

Summary Judgment Motions and Appeals

Summary judgment appeals are great appeals for several reasons. An appellant's chances of success are usually higher, since the standard of review is *de novo*, so the appellate court does not give any deference to the trial court's ruling. Moreover, the court reviews the evidence in the light most favorable to the appellant, the nonmoving party who opposed summary judgment below. The costs are often lower, since it is not usually necessary to obtain a reporter's transcript (although there are situations where a transcript may be required to establish that evidentiary objections were preserved). The record is usually more manageable, consisting of the essential pleadings, summary judgment papers, and relevant orders. Finally, the parties have already briefed the issues to some extent, making it easier to focus on the main issues on appeal and to research those issues thoroughly.

I consider three main issues when evaluating a summary judgment appeal. First, did the moving party carry its burden to establish the lack of any disputed issues of material fact and that the party was entitled to judgment as a matter of law? Both of these elements must be established. Second, did the opposing party produce evidence raising disputed issues of material fact? Finally, did the trial court err in making any evidentiary rulings, and if so, were the objections properly preserved? These considerations apply equally to appellants and respondents.

The Summary Judgment Process

Summary judgment motions are powerful tools that can end the litigation entirely. Failure to follow the proper procedures can affect a party's chances in the trial court and on appeal.

The party seeking summary judgment has the overall burden of persuasion and a burden to produce evidence. Under the summary judgment statute, Code of Civil Procedure section 473c, the moving party must show that "there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Code Civ. Proc. § 437c, subd. (c). The motion must be supported by evidence, such as declarations, discovery responses, or deposition testimony. *Id.*, subd. (b)(1). The moving party also is required to include a "separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed" along with "a reference to the supporting evidence." *Id.*

A defendant seeking summary judgment, the more common situation, must show that one or more elements of the cause of action cannot be established or there is a complete defense to the action. If the defendant carries this burden and makes a *prima facie* showing, then the burden shifts to the opposing party to show the existence of a triable issue of material fact. *See id.*, subd. (p)(2). If the defendant does not meet the initial burden, the court will deny the motion without

looking at the plaintiff's evidence. *See Duckett v. Pistoresi Ambulance Service, Inc.*, 19 Cal.App.4th 1525, 1533 (1993).

Too often, a party will fail to include sufficient admissible evidence with the motion. Also note that it is inappropriate for a moving party to submit new evidence with a reply brief, so make sure to submit all necessary evidence with the moving papers. *See San Diego Watercrafts, Inc. v. Wells Fargo Bank*, 102 Cal.App.4th 308, 316 (2002).

Any documentary evidence must be properly authenticated. For example, it is improper for an attorney to authenticate most documents, such as medical or employment records, since the attorney is not usually the custodian of records. *See Sanchez v. Hillerich & Bradsby Co.*, 104 Cal.App.4th 703, 720 (2002).

Likewise, do not make the mistake of relying on experts to establish proof of the facts of the case. Last year, the First District overturned a grant of summary judgment to a defendant in a medical malpractice case in *Garibay v. Hemmat*, 161 Cal.App.4th 735 (2008), for this very reason. The defendant included a declaration from an expert who testified about the underlying facts of the case based on his review of the medical records. The expert did not have personal knowledge of the facts, and the records were not included with the motion. The court held that the motion "lacked any evidentiary basis" and that since the facts were not properly established with admissible evidence, the burden never shifted to the plaintiff. *Id.* at 737.

A party opposing a summary judgment motion should take care to provide admissible evidence showing that triable issues of fact exist. If the moving party carries its burden, the opposing party then has the burden of establishing disputed issues of material fact. In addition, the opposing party must submit a separate statement identifying any disputed issues and supporting evidence. *See Code Civ. Proc.* § 437c, subd. (b)(3).

Both sides should make sure to raise proper evidentiary objections if necessary. It is a better practice to submit the objections in writing, to ensure a proper record. In addition, attorneys should do their best to seek rulings on their objections by the court. Some courts have held that the failure to obtain a ruling waives the objection. This issue is currently pending before the California Supreme Court in *Reid v. Google, Inc.*, Case No. S158965 (review granted Jan. 30, 2008).

Beware of Over-Litigating the Motion

While it is important that counsel involved in summary judgment proceedings take the proceedings seriously, it is also important not to cross the line into abusing the process. Summary judgment proceedings can quickly spiral out of control. An extreme example is illustrated in the recent decision of *Nazir v. United Airlines, Inc.*, 178 Cal.App.4th 243 (2009).

There, the court overturned summary judgment in favor of defendants in an employment case, criticizing everyone involved in the process.

In *Nazir*, the defendants filed 1,056 pages of moving papers, including a 196-page separate statement and a 174-page request for judicial notice. The plaintiff's opposition was nearly three times as long, with a 1,894-page separate statement. Defendants filed 1,150 pages in reply, including 153 pages of new evidence, a 297-page "Reply Separate Statement," and 764 separate evidentiary objections. The parties filed a total of 5,415 pages. The trial court overruled all of the plaintiff's objections and sustained all of the defendants' objections except for one, and granted summary judgment to the defendants.

The appellate court characterized this case as the "poster child" for criticism against the summary judgment procedure, and said the summary judgment motion was "what may well be the most oppressive motion ever presented to a superior court." *Id.* at 248. The court was especially harsh on the defendants, for the sheer volume of material presented and for creating a "misleading picture" of the evidence. *Id.* at 251-253. The court also rebuked the trial court's decision to sustain 763 of 764 objections by the defendants, many of which were frivolous or stated no basis for the objection. *Id.* at 255-257.

While few cases are as extreme as *Nazir*, counsel are cautioned not to over-litigate summary judgment motions. Consider how much the courts are already overburdened. Further, as the *Nazir* court noted, trial courts have inherent authority to strike proposed pleadings that fail to conform to the rules. *See id.* at 290. An oppressive motion or opposition will only hurt your chances in the trial court and on appeal.

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