Combating motions for summary judgment using CCP section 437c(h)

By Ted Pelletier and Laurel Halbany

The defendant in your case has viciously fought all your attempts at discovery. Every single interrogatory was met with boilerplate objections and evasive responses. You've set depositions of defense witnesses, only to be given excuses at the last minute and told you'll have to reschedule. And then, the defendant drops a motion for summary judgment or summary adjudication, asking the court to throw out your case because you haven't shown you possess necessary evidence.

Code of Civil Procedure section 437c, subdivision (h) is your remedy. It permits a party opposing summary judgment or adjudication to ask to continue the motion to obtain evidence essential to the opposition; to deny the motion, particularly if the absence of evidence is the fault of the moving party; and to make "such orders as are just," which could include directing the uncooperative defendant to turn over critical evidence. But obtaining a continuance requires more than simply asking the court for more time.

Grounds for additional discovery

California law used to be very liberal with continuances to obtain additional discovery, holding that they were "virtually mandated" where the requesting party makes a showing that the discovery is necessary. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.) And it is still true that the language of the statute states that courts "shall" grant relief on an appropriate showing through affidavits, and that courts should exercise their discretion on the side of granting continuances, rather than denying them. (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 324.) But the progression of published case law appears to show the appellate courts growing impatient with litigants who request continuances on flimsy grounds or with the seeming purpose of putting off the inevitable. And the statute itself directs courts to impose costs on a party that tries to use a continuance request in bad faith or for the purpose of delay. (Code Civ. Proc., § 437c, subd. (j).)

To make the required showing for a continuance under Code of Civil Procedure section 437c, subdivision (h), you must submit an affidavit establishing (1) the facts to be obtained through additional discovery are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons additional time is needed to obtain these facts. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254; *Combs v. Skyriver Communications Inc.* (2008) 159 Cal.App.4th 1242, 1270.)

The affidavit can't simply declare that additional discovery is needed; it must specifically describe the specific facts to be obtained, and the reasons those facts are necessary to justify opposition. (*Jade Fashion & Co., Inc. v. Harkham Industries*, Inc. (2014) 229 Cal.App.4th 635, 655-656.) If the affidavit is conclusory and fails to show what facts exist that must be obtained and why they are essential to support

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your opposition, the trial court is entirely within its authority to deny the continuance. (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548; *Depew v. Crocodile Enterprises, Inc.* (1998) 63 Cal.App.4th 480, 493.) It is not necessary to prove that the evidence you are seeking in fact exists, only that it may exist. (*Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 34.)

The more detail you are able to supply, the better. You should be prepared to explain not only the specific discovery that needs to happen, but the evidence you believe you may obtain from that discovery, and why that evidence is essential to your opposition. If a defendant has refused to cooperate with discovery, that lack of cooperation may support a motion to compel, but it will not support a continuance unless you can show the court what you expected to learn from that discovery and how it is necessary to opposing the defendant's summary judgment motion.

A game of "Clue"?

Think of your motion like a game of *Clue*: it was the defendant, with the refusal to comply with the deposition notice, which sought the evidence you need to set out in your opposition. Do not simply recite the factors necessary for a continuance to be granted, or make a conclusory statement that a continuance is essential. (*Granadino v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 411, 420.) Instead, explain what is missing, why you believe the missing information exists, and the specific steps you will take (e.g., taking a witness's deposition, or a pending motion to compel). If you can draw a clear line between missing discovery and the need for a continuance – and even better, show that the defendant's stonewalling is the real basis for the motion – you will be in an excellent position to show why a continuance is necessary.

Good cause

You may also request a continuance based on a showing of good cause. It is best to rely on 'good cause' as secondary grounds for a motion based on affidavits showing that more time is necessary to obtain evidence because the standards are much more nebulous and subject to the discretion of the court. In granting a continuance on a showing of good cause, the trial court must consider factors including how long the case has been pending, how long the requesting party had to oppose the motion, whether the continuance could have been requested earlier, the proximity of the trial date and discovery cutoff, any prior continuances, and whether the evidence sought is truly essential to the motion. (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 643-644.)

If you have not been diligent in conducting discovery, the trial court may also take that into account in determining whether a continuance is proper. (*Chavez* at 644; *Jones v. Alameda County Medical Center* (2012) 205 Cal.App.4th 521, 531.) If you waited until a summary judgment motion is filed to start launching discovery to support your case, you will have a much harder time showing good cause to continue the motion. Trial courts are reluctant to give you more time to engage in discovery you should have started already. Good cause may also exist where a continuance is necessary for reasons not directly related to discovery, such as the death or serious illness of an attorney or a party. (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716.)

Timing

Code of Civil Procedure section 437c, subdivision (h) allows a request for a continuance to be made through affidavits accompanying the opposition itself, or "by ex parte motion at any time on or before the date the opposition response to the motion is due." Waiting until after the opposition is due – or even making the request at the hearing to try and stave off a grant of summary judgment – is almost certainly a losing strategy, even when the need for a continuance is the result of a defendant's gamesmanship in discovery. (*Park v. First American Title Co.* (2011) 201 Cal.App.4th 1418, 1428 [trial court appropriately denied request for continuance when no affidavit was submitted in opposition and request was made for the first time orally at hearing]; *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1010, 1056 [plaintiffs failed to ask for a continuance while their motion to compel was pending].) Having a pending motion to compel, or even an order granting a motion to compel, is not a substitute for your affidavit showing what evidence the continuance may allow you to obtain. (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 325-326.)

It is almost always best practice to seek ex parte relief as soon as you learn that additional discovery is necessary, ideally right after you receive the defendant's summary judgment motion. Doing so not only maximizes the time you have to conduct discovery, but shows the trial court that you are diligent and pursuing necessary discovery, and are not just throwing a request for a continuance into your opposition as a backup plan. Support your prompt ex parte application with a detailed affidavit explaining the facts you need to obtain through additional discovery, why you believe those facts may exist, and why you need additional time to obtain those facts.
It's particularly helpful if you can also demonstrate that you have been diligent in trying to obtain the evidence; for example, attaching papers showing that you have moved to compel further responses, or correspondence showing that you have met and conferred at length to obtain the necessary evidence. And, if the court is inclined to deny your relief, ask that the denial be made without prejudice; you will want

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the option to renew your request in opposition with a stronger showing.

In requesting a continuance in your opposing papers, make it absolutely clear to the court in the title of your opposition that you are requesting a continuance (e.g., "Plaintiffs' Opposition, and Request for Continuance Under Code of Civil Procedure section 437c, subdivision (h)"). First, you don't want the court to overlook the fact that you made the request, and second, you don't want it to appear tacked onto your opposition as an afterthought. Whether to ask for a continuance before or after the substantive portion of your opposition is a judgment call, and depends on the facts of your case. Asking for a continuance first and foremost may be best when you can make a strong showing that the defendant has been withholding critical evidence, that you have been diligent and timely in seeking that evidence, and your affidavits show that you are likely to prevail. But a request for a continuance might instead make it seem as though your opposing case is weaker than it should be; it might be better to put it second in your papers as an alternative request.

Additional relief

In addition to a continuance, Code of Civil Procedure section 437c, subdivision (h) states that on a showing that essential evidence cannot now be presented, trial courts shall "make any other order as may be just." This broad grant of discretion can and should be an avenue for you to ask the court to issue orders facilitating discovery of that evidence; for example, order a defendant to turn over documents you have been trying to obtain, or to produce a corporate officer in response to a deposition notice. This provision is incredibly helpful in forcing a defendant to stop withholding evidence while avoiding the burden of a separate motion to compel – particularly as continued stonewalling may lead to the denial of the defendant's summary judgment motion outright.

No playing "dirty pool," section 437c(i)

Code of Civil Procedure section 437c, subdivision (i) is a powerful and often-overlooked provision meant to prevent a party from refusing to turn over evidence in discovery and then using its bad conduct to escape from a case on summary judgment. Code of Civil Procedure section 437c, subdivision (h) allows the court not only to grant a continuance for the opposing party to gather essential evidence, but to outright deny the summary judgment motion. While you are unlikely to persuade a trial court to deny a summary judgment motion under Code of Civil Procedure section 437c, subdivision (h) rather than grant you additional time to obtain evidence, if the defendant moving for summary judgment is uncooperative, you are in a strong position to ask the court to deny the motion. Code of Civil Procedure section 437c, subdivision (i) states that if the party moving for summary judgment "has unreasonably failed to allow the discovery to be conducted," the court can either grant a further continuance or deny the motion outright.

Be prepared to explain in detail what steps you have taken to secure the evidence from the moving party essential to justify your opposition, and how their failure to produce that evidence is unreasonable. For example, if a key defense witness has refused to appear for deposition, or if the defendant fails to comply with an order compelling further interrogatory responses, you can easily demonstrate to the court that the defendant is withholding essential evidence and then asking for summary judgment based on the fact that you don't have that evidence. Trial courts do not like these tactics, and are inclined to rule against parties that use bad conduct to manufacture a basis for summary judgment.

It is more difficult to obtain an outright denial if the discovery you are attempting to obtain is not within the moving party's control; for example, the deposition of an uncooperative third-party witness, or documents in the exclusive possession of a slow-moving and disorganized government agency. Assuming that the delay is not caused by the moving defendant's interference, you should not ask for a denial based on "unreasonable" conduct by the moving party, but instead, should request a further continuance based on the fact that it is not your fault that you have been unable to obtain the required evidence so far.

Opposing a continuance from the other side

What if it is the defendant asking for a continuance? This is most common when you have presented a very strong opposition to a summary judgment motion, and the moving defendant asks for a continuance to allow it to obtain further information to supplement its motion. This is easily rebutted, because no such basis for a continuance exists: the statute explicitly states that a continuance may be granted when facts essential to justify *opposition* exist. And, allowing a party to try and shore up a defective motion after the fact risks violating the strict 75-day notice period. (Code Civ. Proc. § 437c, subd. (a)(2); see also *McMahon v. Superior Court* (2003) 106 Cal.App.4th 112, 117-118; *Nazir v. United Airlines, Inc*. (2009) 178 Cal.App.4th 243, 252-253.)

If you have moved for summary judgment and the defendant is asking for a continuance to oppose, carefully review whether they have offered affidavits and made an appropriate showing that would justify a continuance. Defense counsel often fumble when acting outside of their usual habits, especially when they have to act from 'the other side,' and you may be able to explain why they have failed to meet the elements necessary to continue your motion, particularly if it is clear that the defendant was dilatory and only discovered the urgency of this evidence after receiving your moving papers.

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