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Summary Judgment Clarified

The determination of who has the burden of proof is crucial to a motion for summary judgment

By CHARLES V. BERWANGER

Must a defendant conclusively negate the plaintiff's case to succeed on a motion for summary judgment? Or may a defendant, after the plaintiff has an opportunity to complete discovery, successfully move for summary judgment on the basis that the plaintiff does not have, and will not have at the time of trial, sufficient evidence to survive a motion for nonsuit?

Finally, what is the relationship between California Code of Civil Procedure §437c and Federal Rule of Civil Procedure 56?

On June 14, 2001, the California Supreme Court, in a tour de force exposition on the meaning of §437c, answered those questions as well as many others by "clarifying" §437c.

That decision, written by the late Justice Stanley Mosk, was *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826 (2001), modified 26 Cal.4th 80a (2001). The *Aguilar* court built upon its decision in *Saelzler v. Advance Group* 400, 25 Cal.4th 763 (2001), concluding that for almost all purposes §437c has the same meaning and operates in the same manner as FRCP 56.

This article discusses the clarified meaning of §437c according to the California Supreme Court.

§437c and Aguilar

Section 437c, both before and after substantial amendments to it in 1992 and 1993, provided that "any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." It continues that "the motion for summary judgment shall be granted if all the papers submitted 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."

The purpose of §437c, as is true with FRCP 56, "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." *Aguilar* at 843.

To that end, the California legislature in 1992 and 1993 amended §437c. The purpose of the amendments was to move §437c closer to FRCP 56 as Rule 56 was interpreted and applied by the 1986 trilogy of United States Supreme Court decisions making summary judgment an effective procedure to avoid needless trials in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986).

The 1992 amendments to §437c provided for a mix of burdens of persuasion and production that shift under §437c(o).

Thus, under §437c(o)(1) "plaintiff . . . has met" his "burden of showing that there is no defense to a cause of action if" he "has proved each element of the cause of action entitling" him "to judgment on that cause of action. Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or defense thereto.

"The defendant . . . may not rely upon the mere allegations or denials" of his pleadings, but must set forth specific facts. Section 437c(o)(2) declares that "defendant . . . has met" his "burden of showing that a cause of action has no merit if" he "has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action.

"Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or defense thereto."

Here, too, a plaintiff may not rely upon allegations or denials of pleadings, but must set forth specific facts showing a triable issue of material fact.

Justice Mosk, on the twin pillars of the 1992 and 1993 amendments, concluded the California legislature intended to move §437c closer to FRCP 56. *Aguilar* "clarifies" §437c to accomplish that movement.

Threading its way through *Aguilar* is the concept that a plaintiff who makes a pretrial showing of entitlement to a directed verdict should not have to go through a trial and is entitled to summary judgment; and that a defendant who makes a pretrial showing that the plaintiff cannot survive a motion for a nonsuit at trial is likewise entitled to summary judgment.

Burden of persuasion

Aguilar describes how clarified §437c works. The burden on the moving party is the "burden of persuasion" to show there is no triable issue of material fact. Further, "there is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof."

The amendments, explained Justice Mosk, direct that "the placement and quantum of the burden of proof at trial are crucial for purposes of summary judgment"

Necessarily, the plaintiff bears the burden of persuasion on each element of his cause of action and that there is no defense thereto. So, too, a defendant bears the burden of persuasion that "one or more elements of" the "cause of action" in question "cannot be established" or that "there is a complete defense" thereto.

Aguilar instructs that a party moving for summary judgment bears "an initial burden of production to make a prima facie showing that no triable issue of material fact exists." If that burden is met, the burden shifts to the opposing party to produce sufficient evidence to make a prima facie showing of a triable issue of material fact.

The burden of persuasion held by the moving party does not shift; only the burden of production shifts.

Burden of proof

Aguilar emphasizes that the determination of who has the burden of proof and the quantum of the burden of proof at trial are crucial to determining a motion for summary judgment. Thus, a plaintiff who has "the burden of proof by preponderance of evidence at trial" and "moves for summary judgment" must present evidence that would "require a reasonable trier of fact to find any material fact more likely than not"

On the other hand, "if a defendant moves for summary judgment against such a plaintiff, he must present evidence that would require a reasonable trier of fact not to find any material fact more likely than not — otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact."

With that framework, *Aguilar* analyzed the showing made by the defendants, movants for summary judgment, and the plaintiffs. The complaint alleged defendant petroleum companies' unlawful conspiracy to restrict the output of California Air Resources Board gasoline and to raise its price.

Aguilar recounts the extensive discovery and the numerous declarations submitted by the moving defendants that there was no factual basis for the asserted conspiracy.

Plaintiffs responded that there was substantial circumstantial evidence that the defendants used the same experts, that there was commonality of pricing of products, and that there were exchange agreements by which two companies may trade, with or without a price differential, products of the same type in different geographical areas and/or at different times, or products of different types.

The plaintiffs asserted that an inference could be drawn that the defendants had colluded and that the matter should go to jury trial. *Aguilar*, in determining that summary judgment should have been granted to the defendants, rejected the plaintiffs' arguments and inferences, and explained the proper analytical analysis under §437c.

In *Aguilar*, the defendants presented a prima facie case that no reasonable trier of fact could find that it was more likely than not there was conspiracy. The plaintiffs, who would bear the burden of proof at trial, bore the burden to produce evidence that would allow a reasonable trier of fact to find in their favor — that is, sufficient evidence to warrant a finding by the trier of fact by a preponderance of the evidence that an unlawful conspiracy was more likely than not.

The plaintiffs argued that a trier of fact could infer that there was an unlawful conspiracy.

Aguilar responded that "ambiguous evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding does not allow such a trier of fact . . ." to find conspiracy.

The foregoing is discussed in the context of antitrust law, where there is a public policy that a conspiracy may not be inferred from circumstantial evidence from which an inference of a proper business purpose may also be drawn.

Aguilar — and *Saelzer* — give broader scope to inferences in equi-poise and the impropriety of inferring the conclusion sought by the party with the burden of proof. After all, a trier of fact may not do so and, therefore, on a motion for

summary judgment the court may not do so.

Also germane to the *Aguilar* court's clarification of §437c is *Aguilar's* rejection of decisions that required a defendant moving for summary judgment to "conclusively negate an element of plaintiff's cause of action."

In other words, it is not the defendant's burden to affirmatively and conclusively "prove not 'x' . . ." (assuming that 'x' is one of the elements of the plaintiff's cause of action), but rather defendant need only show that the "plaintiff does not possess, and cannot reasonably obtain, needed evidence."

Finally, *Aguilar* explains that although FRCP 56 and §437c are similar, §437c "continues to require a defendant moving for summary judgment to present evidence, and not simply point out that plaintiff does not possess, and cannot reasonably obtain, needed evidence."

In this particular, at least §437c still diverges from FRCP 56. (Justice Mosk emphasizes that *Aguilar* was not limited to antitrust cases.)

§437c and Saelzler

Saelzler, too, deals with the operation of §437c but without the detailed analysis provided by *Aguilar*. *Saelzler*, however, presages *Aguilar* by clearly stating that the prior requirement that defendant "conclusively negate" a necessary element of plaintiff's case is not the law.

Further *Saelzler* affirms that §437c allows a defendant to "obtain summary judgment solely by showing, after opportunity for discovery, that the opposing plaintiff had failed to present triable evidence crucial to his case."

(The amendment of §437c effective Jan. 1, 2003, requiring 75 days notice of a Motion for Summary Judgment probably generally moots an argument that the responding party needs more time to perform discovery to respond to the motion. Such an argument was readily available before the amendment when the minimum notice required was 28 days.)

Saelzler involved a motion by a defendant owner of an apartment complex where the plaintiff was brutally assaulted. The plaintiff alleged that the defendant had failed to provide adequate security and that the breach of that duty proximately caused her injuries.

The defendant moved for summary judgment on the ground that the plaintiff could not present evidence at trial that would enable the trier of fact to determine it was more probable than not that but for the failure of the defendant to satisfy its duty — that is, to provide adequate security — the plaintiff would not have been injured.

There was evidence that even with proper repair and maintenance of security gates and with security guards, the plaintiff still may have been assaulted. Gang members lived in the apartment complex, gangs had free run of the property and the defendant's security efforts had not effectively controlled the gangs.

Saelzler concluded that the failure to provide security led to inferences which were in equipoise. It would have been speculation and conjecture for a jury to infer that had adequate security been provided, the plaintiff would not have been injured. Because at trial the plaintiff could not have met her burden of proof, summary judgment was appropriate.

Conclusion

Aguilar's and *Saelzler's* clarifications of §437c substantially tracks FRCP 56 to bring litigation to an end when the respondent cannot meet his burden of proof at trial.

Section 437c, as clarified, protects the rights of the parties to discovery and allows them an opportunity to develop and argue all relevant facts. Summary judgment should be available pretrial to avoid needless trials and the expense of preparing for and going to trial.

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TEST

1 Hour MCLE Credit

1. Does CCP §437c have substantially the same meaning as FRCP 56?
2. May a party responding to a motion for summary judgment rely upon its pleadings to successfully oppose such a motion?
3. Must a plaintiff moving for summary judgment conclusively show entitlement to judgment?
4. Must summary judgment be granted to a moving defendant if it shows plaintiff cannot survive a motion for nonsuit at trial?
5. Is the burden of production the same as the burden of proof?
6. Is the burden of proof critical to a motion for summary judgment?
7. On a motion for summary judgment, if the evidence is in equipoise and the respondent has the burden of proof, must the motion be granted?
8. If the moving party has the burden of proof, must the motion be granted if the evidence requires a reasonable trier of fact to find any material fact more likely than not?
9. Does the burden of production on a motion for summary judgment shift if the moving party makes a prima facie showing of entitlement to judgment?
10. If upon a motion for summary judgment the moving party has the burden of proof and the court concludes the evidence is in equipoise, should the court deny the motion?
11. Must a defendant moving for summary judgment conclusively disprove every element of plaintiff's cause of action?
12. May a moving party solely rely on argument that the responding party cannot establish a prima facie case on defense?
13. Is the minimum notice requirement for a summary judgment motion 75 days?
14. Strategically, should the moving party show that responding party has had a chance to perform discovery and has not discovered and does not have the potential for discovering sufficient evidence to defeat a motion for summary judgment?
15. Is plaintiff-movant for summary judgment entitled to judgment if it makes a showing that it would be entitled to a directed verdict?
16. Are public policy considerations precluding inferences (such as parallel pricing of consumer products in an antitrust case) relevant to the trial court's determination of a motion?
17. Must the quantum of burden of proof (e.g. clear and convincing) be applied by the court in determining the merits of a motion?
18. Is summary judgment intended to avoid unnecessary trials?
19. Is needed discovery relevant in opposing a motion for summary judgment?
20. Should the motion be denied if inferences from direct evidence are in equipoise and if the moving party bears the burden of proof?

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