Focus

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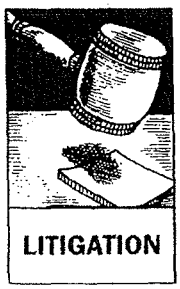
Oral Argument Earns High Place at Summary Judgment

By Paul D. Fogel
and Benjamin G. Shatz



In 'Brannon v. Superior Court,' the trial court issued a telephonic ruling denying defendants' summary judgment motion and refusing to entertain oral argument.

A motion for summary judgment is probably the most important pretrial proceeding in any lawsuit. When granted, the motion ends the litigation; when denied, it signals a trial may be in the offing. Small wonder, then, that summary judgment procedure is of paramount interest to litigators, who need to ensure the judge who considers their arguments will not only read them but also hear them. This is undoubtedly why the issue of the right to oral argument on a summary judgment motion has been a hot topic of debate among the courts of appeal.

Although nothing in the summary judgment statute, Code of Civil Procedure Section 437c, by its terms gives a party the right to present oral argument, the many references to "hearing" and "heard" in the statute strongly suggest as much. Section 437c(a) states that the motion "shall be heard" no later than 30 days before trial and requires service of motion's notice at least 75 days before "the time appointed for hearing." Section 437c(b)(2) requires the filing and serving of the opposition and reply at least 14 and five days, respectively, before the "date of hearing." And Sections 437c(b)(5) and 437c(d) make clear that evidentiary objections not made at the hearing are waived.

Despite the seeming clarity of the statute, the issue of the right to oral argument on a summary judgment motion has divided appellate courts over the last several years. A decision earlier this year, however, has confirmed the viability of the oral-argument right in this context, hopefully putting the issue to rest for the moment.

Nine years ago, in *Sweat v. Hollister*, 37 Cal.App.4th 603 (1995), disapproved on other grounds, *Santisas v. Goodin*, 17 Cal.4th 599 (1998), Division One of the 4th District Court of Appeal noted that Section 437c does not require oral argument on a summary judgment motion. There, the trial court issued a telephonic decision granting the motion. On receiving the decision, the plaintiffs, believing the decision was a tentative one, sought and obtained a date to present argument. However, they realized they likely would lose (and thus be liable to the defendants for contractual attorney fees), so the day before the hearing, they filed a request for dismissal without prejudice, which the clerk entered. Despite the dismissal, the court entered summary judgment for the defendants and awarded fees.

The plaintiffs appealed, claiming the summary judgment was void because they had dismissed the action. The validity of the dismissal depended on whether the court's ruling was tentative (and thus subject to reconsideration after argument) or final. The 4th District recognized that the applicable authorities "suggested" the right to argument but believed a trial court had the power to decide a summary judgment motion without argument. The court supported this proposition with cases from 1930 to 1972 that permit courts to decide motions without hearings, although none of the cited cases involved summary judgment motions.

Sweat's comments about the right to oral argument, however, were unnecessary to its holding. The court explained that the trial court intended its telephonic ruling to be final and that the plaintiffs' request for argument stayed imposition of the summary judgment order pending argument. When the plaintiffs attempted to dismiss, that vacated the stay, rendering the ruling final. Thus, the plaintiffs' own procedural ploy in effect waived argument.

Three years later, in *Jovine v. FHP Inc*, 64 Cal.App.4th 1506 (1998), Division Three of the 2nd District cited *Sweat* approvingly in dicta. The trial court there granted a defense summary judgment based solely on a referee's rulings. The plaintiff asked for a court hearing, which was denied. The 2nd District reversed the judgment on the ground the parties were entitled to have the court rather than the referee rule. Citing *Sweat*, it found the absence of an opportunity to present argument irrelevant, "assum[ing] without deciding" that no such right exists.

Later that year, however, the question was squarely presented to Division 3 of the 4th District, which in *Mediterranean Constr. Co. v. State Farm Fire & Cas. Co.*, 66 Cal.App.4th 257 (1998), disagreed with *Sweat* and held there is a right to argument on a summary judgment motion. There, the trial court telephoned counsel on the morning of the scheduled hearing, informing them the court had granted the motion and no hearing would occur. The parties appeared, anyway, but the court refused to allow argument. Reversing the judgment, the 4th District construed references to "hearing" in the summary judgment statute as "clear legislative intent" that parties have the right to argument, relying on the policy that argument enhances judicial visibility and accountability. *Mediterranean* found not only that *Sweat*'s treatment of the issue was dicta but also that *Sweat*'s cited cases were "stale" and unconvincing "shaky precedents."

One year later, in *Lewis v. Superior Court*, 19 Cal.4th 1232 (1999), the state Supreme Court held there is no right to oral argument before a reviewing court issues a peremptory writ in the first instance. The court reasoned that the words "heard" and "hearing" in the writ statutes (Code of Civil Procedure Sections 1088 and 1094) did not "necessarily encompass oral presentations," noting the right to argument exists only if the statutory context or language indicates a legislative intent to such a right. In the peremptory-writ context, the court did not believe the statutes indicated any such intent.

Lewis did not resolve the *Sweat-Mediterranean* conflict, but its interpretation of "hearing" in the writ statutes suggested a similar construction of "hearing" in Code of Civil Procedure Section 437c, implicitly favoring *Sweat* and giving trial courts license to deny oral argument.

In spite of this, however, a few months ago, the same court that decided *Sweat* concluded there is a right to oral argument on a summary judgment motion. In *Brannon v. Superior Court*, 114 Cal.App.4th 1203 (2004), the trial court issued a telephonic ruling denying defendants' summary judgment motion and refusing to entertain oral argument. The 4th District issued a writ and ordered the trial court to vacate its order denying the motion and entertain argument. The court explained that *Sweat*'s conclusion was dicta because the result there rested on the intended finality of the trial court's telephonic decision and the procedural ploy the plaintiffs had employed to avoid finality. *Brannon* also noted that *Mediterranean* cogently discussed the policy reasons favoring oral argument and convincingly distinguished *Sweat*'s cited authorities, which did not focus on summary judgment motions or on Section 473c's language.

Taking the cue from *Lewis*, *Brannon* noted that a right to oral argument could be gleaned from Code of Civil Procedure Section 437c's language, particularly recent amendments requiring service of the motion at least 75 days "before the time appointed for hearing" and the new requirements that expand the deadlines for filing opposition and reply papers within specified days before the "date of hearing." The use of the "date of hearing" as the trigger for filing papers meant the Legislature contemplated an oral argument as part of summary judgment procedure. *Brannon* also noted that the Legislature had expanded the notice and opposition deadlines as a recognition of the "substantial rights at stake" and "far-reaching consequences" of summary judgment motions. Ensuring the opportunity for oral argument, *Brannon* concluded, promotes the objective of giving parties an opportunity to advance their positions and protect a precious right.

Brannon also relied on the legislative history of Code of Civil Procedure Section 1005.5 (which governs motions generally) and the Rules of Court (especially those concerning tentative rulings), the latter of which mention "hearing" in the sense of oral argument. California Rules of Court 317(c), 321, 323, 324, 343 and 345.

Brannon cautioned that, while a court cannot refuse to entertain argument, it retains the right to control how the argument is conducted, including the right to impose time and subject matter limitations and to find a waiver if a party fails to timely request argument. And the court limited its holding to summary judgment motions, noting that whether argument is required in other proceedings depends on the statute's language and "other factors" unique to the statutory scheme.

As the latest word on the subject, *Brannon* should go far in dissuading trial courts from denying argument in summary judgment proceedings. Other courts of appeal should follow its lead, allowing *Sweat* to die a quiet death and eliminating the need for Supreme Court or legislative resolution of the issue.

Paul D. Fogel of Reed Smith is a partner in the firm's appellate group and a member of the American and the California Academy of Appellate Lawyers. **Benjamin G. Shatz** is of-counsel in the firm's appellate group. Both are certified appellate law specialists.