

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
---

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

BARDOMIANO A. GARCIA et  
al.,

Plaintiffs and Respondents,

v.

RAUL B. OROZCO,

Defendant and Appellant.

2d Civ. No. B278186  
(Super. Ct. No. 56-2015-  
00472746-CU-BC-VTA)  
(Ventura County)

Raul B. Orozco appeals from the summary judgment granted to Bardomiano A. Garcia and Arminda B. Garcia (plaintiffs) on their complaint for breach of contract. Orozco contends the trial court committed reversible error by denying his ex parte application for a continuance of the summary judgment hearing. He claims he was eligible for such relief under either the discretionary or mandatory provisions of Code of Civil

Procedure section 473, subdivision (b) [hereafter section 473(b)].<sup>1</sup> The record confirms, however, that the ex parte application was brought under section 437c, subdivision (h) [hereafter section 437c(h)], and that the court properly exercised its discretion to deny the application as untimely. We affirm the judgment.

#### FACTS AND PROCEDURAL BACKGROUND

This action arises out of Orozco's breach of a commercial lease. When Orozco failed to respond to discovery requests, plaintiffs moved to compel responses. They also asked that their requests for admission be deemed admitted. The trial court granted the unopposed motions.

On May 24, 2016,<sup>2</sup> plaintiffs filed and served a motion for summary judgment, which was scheduled to be heard on August 8. The motion was based primarily on Orozco's admissions.

On June 3, plaintiffs filed a motion for terminating sanctions or, in the alternative, for evidentiary sanctions. The motion was scheduled to be heard on June 30. On the date of the hearing, Orozco's attorney, Anthony J. Rista, filed an ex parte application to continue the motion under section 473(b) due to his failure to notify plaintiffs' counsel and the court of his new mailing address. According to the supporting declaration, Rista had changed his mailing address and did not receive his mail until June 27.

On July 13, the trial court denied plaintiffs' motion for terminating sanctions. It also denied the ex parte application to continue the hearing on that motion, but construed it as an

---

<sup>1</sup> All further statutory references are to the Code of Civil Procedure.

<sup>2</sup> All relevant dates are in 2016.

opposition to the motion. The court stated: “The opposition (and basis for the continuance) request by Mr. Rista is that he has moved his office and that through inadvertence and excusable negligence he never notified plaintiffs’ counsel of his new mailing address. As a result, he states that he never received the notice of the motion. This lacks credibility. It is an explanation that has been made to this court in at least one other case. Failure to notify [plaintiffs’ counsel] after the change of office address is clearly negligent conduct. It is not excusable.” The court further confirmed that “[t]he requests for admission remain admitted as [previously] ordered.”

On August 8, the date the summary judgment motion was scheduled to be heard, Rista filed, on Orozco’s behalf, an ex parte application under section 437c(h) to continue the hearing on the motion. The application was based “upon the untimely receipt by [Rista] of [the] Motion for Summary Judgment, the unavailability of pending discovery, and the inability of [Rista] to complete [his] response without Plaintiff’s responses to that discovery.”

Rista stated in his declaration that the motion for summary judgment was served on May 24 at his prior address and that he did not actually receive the motion until June 27. Rista declared that his late receipt of the motion deprived him of the statutory time period to oppose the motion, and that he needed the full time period to prepare an adequate response.

The trial court heard the ex parte application and the motion for summary judgment on August 8. No court reporter was present. In a subsequent minute order, the court denied the ex parte application for a continuance. The court explained: “The present ex parte application is brought on the date of the hearing on the [motion for summary judgment] with no

explanation as to why it was not made earlier. The ex parte application recites that defense counsel [Rista] had actual knowledge of the pendency of the hearing on the [motion] on June 27th, yet nothing was done until the day of the hearing.”

In addition, the trial court granted plaintiffs’ motion for summary judgment “[b]ased largely on the [requests for admission] previously deemed to be admitted.” The total amount of the judgment is \$122,037.64, plus interest, attorney fees and costs. Orozco appeals.

## DISCUSSION

### *Section 473(b) Does Not Apply*

Orozco contends the trial court erred by denying the ex parte application to continue the hearing on the summary judgment motion. He maintains the application “put forth . . . error on the part of [Rista] as the basis per [section] 473(b), to extend the time for hearing on Plaintiffs’ [motion for summary judgment] by the same 34 days [Orozco] had been deprived of due to said legal counsel’s inadvertence.” Orozco claims Rista’s declaration of fault triggered either the mandatory or discretionary relief provisions of section 473(b).

Orozco’s argument is based on the wrong legal standard. The first page of the ex parte application expressly stated that it was brought under section 437c(h), which requires a trial court to deny or continue a motion for summary judgment if the opposing party meets certain requirements. (See *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254 (*Cooksey*).) Orozco’s memorandum of points and authorities set forth the requirements for relief under section 437c(h) and asserted that they were met. Orozco specifically noted that both *Frazee v. Seely* (2002) 95 Cal.App.4th 627, and *Bahl v. Bank of America* (2001)

89 Cal.App.4th 389, concluded there was good cause for a continuance under section 437c(h) “on the ground that ‘discovery’ was ongoing and deposition transcripts essential to opposing the motion had not been received from the court reporter.” (See *Fraze*, at p. 633; *Bahl*, at pp. 392, 396.) Orozco argued that, “under the intent and meaning of both cases, discovery essential to [his] response and opposition to plaintiff’s dispos[i]tive motion for summary judgment is both ongoing and pending.”

The ex parte application made no mention of section 473(b) except to state in Rista’s supporting declaration that a separate motion for relief under that section was heard by the trial court on August 1. Rista attached as an exhibit a copy of the declaration supporting that separate motion.

Nothing in the record Orozco has provided suggests that the trial court treated the ex parte application for a continuance as a motion under section 473(b). To the contrary, the court’s August 8 minute order states that the document before the court was an “Ex Parte Application and Order to Continue Plaintiffs Motion for Summary Judgment and to Continue Trial if Necessary, Order Thereon CCP Sec 437c subdivision h . . . .” As a general rule, we do not consider claims made for the first time on appeal. (*Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 972 (*Lauron*).) “Appellate courts are loathe to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. [Citation.]” (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.) “We will therefore “ignore arguments, authority, and facts not presented and litigated in the trial court.” [Citation.] Such

arguments raised for the first time on appeal are generally deemed forfeited. [Citation.]” (*Lauron*, at p. 972.)

Even if the issue were not forfeited, Orozco would not prevail. Section 473(b) provides that “[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from *a judgment, dismissal, order, or other proceeding taken against him* or her through his or her mistake, inadvertence, surprise, or excusable neglect.” (Italics added.) Orozco’s ex parte application sought a continuance of the summary judgment hearing. It did not seek to set aside a judgment, dismissal, order, or other proceeding taken against him. Because the trial court had yet to enter a judgment or order from which relief could be granted, any request for relief under section 473(b) would have been premature.

*The Application for a Continuance Was Properly Denied*

Although Orozco’s brief does not contend that the trial court erred by denying his ex parte application for a continuance under section 437c(h), he arguably raises the issue by contesting the court’s ruling on the application. We therefore address the issue.

The trial court’s denial of a continuance is reviewed for abuse of discretion. (*Cooksey, supra*, 123 Cal.App.4th at p. 254; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 100; *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72.) In this case, the record on appeal does not contain a reporter’s transcript from the hearing on the summary judgment motion and application for a continuance. An appellant “bears the burden to provide a record on appeal which affirmatively shows that there was an error below, and any uncertainty in the record must be resolved against the [appellant].” (*People v. Sullivan*

(2007) 151 Cal.App.4th 524, 549; *National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 522.) Without a reporter's transcript of the hearing or a suitable substitute, the record does not reveal the parties' arguments to the court or any concessions concerning the facts, issues and evidence. In the absence of an adequate record, we must indulge all inferences to support the judgment on appeal and presume the court did not abuse its discretion in denying the continuance request. (See *Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483; Cal. Rules of Court, rule 8.120(b).)

Section 437c(h) requires a trial court to deny or continue a motion for summary judgment if the opposing party submits declarations demonstrating that "facts essential to justify opposition may exist but cannot, for reasons stated, then be presented . . . ." (*Cooksey, supra*, 123 Cal.App.4th at pp. 253-254.) Of relevance here is the requirement that any such request for a continuance be submitted "in opposition" to the motion or "*by ex parte motion at any time on or before the date the opposition response to the motion is due.*" (§ 437c(h), italics added; see *Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1353.)

As the trial court observed, Orozco failed to make a timely request for a continuance of the summary judgment hearing. Section 437c(h) authorizes continuance requests by ex parte application so long as the application is filed on or before the date the opposition is due. Orozco's ex parte application for a continuance was filed on the date of the summary judgment hearing, and thus was untimely under the statute. (See *Cooksey, supra*, 123 Cal.App.4th at pp. 252, 255 [attorney declaration submitted the day of the hearing was not timely].) The August 8

hearing date was scheduled on May 24 and Rista admittedly learned of the hearing on June 27. Not only did Orozco and Rista wait until the last minute to seek a continuance, but they also offered no explanation for the delay. Based on the record before us, we conclude the court properly exercised its discretion to decide the summary judgment motion without a continuance.

DISPOSITION

The judgment is affirmed. Plaintiffs/respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.



Henry J. Walsh, Judge  
Superior Court County of Ventura

---

Anthony J. Rista, for Defendant and Appellant.  
Law Office of Michael A. Morrow and Michael A. Morrow,  
for Plaintiffs and Respondents.