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MASTERING MOTION PRACTICE

Justice Thomas E. Hoffman
Judge Lynn M. Egan

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PRE-TRIAL MOTION PRACTICE

by

Hon. Thomas E. Hoffman

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The materials contained in this document relating to motions pursuant to Sections 2-615, 2-619 and 2-1005 were edited and compiled from primary source works authored by Justice Allen Hartman and Justice Thomas R. Rakowski of the Illinois Appellate Court.

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PRE-TRIAL MOTION PRACTICE

by
Hon. Thomas E. Hoffman
Appellate Judge, 1st District
Updated August 2015

I. INTRODUCTION

Pre-Trial motion practice in Illinois covers a wide range of topics and it is not the intention of the author to presume to present all possible variations that one might encounter. It is the intention of this work to present the most common motions that might be encountered in the average case.

Although section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2014)) provides a pleading device for the filing of combined motions, it does not authorize hybrid motion practice. Our Supreme Court in Janes v. First Federal Savings & Loan Association of Berwyn, 57 Ill. 2d 398, 406, 312 N.E.2d 605, 609 (1974), expressly disapproved of hybrid motion practice and stated that it should not be sanctioned at the trial level. Hence, it is imperative that members of the bench and bar alike be precise in the manner in which pre-trial motions are presented and the manner in which they are ruled upon. The bar must be vigilant in labeling their motions since the motion itself determines the standards applicable to their resolution. The bench must be careful to maintain a clear record as to the type of motion being decided so that a reviewing court is able to address the merits of a ruling. Although a reviewing court may disregard the trial court's failure to distinguish between the various types of pre-trial motions (see

Janes, supra; Wallace v. Smyth, 203 Ill. 2d 441, 447, 786 N.E.2d 980, 984 (2002) (where no prejudice to the non-movant is evident (Burton v. Airborne Express, Inc., 367 Ill. App. 3d 1026, 1029, 857 N.E.2d 707, 711 (5th Dist. 2006))), a reversal will follow where there is a prejudice to the non-moving party. Illinois Graphics Co. v. Nickum, 159 Ill. 2d 469, 484, 639 N.E.2d 1282, 1289 (1994); Krause v. USA DocuFinish, 2015 IL App (3d) 130585, ¶ 20, 28 N.E.3d 996. Prejudice can occur by reason of the movant's failure to label a motion. Becker v. Zellner, 292 Ill. App. 3d 116, 124, 684 N.E.2d 1378, 1385 (2nd Dist. 1997).

If the reviewing court is unable to determine the type of motion that was before the trial court, the judgment below may be reversed without addressing the merits of the motion. As was stated in the case of Morrey v. Kinetic, 133 Ill. App. 3d 1002, 1005, 479 N.E.2d 953, 955 (1st Dist. 1985): "Reviewing courts are not under a duty to search the record to determine the real issues nor seek material for disposition of such issues. [Citations omitted.] After a shirt or blouse is incorrectly buttoned, the solution is to unbutton it completely and start all over. Reviewing courts should not have to speculate on what matters were before the trial court, what was considered, and why it was considered. It is best for the record to be put in proper order." See also Howle v. Aqua Illinois, Inc., 2012 IL App (4th) 120207, ¶ 73, 978 N.E.2d 1132.

Accordingly, a trial judge should insist from the very beginning that the litigants properly label their motions and refrain from hybrid motion practice.

II. SECTION 2-615 MOTIONS

2-615. Motions with respect to pleadings

> "§ 2-615. Motions with respect to pleadings. (a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.
>
> (b) If a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein the pleading or division thereof is insufficient.
>
> (c) Upon motions based upon defects in pleadings, substantial defects in prior pleadings may be considered.
>
> (d) After rulings on motions, the court may enter appropriate orders either to permit or require pleading over or amending or to terminate the litigation in whole or in part.
>
> (e) Any party may seasonably move for judgment on the pleadings." 735 ILCS 5/2-615 (West 2014).

A. The Various Types of 2-615 Motions

1. Motions to Strike and Motions to Dismiss

Any party may move to strike all or any part of an

opponent's pleading, either as to substance or as to form. The motions may or may not be dispositive. A motion to strike a complaint as being substantially insufficient in law raises the question of whether the complaint states a cause of action. Janes, supra. Similarly, one may move to strike an answer or a reply as being substantially insufficient in law. A motion to strike certain designated matter in a pleading as being immaterial may go to the merits, but in most cases is formal. The "and so forth" language at the end of section 2-615(a) appears to preserve other uses of the motion to strike, such as a motion to strike a jury demand or an affidavit. But the motion to strike as being substantially insufficient in law is likely to be dispositive.

Objections to a pleading based upon the pleader's failure to abide by formal pleading requirements (e.g. 735 ILCS 5/2-407, 2-603, 2-604, 2-606, 2-613 (West 2014)) should be brought by a 2-615 motion. Defects as to form can generally be remedied by a revision of the pleadings. Motions relating to such defects, if granted, will usually result in the striking of all or a part of the pleading and granting the pleader leave to amend.

Often we say that a pleading or a portion thereof is "dismissed" and refer to a "motion to strike" as a "motion to dismiss." This is incorrect. Pleadings are stricken in whole or in part; only actions are dismissed. The dismissal of a complaint cannot be equated with the striking of a party's pleading and this distinction is a substantive one which has long been recognized in Illinois. Bejda v. SGL Industries, Inc., 82 Ill. 2d 322, 328, 412 N.E.2d 464 (1980).

A cause of action should not be dismissed on the pleadings

unless it clearly appears that no set of facts could be proven which would entitle the pleader to relief. Tedrick v. Community Resources Center, Inc., 235 Ill. 2d 155, 161, 920 N.E.2d 220, 223 (2009); Pooh-Bah Enterprises, Inc. v. County of Cook, 232 Ill. 2d 463, 473, 905 N.E.2d 781, 788 (2009); Canel v. Topinka, 212 Ill. 2d 311, 818 N.E.2d 311 (2004); Illinois Graphics Co. v. Nickum, 159 Ill. 2d 469, 639 N.E.2d 1282 (1994); Ogle v. Fuiten, 102 Ill. 2d 356, 466 N.E.2d 224 (1984); Fitzgerald v. Chicago Title & Trust Co., 72 Ill. 2d 179, 380 N.E.2d 790 (1978). For this reason, as a general rule, leave to amend is freely granted when a pleading has been stricken.

2. Motions for Judgment on the Pleadings

a. Nature of the motion

Judgment on the Pleadings (JOP) serves a purpose different than that of summary judgment. There is no cognizable procedure known as "summary judgment on the pleadings," a phrase which has been a recurring source of confusion. Christensen v. Wick Building Systems, Inc., 64 Ill. App. 3d 908, 912, 381 N.E.2d 1189, 1192 (3rd Dist. 1978). Summary judgment is a fact motion, whereas, JOP is a pleading motion. In the simple case where there is only a complaint, or a complaint and an answer, and the defendant moves for JOP, the issue raised is whether the complaint states a cause of action. Reynolds v. Jimmy John's Enterprises, LLC, 2013 IL App (4th) 120139, ¶ 52, 988 N.E.2d 984. Where the plaintiff moves for JOP, the issue posed is whether the facts alleged in the answer constitute a legally sufficient defense. Where the plaintiff files a reply raising matters in avoidance of

the affirmative defenses pled in the answer, the defendant may test the sufficiency of the reply by moving for JOP. Village of Worth v. Hahn, 206 Ill. App. 3d 987, 989, 565 N.E.2d 166, 168 (1st Dist. 1990); Simmons v. Columbus Venetian Stevens Buildings, Inc., 20 Ill. App. 2d 1, 155 N.E.2d 372 (1st Dist. 1958).

Do not confuse a JOP with a judgment by default. A JOP is a judgment on the issues raised by the pleadings. Where a defendant has not answered, no legal issue has been posed which can be disposed of by JOP. Failure to answer should result in a default, not in a JOP. Columbus Savings and Loan Association v. Century Title Co., 45 Ill. App. 3d 550, 359 N.E.2d 1151 (2nd Dist. 1977).

b. Standards for deciding the motion

The Court must determine if the pleadings present a material issue of fact. Hope Clinic for Women, Ltd. v. Flores, 2013 IL 112673, ¶ 32, 991 N.E.2d 745. If the pleadings present a material issue, the motion must be denied, since a motion for JOP does not test whether there is any evidence to support the factual allegations in the pleading. People ex. rel. Shapo v. Agora Syndicate, Inc., 323 Ill. App. 3d 543, 752 N.E.2d 1186 (1st Dist. 2001); Pfeil v. Weerde, 152 Ill. App. 3d 759, 504 N.E.2d 988 (2nd Dist. 1987). Factual allegations in a pleading are tested by a motion for summary judgment or by trial.

A motion for JOP concedes the truth of the well pled facts in the non-movant's pleadings (Walker v. State Bd. of Elections, 65 Ill. 2d 543, 553, 359 N.E.2d 113, 117 (1976)); concedes all fair inferences to be drawn therefrom (Pekin Insurance Co. v. Wilson,

237 Ill. 2d 446, 455, 930 N.E.2d 1011, 1016 (2010)); and concedes for the purpose of the motion that the movant's own allegations are false insofar as they have been contradicted by the non-movant's pleadings. Where the well pled allegations are susceptible of more than one reasonable interpretation, the entry of JOP is improper. People ex rel. Shapo v. Agora Syndicate, Inc., 323 Ill. App. 3d 543, 550, 752 N.E.2d 1186, 1191 (1st Dist. 2001). Because of these rules, cross motions for JOP must be considered separately, since if any allegations in any pleading are denied, then one set of facts will be taken as true for one motion and another set of facts will be taken as true for the other. It also follows, that one party cannot be granted a JOP on another party's motion. If the court concludes that the party opposing a motion for JOP is himself entitled to a JOP, the court should invite the filing of a motion seeking that relief.

3. Motions to make definite and certain

Section 2-615(a) provides that a party may move to have a pleading "made more definite and certain in a specified particular." 735 ILCS 5/2-615(a) (West 2014). The function of this motion may also be fulfilled by demanding a bill of particulars under section 2-607 (735 ILCS 5/2-607(a) (West 2014)) or through discovery. Section 2-607(a) requires the party requesting the bill of particulars to "point out specifically the defects complained of or the details desired" and to file a copy of the request. The non-moving party may furnish the bill or move to have the request denied or modified. If a party fails to respond to a request for a bill of particulars, the requesting party may move to strike his or her pleadings. It should also be noted that section 2-612(a) (735 ILCS

5/2-612(a) (West 2014)) authorizes the court on its own motion to order new pleadings prepared when the existing pleadings fail to define the issues sufficiently.

4. Motions relating to joinder of parties

Motions to add necessary parties or to dismiss improperly joined parties are made pursuant to section 2-615. But, joinder problems are not grounds for dismissing an entire action or striking an entire complaint. The proper remedy is to order the dismissal of an improper party or to order the joinder of a missing party. See 735 ILCS 5/2-407 (West 2014); BHI Corp. v. Litgen Concrete Cutting & Coring Co., 346 Ill. App. 3d 300, 804 N.E.3d 707 (1st Dist. 2004); Midwest Bank & Trust Co v. Village of Lakewood, 113 Ill. App. 3d 962, 447 N.E.2d 1358 (2nd Dist. 1983).

B. Motions to Strike Pleadings as Substantially Insufficient at Law

Motions challenging the legal sufficiency of a pleading are an. important aspect of Section 2-615. The most common of these is the motion to strike a complaint for failure to state a cause of action. However, one wishing to challenge the legal sufficiency of any other pleading should also proceed by way of a section 2-615 motion. (E.g. Affidavits submitted in support of or in opposition to a motion.) The rules applicable to these types of motions as set forth hereinafter apply equally to motions for JOP.

1. What may be considered

Only the legal sufficiency of the challenged pleading and the allegations of fact contained therein may be considered on a motion to strike. Canel v. Topinka, 212 Ill. 2d 311, 818 N.E.2d 311 (2004); Illinois Graphics Co. v. Nickum, 159 Ill. 2d 469, 639 N.E.2d 1282 (1994). A properly filed bill of particulars is a part of the complaint which it particularizes, as are exhibits attached to and incorporated into a pleading. Hence, these items may be considered on a motion to strike. Green v. Rogers, 234 Ill.2d 478, 491, 917 N.E.2d 450, 459 (2009) (The court must consider "[a]ll facts apparent from the face of the pleadings, including the exhibits attached thereto."). As indicated, all exhibits attached to and incorporated into a pleading are part of the pleading and the facts stated in the exhibits are considered the same as if they had been alleged in the pleading itself. Factual matters contained within an exhibit which conflict with factual matter contained within the pleading to which the exhibit is attached negate the allegations within the pleading. Put another way, factual allegations within an exhibit control over contrary factual allegations within the pleading. Although a motion to strike admits all facts well-pleaded as well as all reasonable inferences therefrom which are favorable to the pleader, such a motion does not admit allegations within the body of a pleading which are in conflict with the facts contained within an exhibit to that pleading. Steenes v. MAC Property Management, LLC, 2014 IL App (1st) 120719, ¶ 16, 16 N.E.3d 243; Outboard Marine Corporation v. James Chisholm & Sons, Inc., 133 Ill. App. 3d 238, 478 N.E.2d 651 (2nd Dist. 1985).

The grounds alleged in a motion to strike or dismiss must be directed to facts alleged in the pleading under attack. Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors, 2012

IL 112479, ¶¶ 15-16, 973 N.E.2d 880; Illinois Graphics Co. v. Nickum, 159 Ill. 2d 469, 639 N.E.2d 1282 (1994). A movant may not allege any facts dehors the face of the challenged pleading. Movants may not support their motions with affidavits (Khan v. Deutsche Bank AG, 2012 IL 112219, ¶ 54, 978 N.E.2d 1020); discovery material, not even the pleader's deposition testimony (Hartmann Realtors v. Biffar, 2014 IL App (5th) 130543, ¶ 14, 13 N.E.3d 350; Reynolds v. Jimmy John's Enterprises, LLC, 2013 IL App (4th) 120139, ¶ 42, 988 N.E.2d 984); or any other form of evidentiary material or new matter. So also, the pleader cannot oppose the motion by reference to any factual matter that is not set forth in the challenged pleading. Inland v. Christoph, 107 Ill. App. 3d 183, 437 N.E.2d 658 (1st Dist. 1981). The only means by which the pleader may interject facts which are not contained in the challenged pleading is by means of an amendment pursuant to section 2-616. 735 ILCS 5/2-616 (West 2014).

An amended pleading which is complete in itself and does not refer to or adopt a prior pleading completely supersedes the prior pleading and the prior pleading is deemed abandoned and withdrawn. Bonhomme v. St. James, 2012 IL 112393, ¶ 17, 970 N.E.2d 1. The original pleading cannot be relied upon by either party in support of or in opposition to a motion to strike the amended pleading. Barnett v. Zion Park Dist., 171 Ill. 2d 378, 384, 665 N.E.2d 808, 811 (1996). If, however, the original pleading was verified, its allegations of fact are binding judicial admissions on the part of the pleader and unless it is established that they were the product of mistake or inadvertence they may be relied upon to support a motion to strike or dismiss the amended or subsequent pleading. Victor Township Drainage District 1 v.

Lundeen Family Farm Partnership, 2014 IL App (2d) 140009, ¶ 49, 19 N.E.3d 652; Nissan Motor Acceptance Corp. v. Abbas Holding I, Inc., 2012 IL App (1st) 111296, ¶ 19, 976 N.E.2d 1076; Arpac Corp. v. Murray, 226 Ill. App. 3d 65, 589 N.E.2d 640 (1st Dist. 1992).

The provision in section 2-615(c) which provides that "substantial defects in prior pleadings may be considered" is not inconsistent with the foregoing. "Prior pleadings" refers to pleadings which are still on file and prior in sequence of issue formation. Decatur Memorial Hospital v. West Lincoln Township, Logan County, 38 Ill. App. 3d 356, 347 N.E.2d 804 (4th Dist. 1976). The complaint is prior to the answer, and both are prior to the reply. Thus, when a defendant moves to strike a reply, he also puts in issue the sufficiency of his own answer and of the complaint. Reconstruction Finance Corp. v. Pines, 295 Ill. App. 262, 14 N.E.2d 886 (1st Dist. 1938). This provision codifies and simplifies the common law practice of "carry back demurs." See Joint Committee Comments, and Jenner & Tone, Historical and Practice Notes, Ch. 110, Sec. 2-615 S.H.A.

On occasion, trial judges are aware of evidentiary material which makes it clear that the pleading under attack by means of a motion to strike cannot be factually supported and the movant is entitled to judgment as a matter of law. In such a case, the proper motion is a motion for summary judgment or a motion for involuntary dismissal. Trial judges must resist the expediency of merely granting the motion to strike and dismissing the action. The reporters are full of cases where a motion to strike was granted and the action dismissed only to have the judgment reversed on appeal because the court relied upon material that was not

contained in the challenged pleading, even though it seems certain that on remand that same evidentiary material would support a successful motion for summary judgment. See Cain v. American National Bank & Trust Company of Chicago, 26 Ill. App. 3d 574, 325 N.E.2d 799 (1st Dist. 1975); Iverson v. Dunham, 18 Ill. App. 2d 404, 152 N.E.2d 615 (1st Dist. 1958). The distinction is not a mere technicality; labeling the motion as a motion to strike may induce the non-movant to forgo the submission of affidavits or other evidentiary material which he would have submitted if the motion had been properly labeled as one for summary judgment or for involuntary dismissal.

2. Standards to be applied

a. To the motion

The rules that all motions objecting to pleadings "shall point out specifically the defect complained of" (735 ILCS 5/2-615(a) (West 2014)) and that motions which charge that a pleading is substantially insufficient in law "must specify wherein the pleading ... is insufficient" (735 ILCS 5/2-615(b) (West 2014)) are grounded in principles of sound judicial administration which obviate the need for the court to search for alleged pleading defects. Segall v. Berkson, 139 Ill. App. 3d 325, 487 N.E.2d 752 (4th Dist. 1985). Another purpose served by these specificity requirements is to inform the non-movant of the movant's contentions so that the defect can be cured by amendment or so that the non-movant can intelligently argue to the motion. See Smith v. Chemical Personnel Search, Inc., 215 Ill. App. 3d 1078, 1084, 576 N.E.2d 340, 345 (1st Dist. 1991).

b. To the pleading attacked

A motion to strike or dismiss concedes that all well-pleaded facts in the pleading under attack are true (Doe-3 v. McLean County Unit District No. 5, 2012 IL 112479, ¶ 16, 973 N.E.2d 880), but only for the purposes of the motion. Such a concession is no longer binding after the motion is denied. O'Fallon v Ring, 37 Ill. 2d 84, 224 N.E.2d 782 (1968). Only the well-pleaded facts are taken as true; conclusions of law or conclusions of fact unsupported by allegations of specific facts upon which such conclusions rest are not taken as true and are not to be considered in ruling on the motion. Jarvis v. South Oak Dodge, Inc., 201 Ill. 2d 81, 86, 773 N.E.2d 641, 644 (2002). The ancient difficulty in distinguishing "conclusions" from "facts" and "facts" from "evidence" has never been solved, and it is difficult to make any helpful generalizations. One useful approach is to ask what further detail the pleader could allege without the benefit of discovery. Conversely, the same allegation might in one context be deemed to be one of ultimate fact, while in another, where from a pragmatic viewpoint some of the words do not give sufficient information to an opponent of the character of the evidence to be introduced or of the issues to be tried, they are conclusions. The distinction between "fact" and "conclusion" can only be determined from a careful consideration of the practical tasks of administering a particular piece of litigation. People v. $1,124,905 U.S. Currency & One 1988 Chevrolet Astro Van, 177 Ill. 2d 314, 685 N.E.2d 1370, 1382 (1997).

Once the court has identified all of the well-pled facts, it must then draw all reasonable inferences therefrom which are

favorable to the pleader. Doe-3 v. McLean County Unit Dist. No. 5, 2012 IL 112479, ¶ 16, 973 N.E.2d 880,. The court must consider all possible conclusions supported by the well-pled facts regardless of whether the pleader sets forth the conclusion and even if the pleader has set forth the wrong conclusion. A motion to dismiss should not be granted so long as a good cause of action has been stated even if that cause of action is not the one that the plaintiff intended to assert. Illinois Graphics Co. v. Nickum, 159 Ill. 2d 469, 639 N.E.2d 1282 (1994). Hence, where the well-pled facts in a complaint support a negligence theory of liability, a motion to strike the complaint must be denied even though the plaintiff did not argue that the defendant was negligent, but incorrectly argued that the defendant was strictly liable for the harm caused. In re Estate of DiMatteo, 2013 IL App (1st) 122948, ¶ 58, 995 N.E.2d 420. The same rule applies to conclusions with factual components. Majewski v. Chicago Park Dist., 177 Ill. App. 3d 337, 341, 532 N.E.2d 409, 411 (1988).

Pleadings must be liberally construed with a view toward doing substantial justice between the parties pursuant to the mandate contained in Section 2-603(c) of the Code and this rule is applicable to motions to strike. Bowie v. Evanston Community Consolidated School Dist. 65, 168 Ill. App. 3d 101, 105, 522 N.E.2d 669, 672 (1st Dist. 1988). This rule, however, has never been interpreted so as to authorize notice pleading. Porter v. Decatur Memorial Hospital, 227 Ill. 2d 343, 360 n.1, 882 N.E.2d 583, 593 (2008).

No pleading is bad in substance if it sets forth sufficient information to reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet. 735 ILCS

5/2-612(b) (West 2014). It has been held that if the trial court is adequately informed of the issues by the pleadings, the parties are likewise so informed. Senese v. City of Chicago, 88 Ill. App. 2d 178, 182, 232 N.E.2d 251, 253 (1st Dist. 1967).

A complaint should not be stricken and the action dismissed unless the court is prepared to conclude that there is no possible set of facts in support of the allegations in the complaint that would entitle the plaintiff to relief. Marshall v. Burger King Corp., 222 Ill. 2d 422, 429, 856 N.E.2d 1048, 1053 (2006); see also Tedrick v. Community Resource Center, Inc., 235 Ill. 2d 155, 161, 920 N.E.2d 220, 223 (2009). There need be only a possibility of recovery (Carter v. New Trier East High School, 272 Ill. App. 3d 551, 555, 650 N.E.2d 657, 660 (1st Dist. 1995); the court may not weigh the probabilities of a recovery on a motion to strike or dismiss. Neurauter v. Reiner, 117 Ill. App. 2d 141, 146, 254 N.E.2d 66, 69 (1st Dist. 1969).

3. When it may be raised

Illinois Supreme Court Rule 182(c) (eff. Jan. 1, 1967) provides that motions objecting to pleadings other than the complaint must be made within 21 days of the last day for filing of the pleading. Section 2-612(c) of the Code says that without exception, all defects in pleadings must be raised in the trial court. 735 ILCS 5/2-612(c) (West 2014).

With regard to the filing of a 2-615 motion attacking a complaint, Illinois Supreme Court Rule 181 (eff. Jan. 4, 2013) is not at all specific. The rule does provide that when service of a complaint is by summons, an answer or appropriate motion must

be filed within 30 days. The rule does not specifically state that all motions attacking the complaint must be filed within the 30 day period. It is not at all clear as to at what point in a proceeding a defendant will be deemed to have waived his right to bring a motion attacking the sufficiency of a complaint. Section 2-615 places no specific time limit upon the filing of the motion. However, given the fact that the best measure of a complaint's sufficiency is whether the defendant is able to answer it (People ex rel. Fahner v. Carriage Way West, Inc., 88 Ill. 2d 300, 308, 430 N.E.2d 1005, 1008 (1981)), it seems to follow that by answering a complaint a defendant impliedly acknowledges its sufficiency and waives any objections to the complaint other than its total failure to state a recognized cause of action. Several courts of review have held that where a complaint substantially, but imperfectly, states a cause of action, the defendant waives any defect in the complaint by answering it and proceeding to trial. Gulley v. Noy, 316 Ill. App. 3d 861, 865, 737 N.E.2d 1115, 1118 (4th Dist. 2000); Meadows v. State Farm Mutual Automobile Insurance Co., 237 Ill. App. 3d 240, 253, 603 N.E.2d 1314, 1322 (5th Dist. 1992); but see Illinois Housing v. Sjostrom, 105 Ill. App. 3d 247, 433 N.E.2d 1350 (2nd Dist. 1982).

While it appears that defects in a complaint containing an incomplete or otherwise insufficient statement of a good cause of action may be waived, a failure to state a recognized cause of action is such a fundamental defect that it cannot be waived and it may be raised at any time, by any means, even on the court's own motion. People v. Vincent, 226 Ill. 2d 1, 8-9, 871 N.E.2d 17, 23 (2007); Adcock v. Brakegate, Ltd., 164 Ill. 2d 54, 61, 645 N.E.2d 888, 893 (1994); Rainey v. City of Salem, 209 Ill. App. 3d 898,

904, 568 N.E.2d 463, 467 (5th Dist. 1991).

C. Leave to Amend

A ruling on a motion to strike a pleading which does not declare the rights or title of the parties is not a final and appealable adjudication. Hernandez v. Pritikin, 2012 IL 113054, ¶ 47, 981 N.E.2d 981. Under the provisions of section 2-616(a) "amendments may be allowed on just and reasonable terms" so as to give the plaintiff a reasonable opportunity to state a cause of action. 735 ILCS 5/2-616(a) (West 2014).

An amendment filed without first obtaining leave of court is a nullity. Unauthorized amendments are disregarded on review. Greene v. Helis, 252 Ill. App. 3d 957, 960, 625 N.E.2d 162, 165 (1st Dist. 1993); McGinnisv. Abrams, 141 Ill. App. 3d 417,490 N.E.2d 115 (4th Dist. 1986); but see Fischerv. Senior Living Properties, 329 Ill. App. 3d 551, 771 N.E.2d 505 (4th Dist. 2002) (holding that "the filing of an amended complaint where the judge has not signed the order granting leave is not per se inadequate."). Before filing an amended pleading, the pleader must bring a motion requesting leave to amend. While the granting of leave to amend is discretionary, any doubts regarding the right to amend should be resolved in favor of allowing the amendment. Bangaly v. Baggiani, 2014 IL App (1st) 123760, ¶ 200, 20 N.E.3d 42. The factors to be considered in determining whether or not to permit an amendment to the pleadings are whether: (1) the proposed amendment would cure a defect in the pleadings; (2) the proposed amendment would prejudice or surprise other parties; (3) the proposed amendment is timely; and (4) there were previous

opportunities to amend the pleading. Clemons v. Mechanical Devices Co., 202 Ill. 2d 344, 355-56, 781 N.E.2d 1072, 1080 (2002). Leave to amend should be granted unless it is apparent that no cause of action can be stated even after amendment. McDonald v. Lipov, 2014 IL App (2d) 130401, ¶ 49, 13 N.E.3d 179. Leave to amend may be sought at any time before final judgment. 735 ILCS 5/2-616(a) (West 2014). There is no final judgment when a complaint is stricken until an order is entered explicitly dismissing the action. Hernandez v. Pritikin, 2012 IL 113054, ¶ 46, 981 N.E.2d 981 (no final judgment where the trial court granted plaintiffs leave to amend complaint; the complaint was not dismissed with prejudice). In seeking leave to amend, the pleader should either present the court with a copy of the proposed amended pleading or give the court a specific indication of its proposed contents. Denial of leave to amend is not error if the court is not sufficiently apprised of the proposed amendment or if the proposed amendment does not cure the defect in the stricken pleading. See Teter v. Clemons, 112 Ill. 2d 252, 261, 492 N.E.2d 1340, 1344 (1986); Pirrello v. Maryville Acad., Inc., 2014 IL App (1st) 133964, ¶ 19, 19 N.E.3d 1261.

If in striking a complaint the court is of a belief that the pleader may be able to cure the defects in the pleading by amendment, a helpful practice is to impose a time limit for the filing of an amended pleading in the order striking the complaint. Smith v. Central Illinois Regional Airport, 207 Ill. 2d 578, 588, 802 N.E.2d 250, 256 (2003). When the time set for the filing of the amended pleading has passed and the plaintiff has failed to file the amended complaint or has taken other action demonstrating that no amended pleading is forthcoming, the plaintiff will be

deemed to have elected to stand on the stricken pleading. Jackson v. Victory Memorial Hospital, 387 Ill. App. 3d 342, 352, 900 N.E.2d 309, 318 (2008). If a complaint is stricken and leave is granted for the filing of an amended pleading and none is so filed, the issue arises as to the appropriate order disposing of the case. There is some authority for the proposition that if a plaintiff fails to amend within the time provided, the court may enter an order dismissing the cause (with prejudice). Sander v. Dow Chemical Co., 166 Ill. 2d 48, 71, 651 N.E.2d 1071, 1082 (1995). But, the weight of authority suggests that, absent some affirmative indication on the part of the plaintiff of an election to stand on the stricken pleading, the appropriate order in such a circumstance is a dismissal for want of prosecution. O'Reilly v. Gerber, 95 Ill. App. 3d 947, 420 N.E.2d 425 (1st Dist. 1981); Kraus v. Metropolitan, 146 Ill. App. 3d 210, 496 N.E.2d 1080 (1st Dist. 1986).

D. Problems of Waiver and Appeal

If a motion to strike is denied, the movant may plead and still preserve his claim of error in the denial of the motion. People v. Vincent, 226 Ill. 2d 1, 9 (2007) ("as in any civil action, if the facts alleged cannot state a legal basis for the relief requested *** the pleading may be challenged at any time, even on appeal"). Some pleading defects may be lost to the harmless error rule, but the movant may contest the facts by answer or reply without losing his right to challenge the pleader's legal theory. The trial judge has discretion in permitting more than one motion to strike by the same side in the same case. Inland Real Estate Corp. v. Lyons Savings & Loan, 153 Ill. App. 3d 848, 853, 506 N.E.2d 652, 656 (2nd Dist. 1987).

On the other hand, when a pleading is stricken and the pleader amends, he waives the right to challenge the order striking the original pleading. Gaylor v. Campion, Curran, Rausch, Gummerson & Dunlop, P.C., 2012 IL App (2d) 110718, ¶ 35, 980 N.E.2d 215. If the pleader wishes to challenge the order striking the pleading, he may elect to stand on the stricken pleading and suffer judgment to be entered against him. The appeal must "stand or fall on the contents" of the stricken pleading. Vilardo v. Barrington Community School District 220, 406 Ill. App. 3d 713, 719, 941 N.E.2d 257 (2010).

III. SUMMARY JUDGMENT PROCEEDINGS

A. Section 2-1005: Summary Judgments

"§ 2-1005. Summary judgments. (a) For plaintiff. Any time after the opposite party has appeared or after the time within which he or she is required to appear has expired, a plaintiff may move with or without supporting affidavits for a summary judgment in his or her favor for all or any part of the relief sought.

(b) For defendant. A defendant may, at any time, move with or without supporting affidavits for a summary judgment in his or her favor as to all or any part of the relief sought against him or her.

(c) Procedure. The opposite party may prior to or at the time of the hearing on the motion file counteraffidavits. The judgment sought shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Summary determination of major issues. If the court determines that there is no genuine issue of material fact as to one or more of the major issues in the case, but that substantial controversy exists with respect to other major issues, or if a party moves for a summary determination of one or more, but less than all, of the major issues in the case, and the court finds that there is no genuine issue of material fact as to that issue or those issues, the court shall thereupon draw an order specifying the major issue or issues that appear without substantial controversy, and directing such further proceedings upon the remaining undetermined

issues as are just. Upon the trial of the case, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits. The form and contents of and procedure relating to affidavits under this Section shall be as provided by rule.

(f) Affidavits made in bad faith. If it appears to the satisfaction of the court at any time that any affidavit presented pursuant to this Section is presented in bad faith or solely for the purpose of delay, the court shall without delay order the party employing it to pay to the other party the amount of the reasonable expenses which the filing of the affidavit caused him or her to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(g) Amendment of pleading. Before or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms." 735 ILCS 5/2-1005 (West 2014).

B. Nature and Purpose of the Motion

1. Generally

As was noted by our Supreme Court in Allen v. Meyer, 14 Ill. 2d 284, 292, 152 N.E.2d 576, 580 (1958):

> "Summary judgment procedure is an important tool in the administration of justice. Its use in a proper case, wherein is presented no genuine issue as to any material fact, is to be encouraged. The benefits of summary judgment in a proper case inure not only to the litigants, in the saving of time and expenses, but to the community in avoiding congestion of trial calendars and the expenses of unnecessary trials."

Summary judgment is a fact motion the purpose of which is to determine the existence or absence of a genuine issue as to any material fact. Illinois State Bar Association Mutual Insurance Co. v. Law Office of Tuzzolino & Terpinas, 2015 IL 117096, ¶ 14, 27 N.E.3d 67. But, it cannot be used to resolve an issue of fact when one is found to exist. Illinois State Bar Association Mutual Insurance Co. v. Law Office of Tuzzolino & Terpinas, 2015 IL 117096, ¶ 14, 27 N.E.3d 67; Forest Preserve District of Du Page County v. First National Bank of Franklin Park, 2011 IL 110759, ¶ 62, 961 N.E.2d 775.

Summary judgment is a drastic method of disposing of a case, and it should not be employed unless the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the right of the moving party to judgment as a matter of law is free from doubt. Bruns v. City of Centralia, 2014 IL 116998, ¶ 12, 21 N.E.3d 684; 735 ILCS 5/2-1005(c) (West 2014).

Although section 2-1005, sub-sections (a) and (b) each state that a party may move for summary judgment "with or without supporting affidavits," if a motion for summary judgment is not supported by evidentiary material which if uncontradicted would entitle the movant to judgment as a matter of law, the parties are in no different position then when they joined in issue and the motion will be denied. South Side Trust & Savings Bank of Peoria v. Mitsubishi Heavy Industries, Ltd., 401 Ill. App. 3d 424, 435, 927 N.E.2d 179, 190 (1st Dist. 2010); Cato v. Thompson, 83 Ill. App. 3d 321, 403 N.E.2d 1239 (2nd Dist. 1980).

The resolution of a motion for summary judgment is not a

matter committed to the sound discretion of the trial court. Either the movant is entitled to the judgment sought as a matter of law or the motion must be denied. Bruns v. City of Centralia, 2014 IL 116998, ¶ 13, 21 N.E.3d 684 (summary judgment rulings are reviewed *de novo*). To hold otherwise, would be contrary to the provisions of section 2-1005 and could in some circumstances be an infringement upon a party's constitutional right to trial by jury. Yusuf v. Village of Villa Park, 120 Ill. App. 3d 533, 458 N.E.2d 575 (2nd Dist. 1983), distinguished on other grounds by Galik v. County of Lake, 335 Ill. App. 3d 325, 781 N.E.2d 522 (2nd Dist. 2002); Perez v. Sunbelt Rentals, Inc., 2012 IL App (2d) 110382, ¶ 8, 968 N.E.2d 1082; Kurczak v. Cornwell, 359 Ill. App. 3d 1051, 1060, 835 N.E.2d 452, 461 (2nd Dist. 2005) (questions of fact are for the jury to resolve).

2. Distinguishing summary judgment motions from pleading motions

A motion for summary judgment is not a pleading motion it is a fact motion. Pleading motions are brought pursuant to section 2-615. Sections 2-1005 and 2-615 provide for two entirely distinct procedures. A pleading motion brought pursuant to section 2-615 places in issue only the sufficiency of the pleading under attack. Such a motion by its very nature does not question the existence of facts to support the allegations in the pleading. In that regard, the motion concedes the truth of all well pled facts contained within the pleading (K. Miller Construction. Co. v. McGinnis, 238 Ill. 2d 284, 291, 938 N.E.2d 471, 477 (2010)) and as such, the non-movant may rely upon the factual allegations in the pleading to defeat the motion. A motion for summary judgment, on the other

hand, does not question the sufficiency of any pleading. Rather, the motion assumes that the pleadings are sufficient to put the parties at issue (Mydlach v. DaimlerChrysler Corp., 226 Ill. 2d 307, 315, 875 N.E.2d 1047, 1055 (2007)) and seeks to pierce the pleadings and raise the issue of whether evidence exists to support the allegations of fact contained therein. Hence, unlike a pleading motion, in a summary judgment proceeding, the non-movant cannot rely upon the factual allegations in his or her pleading to defeat the motion, nor can the movant rely upon his or her pleading to support the motion. Carruthers v. Christopher, 57 Ill. 2d 376, 313 N.E.2d 457 (1974). The distinction between a pleading motion pursuant to Section 2-615 and a fact motion pursuant to Section 2-1005 was the subject of the Supreme Court's decision in Janes, supra., wherein the court severely criticized the failure of both the parties and the trial court for neglecting to observe and honor the distinctions in proceeding to argue and decide a motion which combined both pleading and factual issues.

3. Motions for partial summary judgment

Sections 2-1005(a)-(c) provide the statutory authorization for the entry of a partial summary judgment for any part, but less than all, of the relief sought by a party or as to the issue of liability alone. Sections 2-1005(a) and (b) clearly authorize the entry of partial summary judgment on one or more, but less than all, of the counts of a multi-count complaint. See Chicago Transit Authority v. Clear Channel Outdoor, Inc., 366 Ill. App. 3d 315, 323, 851 N.E.2d 171, 177 (1st Dist. 2006); Lawrence & Allen, Inc. v. Cambridge Human Resources Group, Inc., 292 Ill. App. 3d 131, 136-37, 685 N.E.2d 434, 440 (2nd Dist. 1997). If a partial

summary judgment is entered on the issue of liability only under Section 2-1005(c), the order is interlocutory in nature and may be modified or vacated at any time before a final judgment is entered. Hernandez v. Pritikin, 2012 IL 113054, ¶ 42, 981 N.E.2d 981.

4. Summary determination of major issues

Section 2-1005(d) permits the court to use the summary judgment procedure to enter findings as to uncontroverted facts and to make those findings of fact binding upon the parties upon the trial of the cause. Such factual findings may be entered under this section of the Code of Civil Procedure even though they do not result in the entitlement of a party to either a complete or partial judgment. The effect of Section 2-1005(d) which was adopted by the legislature effective September 14, 1985, was to render the decision in Schutzenhofer v. Granite City Steel, 93 Ill. 2d 208, 443 N.E.2d 563 (1982), no longer applicable to summary judgment proceedings. Relief under this section may be granted upon motion of a party or by the court on its own initiative when ruling on a motion for either full or partial summary judgment.

C. When May It Be Raised

1. By plaintiff

Section 2-1005(a) provides that a plaintiff may move for a summary judgment for all or any of the relief sought at any time after the non-movant has appeared or at any time within which the non-movant is required to appear has expired.

2. By defendant

Section 2-1005(b) provides that a defendant may move for a summary judgment for all or any of the relief sought against him or her at anytime. This section of the Code of Civil Procedure has been interpreted to mean that a defendant may file a motion for summary judgment even before the filing of an answer. By filing a motion for summary judgment before filing an answer, the defendant does not admit the truth of all well pleaded facts contained within the complaint, but does, for the purposes of the motion, admit the well pleaded facts in the complaint that the defendant leaves uncontradicted by evidentiary material submitted in support of the motion. Bank of Waukegan v. Epilepsy Foundation, 163 Ill. App. 3d 901, 516 N.E.2d 1337 (2nd Dist. 1987); Kempes v. Dunlop Tire & Rubber Corp., 192 Ill. App. 3d 209, 217, 548 N.E.2d 644, 648 (1st Dist. 1989); Metropolitan v. Pontarelli, supra.

An argument is often made that a motion for summary judgment is premature when it is brought early on in litigation and before discovery is completed. Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013) specifies the procedure to be followed when a party requires additional discovery prior to responding to a motion for summary judgment. (See § III(D)(10), infra.) If a non-movant fails to comply with Rule 191(b), he will not be heard to complain of an inability to conduct discovery before the summary judgment motion is heard. Giannoble v. P & M Heating & Air Conditioning, Inc., 233 Ill. App. 3d 1051, 1064, 599 N.E.2d 1183, 1192 (1st Dist. 1992); Hayward v. C.H. Robinson Co., 2014 IL App (3d) 130530, ¶ 46, 24 N.E.3d 48. An interesting sub-issue arises, when a non-

movant to a summary judgment motion argues that discovery from the movant is necessary prior to his being required to respond to the motion. If the discovery requested is central to the issues raised in the summary judgment motion, then it may be an abuse of discretion for a trial court to refuse to stay the summary judgment proceedings pending movant's compliance with the requested discovery under the authority granted to the court pursuant to Supreme Court Rule 219(c)(i) even absent the non-movant's compliance with the provisions of Rule 191(b). Hanes v. Orr, 53 Ill. App. 3d 72, 368 N.E.2d 584 (1st Dist. 1977); but see Hayward v. C.H. Robinson Co., 2014 IL App (3d) 130530, ¶ 46, 24 N.E.3d 48. Relief under Rule219 may not be available if the discovery request in itself was not timely. Certified Grocers of Illinois, Inc. v. Hodgkins Properties, Inc., 145 Ill. App. 3d 406, 495 N.E.2d 1080 (1st Dist. 1986). If the discovery requested is not essential to the determination of the issues raised by the motion for summary judgment, then relief under Rule 219(c)(i) ought not be granted and the non-movant must comply with the provisions of Rule 191(b). Kittleson v. United Parcel Services, Inc., 162 Ill. App. 3d 966, 516 N.E.2d 350 (1st Dist. 1987).

3. Supreme Court Rule 191(a)

a. The Rule

> "(a) Requirements. Motions for summary judgment under section 2-1005 of the Code of Civil Procedure and motions for involuntary dismissal under section 2-619 of the Code of Civil Procedure must be filed before the last date, if any, set by the trial court for the filing of dispositive motions. * * *." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

b. Application

Although section 2-1005, sub-sections (a) and (b) purport to fix the time when plaintiffs and defendants may bring their motions for summary judgment, Rule 191(a) provides that the trial court may fix an outside date for the filing of such motions. To the extent that one might argue that section 2-1005, sub-sections (a) and (b) are in conflict with the provisions of Rule 191(a) on this issue, then Rule 191(a) must control. In re S.G., 175 Ill. 2d 471, 487, 677 N.E.2d 920, 928 (1997); People v. Cox, 82 Ill. 2d 268, 274, 412 N.E.2d 541 (1980).

Several circuit courts have provided by circuit court rule for the outside date upon which a motion for summary judgment may be filed. Examples of such rules are as follows:

The circuit court of Cook County:

Motions for summary judgment must be "filed and noticed for hearing not later than 45 days before the trial date, except by prior leave of court and for good cause shown." Cook County circuit court rule 2.1(f) (eff. June 15, 1988).

16th Judicial Circuit:

Motions for summary judgment in Law Division cases "shall be filed and brought to argument before the judge no later than 90 days before the scheduled trial date, except by prior leave of court and for good cause shown." Sixteenth Judicial Circuit Rule 6.04(a) (eff. May 5, 2008).

18th Judicial Circuit:

Motions for summary judgment in civil proceedings "shall be filed no later than 30 days before the scheduled trial date, except by prior leave of court and for good cause shown." Eighteenth Judicial Circuit Rule 6.04(a).

19th Judicial Circuit:

"In any cause of action, the court may designate a date by which all motions are to be on file. A motion may not be filed subsequent to that date except by leave of court." Nineteenth Judicial Circuit Rule 2.03(a) (eff. Feb. 11, 2013).

D. What May Be Considered

1. Generally

Section 2-1005(c) by its very terms contemplates that the court will consider the pleadings, depositions, admissions on file and affidavits in resolving a motion for summary judgment. Section 2-1005(e) provides that the form and content of affidavits submitted in support of or in opposition to a motion for summary judgment shall be as provided by rule, and the Supreme Court has so provided in Rule 191(a). While section 2-1005(e) speaks only to affidavits being in the form and content as provided by rule and Rule 191(a) itself speaks only to the form and content of affidavits, it is clear that Rule 191(a) is applicable to all pleadings and evidentiary material submitted in support of or in opposition to a motion for summary judgment. See Alpert v. Bertsch, 235 Ill. App. 3d 452, 459, 601 N.E.2d 1031, 1035 (1st Dist. 1992) (as to

pleadings); Kavales v. City of Berwyn, 305 Ill. App. 3d 536, 548, 712 N.E.2d 842, 850 (1st Dist. 1999) (as to depositions).

2. Pleadings

Generally, on a motion for summary judgment, the court will consider the pleadings for the limited purpose of discerning what issues are raised by the controversy. Fryison v. McGee, 106 Ill. App. 3d 537, 539, 436 N.E.2d 12, 14 (1st Dist. 1982). A party may not rely upon his own unverified pleadings to support a motion for summary judgment. Doe v. University of Chicago Medical Center, 2015 IL App (1st) 133735, ¶ 43, 31 N.E.3d 323. So also, a party may not rely upon his own unverified pleadings to oppose a motion for summary judgment when the movant has supplied evidentiary material which if uncontradicted would entitle him to judgment as a matter of law. Forsberg v. Edward Hospital & Health Services, 389 Ill. App. 3d 434, 441-42, 906 N.E.2d 729, 735 (2nd Dist. 2009). A party may be able to rely upon his own verified pleadings to support or oppose a motion for summary judgment if the verification satisfies the requirements of Supreme Court Rule 191(a). See Central Clearing, Inc. v. Omega Industries, Inc., 42 Ill. App. 3d 1025, 1028, 356 N.E.2d 852, 855 (1st Dist. 1976); but see Dohertv v. Kill, 140 Ill. App. 3d 158, 162-63, 488 N.E.2d 629, 632 (1st Dist. 1986); Wooding v. L&J Press Corp., 99 Ill. App. 3d 382, 386, 425 N.E.2d 1055, 1058 (1st Dist. 1981); Laurence v. Flashner Medical Partnership, 206 Ill. App. 3d 777, 784, 565 N.E.2d 146, 150 (1st Dist. 1990).

As indicated earlier, in deciding a motion for summary judgment, the court considers the pleadings to determine what the

issues in controversy are. However, the court is not prohibited from considering a motion for summary judgment based upon an affirmative defense which was not previously raised in the movant's answer or by a motion for involuntary dismissal under section 2-619. Board of Library Trustees of Village of Midlothian v. Board of Library Trustees of Posen Public Library District, 2015 IL App (1st) 130672, ¶ 23, 34 N.E.3d 602; Falcon Funding, LLC v. City of Elgin, 399 Ill. App. 3d 142, 156, 924 N.E.2d 1216, 1228 (2nd Dist. 2010). But, a non-movant to a motion for summary judgment cannot create an issue of fact and defeat an otherwise well taken motion for summary judgment by introducing evidentiary material in support of a theory of liability that has not been pled. Eikey v. Rapp, 205 Ill. App. 3d 46, 562 N.E.2d 1274 (3rd Dist. 1990).

3. Admissions

The admissions of a party may always be used against that party to either support or oppose a motion for summary judgment. Admissions fall into one of two categories. They are either "judicial admissions" or "evidentiary admissions." The rules attendant to each type of admission differs, especially in the ability of the party against whom the admission is offered to introduce evidentiary material which contradicts the admission.

a. Judicial Admissions

The definition of a "judicial admission" and its effects are discussed in sub-section 9(c) of this section, infra. Admissions or statements of fact made in any of the following circumstances may

be deemed "judicial admissions":

- Verified Pleadings (Crittenden v. Cook County Commission on Human Rights, 2012 IL App (1st) 112437, ¶ 45, 973 N.E.2d 408); even verified pleadings which have been amended unless the amended pleading discloses that the admission in the prior pleading was the result of mistake or inadvertence. Coghlan v. Beck, 2013 IL App (1st) 120891, ¶ 24, 984 N.E.2d 132; North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC, 2014 IL App (1st) 123784, ¶ 102, 20 N.E.3d 104.

- Responses to Requests to Admit pursuant to Illinois Supreme Court Rule 216 (eff. July 1, 2014). However, such an admission may not be used against a party in any proceeding other than the one in which it was made. (Ill. S. Ct. R. 216(e) (eff. July 1, 2014)).

b. Evidentiary Admissions

An excellent discussion on the topic of "evidentiary admissions" and their uses can be found in Cleary & Graham's Handbook of Illinois Evidence, section 802.11 (5th ed. 1990). As noted therein, evidentiary admissions maybe controverted (Ayers v. Metcalf, 39 Ill. 307, 310-11 (1866)) or explained (Haskell v. Siegmund, 28 Ill. App. 2d 1, 11, 170 N.E.2d 393, 398 (3rd Dist. 1960)). Admissions and statements of fact made in the following circumstances generally constitute "evidentiary admissions":

- Unverified pleadings in the case, even superseded or

withdrawn pleadings. Knauerhaze v. Nelson, 361 Ill. App. 3d 538, 558, 836 N.E.2d 640, 659 (1st Dist. 2005).

– Pleadings filed in other cases. Chambers v. Appel, 392 Ill. 294, 64 N.E.2d 511 (1945).

– Answers to interrogatories. Garland v. Sybaris Club Int'l, Inc., 2014 IL App (1st) 112615, ¶ 81, 21 N.E.3d 24.

If a party pleads two or more statements of fact in the alternative pursuant to section 2-613(b) of the Code of Civil Procedure, then neither statement of fact can be used as an admission. Abruzzo v. City of Park Ridge, 2013 IL App (1st) 122360, ¶ 39, 3 N.E.3d 824; Cleveringa v. J.I. Case Co., 230 Ill. App. 3d 831, 845, 595 N.E.2d 1193, 1204 (1st Dist. 1992); Tuttle v. Fruehauf, 122 Ill. App. 3d 835, 462 N.E.2d 645 (1st Dist. 1984).

4. Affidavits

From the language of both Section 2-1005 and Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013), it is clear that affidavits may be submitted both in support of and in opposition to motions for summary judgment. The form and content requirements for such affidavits are controlled by the provisions of Rule 191(a) which is discussed in detail in sub-section 8 of this section, infra.

5. Depositions

Depositions may be used in a summary judgment proceeding "for any purpose for which an affidavit may be used." In re Estate of Rennick, 181 Ill. 2d 395, 401-02, 692 N.E.2d 1150, 1154 (1998); see also Ill. S. Ct. R. 212(a)(4) (eff. Jan. 1, 2011). To be used, a deposition must be part of the court record. Illinois Supreme Court Rule 207 (eff. June 1, 1995) governs the procedure for the signing and filing of depositions. To be used in a summary judgment proceeding, the deposition must be signed or the signature requirement must have been waived and the deposition must be certified, sealed and filed of record. Failure to comply with this rule, renders the deposition incompetent to support or to oppose a motion for summary judgment. Ford Motor Credit Co. v. Neiser, 196 Ill. App. 3d 515, 519, 554 N.E.2d 322, 325 (1st Dist. 1990); Ideal Tool & Manufacturing Co. v. One Three Six, Inc., 289 Ill. App. 3d 773, 776, 682 N.E.2d 437, 439 (1st Dist. 1997).

6. Other Evidentiary Material

Evidentiary material which would be inadmissible upon the trial of a cause may not be considered by a court in support of or in opposition to a motion for summary judgment. Fabiano v. City of Palos Hills, 336 Ill. App. 3d 635, 648, 784 N.E.2d 258, 271 (1st Dist. 2002). Unsworn statements, photographs not authenticated by affidavit, copies of documents not authenticated by affidavit and the like, even if attached as exhibits to a motion for summary judgment or a response in opposition, may not be considered in ruling upon the motion. See Paul H. Schwendener, Inc. v. Jupiter Electric Co., 358 Ill. App. 3d 65, 79, 829 N.E.2d 818, 831-32 (1st Dist. 2005).

If a court could take judicial notice of a fact or a document upon the trial of a cause, then it may take judicial notice of it in a summary judgment proceeding. See People ex rel First National Bank of Chicago v. City of North Chicago, 158 Ill. App. 3d 85, 104-105, 510 N.E.2d 577, 590 (2nd Dist. 1987).

7. Presumptions

A rebuttable presumption can be used to support or to oppose a motion for summary judgment. The manner in which such a presumption may be used and its effect upon a summary judgment proceeding is essentially no different than the use and effect of a presumption in reference to the underlying burdens of proof on the trial of a cause. Rebuttable presumptions can create a prima facie case as to the particular issue in question, the effect of which is to shift the burden of coming forth with evidence to meet the presumption to the party against whom the presumption operates. Once evidence in opposition to the presumption is introduced, the presumption ceases to exist and the matter must be determined as if no presumption had ever existed. The existence of a rebuttable presumption does not act to shift the burden of proof; in reality, the presumption, absent evidence in opposition, operates to satisfy the burden on the issue. But, once evidence in opposition to the presumption is introduced, the party in whose favor the presumption operated remains the burdened party on the issue. Franciscan Sisters v. Dean, 95 Ill. 2d 452, 460-63, 448 N.E.2d 872, 875 (1983); Diederich v. Walters, 65 Ill. 2d 95, 357 N.E.2d 1128 (1976). The effect of a rebuttable presumption is no different in a summary judgment proceeding. In re S.W., 315 Ill. App. 3d 1153, 1158, 735 N.E.2d 706, 709-10 (1st Dist. 2000).

8. Supreme Court Rule 191(a)

a. The Rule

> "(a) Requirements. * * * Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure, affidavits submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure, and affidavits submitted in connection with a motion to contest jurisdiction over the person, as provided by section 2-301 of the Code of Civil Procedure, shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

b. Interpretation

Affidavits (or other evidentiary material) submitted pursuant to Rule 191(a) must:

1. Be made on the personal knowledge of the affiant;
2. Set forth with particularity the facts upon which the claim, counterclaim or defense is based;
3. Have attached thereto sworn or certified copies of all papers upon which the affiant relies;
4. Consist of facts admissible in evidence and not

conclusions; and

5. Affirmatively show that the affiant, if sworn as a witness, can competently testify to the facts recited therein.

As to the first element, the personal knowledge requirement, it is satisfied if, from the document, considered as a whole, it appears that it is based upon the personal knowledge of the affiant. Fabiano v. City of Palos Hills, 336 Ill. App. 3d 635, 650-51, 784 N.E.2d 258, 273 (1st Dist. 2002). Affidavits made upon the "information and belief of the affiant are never sufficient to satisfy this requirement. Illinois State Bar Association Mutual Insurance Co. v. Cavenagh, 2012 IL App (1st) 111810, ¶ 54, 983 N.E.2d 468; In Interest of E.L., 152 Ill. App. 3d 25, 31, 504 N.E.2d 157, 161 (1st Dist. 1987).

The second and fourth elements are usually dealt with as a single element. They require that the affidavit consist of facts admissible in evidence, set forth with particularity, and not conclusions. Affidavits which merely set forth opinions of the affiant but fail to set forth the factual support for the opinion do not satisfy these requirements. Gassner v. Raynor Manufacturing Co., 409 Ill. App. 3d 995, 1005, 948 N.E.2d 315, 325 (2nd Dist. 2011); Wilson v. Bell, 214 Ill. App. 3d 868, 574 N.E.2d 200 (1st Dist. 1991); but see Matuszak v. Cerniak, 346 Ill. App. 3d 766, 805 N.E.2d 681 (3rd Dist. 2004) (distinguishing Bell where an expert witness's opinion in an affidavit was admissible as evidence). A review of these elements is critical when the affidavit under consideration is that of an expert who is attempting to render an opinion in the affidavit. Although Wilson v. Clark, 84 Ill. 2d 186, 417 N.E.2d 1322 (1981), permits an expert to render opinion

testimony at trial without disclosing the facts upon which the opinion is based, the holding in Wilson v. Clark has no relevance to summary judgment procedure. Robidoux v. Oliphant, 201 Ill. 2d 324, 339, 775 N.E.2d 987, 995 (2002). As was noted in Wilson v. Bell, supra: "An expert's opinion is only as valid as the basis and reasons for the opinion *** When there is no factual support for an expert's conclusions, his conclusions alone do not create a question of fact." Wilson v. Bell Fuels, Inc., 214 Ill. App. 3d 868, 875-76, 574 N.E.2d 200, 205 (1st Dist. 1991).

The third element requires the attachment of sworn or certified copies of all papers upon which the affiant relies. Preze v. Borden Chemical, Inc., 336 Ill. App. 3d 52, 56, 782 N.E.2d 710, 713 (1st Dist. 2002); Forsberg v. Edward Hospital & Health Services, 389 Ill. App. 3d 434, 440, 906 N.E.2d 729, 734 (2nd Dist. 2009). This element is subject to certain exceptions. If the papers relied upon are already part of the court record as attachments to another affidavit which authenticate them, they need not be attached to a subsequent affidavit if they are relied upon by the affiant. Beals v. Huffinan, 146 Ill. App. 3d 30, 496 N.E.2d 281 (4th Dist. 1986); but see Robidoux v. Oliphant, supra ("The Rule 191(a) provisions barring conclusionary assertions and requiring an affidavit to state facts with "particularity" would have little meaning were we to construe the attached-papers provision as merely a technical requirement that could be disregarded so long as the affiant were competent to testify at trial.") Supporting documents need not themselves be sworn to or certified when they are incorporated by reference into an affidavit when the affidavit reflects that the affiant has personal knowledge as to their authenticity and that the facts contained therein are true. Ciochon

v. Bellino, 184 Ill. App. 3d 993, 540 N.E.2d 840 (1st Dist. 1989) (supporting documents need not be sworn to or certified since the documents were incorporated by reference into the sworn affidavit that attested that the facts therein were true). Lastly, one need not attach all of one's records to establish a negative. That is to say that one need not attach all of one's records to an affidavit to support a statement in an affidavit that no particular record exists or that no reference to a given fact exists in the records. Such a statement can be competently made in an affidavit without attachment by the person who has examined the records in issue provided that the opposing party has been afforded an opportunity to examine the records. Tipsord v. Unarco, 188 Ill. App. 3d 895, 544 N.E.2d 1198 (4th Dist. 1989).

The last element requires that the document, when considered as a whole, support the reasonable inference that the affiant could competently testify to the matters contained therein if sworn as a witness. Doria v. Village of Downers Grove, 397 Ill. App. 3d 752, 756, 921 N.E.2d 478, 481 (2nd Dist. 2009). The rule does not require that the affidavit contain a specific statement that the affiant could competently testify to the facts therein. Beattie v. Lindelof, 262 Ill. App. 3d 372, 382, 633 N.E.2d 1227, 1234 (1st Dist. 1994). This element prohibits the consideration of evidentiary material which could not be considered at trial by reason of substantive or evidentiary rules such as the "Parol Evidence Rule," or the "Dead Man's Act." Windlow v. Wagner, 29 Ill. App. 3d 172, 178, 329 N.E.2d 911, 916 (2nd Dist. 1975). It will also prevent the consideration of evidentiary material submitted in violation of a prior order in the case. James v. Yasunaga, 157 Ill. App. 3d 450, 459, 510 N.E.2d 531, 537 (4th

Dist. 1987); Castro v. South Chicago Community Hospital, 166 Ill. App. 3d 479, 482, 519 N.E.2d 1069, 1071 (1st Dist. 1988). Hearsay statements will not be considered except for the purpose of impeachment. Beauvoir v. Rush-Presbyterian-St. Luke's Medical Center, 137 Ill. App. 3d 294, 302, 484 N.E.2d 841, 846 (1st Dist. 1985); Indiana Insurance Co. v. Royce Realty & Management, Inc., 2013 IL App (2d) 121184, ¶ 11 n.2, 990 N.E.2d 1244.

9. Counter-Evidentiary Material

a. Effect of Failure to File

Proper evidentiary material submitted in support of a motion for summary judgment will be taken as true unless contradicted by proper counter-evidentiary material submitted in opposition to the motion, notwithstanding the existence of contrary averments in the non-movant's pleadings. Curatola v. Village of Niles, 154 Ill. 2d 201, 205, 608 N.E.2d 882, 884 (1993); Fooden v. Board of Governors of State Colleges & Universities, 48 Ill. 2d 580, 587, 272 N.E.2d 497, 500-01 (1971).

The fact that a non-movant may obtain the testimony of a witness at some future date which might create an issue of fact is of no moment in the disposition of a motion for summary judgment supported by evidentiary material which if uncontradicted would entitle the movant to judgment as a matter of law. As our Supreme Court noted in Addison v. Wittenberg, 124 Ill. 2d 287, 296, 529 N.E.2d 552, 556 (1988): "[T]he possibility of further disclosures of expert opinion *** will [not] enable a party

to avoid a summary judgment to which the movant is otherwise entitled at the time the motion is heard."

b. Timeliness

Section 2-1005(c) provides that a party may file counter-affidavits prior to or at the time of the hearing on the motion for summary judgment. The failure on the part of a trial court to consider counter-evidentiary materials offered for the first time on the date of the hearing on the motion is error. Lombard v. Elmore, 134 Ill. App. 3d 898, 480 N.E.2d 1329 (1st Dist. 1985), rev'd on other grounds, 112 Ill. 2d 467, 493 N.E.2d 1063 (1986). However, a trial court is not required to consider counter-affidavits submitted for the first time after the order granting summary judgment has been entered. Mid America Fire v. Smith, 109 Ill. App. 3d 1121, 1124, 441 N.E.2d 949, 951 (4th Dist. 1982); Wilfong v. L.J. Dodd Construction, 401 Ill. App. 3d 1044, 1063, 930 N.E.2d 511, 529 (2nd Dist. 2010) (noting that trial courts should not allow litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling). For a more in depth discussion of this issue, see Section (G)(2) hereinafter.

c. Effect of Prior Judicial Admission

A party cannot create a genuine issue of fact and thereby defeat a motion for summary judgment by introducing counter-evidentiary material which contradicts that party's own judicial admissions. Crittenden v. Cook County Comm'n on Human Rights, 2012 IL App (1st) 112437, ¶ 45, 973 N.E.2d 408. The rule

is applicable in cases where the non-movant to a motion for summary judgment attempts to introduce his own affidavit which contradicts his prior judicial admissions (Shelton v. OSF Saint Francis Medical Center, 2013 IL App (3d) 120628, ¶ 24, 991 N.E.2d 548; Hansen v. Ruby Construction Co. [Ruby I], 155 Ill. App. 3d 475, 480, 508 N.E.2d 301, 304 (1st Dist. 1987)) and in cases where the non-movant attempts to introduce the affidavit or deposition testimony of a third party which contradicts the non-movant's prior judicial admissions (Hansen v. Ruby Construction Co. [Ruby II], 164 Ill. App. 3d 884, 888, 518 N.E.2d 354, 356 (1st Dist. 1987); Lewis v. Rutland Township, 359 Ill. App. 3d 1076, 1082, 824 N.E.2d 1213, 1218 (2005)). The reason for this rule is obvious; once a party has sworn to a fact under oath he should not be invited to commit perjury merely to avoid the consequences of his own sworn statements. North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC, 2014 IL App (1st) 123784, ¶ 103, 20 N.E.3d 104.

To bind a party such that he may not contradict them by counter evidentiary material, that party's prior statements must be judicial admissions. To constitute a judicial admission, the statement must have been made under oath; it must be a statement of concrete fact, not a matter of speculation, inference or opinion; the statement of fact must be deliberate; it must be as to a matter within the peculiar knowledge of the party so making it; and, the statement must be unequivocal. In re Estate of Rennick, 181 Ill. 2d 395, 406, 692 N.E.2d 1150, 1156 (1998); Meade v. City of Rockford, 2015 IL App (2d) 140645, ¶ 32, — N.E.3d —; Ruby I, supra. What does or does not constitute a judicial admission is a matter to be considered on an ad hoc basis. But, before a statement

can be held to be a judicial admission it must be given a meaning consistent with the context in which it is found and by reference to the entirety of the statement and not merely portions of it. Smith v. Pavlovich, 394 Ill. App. 3d 458, 468, 914 N.E.2d 1258, 1268 (2009). Whether a statement is equivocal is a question of law to be determined by the court. North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC, 2014 IL App (1st) 123784, ¶ 117, 20 N.E.3d 104 (quoting Crittenden, 2012 IL App (1st) 112437, ¶ 46, 973 N.E.2d 408 (quoting Ruby I, 155 Ill. App. 3d at 480, 508 N.E.2d 301)). Additionally, the issue as to whether a statement is one of fact or merely one of opinion is also a question of law. See Arnold v. Consolidated, 227 Ill. App. 3d 600, 592 N.E.2d 225 (1st Dist. 1992); Thomas v. Northington, 134 Ill. App. 3d 141, 479 N.E.2d 796 (1st Dist. 1985). Judicial admissions can be made in verified pleadings (Knauerhaze v. Nelson, 361 Ill. App. 3d 538, 558, 836 N.E.2d 640, 659 (1st Dist. 2005)), answers to interrogatories, and in depositions (In re Estate of Rennick, 181 Ill. 2d 395, 407, 692 N.E.2d 1150, 1156 (1998); Ruby I, supra.)

10. Missing or Unavailable Evidence

a. Supreme Court Rule 191(b)

> "(b) When Material Facts Are Not Obtainable by Affidavit. If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order

> that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of documents so furnished, shall be considered with the affidavits in passing upon the motion." Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013).

b. Application

The sufficiency of an affidavit under Rule 19l(b) was the subject of the opinion in Koukoulomatis by Koukoulomatis v. Disco Wheels, Inc., 127 Ill. App. 3d 95, 99, 468 N.E.2d 477, 480-81 (1st Dist. 1984), where the court held:

> "Pursuant to Rule 191(b), an affidavit must contain the following information before the trial court is required to act upon it: (1) a statement that material facts are unavailable due to hostility or otherwise; (2) the names of those persons the affiant wants to depose; (3) a showing as to why affidavits could not be procured from those named persons; (4) a statement as to what those persons will testify; (5) the basis for the affiant's belief that those persons will so testify; and (6) the affiant must be a party to the action."

Affidavits signed by attorneys do not satisfy the requirements of Rule 19l(b); the affiant must be a party to the cause. Crichton v. Golden Rule Insurance Co., 358 Ill. App. 3d 1137, 1151, 832 N.E.2d 843, 856 (5th Dist. 2005).

Rule 191(b) is the procedural mechanism provided to a non-movant to a motion for summary judgment (or a motion for

involuntary dismissal) who is in need of further discovery prior to being required to respond to such a motion. Hayward v. C.H. Robinson Co., 2014 IL App (3d) 130530, ¶ 46, 24 N.E.3d 48 ("When a Rule 191(b) affidavit requests further discovery, the court may continue the summary judgment hearing to allow the party to obtain the discovery, including documents from affiants."); Griffith v. Wilmette Harbor Ass'n, Inc., 378 Ill. App. 3d 173, 183, 881 N.E.2d 512, 521 (1st Dist. 2007); but see Emerson Electric Co. v. Aetna Casualty & Surety. Co., 281 Ill. App. 3d 1080, 1089, 667 N.E.2d 581, 587 (1st Dist. 1996) (rejecting request for further discovery based on Rule 191(b) where party failed to specify what prospective evidence would show).

E. Standards To Be Applied

One must never lose sight of the fact that the movant in a summary judgment proceeding is the burdened party. As such, it is not until the movant has come forward with evidentiary material which, if uncontradicted, would entitle him or her to judgment as a matter of law, that the non-movant is ever required to submit evidentiary material in opposition to the motion. South Side Trust & Savings Bank of Peoria v. Mitsubishi Heavy Industries, Ltd., 401 Ill. App. 3d 424, 435, 927 N.E.2d 179, 190 (1st Dist. 2010) ("Defendant did not support its motion for summary judgment with evidentiary facts and plaintiff may, therefore, rely on its complaint to establish a genuine issue of fact."); Kielbasa v. St. Mary of Nazareth Hospital, 209 Ill. App. 3d 401, 406, 568 N.E.2d 208, 211 (1st Dist. 1991). The summary judgment sought should be granted if the court is prepared to find that there exists no genuine issue as to any outcome determinative material fact and the moving party is

entitled to judgment as a matter of law. Williams v. Manchester, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 9 (2008).

In ruling on a motion for summary judgment, the court is required to strictly construe all evidentiary material submitted in support of the motion while liberally construing all evidentiary material submitted in opposition. Williams v. Manchester, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 9 (2008). All evidentiary material submitted in opposition to a motion for summary judgment will be taken as true for the purposes of ruling on the motion; conversely, all evidentiary material submitted in support of the motion will be taken as true unless the opponent submits contradictory evidentiary material. Central Illinois Light Co. v. Home Insurance Co., 213 Ill. 2d 141, 171, 821 N.E.2d 206, 223 (2004). If the evidentiary material before the court could lead to more than one conclusion or inference, then the court must adopt the conclusion or inference that is most favorable to the opponent of the motion. McIntosh v. Cueto, 323 Ill. App. 3d 384, 389, 752 N.E.2d 640, 644 (5th Dist. 2001). But inferences or conclusions drawn from the evidentiary material before the court must be reasonable. Courts are not required to adduce remote factual possibilities in favor of the opponent of such a motion. Elizondo v. Ramirez, 324 Ill. App. 3d 67, 78, 753 N.E.2d 1123, 1131 (2nd Dist. 2001). Similarly, parties are not permitted to rely upon guess, speculation or conjecture to oppose a motion for summary judgment. Motorola Solutions, Inc. v. Zurich Insurance Co., 2015 IL App (1st) 131529, ¶ 103, 33 N.E.3d 917.

Issues of credibility (Danhauer v. Danhauer, 2013 IL App (1st) 123537, ¶ 36, 2 N.E.3d 424), motive, and intent (Borchers v. Franciscan Tertiary Province of Sacred Heart, Inc., 2011 IL App

(2d) 101257, ¶ 30, 962 N.E.2d 29) are generally inappropriate for disposition in a summary judgment proceeding. But see Austin v. St. Joseph Hospital, 187 Ill. App. 3d 891, 897, 543 N.E.2d 932, 935 (1st Dist. 1989) (summary judgment, nevertheless, is appropriate where facts were insufficient to give rise to inference that employer's motive for terminating employee was based on employee's filing a claim for workers' compensation benefits).

When the parties file cross motions for summary judgment, they concede that only a question of law is involved and invite the court to decide the issues based on the record. Pielet v. Pielet, 2012 IL 112064, ¶ 28, 978 N.E.2d 1000. But, the court is not obligated to enter summary judgment for either party if material issues of fact precluding judgment for either movant exist. Pielet v. Pielet, 2012 IL 112064, ¶ 28, 978 N.E.2d 1000.

Summary judgment is a drastic measure that disposes of a case without a trial and as such it should not be granted unless the right of the movant is free from doubt. Bruns v. City of Centralia, 2014 IL 116998, ¶ 12, 21 N.E.3d 684. If the evidentiary material before the court discloses a dispute as to any material issue of fact, then the motion must be denied. Ray v. City of Chicago, 19 Ill. 2d 593, 599, 169 N.E.2d 73, 76 (1960).

F. Leave To Amend

Prior to the adoption of section 2-1005(g) of the Code (735 ILCS 5/2-1005(g) (West 2014) (added by Pub. Act 82-280, § 2-1005 (eff. July 1, 1982))), it was generally accepted that a motion for leave to file an amended pleading, except to conform the pleadings to the proofs, was improper post judgment relief. See

Fultz v. Haugan, 49 Ill. 2d 131, 136, 305 N.E.2d 873, 876 (1972).

After the adoption of Section 2-1005(g) which provides in pertinent part: "Before or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms," essentially three schools of thought emerged as to the interpretation of this provision of the statute.

In Siebert v. Continental Oil Co., Inc., 161 Ill. App. 3d 891, 515 N.E.2d 728 (1st Dist. 1987), the court held that section 2-1005(g) permits a court to grant a plaintiff leave to file an amended complaint after the entry of a summary judgment which constituted a final judgment. The Siebert Court held that the relevant factors which a trial court should consider in determining whether to exercise its discretion in favor of granting leave to file an amended pleading are (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) the timeliness of the proposed amendment; and, (4) whether previous opportunities to amend the pleading could be identified. The court further held that the last element need not be applied if the first three elements are decided in favor of allowing the amendment.

In Wells v. Great Atlantic & Pacific Tea Co., 171 Ill. App. 3d 1012, 525 N.E.2d 1127 (1st Dist. 1988), another division of the First District Appellate Court declined to follow Siebert and held that Section 2-1005(g) and Section 2-616(c) of the Code of Civil Procedure must be construed with reference to one another so that both sections may be given harmonious effect and as such, once a summary judgment has been entered which constitutes a final judgment, the only amendment which may be made is one to

conform the pleadings to the proofs.

In Loyola Academy v. S&S Roof Maintenance, Inc., 198 Ill. App. 3d 799, 556 N.E.2d 586 (1st Dist. 1990), and Hill v. Jones, 198 Ill. App. 3d 854, 556 N.E.2d 613 (1st Dist. 1990), with one justice dissenting in both cases, yet another division of the First District Appellate Court, rejected the analysis in Wells, supra, and essentially adopted the four part analysis set forth in Siebert. But, contrary to Siebert, that court held that the fourth element, "whether previous opportunities to amend the pleading could be identified," was a necessary element to the analysis. In so doing, the court found that when a plaintiff fails to offer any justification as to why the proposed amendment could not have been offered prior to the entry of a summary judgment, a trial court does not abuse its discretion when it denies leave to amend under section 2-1005(g).

The Supreme Court has settled the split in authority relating to the interpretation of Section 2-1005(g) with its decision in Loyola Academy v. S&S Roof Maintenance, Inc., 146 Ill. 2d 263, 586 N.E.2d 1211 (1992). The Supreme Court adopted the four part test outlined in Siebert, but did not dispense with the fourth element as did the Siebert court. Contrary to the Appellate Court, the Supreme Court in Loyola Academy found that the plaintiff had met all four elements of the analysis and held that the trial court had abused its discretion in failing to permit the amendment. The Supreme Court, citing with approval to Kupianen v. Graham, 107 Ill. App. 3d 373, 437 N.E.2d 774 (1st Dist. 1982), held that the four factors to be examined in determining whether a party should be granted leave to file an amended pleading pursuant to Section 2-1005(g) after the entry of a summary judgment are as follows:

1. Whether the proposed amendment would cure the defective pleading;
2. Whether other parties would sustain prejudice or surprise by virtue of the proposed amendment;
3. Whether the proposed amendment is timely; and
4. Whether previous opportunities to amend the pleading could be identified.

The Supreme Court again reiterated that the trial court is vested with broad discretion in motions to amend.

G. Motions To Reconsider

1. In General

The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence which was not available at the time of the first hearing, changes in the law, or errors in the court's previous application of existing law. In re Marriage of Heinrich, 2014 IL App (2d) 121333, ¶ 55. The motion is not intended to afford a party an opportunity to relitigate or reargue that which has already been argued.

2. Evidentiary Matters

If a party fails to object to the sufficiency of his or her opponents evidentiary material either by way of a motion to strike or within the parties opposing papers prior to the court's ruling upon a motion for summary judgment, that party is deemed to have waived any objection to the sufficiency of the evidentiary material and may not raise the issue in a motion for reconsideration. Stone

v. McCarthy, 206 Ill. App. 3d 893, 565 N.E.2d 107 (1st Dist. 1990).

A trial court is not required to consider evidentiary material in opposition to a motion for summary judgment submitted for the first time with a motion for reconsideration after an order granting summary judgment has been entered. Getman v. Indiana Harbor Belt Railroad Co., 172 Ill. App. 3d 297, 526 N.E.2d 557 (1st Dist. 1988). The submission of new evidentiary material in opposition to a motion for summary judgment in support of a motion for reconsideration is a matter committed to the sound discretion of the trial court. But the court's discretion should not be exercised in favor of allowing the submission of such material for the first time after an order for summary judgment has been entered in the absence of some reasonable explanation of why it was not available at the time of the original hearing. In the absence of any such explanation, there is no reason to reconsider or change the original ruling on the motion. Delgato v. Brandon Associates, Ltd., 131 Ill. 2d 183, 545 N.E.2d 689 (1989); Direct Auto Insurance Co. v. Beltran, 2013 IL App (1st) 121128, ¶¶ 71-72, 998 N.E.2d 892.

H. Enforcement

1. In General

If an order granting summary judgment terminates the litigation in toto, then the judgment is enforceable in the same manner as all other final judgments.

2. Supreme Court Rule 304(a)

If an order granting a summary judgment affords relief to one or more but fewer than all of the parties or upon one or more but fewer than all of the claims, then the judgment is unenforceable so long as the case still pends at the trial level unless the trial court makes the requisite finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). Unless and until an order is appealable, it may be modified at any time prior to the entry of the final order which terminates the litigation in toto. Washington Mutual Bank, F.A. v. Archer Bank, 385 Ill. App. 3d 427, 432, 895 N.E.2d 677, 681 (2nd Dist. 2008)

3. Supreme Court Rule 192

> "When the entry of a summary judgment will not dispose of all the issues in the case, the court may, as the justice of the case shall require, either (1) allow the motion and postpone the entry of judgment thereon; (2) allow the motion and enter judgment thereon; or (3) allow the motion, enter judgment thereon, and stay the enforcement pending the determination of the remaining issues in the case. If a party resisting the entry of a summary judgment relies upon an affirmative demand against the moving party for an amount less than the latter's demand, judgment for the difference may be entered and enforced." Ill. S. Ct. R. 192 (eff. Jan. 1, 1967).

The application of the rule is a matter committed to the sound discretion of the trial judge which involves an inquiry into the justice of the case. In exercising that discretion, the court may inquire into such matters as possible unfair advantage that might be gained by either party, the merits of the remaining claims, and the

ability of a party to satisfy a judgment in the future. Samuels v. Chicago Housing Authority, 207 Ill. App. 3d 10, 565 N.E.2d 234 (1st Dist. 1990).

I. Problems Of Waiver and Appeal

Objection to the sufficiency of evidentiary material submitted in support of or in opposition to a motion for summary judgment must be raised at the trial level before the motion is ruled upon. If a party fails to object to the sufficiency of an opponent's evidentiary material prior to the court's ruling upon a motion for summary judgment, the issue is deemed waived for purposes of both a motion for reconsideration (Stone v. McCarthy. supra) and for purposes of appeal (Wogelius v. Dallas, 152 Ill. App. 3d 614, 504 N.E.2d 791 (1st. Dist. 1987); Urban v. Invemess, 176 Ill. App. 3d 1, 530 N.E.2d 976 (1st Dist. 1988)).

The propriety of a trial court's denial of a motion for leave to file an amended pleading is deemed waived if a copy of the proposed amended pleading presented to the trial court is not included in the record on appeal. Hamer v. City Segway Tours of Chicago, LLC, 402 Ill. App. 3d 42, 46, 930 N.E.2d 578, 582 (1st Dist. 2010).

The denial of a motion for summary judgment is not appealable as such. If an issue of law is involved, a trial court might certify a question for appeal pursuant to Supreme Court Rule 308. But, as a general statement, the denial of a motion for summary judgment is not appealable at any time. When the order is entered it lacks finality and as such is not appealable and since it neither disposes of any issue or any party it is not the proper

subject of a Rule 304(a) finding. Further, since an order denying summary judgment merges into the final judgment entered in the case, it is not subject to review on appeal after the case is terminated at the trial level. Elane v. St. Bernard Hospital, 284 Ill. App. 3d 865, 869, 672 N.E.2d 820, 823 (1st Dist. 1996); Banwart v. Okesson, 83 Ill. App. 3d 222, 403 N.E.2d 1234 (2nd Dist. 1980). An exception exists where the issue raised in the summary judgment motion presents a question of law and, therefore, would not be decided by the jury. In that case, the denial of a summary judgment motion does not merge with the judgment and may be addressed on appeal under *de novo* review. Young v. Alden Gardens of Waterford, LLC, 2015 IL App (1st) 131887, ¶ 42, 30 N.E.3d 631.

The granting of a motion for summary judgment the effect of which is to terminate the litigation in total is subject to appeal pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). If the order granting a summary judgment is in itself a final judgment as to one or more but fewer that all of the parties or claims, it can be appealed prior to the termination of the entire case only when the trial judge makes the requisite finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). Washington Mutual Bank, F.A. v. Archer Bank, 385 Ill. App. 3d 427, 432, 895 N.E.2d 677, 681 (2nd Dist. 2008).

IV. SECTION 2-619 MOTIONS FOR INVOLUNTARY DISMISSAL

"§ 2-619. Involuntary dismissal based upon certain defects or defenses. (a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

(1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.

(2) That the plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued.

(3) That there is another action pending between the same parties for the same cause.

(4) That the cause of action is barred by a prior judgment.

(5) That the action was not commenced within the time limited by law.

(6) That the claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.

(7) That the claim asserted is unenforceable under the provisions of the Statute of Frauds.

(8) That the claim asserted against defendant is unenforceable because of his or her minority or other disability.

(9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

(b) A similar motion may be made by any other party against whom a claim is asserted.

(c) If, upon the hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer and shall so deny it if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time.

(d) The raising of any of the foregoing matters by motion under this Section does not preclude the raising of them subsequently by answer unless the court has disposed of the motion on its merits; and a failure to raise any of them by motion does not preclude raising them by answer.

(e) Pleading over after denial by the court of a motion under this Section is not a waiver of any error in the decision denying the motion.

(f) The form and contents of and procedure relating to affidavits under this Section shall be as provided by rule." 735 ILCS 5/2-619 (West 2014).

A. In General

Section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2014)) affords a defendant a means of obtaining a summary disposition of an action. The basis for the motion must

be one of the nine grounds enumerated in the section and must go to an entire claim or demand. Illinois Graphics Co. v. Nickum, 159 Ill. 2d 469, 485, 639 N.E.2d 1282, 1289 (1994). Section 2-619 contemplates two types of motions. If the grounds for the motion appear on the face of the complaint under attack, then it is a pleading motion. If, on the other hand, the grounds for the motion rest upon facts supplied by the movant pursuant to section 2-619(a), then the motion is a fact motion. The section does not authorize hybrid motions. That is to say, that each specific 2-619 motion must be either a pleading motion or a fact motion, but not a hybrid of both. See Premier Electrical Construction Co. v. LaSalle National Bank, 115 Ill. App. 3d 638, 450 N.E.2d 1360 (1st Dist. 1984).

1. Overlap with Section 2-615 motions

Pursuant to section 2-619(a), if a defect appears on the face of the complaint, the defendant may move to dismiss without supporting affidavits. Callaghan v. Vill. of Clarendon Hills, 401 Ill. App. 3d 287, 290, 929 N.E.2d 61, 67 (2nd Dist. 2010). A similar motion could obviously be made pursuant to section 2-615 and the standards to be applied are identical. See Illinois Graphics Co. v. Nickum, 159 Ill. 2d 469, 485, 639 N.E.2d 1282, 1290 (1994); Cali v. Demattei, 121 Ill. App. 3d 623, 628, 460 N.E.2d 121, 124-25 (5th Dist. 1984).

2. Overlap with Section 2-1005 motions

a. Similarities

If a section 2-619 defect does not appear on the face of the complaint, the motion must be supported by affidavit and, as such, is much like a summary judgment proceeding. Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) governs affidavits under both procedures.

b. Differences

Because a 2-619 motion is a motion to dismiss, it concedes the truth of the factual allegations in the complaint. Reynolds v. Jimmy John's Enterprises, LLC, 2013 IL App (4th) 120139, ¶ 31, 988 N.E.2d 984. A movant pursuant to section 2-619 cannot submit evidentiary material in support of the motion which contradicts well-pleaded allegations in the complaint. Doe v. University of Chicago Medical Center, 2015 IL App (1st) 133735, ¶ 39, 31 N.E.3d 323. Subject to that exception, a 2-619 motion which relies upon evidentiary material has been treated just like a motion for summary judgment. The non-movant must meet affidavits with counter-affidavits. FirstMerit Bank, N.A. v. Soltys, 2015 IL App (1st) 140100, ¶ 11, 29 N.E.3d 568; Callaghan, 401 Ill. App. 3d at 291, 929 N.E.2d at 67. Ordinarily, it is of no significance that the complaint is taken as true, since all issues that can be raised by a 2-619 motion are in the nature of affirmative defenses which avoid the effect of the plaintiff's allegations (FirstMerit Bank, 2015 IL App (1st) 140100, ¶ 11, 29 N.E.3d 568) and can be raised in the defendant's answer or by a motion for summary judgment.

Confusion arises when the complaint alleges facts which negate the factual basis for the 2-619 motion. In such a case, the

factual allegations of the complaint must be taken as true and the motion must fail. A motion for summary judgment should be employed in such circumstances. Reynolds, 2013 IL App (4th) 120139, ¶ 34, 988 N.E.2d 894; Howle v. Aqua Illinois, Inc., 2012 IL App (4th) 120207, ¶ 37, 978 N.E.2d 1132.

Another distinction exists between 2-619 and 2-1005 motions in those cases where no jury demand has been filed by the non-moving party. In non-jury cases, the judge may resolve a 2-619 motion even though there is a disputed issue of fact. See 735 ILCS 5/2-619(c) (West 2014). The judge is to decide the motion upon affidavits and evidence. The procedure for such a hearing is discussed hereinafter. Section 2-1005 contains no similar provision for resolving disputed issues of fact in non-jury cases. In a summary judgment proceeding, if the court finds the existence of a disputed issue of fact, the issue must be resolved by a trial even when no jury has been demanded.

B. When The Motion May Be Raised

A section 2-619 motion must be made within the time for pleading. 735 ILCS 5/2-619(a) (West 2014). The court may, in its discretion, grant leave at a later time for the filing of such a motion provided that no prejudice is worked upon the non-moving plaintiff. Ingersoll v. Klein, 46 Ill. 2d 42, 262 N.E.2d 593 (1971).

C. Grounds For The Motion

Section 2-619(a) lists eight specific and one general affirmative defenses which may be raised by motion. They are as

follows:

1. Lack of Subject Matter Jurisdiction

> "That the court does not have jurisdiction of the subject-matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction." 735 ILCS 5/2-619(a)(1) (West 2014).

A motion pursuant to this section challenges the subject matter jurisdiction of the court and should not be confused with motions which challenge the court's jurisdiction over the person of a defendant. The latter motion is governed by section 2-301 of the Code of Civil Procedure. 735 ILCS 5/2-301 (West 2014).

A motion to dismiss by reason of the court's lack of subject matter jurisdiction may be made at any stage of a proceeding. Sheffler v. Commonwealth Edison Co., 399 Ill. App. 3d 51, 68, 923 N.E.2d 1259, 1274-75 (1st Dist. 2010).

2. Lack of Capacity to Sue

> "That the plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued." 735 ILCS 5/2-619(a)(2) (West 2014)

Examples of circumstances which could be raised under this section are: Actions brought by or against non-entities; actions brought on behalf of another by one who is not licensed to practice law (Downtown Disposal Services, Inc. v. City of Chicago, 2012 IL 112040, ¶¶ 7, 47, 979 N.E.2d 50); actions against a dead person (Marcus v. Art Nissen & Son, Inc., 224 Ill. App. 3d 464, 465 (1st

Dist. 1991); actions brought by an infant; and, actions brought by or against an incompetent (Aurora Bank FSB v. Perry, 2015 IL App (3d) 130673, ¶ 17, 30 N.E.3d 1166).

3. Prior Pending Actions

> "That there is another action between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2014)

"The section refers to 'the same cause', not 'the same cause of action,' and it has been held that actions are for 'the same cause,' when relief is requested on substantially the same state of facts." Slotnick v. Martin, 32 Ill. 2d 55, 57, 203 N.E.2d 428, 429 (1964).

For the purpose of invoking the provisions of section 2-619(a)(3), the other action can be one pending in a foreign jurisdiction or in the federal courts. Slotnick, supra.

While section 2-619(a)(3) is designed to avoid duplicative litigation, even when the same cause of action and same party requirements are met, the section does not mandate automatic dismissal. The decision to grant or deny a motion to dismiss, or to stay the action, is committed to the sound discretion of the trial court. The factors to be considered by a court in deciding whether to grant relief under this section include: comity; the prevention of multiplicity, vexation and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the res judicata effect of a foreign judgment in the local forum. Kellerman v. MCI, 112 Ill. 2d 428, 447-48, 493 N.E.2d 1045, 1053 (1986); but see Rodgers v. Cook County, 2013 IL App (1st) 123460, ¶ 36, 998 N.E.2d 164 (noting that not all four Kellerman factors necessarily

apply to each section 2-619(a)(3) dismissal).

4. Res Judicata and Collateral Estoppel

> "That the cause of action is barred by a prior judgment." 735 ILCS 5/2-619(a)(4) (West 2014)

This subsection allows a defendant to raise the doctrines of res judicata and collateral estoppel, but these doctrines apply only where there is a final judgment in a prior action. Nowak v. St. Rita High School, 197 Ill. 2d 381, 389-90, 757 N.E.2d 471, 477 (2001).

5. Statute of Limitations or Repose

> "That the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2014)

The passage of a general statute of limitations or repose is an affirmative defense which cannot be raised by a section 2-619 motion unless it appears from the face of the complaint that the action is time barred. Farkas v. Howard, 176 Ill. App. 3d 1005, 1011, 531 N.E.2d 1025, 1029 (1st Dist. 1988). Movants pursuant to section 2-615(a)(5) cannot submit evidentiary material to contradict well pled factual allegations in a complaint as to the date of the occurrence (Pumala v. Sipos, 131 Ill. App. 3d 845, 847, 476 N.E.2d 462, 463 (2nd Dist. 1985) or the date of discovery (MBL v. Diekman, 137 Ill. App. 3d 238,484 N.E.2d 371 (1st Dist. 1985)). If a movant wishes to contest the date of occurrence alleged in the complaint, the proper motion is one for summary judgment. See Pumala, supra; but see Barber-Colman Co. v. A&K Midwest Insulation Co., 236 Ill. App. 3d 1065, 1068, 603 N.E.2d 1215,

1218-19 (5th Dist. 1992).

When a movant properly raises the passage of a statute of limitations with a 2-619(a)(5) motion, it becomes incumbent upon the plaintiff to come forward with facts sufficient to avoid the statutory limitation. Polka v. Turner, 182 Ill. App. 3d 705, 708, 538 N.E.2d 640, 642 (1st Dist. 1989) (citing Cundiff v. Unsicker, 118 Ill. App. 3d 268, 454 N.E.2d 1089 (3rd Dist. 1983)).

6. Release, Satisfaction or Discharge

> "That the claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy." 735 ILCS 5/2-619(a)(6) (West 2014).

When the defendant's motion is based upon a release or covenant, valid on its face, the burden shifts to the plaintiff to come forward with evidentiary material to create an issue of fact as to its validity. Currie v. Wisconsin Century, Ltd., 2011 IL App (1st) 103095, ¶ 34, 961 N.E.2d 296.

The filing of a bankruptcy proceeding by operation of law stays all actions pending against the bankrupt-defendant. But, a motion to dismiss an action by reason of the defendant's bankruptcy should not be entertained unless and until the plaintiff's claim has been discharged by order of the bankruptcy court

7. Statute of Frauds

> "That the claim asserted is unenforceable under the provisions of the Statute of Frauds." 735 ILCS 5/2-619(a)(7) (West 2014).

8. Defendant's Minority of Disability

> "That the claim asserted against the defendant is unenforceable because of his or her minority or other disability." 735 ILCS 5/2-619(a)(8) (West 2014).

9. Other Affirmative Matter

> "That the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2014).

a. Meaning

The "other affirmative matter avoiding the legal effect or defeating the claim" must be something more than evidence offered to refute a material fact alleged in the complaint (In re Marriage of Vaughn, 403 Ill. App. 3d 830, 835-36, 935 N.E.2d 123, 127 (1st Dist. 2010)), which must be taken as true for the purposes of the motion (Reynolds, 2013 IL App (4th) 120139, ¶ 31, 988 N.E.2d 984). But see Barber-Coleman Co. v. A&K Midwest Insulation Co., 236 Ill. App. 3d 1065, 603 N.E.2d 1215 (5th Dist. 1992), as to non-elemental facts. To defeat the plaintiff's claim, the defendants assertion of affirmative matter must negate the cause of action completely or refute conclusions of law or conclusions of fact contained in the complaint which are unsupported by allegations of specific fact upon which the conclusions rest. Smith v. Waukegan Park District, 231 Ill. 2d 111, 120-21, 896 N.E.2d 232, 238 (2008).

b. Examples

Some examples of "other affirmative matter" which may be raised by a 2-619 motion are:

1. Failure to comply with the notice provisions of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101 et seq. (West 2014)) (see Heise v. Mitten, 207 Ill. App. 3d 941, 942-43, 566 N.E.2d 507, 508 (2nd Dist. 1991)) or the Metropolitan Transit Authority Act (70 ILCS 3605/1 et seq. (West 2014));

2. Immunities from liability;

3. The provisions of sections 5A of the Worker's Compensation Act (820 ILCS 305/S(a) (West 2014)) or the Worker's Occupational Diseases Act (820 ILCS 310/5(a) (West 2014)) (see Schusse v. Pace Suburban Bus Division of Regional Transportation Authority, 334 Ill. App. 3d 960, 963, 779 N.E.2d 259, 262 (1st Dist. 2002));

4. Business loan exceptions to a usury statute (Huss v. Maras, 77 Ill. App. 3d 554, 396 N.E.2d 92 (2nd Dist. 1979));

5. With regard to defamation suits, issues of privilege, innocent construction, and fair comment and criticism (Myers v. The Telegraph, 332 Ill. App. 3d 917, 922-23, 773 N.E.2d 192, 198 (1st Dist. 2002))

6. Lack of standing to sue (Glisson v. City of Marion, 188 Ill. 2d 211, 220, 720 N.E.2d 1034, 1039 (1999));

7. The existence of a written disclaimer in compliance with the provisions of the UCC (R.O.W. Window Co. v. Allmetal, Inc., 367 Ill. App. 3d 749, 754, 856 N.E.2d 55, 60 (2006));

8. Discharge of one's contractual obligations because of death (Muka v. Estate of Muka, 164 Ill. App. 3d 223, 228, 517 N.E.2d 673, 676 (2nd Dist. 1987));

9. Failure to exhaust administrative remedies

(Dratewska-Zator v. Rutherford, 2013 IL App (1st) 122699, ¶ 15, 996 N.E.2d 1151); and

10. Failure to comply with the certificate requirements in a medical negligence action (Jacobs v. Rush North Shore Medical Center, 284 Ill. App. 3d 995, 997, 673 N.E.2d 364, 366 (1996)).

This list is neither complete nor exhaustive, but it is indicative of the type of affirmative matter that may be raised by a section 2-619(a)(9) motion.

D. What May Be Considered

Section 2-619(a) calls for the presentation of the grounds for the motion by affidavit when the defect does not appear on the face of the complaint under attack. Obviously, the plaintiff may oppose the motion with counter-affidavits. Discovery depositions are also a proper means to bring forth evidentiary material in support of and in opposition to a section 2-619 motion. See 134 Ill. S. Ct. R. 212(a)(4) (eff. Jan. 1, 2011); Raintree Homes, Inc. v. Village of Long Grove, 209 Ill. 2d 248, 262, 807 N.E.2d 439, 447 (2004). Affidavits and other evidentiary material submitted by either party must comply with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). (See § III(D)(8), supra.) Thus, the court will consider the complaint under attack, taking as true all well-pled allegations contained therein, and the evidentiary material submitted both in support of and in opposition to the motion.

E. Standards To Be Applied

A motion for involuntary dismissal concedes the truth of all well-pled facts contained in the complaint under attack. Reynolds,

2013 IL App (4th) 120139, ¶ 31, 988 N.E.2d 984. Only the well-pled facts in the complaint are taken as true; conclusions of law and conclusions of fact unsupported by allegations of specific fact upon which those conclusions rest are not taken as true and are not considered in ruling on the motion. Henderson Square Condo. Ass'n v. LAB Townhomes, L.L.C., 2014 IL App (1st) 130764, ¶ 78, 16 N.E.3d 197. Just as with a 2-615 motion, once the court has identified all of the well-pled facts in the complaint, it must draw all reasonable inferences therefrom which are favorable to the pleader. Bjorkstam v. MPC Products Corp., 2014 IL App (1st) 133710, ¶ 14, 21 N.E.3d 1216. Factual allegations contained in an exhibit to a complaint will control over contrary allegations of fact contained within the body of the complaint. Capital One Bank, N.A. v. Czekala, 379 Ill. App. 3d 737, 744, 884 N.E.2d 1205, 1212 (3rd Dist. 2008).

When a defendant supports a 2-619 motion with affidavits or other evidentiary material, the facts contained therein will be taken as true unless contradicted by counter-affidavits submitted by the plaintiff. Goral v. Kulys, 2014 IL App (1st) 133236, ¶ 30, 21 N.E.3d 64; Henderson Square Condominium Ass'n v. LAB Townhomes, L.L.C., 2014 IL App (1st) 130764, ¶ 81, 16 N.E.3d 197.

As indicated earlier, affidavits and other evidentiary material submitted in support of, and in opposition to, a 2-619 motion are governed by the provisions of Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). (See § III(D)(8), supra.)

F. Resolving Issues Of Fact

In non-jury cases, the judge may resolve a section 2-619 motion even where there is a disputed issue of fact. 735 ILCS 5/2-619(c) (West 2014). The court is to decide the motion on the "affidavits and evidence." This phrase coupled with the rule against resolving credibility issues without demeanor evidence mandates that the court conduct an evidentiary hearing. Curtis Casket Co. v. D.A. Brown & Co., 259 Ill. App. 3d 800, 807, 632 N.E.2d 204, 209-10 (1st Dist. 1994). The court in its discretion may deny the motion without a hearing, but in such a case, the denial must be without prejudice to the defendant's right to raise the subject matter of his motion by answer. In re Marriage of Vaughn, 403 Ill. App. 3d 830, 836, 935 N.E.2d 123, 128 (1st Dist. 2010.

In a case where a jury has been demanded, the court may not weigh evidence and resolve issues of fact presented by the motion. If a material issue of fact exists, the motion must be denied, again without prejudice to the defendant's right to raise the subject matter of his motion by answer. To do otherwise would be a deprivation of the right to trial by jury. Andrews v. Mid-American Bank & Trust Co. of Fairview Heights, 152 Ill. App. 3d 139, 143, 503 N.E.2d 1120, 1123 (5th Dist. 1987).

The reference to a jury trial in section 2-619(c) does not create any right to a trial by jury which does not otherwise exist. Berk v. Will County, 34 Ill. 2d 588, 590-91, 218 N.E.2d 98, 100 (1966).

G. Leave To Amend

If the basis for the granting of a 2-619 motion is some technical deficiency in the complaint, then the section does not require that the order of dismissal be with prejudice. Under such circumstances, the plaintiff should be afforded an opportunity to amend the complaint to cure the deficiency. See McCastle v. Mitchell B. Sheinkop, M.D., Ltd., 121 Ill. 2d 188, 193, 520 N.E.2d 293, 296 (1988).

H. Problems of Waiver and Appeal

Failure on the part of a plaintiff to challenge the sufficiency of an affidavit submitted in support of a 2-619 motion at the trial level will be deemed a waiver of the issue for purposes of appeal. Arnett v. Snyder, 331 Ill. App. 3d 518, 523, 769 N.E.2d 943, 947 (4th Dist. 2001; but see Pumala, supra.

The failure of a defendant to raise a defense by way of a section 2-619 motion does not in any way preclude the defendant from raising the same issue by answer. 735 ILCS 5/2-619(d) (West 2014); Treadway v. Nations Credit Financial Services Corp., 383 Ill. App. 3d 1124, 1133, 892 N.E.2d 534, 542 (5th Dist. 2008).

Section 2-619(c) provides that the motion may be denied without prejudice to the reassertion of the defense by way of answer. If the defense is genuine and an issue of fact is presented, the motion should be denied without prejudice to the defendant's right to reassert it by way of answer unless the denial is based upon an evidentiary hearing conducted pursuant to section 2-619(c).

Section 2-619(c) provides that the erroneous denial of a 2-619 motion may be raised on appeal even though the movant pleads over.