

RESOLUTION 10-06-2002

DIGEST

Summary Judgment: Non-moving Party.

Amends Code of Civil Procedure section 437c to permit the court to grant summary judgment or summary adjudication to a non-moving party.

RESOLUTION COMMITTEE RECOMMENDATION

DISAPPROVE

Reasons

This resolution amends Code of Civil Procedure section 437c to permit the court to grant summary judgment or summary adjudication of issues to a non-moving party. This resolution should be disapproved because it creates due process problems by failing to provide the moving party with an opportunity to respond, and because it fails to account for cases that involve multiple parties.

When a party brings a motion for summary judgment or summary adjudication of issues, a separate statement of facts as well as a memorandum of points and authorities must support the motion. The adverse party responds by showing that there are material facts in dispute, which require a trial. This resolution would permit the court to grant a summary judgment against the moving party without allowing that party to produce additional evidence to avoid an adverse judgment. There will be situations where the moving party identifies only that evidence that it believes is necessary to support its affirmative motion, withholding other available evidence for tactical or other reasons.

Where there are multiple parties in an action, this resolution allows the extreme result of disposing of a party's action, or cause of action, where that party is not even involved in the motion and does not file opposition because the moving party sought no adverse ruling against it.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates 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
- 4 proceeding. The motion may be made at any time after 60 days have elapsed since the
- 5 general appearance in the action or proceeding of each party against whom the motion is
- 6 directed or at any earlier time after the general appearance that the court, with or without
- 7 notice and upon good cause shown, may direct. Notice of the motion and supporting
- 8 papers shall be served on all other parties to the action at least 28 days before the time
- 9 appointed for hearing. However, if the notice is served by mail, the required 28-day period
- 10 of notice shall be increased by five days if the place of address is within the State of
- 11 California, 10 days if the place of address is outside the State of California but within the
- 12 United States, and 20 days if the place of address is outside the United States, and if the
- 13 notice is served by facsimile transmission, Express Mail, or another method of delivery
- 14 providing for overnight delivery, the required 28-day period of notice shall be increased by
- 15 two court days. The motion shall be heard no later than 30 days before the date of trial,
- 16 unless the court for good cause orders otherwise. The filing of the motion shall not extend
- 17 the time within which a party must otherwise file a responsive pleading.

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

25 Any opposition to the motion shall be served and filed not less than 14 days
26 preceding the noticed or continued date of hearing, unless the court for good cause orders
27 otherwise. The opposition, where appropriate, shall consist of affidavits, declarations,
28 admissions, answers to interrogatories, depositions, and matters of which judicial notice
29 shall or may be taken. The opposition papers shall include a separate statement which
30 responds to each of the material facts contended by the moving party to be undisputed,
31 indicating whether the opposing party agrees or disagrees that those facts are undisputed.
32 The statement also shall set forth plainly and concisely any other material facts which the
33 opposing party contends are disputed. Each material fact contended by the opposing party
34 to be disputed shall be followed by a reference to the supporting evidence. Failure to
35 comply with this requirement of a separate statement may constitute a sufficient ground, in
36 the court's discretion, for granting the motion.

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

40 Evidentiary objections not made at the hearing shall be deemed waived.
41 Sections 1005 and 1013, extending the time within which a right may be exercised or an
42 act may be done, do not apply to this section.

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

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

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

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

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

69 only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of
70 duty.

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

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

87 (h) If it appears that there is no triable issue as to any material fact and that any party other than the
88 moving party is entitled to a summary judgment or summary adjudication, the court may issue an order
89 granting such summary judgment or summary adjudication without the necessity for a cross-motion.

90 ~~(h)(i)~~ If it appears from the affidavits submitted in opposition to a motion for summary judgment or
91 summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons
92 stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be
93 obtained or discovery to be had or may make any other order as may be just.

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

99 ~~(j)(k)~~ Except where a separate judgment may properly be awarded in the action, no final judgment
100 shall be entered on a motion for summary judgment prior to the termination of the action, but the final
101 judgment shall, in addition to any matters determined in the action, award judgment as established by the
102 summary proceeding herein provided for.

103 ~~(k)(l)~~ In actions which arise out of an injury to the person or to property, when a motion for
104 summary judgment was granted on the basis that the defendant was without fault, no other defendant during
105 trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of
106 the defendant who was granted the motion.

107 ~~(l)(m)~~ A summary judgment entered under this section is an appealable judgment as in other cases.
108 Upon entry of any order pursuant to this section except the entry of summary judgment, a party may, within
109 20 days after service upon him or her of a written notice of entry of the order, petition an appropriate
110 reviewing court for a peremptory writ. If the notice is served by mail, the initial period within which to file
111 the petition shall be increased by five days if the place of address is within the State of California, 10 days if
112 the place of address is outside the State of California but within the United States, and 20 days if the place of
113 address is outside the United States. If the notice is served by facsimile transmission, Express Mail, or
114 another method of delivery providing for overnight delivery, the initial period within which to file the
115 petition shall be increased by two court days. The superior court may, for good cause, and prior to the
116 expiration of the initial period, extend the time for one additional period not to exceed 10 days.

117 ~~(m)(n)(1)~~ If a motion for summary adjudication is granted, at the trial of the action, the cause or
118 causes of action within the action, affirmative defense or defenses, claim for damages, or issue or issues of
119 duty as to the motion which has been granted shall be deemed to be established and the action shall proceed
120 as to the cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of
121 duty remaining.

122 (2) In the trial of the action, the fact that a motion for summary adjudication is granted as to one or more
123 causes of action, affirmative defenses, claims for damages, or issues of duty within the action shall not

124 operate to bar any cause of action, affirmative defense, claim for damages, or issue of duty as to which
125 summary adjudication was either not sought or denied.

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

128 ~~(h)~~(o) A cause of action has no merit if either of the following exists: (1) One or more of the
129 elements of the cause of action cannot be separately established, even if that element is separately pleaded.
130 (2) A defendant establishes an affirmative defense to that cause of action.

131 ~~(e)~~(p) For purposes of motions for summary judgment and summary adjudication: (1) A plaintiff or
132 cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that
133 party has proved each element of the cause of action entitling the party to judgment on that cause of action.
134 Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-
135 defendant to show that a triable issue of one or more material facts exists as to that cause of action or a
136 defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or denials of its
137 pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts
138 showing that a triable issue of material fact exists as to that cause of action or a defense thereto. (2) A
139 defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that
140 party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be
141 established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant
142 has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one
143 or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant
144 may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact
145 exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to
146 that cause of action or a defense thereto.

147 ~~(p)~~(q) Nothing in this section shall be construed to extend the period for trial provided by Section
148 1170.5.

149 ~~(q)~~(r) Subdivisions (a) and (b) shall not apply to actions brought pursuant to Chapter 4 (commencing
150 with Section 1159) of Title 3 of Part 3.

151 ~~(r)~~(s) For the purposes of this section, a change in law shall not include a later enacted statute
152 without retroactive application.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS:

Existing Law: Does not provide for courts to grant summary judgment or summary adjudication against the moving party where no triable issues of material fact exist.

This Resolution: Amends Code of Civil Procedure Section 437c to expressly authorize courts to grant summary judgment or summary adjudication in favor of a non-moving party in appropriate cases where no triable issues of material fact exist and the court determines that the non-moving party is entitled to judgment as a matter of law.

The Problem: When one litigant files a motion for summary judgment or summary adjudication, and the court determines that there are no triable issues of material fact, but that, as a matter of law, the non-moving party is entitled to prevail, there is no mechanism for the court to enter an order of summary judgment or summary adjudication in favor of the non-moving party in the absence of a duly noticed cross-motion. This causes courts to conduct needless trials when the court has already determined that there are no triable issues of material fact.

This situation frequently arises when one party does not have sufficient resources to file a motion for summary judgment or summary adjudication, which is often an expensive motion to prepare. If the other party brings such a motion and demonstrates that there are no triable issues of material fact, but the court determines that as a matter of law judgment should be entered in favor of the non-moving party on the basis of the undisputed facts, the court is currently prohibited from entering an order in favor of the non-moving party.

This proposal provides a solution for this problem and is identical to the procedure already in place in several states, including New York (NY CPLR 3212(b)), Maryland (Md. Rules 2-501(e)), North Dakota (ND RCP 56(c)), and Wisconsin (Wis. Stat. 802.08(6)), and in the federal courts (*See, e.g., Kassbaum v. Steppenwolf Productions, Inc.* (9th Cir. 2000) 236 F.3d 487, 494-495).

IMPACT STATEMENT:

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

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