KRIS KRISHNAN, Plaintiff and Appellant, v. CEDARS-SINAI MEDICAL CENTER et al., Defendants and Respondents.

B194755

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION EIGHT

2008 Cal. App. Unpub. LEXIS 561

January 23, 2008, Filed

PRIOR HISTORY: [*1]
APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC320144. Maureen Duffy-Lewis, Judge.

DISPOSITION: Affirmed.

COUNSEL: Roy Legal Group and Raj D. Roy for Plaintiff and Appellant.

Carroll, Kelly, Trotter, Franzen & McKenna, Richard D. Carroll; Greines, Martin, Stein & Richland, Robin Meadow, Jens B. Koepke and Alana B. Hoffman for Defendants and Respondents.

JUDGES: RUBIN, J.; COOPER, P.J., FLIER, J. concurred.

OPINION BY: RUBIN

OPINION

Plaintiff Kris Krishnan appeals from the summary judgment entered for defendants Cedars-Sinai Medical Center and Dr. Doran Kim. After concluding that the trial court properly struck Krishnan's untimely summary judgment opposition, we hold that defendants' moving papers were sufficient to justify the summary judgment and therefore affirm.

FACTS AND PROCEDURAL HISTORY

On May 22, 2003, Kris Krishnan had a brief seizure after Dr. Doran Kim gave him an intravenous antibiotic treatment for Lyme tick disease at Cedars-Sinai Medical Center (the hospital). The seizure stopped on its own after about 40 seconds. Krishnan was immediately

admitted to the hospital for tests and observation and was released the next day with no signs of brain damage. Krishnan sued the hospital and Kim for negligence, [*2] alleging that his seizure was caused by an overdose of lidocaine, which was given first in order to numb the antibiotic's injection site. [1]

1 We will sometimes refer to the hospital and Kim collectively as respondents. Krishnan's operative second amended complaint included three other causes of action for fraud and negligent misrepresentation based on allegations that respondents altered or suppressed his medical records. Respondents' demurrers to those causes of action were sustained without leave to amend in May 2005. Krishnan has not appealed from that ruling and it is therefore final. (*Leader v. Health Industries of America, Inc. (2001) 89 Cal.App.4th 603, 611*.)

In February 2006, the trial court denied respondents' first summary judgment motion, finding that conflicting expert declarations on the standard of care raised triable issues of fact. On March 21, 2006, the court held a case management conference. That hearing also included motions by respondents to enforce previous discovery sanctions against Krishnan and his lawyer, Raj D. Roy, as well as to impose new sanctions. [2] The court also set a hearing on a new summary judgment motion by respondents for 8:00 a.m. on August 30, [*3] 2006.

2 We describe the various discovery sanctions that were imposed due to Roy's conduct in footnote 5, *post*.

Respondents filed their second summary judgment motion and served it at Roy's office by mail on June 16, 2006. The second motion was based primarily on the declarations of Kim and his medical expert, anesthesiologist Richard Ruffalo. According to Kim, his first attempt to insert the intravenous line failed. He then used ultrasound to guide his second, successful, insertion effort, including the infusion of lidocaine. Kim used four cubic centimeters of a 1 percent lidocaine solution to numb the first attempted injection site, and another 3 cubic centimeters at the second site. Ruffalo reviewed the medical records from the procedure, along with other evidence. According to Ruffalo, both the amounts of lidocaine and the techniques used by Kim conformed to the standard of care. Ruffalo also concluded that lidocaine could not have caused the seizure. According to Ruffalo, it takes 45 to 90 seconds for lidocaine to reach the brain after injection, and another eight minutes to leave the brain. Because the medical records showed that Krishnan's seizure occurred after the procedure [*4] ended - about 20 minutes after the lidocaine was injected - the numbing agent could not have caused the seizure. Instead, according to Ruffalo, because Lyme disease may cause seizures, Krishnan's illness was the most likely cause of the incident.

Because the hearing date for the second summary judgment motion was August 30, 2006, Krishnan's opposition was due no later than August 16. (*Code Civ. Proc., § 437c, subd. (b)(2).*) [3] Roy did not file and serve the opposition until August 23, however. Included with the opposition papers was a separate declaration from Roy that was captioned as a showing of good cause for missing the filing deadline. Roy stated that on Monday, August 21, he "discovered that the final date for opposing the [second summary judgment motion] was Wednesday, August 16, 2006. [P] My office had staffing reorganization that affected the proper calendaring of schedules, particularly the said scheduled hearing of [the second summary judgment motion]. Thus, the last day for filing the opposition to the motion was not calendared." Roy said he sent a letter to his medical expert witness that day asking him to provide an opposition declaration, but did not receive that declaration [*5] until 6 p.m. on August 22. Roy said he believed "[section] 473(b) is applicable

here[,]" and also believed respondents were not prejudiced because they could prepare a reply brief in time for the hearing. [4]

3 All further section references are to the Code of Civil Procedure.

4 Section 473, subdivision (b) provides for discretionary relief due to, among others, a lawyer's excusable neglect, and for mandatory relief from dismissal due to a lawyer's fault, including even inexcusable neglect. (*Rodrigues v. Superior Court (2005) 127 Cal.App.4th 1027, 1032-1033*.) We discuss the applicability of these provisions in footnote 7, *post*.

As required by statute, respondents filed their reply brief five days before the hearing. (*§ 437c, subd. (b)(4)*.) In it, they challenged Roy's explanation because he gave no details or description of the supposed staffing changes and how that affected calendaring the opposition due date; he failed to explain why, after receiving the motion, he took no steps to oppose it; and he failed to explain how his staff's failure to calendar the opposition due date affected his ability to begin preparing an opposition after Roy received the motion. Respondents also pointed [*6] out Roy's history of discovery abuse and discovery sanctions, contending they showed he was flouting the system and should be punished by having the summary judgment opposition stricken. [5]

5 The record shows that between January and March 2006, Roy was the subject of several discovery motions by respondents. On January 17, 2006, the court ordered Roy to exchange his expert witness list, to produce Krishnan for an independent medical examination (IME) within 10 days, and to supply more than just his previously produced W-2 form in order to prove his loss of earnings claim. In connection with those motions, respondents' counsel submitted a declaration stating that Roy said he had refused to turn over his expert witness list because he did not want to "show [his] hand." Respondents requested sanctions of $ 500 for Roy's failure to produce Krishnan for the IME, and the court directed respondents' counsel to supply proof of service of the IME notice. At the February 3, 2006, hearing on the first summary judgment motion, respondents' counsel raised that issue and Roy's failure to comply with the other orders of January 17. Those matters were put over. As happened here, Roy claimed that he [*7] never received actual notice of the IME. The record becomes muddy after this point, but a March 21, 2006, minute order states that Krishnan was sanctioned $ 250 for failing to produce any more documents to support his lost earnings claim and was ordered to provide more documentation, that an order to show cause regarding further compliance with discovery orders was scheduled for April 10, 2006, that "[a]ny further failure to comply will result in significant increase in sanctions[,]" and that Krishnan was ordered to pay previously imposed sanctions of $ 1,000 within three days. On March 28, 2006, the court awarded respondents' sanctions of $ 2,500 for discovery abuses (§ 2023.010) and warned that "[a] further failure to pay will result in further sanctions including striking of complaint."

Roy then filed a "sur-reply" three days later, which read like a declaration but was not signed by Roy under penalty of perjury. In it, Roy explained that Ana Vasquez, who had done his office calendaring, left in April 2006. She was replaced by staff member Albert Bungay, who took over Vasquez's duties. Although Roy's office was personally served with the second summary judgment motion in June 2006, [*8] "this notice was not calendared by Mr. Bungay. Thus, Raj Roy, the attorney of record for Plaintiff Krishnan, had no actual notice of the [motion] . . . . [P] As a result,

no [o]pposition to the [motion] was being prepared." As soon as Roy discovered the mistake on August 21, he began to prepare the opposition. [Emphasis omitted.]

The court began the hearing on the second summary judgment motion by noting that it had previously "given consideration for delays by the plaintiff, and accepted excuses for delays by the plaintiff. It is of concern to the court." The court then asked Roy if he had an excuse for the late opposition brief. Roy repeated his claim that his new calendaring person failed to calendar the motion and that, even though the motion was served on his office staff, he did not find out about it until August 21. Respondents' lawyer argued that Roy's explanation was not believable, especially because he had been present at the March 2006 hearing where the hearing date was set for the second summary judgment motion. Respondents' lawyer then reminded the court of Roy's past discovery misconduct and delays, including his decision to file an expert witness designation after the [*9] deadline to avoid "tip[ping] his hand to defendants." The lawyer added that he had been unable to respond or object to the declaration of Krishnan's expert witness because the opposition had been filed late. Referring back to its previous consideration for Roy's delays, the court struck the opposition. Because the second summary judgment motion was more fully developed factually than the first, and because there was no opposition to contradict respondents' evidence, the court granted summary judgment.

STANDARD OF REVIEW

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (*Code Civ. Proc., § 437c, subd. (c)*.) In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. In doing so, we must strictly scrutinize the moving party's papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. While the appellate court must review a summary [*10] judgment motion by the same standards as the trial court, it must independently determine as a matter of law the construction and effect of the facts presented. (*Barber v. Marina Sailing, Inc. (1995) 36 Cal.App.4th 558, 562*.)

A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party 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. (*Code Civ. Proc., § 437c, subds. (o)(2), (p)(2)*.) If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action or defense. In doing so, the plaintiff cannot rely on the mere allegations or denial of her pleadings, "but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . ." (*Code Civ. Proc., § 437c, subd. (p)(2)*.) A triable issue of material fact exists "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. [Fn. omitted.]" (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850*.)

Our [*11] first task is to identify the issues framed by the pleadings. (*Lennar Northeast Partners v. Buice (1996) 49 Cal.App.4th 1576, 1582*.) The moving party need address only those theories actually pled and an opposition which raises new issues is no substitute for an amended pleading. (*Tsemetzin v. Coast Federal Savings & Loan Assn. (1997) 57 Cal.App.4th 1334, 1342*.) [6]

6 Even though Krishnan's operative second amended complaint said nothing about respondents' failure to obtain his informed consent to the intravenous treatment, for reasons that are not entirely clear, the parties' summary judgment papers address that issue. Because the complaint was devoid of informed consent allegations, respondents were not required to address that issue in their moving papers and we will not consider it on appeal.

DISCUSSION

1. *The Order Striking the Late Opposition Was Correct*

Opposition to a summary judgment motion "shall be served and filed not less than 14 days preceding the noticed or continued date of hearing, unless the court for good cause orders otherwise." (*§ 437c, subd. (b)(2).*) The parties agree that the abuse of discretion standard of review applies here. (See *Hobson v. Raychem Corp. (1999) 73 Cal.App.4th 614, 625* [*12] (*Hobson*), disapproved on another ground in *Colmenares v. Braemar Country Club, Inc. (2003) 29 Cal.4th 1019, 1031, fn. 6* [referring to trial court's "broad discretion" in this area].) Under this standard, we first apply the substantial evidence test to any factual issues resolved by the court and then determine whether the court's order was an abuse of discretion based on those facts. (*Obregon v. Superior Court (1998) 67 Cal.App.4th 424, 430.*)

Although *section 437c* does not define "good cause," the standards used to determine whether excusable neglect justifies discretionary relief from an order (§ 473, subd. (b)) appear applicable. [7] (See *Hobson, supra, 73 Cal.App.4th at pp. 624-625* [applying those standards to late-filed summary judgment opposition]; accord, *Kupka v. Board of Administration (1981) 122 Cal.App.3d 791, 795* [section 473's excusable neglect test was instructive where Legislature authorized extended statute of limitations period on showing of good cause].) Krishnan contends that the failure of Roy's office staff to properly calendar the motion established good cause for the late opposition. While Roy's scenario might have been sufficient to establish good cause if it were [*13] uncontradicted or if its factual sufficiency had not been challenged (see *Nilsson v. City of Los Angeles (1967) 249 Cal.App.2d 976, 980-983)*, Krishnan overlooks another possibility that is fatal to his contention: that the trial court did not believe Roy's story. The court was certainly free to reject Roy's version of events (*Solv-All v. Superior Court (2005) 131 Cal.App.4th 1003, 1007-1008)* and, under the substantial evidence rule, we will view the facts in favor of the court's order, indulging all reasonable inferences and resolving all conflicts accordingly. (*Ibid.; In re Adoption of Arthur M. (2007) 149 Cal.App.4th 704, 717.*)

7 Section 473, subdivision (b), provides, in part, that a court may "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." In addition to the excusable neglect provision, Krishnan also contends that the mandatory relief provision due to attorney Roy's inexcusable neglect also applies. He is incorrect for two reasons. First, that provision allows relief from default judgments or dismissals only, not to orders [*14] granting unopposed summary judgment motions. (*Prieto v. Loyola Marymount University (2005) 132 Cal.App.4th 290, 295-297.*) Second, Krishnan filed only Roy's good cause declaration along with his late-filed summary judgment opposition. He never brought a

motion under 473, subdivision (b), seeking to vacate the trial court's order denying his request to file those opposition papers.

It certainly appears that this was the basis of the trial court's order to strike the untimely opposition papers. Respondents vigorously attacked Roy's credibility, pointing to both evidentiary flaws in his declaration and his past history of abusive discovery delays. The trial court both began and ended the hearing by referring to those delays, noting at the outset that they were cause for concern. The delays were also mentioned in the court's minute order. [8] To the extent the order is ambiguous on this point, we will resolve the ambiguity in favor of affirmance under the well-established rule that a trial court's orders are presumed correct. (*Winograd v. American Broadcasting Co. (1998) 68 Cal.App.4th 624, 631*.) Therefore, we presume the trial court did not believe Roy.

8 The minute order said that the "Court [*15] has previously given consideration for delays by plaintiff. The court strikes the late filed response."

There is ample support in the record for such a finding. The only evidence before the trial court to support Roy's version of events was Roy's declaration of good cause that accompanied Krishnan's summary judgment opposition. [9] This declaration was challenged both because it was conclusory and because Roy had a history of purposefully evading other litigation deadlines. As discussed in footnote 5, *ante*, there was evidence that Roy had violated his statutory duty to timely exchange expert witness information because he did not want to "show his hand." Based on his conduct, which apparently included the false denial that he received notice of his client's IME, the court imposed combined discovery sanctions of $ 3,500 and warned that terminating sanctions might be imposed if he continued delaying payment of the sanctions. In addition, the court was aware that Roy had been present at the March 2006 hearing where the summary judgment hearing date was set. Finally, respondents said they were prejudiced by the late opposition because they did not have time to review and challenge the declaration [*16] of Krishnan's medical expert. On this record, the trial court was justified in concluding that Roy was not truthful about the calendaring error and therefore properly struck the summary judgment opposition papers because he failed to show good cause for missing the filing deadline.

9 Although Roy's so-called sur-reply read like a declaration, it was not signed under penalty of perjury and was therefore not admissible as evidence. (*Bridgeman v. McPherson (2006) 141 Cal.App.4th 277, 286*.)

2. *Respondents' Moving Papers Warranted Summary Judgment*

Even though the trial court properly struck Krishnan's untimely opposition papers, it was still obligated to review respondents' moving papers and determine whether they met their initial burden of showing the absence of triable issues of material fact. (*§ 437c, subd. (c)* [summary judgment shall be granted if all the papers submitted show there are no triable issues of material fact and that moving party is entitled to judgment as a matter of law]; see *Thatcher v. Lucky Stores, Inc. (2000) 79 Cal.App.4th 1081, 1085-1086* [where party opposing summary judgment fails to file required separate statement, trial court cannot grant summary judgment unless [*17] moving party's papers met the initial burden of proof].)

Krishnan contends, without discussion, citation to authority, or analysis, that the trial court granted summary judgment solely because it was not timely opposed. To back up this assertion, he cites to a portion of the reporter's transcript where respondents' counsel asked for a chance to file a more detailed reply brief if the court were inclined to deny the motion, but concluded by asking the court to "grant the motion . . . , which was not timely opposed." Krishnan fails to mention what happened next: the court granted the motion after stating that respondents' second motion was more detailed than their first. Implicit in this, of course, is that the trial court in fact reviewed and considered the moving papers and determined that, standing alone, they were sufficient to warrant summary judgment. Apart from this factually unsupported assertion, Krishnan never argues that the summary judgment moving papers were insufficient. [10] Accordingly, we deem the issue waived. (*Landry v. Berryessa Union School Dist. (1995) 39 Cal.App.4th 691, 699-700*.) [11]

10 Instead, Krishnan contends that his opposition papers raised triable issues of [*18] material fact that would have defeated the summary judgment motion. Because the trial court properly struck his opposition, we do not reach that issue.

11 Krishnan also claims that the order granting summary judgment was somehow inconsistent with the order denying respondents' first summary judgment motion. He did not include any of the papers from the first summary judgment motion in the appellate record, leaving us unable to evaluate that contention.

We alternatively hold that respondents' moving papers established their right to summary judgment. In negligence cases alleging medical malpractice, the plaintiff must present evidence from an expert that the defendant breached his duty to the plaintiff and that the breach caused the plaintiff's injuries. This requirement applies to summary judgment motions. When a medical malpractice defendant moves for summary judgment based on expert declarations that his conduct fell within the standard of care, he is entitled to summary judgment unless the plaintiff presents conflicting expert evidence. (*Powell v. Kleinman (2007) 151 Cal.App.4th 112, 123*.)

Respondents' motion was supported by the declaration of Ruffalo, who was an anesthesiologist [*19] and a professor of anesthesiology at UCLA, and who also had a doctoral degree in pharmaceutical science. Based on his review of the medical records and other evidence, Ruffalo set forth in detail the steps Kim took in administering Krishnan's antibiotic treatment. Ruffalo recounted how, after Kim's first attempt to inject a vein failed, Kim properly used ultrasound to successfully guide the second insertion attempt. According to Ruffalo, the procedures and dosages used were proper, fell within the standard of care, and did not cause Krishnan's seizure. This declaration satisfied respondents' initial burden of proof. Because it was unopposed, summary judgment was properly granted. [12]

12 Even if we were to consider Krishnan's opposition papers, our decision would not change. Krishnan's medical expert, James F. Lineback, opined that Krishnan received an overdose of lidocaine. According to Lineback, there was a "possibility" that instead of using a 1 percent concentration of lidocaine as claimed by Kim, a higher concentration was administered instead. This "possibility" is not supported by any of the evidence and therefore fails to raise a triable issue that negligence occurred. (*Bushling v. Fremont Medical Center (2004) 117 Cal.App.4th 493, 510* [*20] [expert's opinion based on assumed facts not in the evidence lacks evidentiary value].) The second possibility, which Lineback believed was

"more likely than not," involved an intravenous injection of the lidocaine, instead of an injection outside the vein as required. This opinion was based on Kim's supposed failure to pull back on the syringe plunger right after insertion to check for blood. If blood were spotted, then an intravenous injection would have occurred. This opinion suffers from similar flaws. First, Lineback did not rebut the statements by Kim and Ruffalo that the second injection attempt was guided to the right location by ultrasound. That leaves only the first, failed attempt as the possible source of an overdose, but Lineback's declaration does not address that specific point. Further, there is no evidence one way or the other concerning whether Kim made that safety check. And, even if Kim failed to do so, it does not create an inference that the first lidocaine injection struck a vein.

DISPOSITION

For the reasons set forth above, the judgment is affirmed. Respondents shall recover their appellate costs.

RUBIN, J.

WE CONCUR:

COOPER, P.J.

FLIER, J.