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The Uncertain Future Of Summary Judgment In California

By **Scott Dixler, Melissa Edelson and Steve Fleischman** (October 30, 2018, 1:08 PM EDT)

After decades of viewing summary judgment skeptically, the California Supreme Court has recently followed the Legislature's lead and held that summary judgment is no longer a disfavored remedy.[1] Two recent Court of Appeal decisions, however, demonstrate a continuing split of authority among the intermediate courts concerning a trial court's discretion to grant summary judgment based on noncompliance with the summary judgment statute.[2] Leyva v. Garcia exemplifies the liberalization of summary judgment law, while Levingston v. Kaiser Foundation Health Plan demonstrates courts' perennial reluctance toward granting summary judgment.

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In Perry v. Bakewell Hawthorne, the Supreme Court emphasized that "[s]ummary judgment is ... 'a particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case."[3] With the 1992 and 1993 amendments to the summary judgment statute, the Legislature directed that summary judgment should no longer be treated as a disfavored mechanism for disposing of claims, but rather as "an integral part of our rules of civil procedure."[4] Summary judgment has been described as "having a salutary effect, ridding the system, on an expeditious and efficient basis, of cases lacking any merit."[5]

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Despite the Supreme Court's recognition that these amendments "dramatically" liberalized summary judgment law in California,[6] many intermediate courts have retained their historic reluctance toward summary judgment motions.[7]

This lingering judicial hostility toward summary judgment is particularly evident in the context of an opposing party's failure to comply with the procedural requirements of the summary judgment statute and the California Rules of Court regarding separate statements.[8] Although Code of Civil Procedure Section 437c specifically grants trial courts discretion to grant summary judgment based on the opposing party's failure to comply with the separate statement requirement,[9] several intermediate appellate courts have restricted that discretion. Starting with Parkview Villas Association Inc. v. State Farm Fire & Casualty Co. in 2005,[10] some courts have held that it is an abuse of discretion for a trial court to grant summary judgment where the opposing party's separate statement is "not wholly deficient."

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In Parkview Villas, the opposing party filed an inadequate separate statement in opposition to summary judgment.[11] The trial court granted summary judgment on that basis, finding that the opposing party had failed to properly present any admissible evidence in opposition to the moving party's motion.[12] The Court of Appeal reversed, holding that the trial court had abused its discretion by granting summary judgment based solely on the opposing party's deficient separate statement. Parkview Villas held that where an opposition fails to comply with the summary judgment statute but is "not wholly deficient," the trial court "does not have the discretion to enter a judgment against that party solely as a result of that party's failure."[13] Instead, "the proper

response in most instances, if the trial court is not prepared to address the merits of the motion in light of the deficient separate statement, is to give the opposing party an opportunity to file a proper separate statement."[14]

In the wake of Parkview Villas, a split of authority emerged regarding the extent of a trial court's authority to grant summary judgment based on noncompliance with the procedural aspects of the summary judgment statute.[15] This split of authority is enduring — two Court of Appeal cases decided this past year have come out on opposite ends of this issue. In Levingston, the opposing party failed to file any opposition to a motion for summary judgment, allegedly because the opposing party had substituted new attorneys into the case after her former attorneys were disqualified, and her new attorneys claimed to be unaware that opposing party's old opposition had been stricken and a new opposition needed to be filed.[16] At the hearing on the motion, opposing party's new counsel requested a continuance. The trial court found that new counsel's failure was inexcusable neglect and granted summary judgment.

The Court of Appeal reversed, holding that the opposing party was entitled to a continuance to file an opposition "'under the ordinary discretionary standard applied to requests for a continuance,'" i.e., good cause.[17] Analogizing the grant of summary judgment to terminating sanctions, the Court of Appeal held that a trial court abuses its discretion in granting summary judgment unless the opposing violation of the procedural rule was willful, preceded by a history of abuse of pretrial procedures, or less severe sanctions would not produce compliance with the procedural rule.[18] The Court of Appeal then found no evidence that new counsel's failure to file an opposition was willful, [19] nor any history of abusing pretrial procedures.[20] Finding no evidence that new counsel's failure to file an opposition was willful or part of a history of procedural abuse, the court determined the trial court abused its discretion by denying a continuance and reversed with directions to allow opposing party to file an opposition to the motion for summary judgment.

The Court of Appeal in Leyva reached a different conclusion.[21] In contrast to Levingston's "terminating sanctions" analysis, Levya held a trial court may properly grant summary judgment when the moving papers satisfy the initial burden of proof and the opposing party fails to file a separate statement.[22]

Levingston and Levya illustrate California appellate courts' ambivalent attitude toward summary judgment. Leyva's holding comports with the express terms of Code of Civil Procedure Section 437c, Subdivision (b)(3) and California Rules of Court, Rule 3.1350 and the liberalization of summary judgment law. Levingston, on the other hand, illustrates the persistence of courts' skepticism toward summary judgment.

In view of the Supreme Court's recent emphasis that summary judgment is no longer a disfavored remedy, but is instead "a particularly suitable means" for disposing of unmerited claims,[23] the approach taken in Levya appears to be more sound. Nonetheless, litigants filing summary judgment motions, or defending orders granting summary judgment on appeal, must contend with the lingering hostility toward summary judgment reflected in cases like Levingston. Time will tell whether appellate courts will follow the Supreme Court's lead and strictly enforce the procedural rules governing summary judgment.

Correction: A previous version of this article included an incorrect citation for Rush v. White in endnote 15. The error has been corrected.

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[1] See Perry v. Bakewell Hawthorne, LLC (2017) 2 Cal.5th 536, 542 (Perry).

[2] Compare Levingston v. Kaiser Foundation Health Plan, Inc. (2018) 26 Cal.App.5th 309

(Levingston) [2018 WL 3956586] (trial court abused its discretion by denying request for continuance to file an opposition to a motion for summary judgment and granting summary judgment for moving party) with Leyva v. Garcia (2018) 20 Cal.App.5th 1095, 1105 & fn. 3 (Leyva) (trial court may properly grant summary judgment when the moving papers satisfy the initial burden of proof and the opposing party fails to file a separate statement).

[3] Perry, supra, 2 Cal.5th at p. 542.

[4] Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, Summary Judgment & Summary Adjudication, ¶ 10:278.

[5] Nazir v. United Airlines (2009) 178 Cal.App.4th 243, 248.

[6] See Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 848; accord, Perry, supra, 2 Cal.5th at p. 542.

[7] See, e.g., Zoran Corp. v. Chen (2010) 185 Cal.App.4th 799, 806 ("We recognize that summary judgment " 'is a drastic measure which should be used with caution so that it does not become a substitute for trial' "); Baptist v. Robinson (2006) 143 Cal.App.4th 151, 159 (same); Mendoza v. Brodeur (2006) 142 Cal.App.4th 72, 79 ("Summary judgment is a 'drastic measure that deprives the losing party of a trial on the merits,' " and "should therefore 'be used with caution' ").

[8] See Code Civ. Proc., § 437c, subd. (b)(3); Cal. Rules of Court, rule 3.1350.

[9] See ibid.

[10] Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co. (2005) 133 Cal.App.4th 1197, 1210

[11] Parkview Villas, supra, 133 Cal.App.4th at p. 1204.

[12] Id. at p. 1207.

[13] Id. at p. 1215.

[14] Id. at p. 1211.

[15] Compare Batarse v. Service Employees Inter. Union Local 1000 (2012) 209 Cal.App.4th 820, 828 (trial courts have broad discretion to grant summary judgment motion when opposing separate statement is defective); Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co. (2009) 170 Cal.App.4th 554, 557, 576 (same); with Denton v. City and County of San Francisco (2017) 16 Cal.App.5th 779 (trial courts have only limited authority to grant summary judgment as a result of a defective opposition); Rush v. White Corp. (2017) 13 Cal.App.5th 1086 (no abuse of discretion where trial judge postponed the hearing to allow the opposing party to submit a proper separate statement).

[16] Levingston, supra, 26 Cal.App.5th 309 [2018 WL 3956586].

[17] Levingston, supra, 26 Cal.App.5th at p. __ [2018 WL 3956586 at p. *3].

[18] Ibid.

[19] Id. at p. *5 ("[T]here is no conceivable motive for a deliberate failure to file an opposition. How could they possibly have benefited?").

[20] Ibid. ("[N]ew counsel had not abused any procedures. How could they? They had not done anything.").

[21] Leyva, supra, 20 Cal.App.5th at p. 1105 & fn. 3.

[22] Ibid.

[23] Perry, supra, 2 Cal.5th at p. 542.

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