Chapter 19: Civil Procedure and Practice

Wendell F. Grimes
PART III

Adjective Law

CHAPTER 19

Civil Procedure and Practice

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§19.1. Summary judgment: General. By reason of the lack of any important procedural developments during the 1959 Survey year, it has been deemed advisable in this chapter briefly to review summary judgment procedure in Massachusetts. Section 59 of G.L., c. 231 allows either party in a contract action to file a motion for immediate entry of judgment on the basis that there is no genuine issue of fact and the case is determined solely by an issue of law. The motion may be accompanied by affidavits on personal knowledge of admissible facts on which the affiants would be competent to testify. Facts stated therein are taken to be admitted unless contradictory affidavits are filed or unless the opposing party files an affidavit showing specifically and clearly reasonable grounds for believing that contradiction can be presented at the trial but cannot be furnished by affidavits.

§19.2. Summary judgment: Use. Summary judgment procedure offers a quick and expeditious method of enforcing a foreign judgment or decree. In Samincorp South American Minerals & Merchandise Corp. v. Lewis, the plaintiff sued on an arbitration award on which a judgment of the Supreme Court of New York had been entered. The plaintiff moved for summary judgment supported by an affidavit indicating the arbitration award and the judgment thereon. Summary judgment was granted. Such a procedural device is an excellent ve-

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§19.1. 1 As amended by Acts of 1955, c. 674, §1.

hicle by which consent to jurisdiction, the award, the judgment and full faith and credit on the judgment can be quickly adjudicated.

Use of summary judgment procedure is equally available to a defendant in a contract case when his case rests purely upon a matter of law. In *Boston Plate & Window Glass Co. v. John Bowen Co.*, a subcontractor sued the general contractor for breach of contract. In a prior case the award of the general contract to the general contractor was invalidated by the Supreme Judicial Court. In the *Boston Glass* case the defendant moved for summary judgment on the basis that the invalidation of the general contract excused the defendant's performance of the contract with the subcontractor. The Supreme Judicial Court so ruled.

Section 59 of G.L., c. 231, puts upon the party against whom summary judgment is sought the burden of showing that there exists a genuine issue of fact to be tried. Under the statute this can be done by filing counteraffidavits, or by filing an affidavit showing specifically and clearly reasonable grounds for believing that contradiction can be presented at the trial but cannot be furnished by affidavit. In *Albre Marble and Tile Co. v. John Bowen Co.*, a subcontractor sued the general contractor who moved for summary judgment on the same basis as in the *Boston Glass* case, i.e., that the general contract had been invalidated and thus the defendant was excused from performance. The plaintiff submitted a counter affidavit in which he sought to avoid the defense of impossibility of performance. The main thrust of the plaintiff's theory of avoidance of the defense was that the defendant knowingly and fraudulently procured the contract and thereafter, with notice of the infirmities of the contract, the defendant induced the plaintiff to contract.

Seemingly the statements of the counter affidavit would create a triable issue. However, the plaintiff's affidavit was set forth upon information and belief. The Court held that information and belief did not satisfy the provisions of the statute that affidavits be "on personal knowledge of admissible facts as to which it appears affirmatively that the affiants would be competent to testify." Further, the Court ruled that the alternative provision of the statute was not met. The Court stated:

"We are of opinion that the counter affidavit filed by the plaintiff does not meet the requirements of the statute. It is true that the facts asserted upon information and belief in the affidavit concern to a considerable extent the defendant's knowledge and intentions, and evidence of these is usually within the control of the defendant. But the statute provides that interrogatories, and admissions under G.L., c. 231, §69, or in the pleadings will be considered along

\[5\] G.L., c. 231, §59.
with affidavits and stipulations, if any, in deciding whether no genuine issue of material fact exists. Here there is no showing that the plaintiff even attempted to seek answers to interrogatories or that it filed any demand to admit facts. For that matter, no affidavit was filed other than that of its own vice-president. It is to be noted that under the alternative method of opposing the motion for summary judgment the "reasonable grounds for believing that contradiction can be presented at the trial" must be set forth "specifically" and "clearly." If the plaintiff's counter affidavit is treated as satisfying this requirement there would be comparatively few situations in which the statute would operate; the salutary purpose of the statute — which is to avoid the delay and expense of trials in cases where there is no genuine issue of fact — would be set at naught, for it would almost always be possible for a party to file an affidavit containing on information and belief vague and general allegations of expected proof.