

**KOJABABIAN v. GENUINE HOME LOANS, INC.**

California Court of Appeal, Second District, 2009.

174 Cal.App.4th 408, 94 Cal.Rptr.3d 288.

MOSK, ASSOCIATE JUSTICE.

INTRODUCTION

When parties moving for summary judgment do not make a prima facie showing justifying a summary judgment, the trial court may not grant a summary judgment under Code of Civil Procedure section 437c, subdivision (b)(3) for failure of the opposing party to file the required separate statement with supporting evidence. In this case, however, we hold that the moving parties did make such a prima facie showing. \* \* \* We therefore affirm the summary judgment and [the] order denying sanctions.

FACTUAL BACKGROUND

Plaintiff and appellant Vartan Kojababian (plaintiff) sued, inter alia, defendants and respondents Genuine Home Loans, Inc. (Genuine), Nectar Kalajian (Kalajian), and Aida Markarian (Markarian) (defendants) for fraudulent transfer and negligence. The facts are taken from the evidence submitted in support of the defendants' motion for summary judgment, which evidence plaintiff did not dispute.

\* \* \*

PROCEDURAL BACKGROUND

Plaintiff filed a complaint asserting causes of action for fraudulent transfer and conspiracy against all six named defendants and a negligence claim against Markarian only. Defendants Genuine, Kalajian and Markarian filed a summary judgment motion directed at the fraudulent transfer and negligence claims. The motion was supported by a separate statement of undisputed facts, the declarations of the individual defendants, and certain documentary evidence.

Over two months after the motion was filed, plaintiff filed an opposition to the motion, requesting that the motion be denied or continued under section 437c, subdivision (h) to allow plaintiff to conduct discovery. \* \* \* Plaintiff did not submit a memorandum of points and authorities in opposition to the merits of defendants' motion or a separate statement supported by evidence.

Defendants replied to the opposition, arguing that plaintiff's submission failed to raise a triable issue of fact and failed to specify the information plaintiff needed to oppose the motion and expected to discover if a continuance was granted. \* \* \*

The trial court held a hearing on the summary judgment motion and issued a

minute order ruling that, “[t]he motion for summary judgment is granted in its entirety. There are no triable issues of material fact.... Although an opposition should contain ‘affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken,’ plaintiff’s opposition has none of these items. Plaintiff’s response is also procedurally defective, in that it does not provide a separate statement as mandated by Code of Civil Procedure section 437c (b)(3). Plaintiff’s request to continue the hearing under Code of Civil Procedure section 437c (h) is denied for reasons set forth in defendants’ reply papers.”

\* \* \*

## DISCUSSION

\* \* \*

### *B. Summary Judgment*

In granting defendants’ motion for summary judgment, the trial court relied, inter alia, on plaintiff’s failure to comply with the separate statement requirement of section 437c, subdivision (b)(3). \* \* \* [It] states “The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court’s discretion, for granting the motion.”

California Rules of Court, rule 3.1350(d) provides, “The Separate Statement of Undisputed Material Facts in support of a motion must separately identify each cause of action, claim, issue of duty, or affirmative defense, and each supporting material fact claimed to be without dispute with respect to the cause of action, claim, issue of duty, or affirmative defense. In a two-column format, the statement must state in numerical sequence the undisputed material facts in the first column followed by the evidence that establishes those undisputed facts in that same column. Citation to the evidence in support of each material fact must include reference to the exhibit, title, page, and line numbers.” Rule 3.1350(e) specifies that the “opposition to a motion [for summary judgment] must consist of ... (2) ... separate statement of undisputed material facts....”

“The separate statement is not merely a technical requirement, it is an indispensable part of the summary judgment or adjudication process. ‘Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for ... summary judgment to determine quickly and efficiently whether material facts are disputed.’

### *1. Requirement of Prima Facie Showing*

In *Whitehead*, 163 Cal.App.4th at page 902, 77 Cal.Rptr.3d 679, the court said, “The separate statement is required, not discretionary, on the part of each party, and the statutory language makes the failure to comply with this requirement sufficient grounds to grant the motion.” But this categorical statement is tempered by an earlier discussion in which the court said that “ ‘[t]he trial court’s decision to grant a motion for summary judgment because the opposing party failed to comply with the requirements for a separate statement, however, is reviewed for an abuse of discretion.’ ” \* \* \* “While subdivision (b) of section 437c allows the court, in its discretion, to grant summary judgment if the opposing party fails to file a proper separate statement, this provision does not authorize doing so without first determining that the moving party has met its initial burden of proof.”

We conclude that it would be an abuse of discretion for a trial court to grant a summary judgment based on a failure to file a separate statement when the moving parties have not in their moving papers set forth a prima facie showing for summary judgment—i.e., have not met their “burden of persuasion to show that there was no triable issue of material fact and that they were entitled to judgment as a matter of law.” After a prima facie showing, the burden shifts to the opposing party to make a showing of the existence of a triable issue of fact. If the opposing party fails to submit the required separate statement, under the applicable law and rules, a trial court may conclude that the opposing party has not satisfied his “burden of production” showing a triable issue of fact.<sup>6</sup> Thus, we must examine whether defendants made a prima facie showing that they are entitled to a summary judgment.

\* \* \*

### *3. No Abuse of Discretion in Not Giving Plaintiff Opportunity to Cure*

Notwithstanding defendants’ prima facie showing, plaintiff argues that it was an abuse of discretion to grant the summary judgment motion without affording him the opportunity to cure his failure to file a separate statement. \* \* \* [P]laintiff argues that because his failure to file a separate statement was a curable procedural defect, the trial court was required to grant him a continuance to conduct the discovery necessary to file an appropriate separate statement in opposition to the motion.

\* \* \*

[A] separate responsive statement is not an end in itself. Its purpose is to ease the trial court’s burden and put the moving party on notice of the evidence which is disputed by respondent. Therefore, unless the trial court has reason to believe no responsive statement

---

<sup>6</sup> Some courts in exercising their discretion allow the failure to provide a separate statement to be remedied or deny the motion even if the opposing party has not filed a separate statement. (See *Parkview Villas*, *supra*, 133 Cal.App.4th at pp. 1211–1218, 35 Cal.Rptr.3d 411.)

would be filed even if the [defendant] was afforded a reasonable opportunity to file one, the [defendant] should be afforded that opportunity rather than suffer a judgment not supported by a decision on the merits. There is no showing [the defendant] would not have filed a proper responsive statement given the opportunity to do so.”

\* \* \* [P]laintiff’s noncompliance with section 437c, subdivision (b)(3) was not the result of a procedural mistake, but rather was based upon a lack of admissible evidence in opposition to the motion, as evidenced by his request for a continuance under section 437c, subdivision (h). Allowing plaintiff additional time to file a separate statement would have been futile because he did not have the evidence necessary to submit a complying separate statement. His only recourse under the circumstances was to seek a continuance under section 437c, subdivision (h), which he did. But, he failed to satisfy the statutory requirements for such a continuance.

\* \* \*

[P]laintiff’s failure to file a separate statement in this case was not the result of a curable procedural defect. As noted above, plaintiff could not cure the defect without the continuance. Allowing plaintiff the opportunity to file a separate statement would, in effect, give him the continuance to which the trial court concluded he was not entitled under section 437c, subdivision (h). Although it was within the discretion of the trial court to allow plaintiff to file a proper statement, given the defendants’ prima facie showing in support of their motion for summary judgment and plaintiff’s failure to support his request for a continuance, the trial court did not abuse its discretion in granting the motion under section 437c, subdivision (b)(3) without first affording plaintiff an opportunity to file an opposing separate statement.

\* \* \*

#### DISPOSITION

The judgment of the trial court and the order denying defendants’ motion for sanctions \* \* \* are affirmed. Each party shall bear his, hers, or its own costs on appeal.