

Overlooked aspects of opposing summary judgment motions

From timely notice to defendant's failure to produce discovery needed by plaintiff to oppose MSJ

By Brian J. Malloy

You have just been served with a motion for summary judgment, containing many exhibits and declarations. You immediately, and rightly, turn to focus on establishing a triable issue of material fact to defeat the motion. But there are other often overlooked ways to defeat summary judgment.

Code of Civil Procedure ("CCP") section 437c, California Rules of Court ("CRC") 3.1350-3.1354, and the case law interpreting them set forth specific requirements for a party moving for summary judgment. If the moving party wants to gut your entire case, that party must comply with these strict requirements. The Legislature has set forth these requirements to provide adequate notice and fairness to the nonmoving party as well as the trial court. While establishing a triable issue of material fact is unquestionably the heart of a summary judgment opposition, this article will explore other potential ways to defeat such a motion.

Is the motion timely served with an appropriately set hearing date?

The Legislature provided strict notice requirements for a party opposing a summary judgment motion. The first item to check is whether you were provided the required statutory notice prior to the summary judgment hearing date.

CCP § 437c, subd. (a)(2) provides that "[n]otice of the motion and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing." The 75-day time period between the date served and the hearing is extended five days for mail if the place of address is within the State of California, and two court days if served by facsimile, express mail, or another method of overnight delivery. (Code Civ. Proc., § 437c, subd. (a)(2).) The two-court-day extension includes electronic service. (Code Civ. Proc., § 1010.6, subd. (a)(4)(B).)

This notice period is important because a summary judgment motion is case dispositive, an opposition "requires considerable time and effort to prepare," and the motion "is perhaps the most important pretrial motion in a civil case." (*McMahon v. Superior Court* (2003) 106 Cal.App.4th 112, 117-18.) The Legislature therefore provided this minimum notice time so the nonmoving party has "sufficient time to assemble the relevant evidence and prepare an adequate opposition." (*Id.* at 118.)

If there is insufficient notice prior to the hearing date, the motion must be denied absent consent from the nonmoving party. Courts are without authority to entertain a motion for summary judgment when there has been insufficient notice. (See *McMahon,* 106 Cal.App.4th at 118 ["[I]n light of the express statutory language, trial courts do not have authority to shorten the minimum notice period for summary judgment hearings."]; *Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 654-55; *Urshan v. Musicians' Credit Union* (2004) 120 Cal.App.4th 758, 763.) Further, where notice is insufficient, the trial court cannot cure this defect by continuing the hearing for the missing number of days; rather, the notice period must start from the beginning. (See *Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1267-68.)

The 75-day notice requirement is therefore strict and cannot be modified unless the nonmoving party consents.

Another timing issue concerns the summary judgment hearing date in relation to the trial date. A motion for summary judgment or adjudication "shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise." (Code Civ. Proc., § 437c, subd. (a)(3), § 437c, subd. (f)(2).) Note that this provision, however, allows the trial court to hear the motion within 30 days of the trial date upon a finding of good cause.

Has the moving party met its initial burden with admissible evidence?

In order for the burden to shift to the nonmoving party to show a triable issue of material fact, the moving party must first meet its initial burden warranting the shift. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Where a defendant fails to present evidence to support a judgment in its favor, the

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motion should be denied without even looking at the opposing party's evidence. (*Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 940.)

Carefully scrutinize the moving party's evidence: Does it actually negate an element of a cause of action or establish an affirmative defense? (See Code Civ. Proc., § 437c, subd. (p)(2).) If the moving party did not meet its initial burden, summary judgment must be denied. (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.)

In that regard, well-taken evidentiary objections can eliminate the moving party's evidence and leave the moving party without meeting the initial burden. That is because the trial court considers "all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court." (Code Civ. Proc., § 437c, subd. (c).) CRC 3.153 provides that a party objecting to summary judgment evidence must either submit written objections pursuant to CRC 3.154 or make arrangements for a court reporter at the hearing. CRC 3.154 provides the specific formats that evidentiary objections must be made if done in writing before the hearing; there are two alternate formats, but you need to comply with one. Oral objections made at the hearing are also sufficient. (*Reid v. Google, Inc.*, 50 Cal.4th 512, 531-32.)

Only object to evidence that will matter. The Supreme Court has cautioned counsel against blunderbuss objections to every piece of evidence submitted in summary judgment briefing. (See *Reid*, 50 Cal.4th at 532-33.) Needless to say, judges do not appreciate hundreds of pages of cut-and-paste objections. Recently, I had a summary judgment opposition where I made four objections to important evidence, while the defendant made 143 objections, including to every paragraph in an expert declaration and every exhibit attached; the trial court sustained my four objections while overruling all of the defendant's objections.

Did the moving party dispose of the entire cause of action?

Summary judgment must dispose of the entire complaint. (Code Civ. Proc., § 437c, subd. (c).) Summary adjudication must dispose of an entire cause of action. (Code Civ. Proc., § 437c, subd. (f)(1).) The trial court reviewing a motion for summary judgment identifies the issues raised by the pleadings and looks to see if the movant showed that the nonmoving party cannot prevail on any theory raised by the pleadings. (*Hawkins*, 144 Cal.App.4th at 939-40.) The moving party must address all theories and demonstrate that there are no material facts requiring a trial on any of them. (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 160, 163.) "If a cause of action is not shown to be barred in its entirety, no order for summary judgment – or adjudication – can be entered." (*McCaskey v. California State Automobile Assn.* (2010) 189 Cal.App.4th 947, 975.)

For example, in a dangerous condition of public property case, the complaint may allege several dangerous conditions caused the accident. If the summary judgment motion only addresses some – but not all – of those allegations, the moving party has not met its initial burden in disposing of the entire cause of action. Summary judgment should be denied.

Did the moving party refuse to produce a deponent or discovery needed to oppose the motion?

CCP § 437c, subdivision (h) provides in relevant part: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just." This section provides the trial court with discretion to not only continue a summary judgment hearing to obtain the information, but to deny the motion outright.

A denial of a summary judgment under CCP § 437c(h) may be warranted where the hearing date is close to trial. If, for example, the moving party refuses or fails to produce a relevant deponent or timely requested discovery needed to oppose the motion, the nonmoving party can raise this and ask for the denial. It would prejudice the nonmoving party if the moving party is rewarded for its discovery recalcitrance with a trial continuance.

What happens if the nonmoving party was granted a continuance under CCP § 437c(h) to obtain the discovery, but the moving party still fails to produce the discovery? CCP § 437c(i) answers that: "If, after granting a continuance to allow specified additional discovery, the court determines that the party seeking summary judgment has unreasonably failed to allow the discovery to be conducted, the court shall grant a continuance to permit the discovery to go forward or deny the motion for summary judgment or summary adjudication."

Did the moving party comply with the separate statement of undisputed material facts?

CCP § 437c(b)(1) requires the moving party to provide "a separate statement setting forth plainly and concisely all material facts that the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence." The trial court may in its discretion deny the motion for failing to comply with this requirement. (Code Civ. Proc., § 437c, subd. (b)(1).) Within the separate statement, each alleged undisputed fact should be listed separately. (CRC 3.1350(d)(1)(B).) Otherwise, it makes it difficult for the nonmoving party to unequivocally dispute or not dispute the claimed undisputed fact, which also burdens the trial court's review.

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Conclusion

The Legislature provided a number of requirements that a moving party must satisfy in order to obtain a grant of summary judgment and eliminate a trial. In addition to establishing a triable issue of material fact, the nonmoving party should pay careful attention to make sure each of the above often overlooked requirements have been met in opposing these drastic motions.


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Endnotes:

[1] The focus of this article is CCP § 437c and not federal summary judgment practice. Summary judgment in federal court is governed by Federal Rule of Civil Procedure 56, the federal district court's local rules, and the federal judge's standing order.

[2] For service by mail, the time is extended 10 days if the place of address is outside of California but within the United States and 20 days if the place of address is outside the United States. (Code Civ. Proc., § 437c, subd. (a)(2).)

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