

LITIGATION BASICS
REBA NEW LAWYERS AND LITIGATION SECTIONS
OPEN MEETING

August 20, 2020, 12:00PM-1:00PM

Heather Gamache, Esq., Rackemann, Sawyer and Brewster

Kathleen M. Heyer, Esq., Johnson & Borenstein

Nicholas P. Shapiro, Esq., Phillips & Angley

I. Court Rules and Standing Orders

A. Superior Court (Heather)

- In addition to the Rules of Civil Procedure, practitioners should consult the Superior Court Rules when litigating a case in Superior Court. In general, the most referenced rules in civil cases are Rules 9A – 9E governing civil motions, Rule 30 governing interrogatories, Rule 30A governing written discovery and Rule 30B governing expert disclosures.

B. Land Court (Kathleen)

- a. Rules
- b. Standing Orders
- c. Survey Instructions
- d. Registered Land Guidelines

II. Complaints (Nick)

- Mass. R. Civ. P. 8(a)(1): “A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.”
 - Parties, Facts Common to All Counts, Counts.
 - Prayers for Relief
- Mass. R. Civ. P. 9 – Certain Claims Require Pleading with Particularity

- Verified Complaints

III. Service (Kathleen)

- a. Mass. R. Civ. P. 4: Process
- b. Statutory requirements for certain types of cases
- c. Motion for appointment of special process server (Rule 4(c))

IV. Tracking Orders (Heather)

- Superior Court Standing Order 1-88 defines the track that cases will be assigned to, either Fast Track or Average Track.
- Land Court Standing Order 1:04 defines the track that cases will be assigned to, either “T” track (14 months to trial), “F” track (16 months to trial), or “A” track (31 months to trial). For good cause shown, a party may file a motion with the court to be assigned to a different track or an accelerated track (“X” track).
- The tracking order has all of the significant case deadlines leading up to final disposition.
- The tracking order is available on the online docket and, in superior court cases, is served on the parties by the court.

V. Motions for *Lis Pendens* / Applications for Preliminary Injunctions (Nick)

A. Motions for Judicial Endorsement of Memoranda of *Lis Pendens*

- Notice to World of Action Affecting Property Rights.
- G. L. c. 184, § 15(b) (“claim of a right to title to real property or the use and occupation thereof”).
- Verified Complaint with Statutorily-Required Certification: “claimant has read the complaint, that the facts stated therein are true, and that no material facts have been omitted”
- Assuming Correct Genre of Action, and Inclusion of Required Certification, Court *Must* Endorse *Lis Pendens*.
- Remember to Serve and Record.

B. Applications for Preliminary Injunctions

- Equitable Order Governing the Parties' Conduct during Pendency of Lawsuit.
- *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609 (1980).
 - Risk of Irreparable Harm in Light of Party's Likelihood of Success on the Merits.
- Intended to Maintain *Status Quo*.
- Be Careful: Asking Court to Make a Formal Preliminary Assessment of Case and Application Packages Are Expensive.

VI. Answer/Affirmative Defenses/Counterclaims (Heather)

- Answer/Affirmative Defenses
 - Mass R. Civ. P. 12
 - a responsive pleading is due within 20 days of service of the pleading requiring a response;
 - Mass. R. Civ. P. 8
 - A party shall admit or deny the averments in the complaint
 - A party may state that he is without sufficient knowledge or information to admit or deny
 - In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense as set forth in Rule 8(c)
- Counterclaims
 - Mass. R. Civ. P. 13

VII. Motion to Dismiss / Special Motion to Dismiss (Nick)

- Rule 12(b)(1) Motions
 - Court Lacks Subject Matter Jurisdiction
 - Courts of Limited, Specialized Jurisdiction (Land Court, *e.g.*, pure torts, money damages)

- Standing
 - Facial / Factual Challenges
 - Burden on Party Invoking Jurisdiction of Court
- Rule 12(b)(6) Motions
 - Failure to State a Claim for which Relief May be Granted.
 - Tests Legal Sufficiency of Claim.
 - Facts Pleaded Taken as True.
 - Pleading Plausibly Suggests Entitlement to Relief.
- Lis Pendens Statute Special Motions to Dismiss & Anti-SLAPP Special Motions to Dismiss
 - G. L. c. 184, § 15(c) Special Motions to Dismiss
 - Fee Shifting
 - Fails to State a Claim and Is Frivolous.
 - G. L. c. 231, § 59H Special Motions to Dismiss
 - Fee Shifting
 - Burden Shifting

VIII. Case Management Conference (Land Court) / ADR (Kathleen)

- a. Notice from Land Court
- b. Fairly informal, sets timelines, notices, etc.
- c. Alternative Dispute Resolution
 - i. Courts encourage
 - ii. REBA ADR

IX. Written Discovery (Nick)

- Interrogatories

- Mass. R. Civ. P. 33.
- Requests for Production of Documents / Entries.
 - Mass. R. Civ. P. 34.
- Requests for Admissions.
 - Mass. R. Civ. P. 36.

X. Depositions (Kathleen)

- a. Rule 30: Depositions Upon Oral Examination
- b. Rule 30A: Audiovisual depositions
- c. Rule 31: Deposition by Written Questions

XI. Expert Discovery (Heather)

- Mass R. Civ. P. 26(b)(4)
 - Interrogatories are the only form of allowed discovery to obtain information about expert witnesses.
 - Identity of the expert, the subject matter on which the expert is expected to testify, and the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
- Superior Court Rule 30B
 - The pretrial memorandum must include all of the information allowed under Rule 26(b)(4) pertaining to each expert witness and must be signed by the expert witness.
 - The rule also requires that if answers to expert interrogatories are provided, the expert witness must sign the answers certifying that the expert disclosure accurately reflects the expert's opinion, the subject matter on which he is expected to testify and the summary of the grounds for each opinion.

XII. Summary Judgment / Judgment on the Pleadings (Kathleen)

- a. Judgment on the Pleadings – Mass. R. Civ. P. 12(c)

b. Summary Judgment – Mass. R. Civ. P. 56

- i. when “pleadings, depositions, answers to interrogatories, and responses to requests for admission...together with affidavits...show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.”
- ii. Standard – “whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law.” Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991).
- iii. Burden on moving party

XIII. Pre-trial Conferences (Nick)

- Mass. R. Civ. P. 16.
- In Both Land Court and Superior Court, Joint Pretrial Memoranda Are Fairly Elaborate Documents: Agreed Facts, Disputed Facts, Agreed Exhibits, Legal Issues, Disputed Exhibits, Fact and Expert Witnesses, Motions in Limine.

XIV. Trials

A. Jury Trials (Heather)

- Superior Court Rule 6

B. Bench Trials (Kathleen)

XV. Appeals (Nick)

- Mass. R. A. P. 4 (Notice of Appeal Must be Filed within 30 Days)
- Do Not Forget Rules 8 & 9 (Designating Transcripts)
- Assembly of Record / Docketing Appeal
- Principal and Reply Briefs
- Oral Argument or Not

XVI. Most Mistakes Are Not Fatal (Everyone)