Effective Oppositions to Motions for Summary Judgment
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Broken Promises

This article seeks to advise plaintiff's counsel on how to effectively oppose motions in the Superior Court seeking summary judgment or summary adjudication of issues. Unless the context requires more specificity both types of motion are referred to as a summary-judgment motions.

The defendant who brings a summary-judgment motion is, in essence, making a promise to the judge. The promise is that, if the judge wades through all the papers, he or she will come to see that the plaintiff's case is so flawed that there is no need to hold a trial, and the judge can dispose of the case as a matter of law. More specifically, the motion promises the judge one of two things: either the plaintiff cannot establish some critical element of the cause of action, or that regardless of what the plaintiff can establish, the defendant has a defense to the claim.

As the lawyer opposing a summary judgment motion, your job is to show the judge that the promise has been broken. Because of the nature of lawyers, and the nature of the practice of law, this is often not so difficult. Lawyers are duty-bound to be zealous in the representation of their client. Many misunderstand this duty, and assume it means that they have to press arguments that have little factual or legal support, that they have to overstate their positions, and ignore anything that is adverse. These are the lawyers who think that the key to winning an argument is to out-shout the opponent. There are a lot of lawyers like this out there, so the odds are good that the one who drafted the motion you have to oppose is one of them.

These personality quirks are often exacerbated by the time pressures on every lawyer. Lawyers often have too many projects competing for their time, and frequently have clients who are reluctant to pay their lawyer to take the time necessary to draft a first-rate motion. The combined effect of these factors is that many summary-judgment motions promise more than they deliver.

The Burdens of Summary Judgment

Summary-judgment motions involve three different, and often interrelated, legal burdens – the burden of persuasion, the burden of production, and the burden of proof. Effectively opposing summary-judgment motions requires an understanding of these burdens, because one of the best ways to beat the motion is to show that a burden has not been met.

Justice Mosk's opinion in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, is a mini-treatise on summary-judgment law in California, and also explains how California's summary-judgment procedures differ from their federal counterparts. It is required reading for anyone opposing a summary-judgment motion. Justice Turner's opinion in *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 880-882, is also very helpful on this subject.

The burden of persuasion is borne by both sides and does not shift. The moving party bears the burden of persuading the trial court that there are no triable issues of fact; the opposing party bears the burden of showing that there are. Whichever party prevails on the motion is the one that has carried its burden of persuasion.

The burden of production is often the key to winning or losing a summary-judgment motion. The moving party bears the initial burden of production to make a *prima facie* showing that there are no triable issues of fact. (See *Aguilar*, 25 Cal.4th at 850.) A *prima facie* showing is one that is sufficient to support the party's position. (*Id*., at 851.) Once the moving party has met its burden of production, the burden then shifts to the responding party to raise a triable issue of fact. (*Id*., at 850.) But if the moving party fails to carry its burden of production, the burden never shifts to the responding party to make any showing, and the motion must be denied. (Code Civ. Proc. § 437c, subd. (p)(1) & (2); R. Weil & I. Brown, *California Practice Guide – Civil Procedure Before Trial* (Rutter, 2005 Rev.) ¶ 10:261.)("Weil & Brown.")

The parties' respective burdens of proof at trial will shape their applicable burdens of persuasion and production. (*Aguilar*, 25 Cal.4th at 850.) Where a plaintiff is required to prove a matter at trial by a preponderance of evidence, in order to raise a triable issue of fact in opposing a summary-judgment motion, the plaintiff's burden is to introduce admissible evidence showing the matter to be more likely than not. (*Id*. at 857.) In other words, in order to raise a triable issue of fact with respect to an issue on which the plaintiff bears the burden of proof at trial, it is not sufficient merely to produce *some* favorable evidence; the evidence must be sufficient to sustain a judgment on the issue. The converse is also true. When the defendant seeks summary judgment on an issue on which the plaintiff has the burden of proof, the defendant's evidence must be sufficient to persuade the fact finder that the matter is *not* more likely than not. (Weil & Brown at ¶ 10:240.)

Check for Procedural Problems

The summary-judgment statute is complicated and unforgiving, and a failure to comply with any one of its myriad requirements is likely to be fatal to the offending party. (*Haney v. Aramark Uniform Services, Inc*. (2005) 121 Cal.App.4th 623, 631-632; *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1607.) The first thing to check in opposing a motion is whether the moving party has made any procedural mistakes.

- **Is the motion timely noticed?**

A summary-judgment motion requires at least 75-days' notice. If served by overnight delivery or fax, two court-days are added. If it is served by mail within California, an 5 additional calendar days are added. (Code Civ. Proc. § 437c, subd. (a).) The trial court *may not* shorten this period without the responding party's consent. Section 437c allows other time periods pertaining to summary-judgment motions to be shortened, but not the notice provision. (*Urshan v. Musician's Credit Union* (2004) 120 Cal.App.4th 758, 763.) Summary-judgment motions must also be heard no later than 30 days before the trial. (Code Civ. Proc. § 437c, subd. (a).) This deadline can be altered by the trial court for good cause. (*Id*.)

- **Is the supporting evidence admissible?**

If the evidence used to support the motion is not admissible, it does not count. So it is worth reviewing the evidence carefully, paying particular attention to the critical evidence on which the motion hinges. Make sure that documents are properly authenticated; that witnesses

have personal knowledge of what they claim to have knowledge of; and that declarations do not contain inadmissible hearsay. Raise any evidentiary objections in a separate document titled "Plaintiff's Evidentiary Objections" and make sure the Court rules on the objections at the hearing of the motion.

- **Does the motion seek summary adjudication of something that is properly subject to summary adjudication?**

A motion for summary judgment seeks to dispose of the entire action. A motion for summary adjudication of issues seeks to dispose of limited issues within the case. Smart lawyers will combine them, so that if the summary-judgment motion is denied, the court will still be able to summarily adjudicate any issues within the case that are not subject to any disputed facts. But section 437c, subd. (f)(1) limits the scope of the issues that may be summarily adjudicated. The statute provides that summary adjudication is only available where it completely disposes of a particular cause of action, defense, claim for punitive damages, or an issue of duty. (*Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 321.) These restrictions were placed in the statute in 1990, to stop the practice of parties seeking summary adjudication of issues that did not completely dispose of a cause of action or defense. (*Id*; *Regan Roofing Co. v. Superior Court* (1994) 24 Cal.App.4th 425, 433; *Lilienthel & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1853.)

While section 437c, subd. (f)(1) does allow a party to move for summary adjudication of "a claim for damages" in the first sentence, it further explains that such a motion is permissible only if a party contends that the "claim for damages" has no merit under Civil Code section 3294. In other words, the statute only permits summary adjudication of a claim for punitive damages, not simply of various elements of a claim for compensatory damages. (*DeCastro West Chodorow & Burns, Inc. v. Superior Court* (1996) 47 Cal.App.4th 410, 421). Hence, a defendant cannot seek summary adjudication of a single item of compensatory damages which does not dispose of an entire cause of action." (*Id.* at p. 422.)

Is the motion substantively defective?

- **Do the facts in the separate statement establish that the defendant is entitled to judgment?**

It is not easy to draft an airtight summary-judgment motion. As a result, many motions do not establish that the plaintiff's claim can be adjudicated without trial. It is therefore critical to examine the moving party's separate statement of facts and determine whether those facts, if undisputed, would entitle the defendant to judgment. The test is something like a reverse demurrer – even if you concede the truth of every fact in the separate statement, does that establish that you have no cause of action as a matter of law?

- **Has the defendant misstated or ignored facts?**

Determine whether the version of the facts offered by the defendant is accurate. Has the defendant told the whole story? Most likely, something critical has been omitted. Are there portions of the documents referenced in the motion that undermine the argument? If the motion is supported by deposition testimony, did the witness explain or otherwise undercut the argument? If the motion is supported by declarations, are the statements made consistent with how the witnesses have testified in deposition, or with the documents in the case. Are there other witnesses who have or who can offer conflicting testimony?

Be cautious about offering a declaration to rebut a party's deposition testimony. While fragmentary or equivocal concessions in deposition testimony can be explained and contradicted in a declaration, a party cannot contradict unequivocal admissions in his or her testimony to create a triable issue of fact. (*Benavidez v. San Jose Police Dep't.* (1999) 71 Cal.App.4th 853, 861, 864.) Generally, admissions made by a party in a deposition are treated as conclusive. (*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3rd 1609, 1613.)

- **Has the defendant misstated or ignored the law?**

Evaluate the defendant's legal argument, and make sure it is sound. Are there exceptions to the rules that the defendant is relying on? For example, in an insurance bad-faith case in which the insurer denied the policyholder a defense of the underlying action, the insurer may claim that the action is time-barred because it was not commenced within 2 years of the date that the insurer informed the policyholder that it would not defend. Relying on general cases about the accrual of causes of action and the commencement of the statute of limitations, an insurer can create a facially compelling argument that it is entitled to summary judgment. But a bit of legal research will show that in this situation, the statute of limitations is tolled until the judgment in the underlying action is final. (*Lambert v. Commonwealth Land Title Ins. Co.* (1991) 53 Cal.3d 1072, 1077.) Whenever faced with a summary-judgment motion based on a limitations defense, explore the applicable tolling principles, as well as when a cause of action accrues.

Do not accept the defendant's legal arguments at face value. Read the cases that are cited. Look for important differences that permit them to be distinguished, and look for cases that reach a different result than the one advanced by the defendant. Equally important, look for the factual predicates on which the defense argument is based, and determine whether they are disputed. If the issue is whether a party acted reasonably, or had a basis to discover an important fact, there are likely to be factual issues lurking.

Tips for an Effective Opposition

- **Make sure your factual argument is fully integrated throughout the entire opposition**

This cannot be overstated. Make sure any facts you intend to rely on to oppose the motion are contained in the opposition memorandum of points and authorities, the opposition separate statement, and in the opposing evidence. Though discredited, many courts still follow the "golden rule" of summary adjudication: If it is not set forth in the separate statement, it does not exist." (*Compare United Community Church v. Garcin* (1991) 231 Cal.App.3rd 327, 337 [stating rule], with *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 [trial court abuses discretion in ignoring evidence contained in the record and pointed out to court, but which is not in the separate statement].) This means that if your memorandum of points and authorities tells a different story than the one told in the motion, your separate statement must tell the same story. Obviously, your version of the story must be supported by admissible evidence.

- **Be forthright in responding to the separate statement; don't be afraid to admit that undisputed facts are actually undisputed**

If the facts are disputed, you must say so. But if they are not disputed, do not be afraid to say so. Few things are as exasperating for a judge as having to slog through a separate statement that relies on picayune matters to try to create factual disputes that clearly do not exist. Many lawyers respond to separate statements the way they respond to interrogatories. The trouble is, judges seldom read interrogatory responses, and they do read separate statements. If the moving party has included more than one fact within a purportedly undisputed fact in the separate statement, disaggregate them and make it clear which ones you dispute and which ones you do not.

Defendants will frequently draft an undisputed fact that says something like, "defendant's letter of January 15, 2004, says that all payments owed by the defendant under the contract have been timely paid." If the letter of January 15 actually says this, feel free to admit that this is what it says – but be clear that this is all you admitting; you are not admitting the truth of the statements in the letter.

It may be that the defendant's undisputed facts truly are not in dispute, but the motion nevertheless must be denied because those facts, even if true, do not entitle the defendant to summary judgment. Your response to the separate statement in such a case will admit that each fact is not disputed, but will also contain a set of additional facts that preclude summary judgment.

- **Make sure that the defendant has met its burdens**

If the defendant has not met its burden of production, the motion must be denied and the plaintiff has no obligation to make any factual showing. Of course, it is risky to rely entirely on this argument. The better practice is to make it when possible, and to also point out the evidence the plaintiff can produce that establishes a triable issue of fact.

It is not sufficient for a defendant seeking summary judgment to merely assert that the plaintiff has no evidence on a particular point. (*Aguilar*, 25 Cal.4th at 854-855.) Rather, in order to satisfy its initial burden, the party moving for summary adjudication must show *both* that the plaintiff has no evidence to support an essential element of the claim, *and* that the plaintiff cannot obtain such evidence. (*Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 888-892.)

- **Make it easy for the trial court to deny the motion**

Present your arguments in way that make it easy for a busy trial-judge to grasp quickly. Start your opposition memorandum of points and authorities with an introduction that explains why the motion cannot be granted. Follow this up with a detailed statement of facts. Support every fact with an accurate cite to the record. Do not write a five-sentence paragraph that contains multiple assertions of fact, and then put one citation to the record at the end of the last sentence. This does not inspire confidence. It is fine – in fact it is preferable – to rely on the evidence submitted by the moving party, rather than to include a duplicate copy in the opposition evidence.

It is a common practice to have the factual citations in the memorandum of points and authorities refer only to the party's corresponding undisputed fact. Avoid this. Which sentence is more authoritative: "Jones admitted full liability for the accident at the scene. (Undisputed Fact 11.)" Or "Jones admitted full liability for the accident at the scene. (Jones depo., p. 3, lines 4-7.)?

- **Be diligent**

While the 75-day notice provision is a boon to the plaintiff's bar, do not be lulled into putting the opposition on the back burner because it has a distant deadline. Review the motion as soon as it is served, and map out what additional discovery is necessary to obtain the facts necessary to obtain the motion. Then make sure the discovery gets out right away.

Section 437c, subdivision (h) permits a court to deny a summary-judgment motion or to continue the hearing to permit a party to obtain evidence that is necessary to oppose the motion. A request for a continuance under this section requires an affidavit from counsel that must show: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.) When a proper affidavit is submitted, it is mandatory that the trial court grant the continuance. (*Id*.) But a continuance is not mandatory when no affidavit is submitted, or the submitted affidavit fails to make the requisite showing. (*Id*.) While some cases have suggested that a proper affidavit does not require a showing that the party requesting the continuance has been diligent in seeking the necessary evidence, more recent cases have gone the other way. (*Compare Frazee v. Seely* (2002) 95 Cal.App.4th 627, 635 [diligence is not a factor in determining whether a continuance is required] with *Cooksey v. Alexakis*, 123 Cal.App.4th at 254 [rejecting this view and holding that a showing of diligence is a requirement to obtain a continuance].) As a practical matter, trial courts are seldom eager to continue a hearing when it does not appear that the party requesting the continuance has been diligent. It is therefore risky to rely on *Frazee*.

Concluding thoughts

Ultimately, the same factors that make it so difficult for the defense to draft a strong summary-judgment motion are at work on the plaintiff's side as well. Plaintiff's counsel is just as likely to overstate, and just as likely to be under difficult time constraints. Be aware of the traps that you will be arguing that the defense has fallen into, and take care to ensure that you do not find yourself open to the same arguments in the reply.

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