late if you don't ask on time.

The Motion for Summary Judgment

If you will read the Debt Collector's motion for summary judgment first, you may understand how it struck terror into Joe Consumer. It looks good enough to get the job done, and at first it appears that the debt collector has its evidence in order and its ducks in a row. And I have no doubt that such a motion, unopposed or ineffectively opposed, would be granted by the court. If you are facing a motion for summary judgment, yours may also look powerful.

But look at it carefully. Your motto should be “isolate, analyze, and destroy.” You first *isolate* each part of the evidence and argument so that it must stand on its own two feet. Then you analyze it to see if it is correct, all by itself. Then you destroy it by showing how it doesn't work. Taken as a whole it may seem difficult, but piece by piece it may be very easy. Remember to look carefully at the debt collector's “prima facie case” --what it must prove in order to win. If it fails to prove any part of a claim (a “count” in the petition against you), you will win that claim and defeat the motion for summary judgment. If you have also filed a cross-motion for summary judgment, as Consumer Joe did, you should win your cross-motion.

It was a Piece of Junk

As you will see from the response, the debt collector's Motion for Summary Judgment, which was actually filed in a real case, is little short of an attempted fraud on the court and useless if effectively opposed. I was almost embarrassed to use it as an example, to tell you the truth. But it was real, and more than that, it was **typical**. It is likely very similar to what you will receive if the debt collector files a motion for summary judgment against you. And this is because debt collectors rarely have what they need to win and must skillfully hide that fact in their motions for summary judgment.

Look at it closely, and you'll see that most of the work behind a debt collector's motion for summary judgment is often to hide what is *not* there. And they usually don't have to work very hard at that because they do not expect to be opposed and revealed.

So the first thing you must learn from this is that even worthless motions, if properly dressed up, can intimidate the inexperienced and fool a judge who doesn't pay attention unless you take the time to attack it. Observe the way Consumer Joe's memorandum in opposition isolates each part of the motion for summary judgment, analyzes it independently, and destroys it piece by piece. Although you may spot a couple of digs at the collection lawyer, the brief in opposition is methodical, thorough, and generally unemotional. An intelligent judge will know what it reveals, so you don't have to hammer on it too hard.

This Case Was Filed in Arizona

Joe Consumer's case was filed in Arizona state court under Arizona law. As it happens, there is a Rule 26 in Arizona, which requires both parties to make certain disclosures early in a case. That rule is modeled on the Federal Rules of Civil Procedure, but many, and perhaps most, states don't have a similar rule. You may have to substitute discovery you have conducted, and answers to that for the disclosures provided by Rule 26. Arizona also has a statutory right to attorney's fees for the "prevailing" party. Fortunately in this case, the debt collector took the liberty of assuming it would prevail and filed a motion for attorney's fees. That allowed Joe Consumer to attack the debt collector's integrity and honesty without being emotional about it. Again, an intelligent judge knows what he's seeing.

Arizona's provision for attorney's fees is unusual in state law, and if you are facing a claim for attorney's fees, it is most likely because the debt collector seeks fees under "the contract." If they can't produce the contract, and account for why it applies to you with legitimate evidence, however, they can't show a contractual right to fees—potentially a violation of the Fair Debt Collection Practices Act. You'll see that argument in Joe Consumer's Memorandum.

Use Law from Your State

If you are not in Arizona, you will not want to use Arizona case law for your legal argument. You can easily find law from your state, however. None of the state law in this brief (other than as regards attorney's fees under the Arizona Statute) is likely to be different than what courts in your state have held. If you are from Alaska, then, for example, you will find the state law you need by using Google. If you want the prima facie case for a breach of contract in Alaska, you google the following search: (Alaska "breach of contract" "prima facie case"). This will turn up many cases which outline the requirements for proving a breach of contract claim.

For the requirements of the affidavit it might be a little more difficult. First simply look in the rule providing for summary judgments, as it may well say exactly what an affidavit is required to show (it does in Arizona). If not, then begin your Google search with (your state's name, "motion for summary judgment" "supporting affidavits"). If that doesn't bring up a case describing what an affidavit must include, you'll have to fish around using terms from Consumer Joe's brief as possible search terms. It is very likely that all of the laws in your jurisdiction will be exactly the same as Arizona's law. That is because debt law is a very old type of law about which most people agree on the major points.

The Arguments you Face

It may be that the motion for summary judgment you're facing won't have all the same arguments that Consumer Joe's did. One of the things that made Consumer Joe's case a good example was how many

theories the debt collector tried to use. Notice that the debt collector admitted in its argument the facts necessary to dispose of many of these theories. Observe carefully the way Consumer Joe's memo isolates, analyzes and destroys the arguments one by one. Taken as a whole, the debt collector's brief doesn't look so shabby. Taken piece by piece it collapses completely.

There may be arguments raised in your motion for summary judgment that weren't in Consumer Joe's case. In general, you will follow the same process: isolate, analyze, and destroy. And you'll do your research in the same way, too, by googling the terms and finding cases. Or I have also produced youtube videos on the subject of research that you might find helpful. Take a look at: <http://www.youtube.com/user/Fightdebt?feature=mhum#p/a/u/1/Kz-wdrYFNhc>.

This Isn't Cut and Paste

You must resist the urge to try to find pieces of the motion or facts that you are facing that are the same as Consumer Joe's. You'll do that at the end, maybe, so you can spare yourself some of the trouble of figuring out the words you need. But first you need to understand the motion you are facing. Heartless Debt Collector's Motion for Summary Judgment won't end your case and is not in front of the court. It's just a sample for you to use that will help you figure out the one that *is* in front of you. As obvious as that may seem, don't forget that that's the one you must deal with.

Isolate, Analyze, Destroy

Take your time to read, really read, the motion for summary judgment filed against you. Let go of the panic and try to understand what it is saying. Get an understanding of its general organization. In some jurisdictions the paragraphs will be numbered, but in others maybe not. Remember that you will ultimately respond in the same form, that you will have a statement of facts and an affidavit (in all likelihood), and that these things are different things. Resist the temptation to look for shortcuts as to form. The form mandated by rule is designed to let the judge determine as quickly as possible whether there are issues that require a trial. Go with that. The form will show you where you need to make your stand.

Look at the Debt Collector's Affidavits

And this is true of the “supporting evidence,” too. In many, perhaps most, cases, the affidavit was crafted by the debt collector in a skillful way to hide how ineffective it was. Consumer Joe argued that this amounted to a fraud on the court and an unfair debt collection practice. You need to subject your debt collector's evidence to an equally searching examination. Does the person testifying show why he or she would know anything about what she's testifying? Does she testify to the accuracy and validity of the records? And do the records support the arguments made by the debt collector? In Consumer Joe's case the affidavit failed in every way. And the person testifying attempted to substitute her testimony for something certain absent records were *supposed* to say. But a records custodian can't testify as to the contents of the records: she “authenticates” the records which then must “speak for themselves.”

Motion to Strike

Because the evidence in Consumer Joe's case was bogus, Consumer Joe filed a “Motion to Strike” it all. This *may* have been overkill, but there was an Arizona case that said if a motion for summary

judgment was based on faulty evidence which was not objected to the court could grant summary judgment. Probably bad case law, and *definitely* unfair case law, but it was there. That accounts for the repeated references to “and defendant objects to...” evidence in addition to the motion to strike. Perhaps it was an abundance of caution, but it also served to highlight and emphasize how flimsy the debt collector's case was. I'm not aware of any reason it wouldn't be a good idea for anybody. Remember that a response to a motion for summary judgment must show that there are *genuine* (real and significant) disputes about *material* (important) issues. All that objecting certainly showed the issues in a way that cannot be ignored in Consumer Joe's case.

Consumer Joe's Affidavit

As I have said before, fighting a motion for summary judgment is generally much more effective if you can put on evidence which actually and positively denies something (or everything) the debt collector is saying. In Consumer Joe's case the debt collector made a fundamental “mistake” in its petition and brief. It referred to *itself* as the party that entered into a contract with Consumer Joe, whereas in reality it had purchased a contract supposedly entered by someone else (the “original creditor” and Consumer Joe).

Debt collectors claim to have entered the contract as a way to try to intimidate the consumer into believing they have more evidence than they do, and I have often argued that this is a violation of the Fair Debt Collection Practices Act. In this case, however, the practice made it very simple for Consumer Joe to deny in his affidavit that he'd ever entered a contract or had any obligation to the debt collector. Maybe they'll do the same for you.

Thus Consumer Joe's affidavit provides affirmative dispute of all the debt collector's so-called evidence. A luxury probably unnecessary in this case, but it was there for the taking. If the debt collector in your case poses as the original creditor, the same option may be available to you whether you're being sued for a credit card you ever owned or not. Remember that if the debt collector is claiming to be the party you entered a contract with (and it isn't), then you can deny it is in clear conscience knowing that it was trying to deceive and rob you by making that claim.

Notice the Form of Consumer Joe's Affidavit

Notice also the form of Consumer Joe's Affidavit. It is a separate document consisting of numbered factual allegations. They are testimony under oath and can be used at trial (by the debt collector). They must be notarized to be evidence in response for a summary judgment. It is *probably* not enough to notarize your whole memorandum instead of the affidavit specifically, so you should probably follow the form of the affidavit as your testimony. Make sure each piece of evidence you submit stands on its own and is sufficient and admissible under the rules or the court will probably not consider it. That also means not to include facts in your brief without putting them into your affidavit. Your brief is not evidence—your affidavit is. Remember that distinction.

Motion for Attorney's Fees

Finally, the motion for attorney's fees was almost a joke in this case. It is included in the motions packet because it really was filed in an actual case. And it was filed along with the motion for summary judgment even though Arizona law provides a specific standard for attorney fees that requires looking at several factors, including the results of the case (so the motion was filed too early, among other

things). And it would likely have been granted by a court not paying attention because on the very surface of it, it looks like it says what it needs to say.

I would think that almost any lawyer would do a better job than the one in the motions packet, but again for your purposes the important thing is to isolate, analyze, and destroy. Look closely at the hours worked and consider whether they are reasonable. As non-lawyers, this won't necessarily be easy, but sometimes it's obvious, as in Consumer Joe's case. And again, this really was filed in a real case.

In Consumer Joe's case the debt collector was trying to justify a large contingent fee based on a very few hours work (take a look at it, and you'll see that they claim to have spent 2 and a half hours on their motion for summary judgment! Consumer Joe spent 20 hours opposing it).

To try to sneak their motion for contingent fees past the court, the debt collector probably committed perjury and almost certainly violated legal ethics. Consumer Joe responded to the motion (rather than simply objecting to it as untimely) because it showed what a grifter the debt collector in this case was. Most debt collectors won't hand it to you this way, but look closely and see. Look at every part of the motion and affidavit and subject it, independently, to a careful analysis. Motions under the law, like chains, are only as strong as their weakest links. If you can show that the debt collector is trying to hoodwink the judge and defraud the defendant, you can really take the fun out of the case for the debt collector.

Conclusion

There is no set amount of time you should expect to spend on responding to a motion for summary judgment. When I was in practice, it always took longer than I expected. It has to be done right, that's the main thing to remember. Take the amount of time necessary for that. Learn what you need to learn in order to get it right, and then put it together piece by piece.