

RESOLUTION 08-09-2013 (As Amended and Adopted)

DIGEST

Motions for Summary Judgment: Expanded Opposition and Reply Dates

Amends Code of Civil Procedure section 437c to expand the number of days prior to the hearing in which oppositions and replies are due.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 04-10-2005 which was withdrawn.

Reasons:

This resolution amends Code of Civil Procedure section 437c to expand the number of days prior to the hearing in which oppositions and replies are due. This resolution should be approved in principle because expanding the due dates of the oppositions and replies by two days each, to 16 days and seven days respectively, will not present an undue burden on the litigants and will allow the courts a greater period of time in which to evaluate the motion papers.

Summary judgment motions are among the most common “large” motion that parties bring and trial courts are tasked with deciding. While the current notice time of 75 days was established to provide opposing parties more time to develop evidence necessary to oppose summary judgment motions, the time for opposition, reply and for the court to work-up its tentative decision have not been similarly adjusted. Given crowded dockets and reduced judicial support staff in conjunction with the fact these motions are often large and have high consequences to the parties, the two day adjustment to the opposition and reply dates which operates to give the court more time to review the papers makes sense.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Code of Civil Procedure section 437c, to read as follows:

- 1 §437c
- 2 (a) Any party may move for summary judgment in any action or proceeding if it is
- 3 contended that the action has no merit or that there is no defense to the action or proceeding. The
- 4 motion may be made at any time after 60 days have elapsed since the general appearance in the
- 5 action or proceeding of each party against whom the motion is directed or at any earlier time
- 6 after the general appearance that the court, with or without notice and upon good cause shown,
- 7 may direct. Notice of the motion and supporting papers shall be served on all other parties to the
- 8 action at least 75 days before the time appointed for hearing. However, if the notice is served by
- 9 mail, the required 75-day period of notice shall be increased by five days if the place of address
- 10 is within the State of California, 10 days if the place of address is outside the State of California
- 11 but within the United States, and 20 days if the place of address is outside the United States, and
- 12 if the notice is served by facsimile transmission, Express Mail, or another method of delivery

13 providing for overnight delivery, the required 75-day period of notice shall be increased by two
14 court days. The motion shall be heard no later than 30 days before the date of trial, unless the
15 court for good cause orders otherwise. The filing of the motion shall not extend the time within
16 which a party must otherwise file a responsive pleading.

17 (b) (1) The motion shall be supported by affidavits, declarations, admissions, answers to
18 interrogatories, depositions, and matters of which judicial notice shall or may be taken. The
19 supporting papers shall include a separate statement setting forth plainly and concisely all
20 material facts which the moving party contends are undisputed. Each of the material facts stated
21 shall be followed by a reference to the supporting evidence. The failure to comply with this
22 requirement of a separate statement may in the court's discretion constitute a sufficient ground
23 for denial of the motion.

24 (2) Any opposition to the motion shall be served and filed not less than ~~14~~21 days
25 preceding the noticed or continued date of hearing, unless the court for good cause orders
26 otherwise. The opposition, where appropriate, shall consist of affidavits, declarations,
27 admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or
28 may be taken.

29 (3) The opposition papers shall include a separate statement that responds to each of the
30 material facts contended by the moving party to be undisputed, indicating whether the opposing
31 party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly
32 and concisely any other material facts that the opposing party contends are disputed. Each
33 material fact contended by the opposing party to be disputed shall be followed by a reference to
34 the supporting evidence. Failure to comply with this requirement of a separate statement may
35 constitute a sufficient ground, in the court's discretion, for granting the motion.

36 (4) Any reply to the opposition shall be served and filed by the moving party not less than
37 ~~five~~seven days preceding the noticed or continued date of hearing, unless the court for good
38 cause orders otherwise.

39 (5) Evidentiary objections not made at the hearing shall be deemed waived.

40 (6) Except for subdivision (c) of Section 1005 relating to the method of service of
41 opposition and reply papers, Sections 1005 and 1013, extending the time within which a right
42 may be exercised or an act may be done, do not apply to this section.

43 (7) Any incorporation by reference of matter in the court's file shall set forth with
44 specificity the exact matter to which reference is being made and shall not incorporate the entire
45 file.

46 (c) The motion for summary judgment shall be granted if all the papers submitted show
47 that there is no triable issue as to any material fact and that the moving party is entitled to a
48 judgment as a matter of law. In determining whether the papers show that there is no triable issue
49 as to any material fact the court shall consider all of the evidence set forth in the papers, except
50 that to which objections have been made and sustained by the court, and all inferences
51 reasonably deducible from the evidence, except summary judgment may not be granted by the
52 court based on inferences reasonably deducible from the evidence, if contradicted by other
53 inferences or evidence, which raise a triable issue as to any material fact.

54 (d) Supporting and opposing affidavits or declarations shall be made by any person on
55 personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the
56 affiant is competent to testify to the matters stated in the affidavits or declarations. Any
57 objections based on the failure to comply with the requirements of this subdivision shall be made
58 at the hearing or shall be deemed waived.

59 (e) If a party is otherwise entitled to a summary judgment pursuant to this section,
60 summary judgment may not be denied on grounds of credibility or for want of cross-examination
61 of witnesses furnishing affidavits or declarations in support of the summary judgment, except
62 that summary judgment may be denied in the discretion of the court, where the only proof of a
63 material fact offered in support of the summary judgment is an affidavit or declaration made by
64 an individual who was the sole witness to that fact; or where a material fact is an individual's
65 state of mind, or lack thereof, and that fact is sought to be established solely by the individual's
66 affirmation thereof.

67 (f) (1) A party may move for summary adjudication as to one or more causes of action
68 within an action, one or more affirmative defenses, one or more claims for damages, or one or
69 more issues of duty, if that party contends that the cause of action has no merit or that there is no
70 affirmative defense thereto, or that there is no merit to an affirmative defense as to any cause of
71 action, or both, or that there is no merit to a claim for damages, as specified in Section 3294 of
72 the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff
73 or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes
74 of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.

75 (2) A motion for summary adjudication may be made by itself or as an alternative to a
76 motion for summary judgment and shall proceed in all procedural respects as a motion for
77 summary judgment. However, a party may not move for summary judgment based on issues
78 asserted in a prior motion for summary adjudication and denied by the court, unless that party
79 establishes to the satisfaction of the court, newly discovered facts or circumstances or a change
80 of law supporting the issues reasserted in the summary judgment motion.

81 (g) Upon the denial of a motion for summary judgment, on the ground that there is a
82 triable issue as to one or more material facts, the court shall, by written or oral order, specify one
83 or more material facts raised by the motion as to which the court has determined there exists a
84 triable controversy. This determination shall specifically refer to the evidence proffered in
85 support of and in opposition to the motion which indicates that a triable controversy exists. Upon
86 the grant of a motion for summary judgment, on the ground that there is no triable issue of
87 material fact, the court shall, by written or oral order, specify the reasons for its determination.
88 The order shall specifically refer to the evidence proffered in support of, and if applicable in
89 opposition to, the motion which indicates that no triable issue exists. The court shall also state its
90 reasons for any other determination. The court shall record its determination by court reporter or
91 written order.

92 (h) If it appears from the affidavits submitted in opposition to a motion for summary
93 judgment or summary adjudication or both that facts essential to justify opposition may exist but
94 cannot, for reasons stated, then be presented, the court shall deny the motion, or order a
95 continuance to permit affidavits to be obtained or discovery to be had or may make any other
96 order as may be just. The application to continue the motion to obtain necessary discovery may
97 also be made by ex parte motion at any time on or before the date the opposition response to the
98 motion is due.

99 (i) If, after granting a continuance to allow specified additional discovery, the court
100 determines that the party seeking summary judgment has unreasonably failed to allow the
101 discovery to be conducted, the court shall grant a continuance to permit the discovery to go
102 forward or deny the motion for summary judgment or summary adjudication. This section does
103 not affect or limit the ability of any party to compel discovery under the Civil Discovery Act
104 (Title 4 (commencing with Section 2016.010) of Part 4).

105 (j) If the court determines at any time that any of the affidavits are presented in bad faith
106 or solely for purposes of delay, the court shall order the party presenting the affidavits to pay the
107 other party the amount of the reasonable expenses which the filing of the affidavits caused the
108 other party to incur. Sanctions may not be imposed pursuant to this subdivision, except on notice
109 contained in a party's papers, or on the court's own noticed motion, and after an opportunity to be
110 heard.

111 (k) Except when a separate judgment may properly be awarded in the action, no final
112 judgment may be entered on a motion for summary judgment prior to the termination of the
113 action, but the final judgment shall, in addition to any matters determined in the action, award
114 judgment as established by the summary proceeding herein provided for.

115 (l) In actions which arise out of an injury to the person or to property, if a motion for
116 summary judgment was granted on the basis that the defendant was without fault, no other
117 defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on
118 the absence or involvement of the defendant who was granted the motion.

119 (m) (1) A summary judgment entered under this section is an appealable judgment as in
120 other cases. Upon entry of any order pursuant to this section, except the entry of summary
121 judgment, a party may, within 20 days after service upon him or her of a written notice of entry
122 of the order, petition an appropriate reviewing court for a peremptory writ. If the notice is served
123 by mail, the initial period within which to file the petition shall be increased by five days if the
124 place of address is within the State of California, 10 days if the place of address is outside the
125 State of California but within the United States, and 20 days if the place of address is outside the
126 United States. If the notice is served by facsimile transmission, Express Mail, or another method
127 of delivery providing for overnight delivery, the initial period within which to file the petition
128 shall be increased by two court days. The superior court may, for good cause, and prior to the
129 expiration of the initial period, extend the time for one additional period not to exceed 10 days.

130 (2) Before a reviewing court affirms an order granting summary judgment or summary
131 adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the
132 parties an opportunity to present their views on the issue by submitting supplemental briefs. The
133 supplemental briefing may include an argument that additional evidence relating to that ground
134 exists, but that the party has not had an adequate opportunity to present the evidence or to
135 conduct discovery on the issue. The court may reverse or remand based upon the supplemental
136 briefing to allow the parties to present additional evidence or to conduct discovery on the issue.
137 If the court fails to allow supplemental briefing, a rehearing shall be ordered upon timely petition
138 of any party.

139 (n) (1) If a motion for summary adjudication is granted, at the trial of the action, the
140 cause or causes of action within the action, affirmative defense or defenses, claim for damages,
141 or issue or issues of duty as to the motion which has been granted shall be deemed to be
142 established and the action shall proceed as to the cause or causes of action, affirmative defense or
143 defenses, claim for damages, or issue or issues of duty remaining.

144 (2) In the trial of the action, the fact that a motion for summary adjudication is granted as
145 to one or more causes of action, affirmative defenses, claims for damages, or issues of duty
146 within the action shall not operate to bar any cause of action, affirmative defense, claim for
147 damages, or issue of duty as to which summary adjudication was either not sought or denied.

148 (3) In the trial of an action, neither a party, nor a witness, nor the court shall comment
149 upon the grant or denial of a motion for summary adjudication to a jury.

150 (o) A cause of action has no merit if either of the following exists:

151 (1) One or more of the elements of the cause of action cannot be separately established,
152 even if that element is separately pleaded.

153 (2) A defendant establishes an affirmative defense to that cause of action.

154 (p) For purposes of motions for summary judgment and summary adjudication:

155 (1) A plaintiff or cross-complainant has met his or her burden of showing that there is no
156 defense to a cause of action if that party has proved each element of the cause of action entitling
157 the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met
158 that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of
159 one or more material facts exists as to that cause of action or a defense thereto. The defendant or
160 cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a
161 triable issue of material fact exists but, instead, shall set forth the specific facts showing that a
162 triable issue of material fact exists as to that cause of action or a defense thereto.

163 (2) A defendant or cross-defendant has met his or her burden of showing that a cause of
164 action has no merit if that party has shown that one or more elements of the cause of action, even
165 if not separately pleaded, cannot be established, or that there is a complete defense to that cause
166 of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the
167 plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as
168 to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon
169 the mere allegations or denials of its pleadings to show that a triable issue of material fact exists
170 but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as
171 to that cause of action or a defense thereto.

172 (q) This section does not extend the period for trial provided by Section 1170.5.

173 (r) Subdivisions (a) and (b) do not apply to actions brought pursuant to Chapter 4
174 (commencing with Section 1159) of Title 3 of Part 3.

175 (s) (1) Notwithstanding subdivision (f), a party may move for summary adjudication of a
176 legal issue or a claim for damages other than punitive damages that does not completely dispose
177 of a cause of action, an affirmative defense, or an issue of duty.

178 (2) This motion may be brought only upon the stipulation of the parties whose claims or
179 defenses are put at issue by the motion and a prior determination and order by the court that the
180 motion will further the interests of judicial economy, by reducing the time to be consumed in
181 trial, or significantly increase the ability of the parties to resolve the case by settlement.

182 (3) Before a motion may be filed pursuant to this subdivision, the parties shall submit to
183 the court a joint stipulation clearly setting forth the issue or issues to be adjudicated, with a
184 declaration from each stipulating party demonstrating that a ruling on the motion will further the
185 interests of judicial economy by reducing the time to be consumed in trial or significantly
186 increasing the probability of settlement. Within 15 days of the court's receipt of the stipulation
187 and declarations, unless the court has good cause for extending the time in which to make the
188 determination, the court shall notify the submitting parties as to whether the motion may be filed.
189 If the court elects not to allow the filing of the motion, the stipulating parties may request, and
190 upon that request the court shall conduct, an informal conference with the stipulating parties to
191 permit further evaluation of the proposed stipulation; but no further papers may be filed by the
192 parties in support of the proposed motion.

193 (4) Any motion for summary adjudication brought under this subdivision shall contain
194 the following language, or its substantial equivalent, in the notice of motion:

195 "This motion is made pursuant to subdivision (s) of Section 437c of the Code of Civil
196 Procedure. The parties to this motion stipulate that the court shall hear the motion and that the

197 resolution of this motion will either further the interests of judicial economy by reducing the time
198 to be consumed in trial or significantly increase the ability of the parties to resolve the case by
199 settlement."

200 (5) The notice of motion shall be signed by counsel for all parties, and by those parties in
201 propria persona, to the motion.

202 (6) The joint stipulation shall be served on all parties, if any, who are not parties to the
203 motion specified in paragraph (1). If, within 10 days of the submission of the stipulation, any
204 nonstipulating party files an objection to the determination of the issue, the court may consider
205 the objection in determining whether or not to allow the motion to be filed.

206 (7) A motion for summary adjudication brought pursuant to this subdivision may be
207 made by itself or as an alternative to a motion for summary judgment and shall proceed in all
208 procedural respects as a motion for summary judgment.

209 (t) For the purposes of this section, a change in law does not include a later enacted
210 statute without retroactive application.

211 (u) This section shall remain in effect only until January 1, 2015, and as of that date is
212 repealed, unless a later enacted statute, that is enacted before January 1, 2015, deletes or extends
213 that date.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Santa Barbara County Bar Association

STATEMENT OF REASONS

The Problem: Currently, oppositions must be filed 14 days before the hearing and replies five days. The problem is that courts have insufficient time to analyze the motion, opposition and reply in time to prepare for the hearing and post a tentative ruling prior to the hearing. When a summary judgment motion is set for a Monday, the reply can be filed at 5:00 p.m. on the preceding Wednesday. Many summary judgment motions take longer than two days to analyze, particularly when the judge and his or her research attorneys have other matters to work on. The practical result is that the analysis begins without benefit of the reply, unless the attorney knows of this problem and gets the reply in early. And if that Monday is the Monday after Thanksgiving, the timely-filed reply won't be seen before the hearing. For other civil law and motion matters, most of which are more routine, the reply must be filed five court days before the hearing – effectively seven calendar days (11 in the case of the Thanksgiving example). There is no reasonable justification for giving courts less time to analyze summary judgment motions than other motions.

This Solution: This resolution simply moves the reply date to seven days before the hearing, still not the same as the five court days for other motions. To give the moving party the same nine days to prepare a reply as it currently enjoys, the resolution would also move the opposition deadline to 21 days before the hearing. Given the 75 day notice period for the motion, this is still a generous period for preparation of the opposition.

LEGISLATIVE HISTORY

Not known

IMPACT STATEMENT

The proposed resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Thomas Hinshaw, 789 N. Ontare Rd.,
Santa
Barbara, CA 93105; (805) 729-2526; thinsb@gmail.com.

RESPONSIBLE FLOOR DELEGATE: Donna Lewis