"MOTIONS FOR DIRECTED VERDICT" IN NON-JURY TRIALS

Gerald P. Greiman

Most litigators instinctively know what to do in defending a jury case when the plaintiff rests without having adequately proven its claims. You move for a directed verdict.

But what do you do under similar circumstances in a non-jury trial? You certainly want to try to bring the trial to a close at that point. Yet, it seems anomalous to move for a directed verdict. Absent a jury, there is nobody for the court to direct and no one who will be rendering a verdict. ("In legal proceedings, a 'verdict' is the decision of a jury upon an issue or issues of fact submitted for their deliberation and determination." *Cochran v. DeShazo*, 538, S.W.2d 598, 600 (Mo. App. 1976).

Well, defense counsel, don't despair. There is a procedure in non-jury cases for making the equivalent of a motion for directed verdict. However, the terminology and standards governing the grant or denial of such motions are different from motions for directed verdicts. It is important to understand the differences.

In Missouri state court, motions for directed verdict in jury cases are governed by Missouri Supreme Court Rule 72.01(a). The applicable standards are familiar. A motion for directed verdict may be granted only when the court believes that, considering all of the evidence, reasonable minds could reach only one conclusion. In considering a motion for directed verdict, the court must view the evidence in the light most favorable to the non-moving party.

In federal court, motions for directed verdict in jury cases are governed by Fed. R. Civ. Proc. 50(a), and the applicable standards are the same as under Missouri law.

It should be noted that the Judicial Conference of the Untied States has proposed an amended Fed. R. Civ. Proc. 50, and submitted it to the U.S. Supreme Court for approval and transmittal to Congress. Absent Congressional action to the contrary, amended Rule 50 will become effective December 1, 1991. As amended, Rule 50(a) reads as follows:

> (a) JUDGMENT AS A MATTER OF LAW
>
> (1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

The amendment to Rule 50(a) is not intended to change the substantive standards governing motions for directed verdict. Rather, it is intended to substitute the language "judgment as a matter of law" for the anachronistic "directed verdict" terminology, and to make clear that the trial court may enter judgment as a matter of law not only at the close of plaintiff's case or the close of all of the evidence – the traditional directed verdict junctures – but at any time during the trial, as soon as it is apparent that one party or the other is unable to carry its burden of proof on an issue essential to its case.

Now to the matter at hand. In Missouri state court, motions in non-jury trials which are akin to motions for directed verdict in jury cases are governed by Missouri Supreme Court Rule 67.02. Rule 67.02 provides in pertinent part:

> After the plaintiff has completed presentation of his evidence, the defendant may by motion move for a dismissal on the grounds that upon the facts and the law plaintiff is not entitled to relief. . . .

The motion thus is one for involuntary dismissal rather than a directed verdict.

The standards governing motions for involuntary dismissal are significantly different from those applicable to motions for directed verdict. A court faced with a motion for involuntary dismissal is not required to view the evidence in the light most favorable to the non-moving party, or to deny the motion if a prima facie case has been established. Rather, the court may weigh and evaluate the evidence that the plaintiff has presented and grant the motion for involuntary dismissal if it is convinced that the evidence preponderates against the plaintiff. *See Wyrozynski v. Nichols*, 752 S.W.2d 433 (Mo. App. 1988).

The different standards applicable to a motion for involuntary dismissal stem from the fact that there is no jury and the court is acting as the trier of fact. Why require the judge, on a motion to dismiss, to determine merely whether there is a prima facie case, when the judge is going to be the trier of fact? If the judge in a bench trial, after hearing the plaintiff's evidence, has concluded that the plaintiff should not prevail, there is no purpose to be served by requiring the defendant to put on its case, with the attendant waste of time, effort and expense to all concerned.

In federal court, the standards applicable to motions for involuntary dismissal at the close of a plaintiff's case in non-jury case are similar to the above. At present, such motions are governed by Fed. R. Civ. Proc. 41(b). Rule 41(b) contains language similar to that contained in Missouri Supreme Court Rule 67.02, and then makes even more explicit the court's authority to weigh the evidence and decide the facts. The rule states: "The Court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

As with Fed. R. Civ. Proc. 50 discussed above, Rule 41(b) also is the subject of an amendment which is expected to take effect shortly. The Judicial Conference of the United States has proposed an amended Rule 41(b), as well as a related amended Rule 52, to the Supreme Court for its approval and transmittal to Congress. The amended rules are scheduled to become effective December 1, 1991, absent Congressional action to the contrary.

The amendment to Rule 41(b) deletes the language which had made that rule a vehicle for terminating a non-jury action on the merits when the plaintiff had failed to carry its burden of proof in presenting its case. Under the amended rules, that subject now is to be covered by amended Fed. R. Civ. Proc. 52(c), which provides as follows:

> (c) JUDGMENT ON PARTIAL FINDINGS. If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim, counterclaim, cross-claim or third-party claim that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Amended Rule 52(c) parallels amended Rule 50(a) discussed previously, but applies to non-jury trials. As with Rule 50(a), Rule 52(c) is not intended to change the substantive standards applicable to motions for judgment, but expands the time frame within which such a motion may be made. It authorizes the court to enter judgment at any time during the course of the trial that it can appropriately make a dispositive finding of fact on the evidence.

Of course, application of these rules pre-supposes that the party against whom an issue is going to be resolved has had a full opportunity to present its case on that issue. As the Advisory Committee Note to proposed Rule 50(a) states: "Early action is appropriate when economy and expedition will be served. In no event, however, should the court enter judgment against a party

who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact."

As a final note, amended Rules 50(a) and 52(c), coupled with related proposed amendments to Fed. R. Civ. Proc. 16, afford further opportunities for judicial economy by allowing trial courts to structure trials so as to proceed first with the presentation of evidence on an issue that is likely to be dispositive, assuming that such an issue is identified during pretrial proceedings. Amended Rule 16(c)(12) (proposed in the same manner and on the same timetable as Amended Rules 50(a) and 52(a) discussed above) authorizes the court, at a pretrial conference, to make "an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could on the evidence be the basis for a judgment as a matter of law entered pursuant to Rule 50(a) or a judgment on partial findings pursuant to Rule 52(c)."

A proper understanding of the above rules will enable counsel to make the right motion at the right time to bring about a timely termination of a non-meritorious case.