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SARAH ELIZABETH YOUNG SCHULMAN, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.

B195349

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

2008 Cal. App. Unpub. LEXIS 8644

October 22, 2008, Filed

PRIOR HISTORY: [*1]

APPEAL from a judgment of the Superior Court of Los Angeles County. Los Angeles County Super. Ct. No. BC332762. Terry B. Friedman, Judge.

DISPOSITION: Affirmed.

COUNSEL: Law Firm of James R. Dowell, James R. Dowell; Robinson & Schmidt and Polly M. Wang for Plaintiff and Appellant.

Baker, Keener, Nahra, Brenda K. Benson; Greines, Martin, Stein & Richland, Martin Stein, Alison M. Turner, and Jennifer C. Yang for Defendant and Respondent.

JUDGES: ASHMANN-GERST, J.; DOI TODD, Acting P. J., CHAVEZ, J. concurred.

OPINION BY: ASHMANN-GERST

OPINION

Appellant Sarah Elizabeth Young Schulman (Schulman) appeals from a trial court order awarding summary judgment to respondent the Regents of the University of California (the Regents). She assigns error to the trial court's denial of her request to continue the Regents's motion for summary judgment, pursuant to *Code of Civil Procedure, section 437c, subdivision (h)*. [1] Because we find no abuse of discretion, we affirm.

1 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

On May 3, 2004, Schulman collapsed in a parking lot in Malibu. Los Angeles County Fire Department paramedics transported her to Santa Monica/UCLA [*2] Medical Center. She was diagnosed to have suffered a cerebral hemorrhage resulting from a preexisting arteriovenous malformation. She was then transferred to UCLA Medical Center in Westwood, where surgery was performed. She was discharged on May 17, 2004.

Schulman Initiates This Lawsuit

On May 2, 2005, Schulman filed a complaint alleging a single cause of action for medical malpractice against Santa Monica/UCLA Medical Center, the County of Los Angeles Fire Department/Paramedics, and Does 1 through 100. She alleged that these defendants failed to diagnose and treat her cerebral hemorrhage and aneurism.

On June 20, 2005, Schulman amended her complaint to add the Regents as Doe 1.

On August 17, 2005, Schulman dismissed Santa Monica/UCLA Medical Center from the action. On February 21, 2006, the trial court awarded summary judgment to the County of Los Angeles Fire Department/Paramedics.

The Regents's Motion for Summary Judgment

On June 14, 2006, the Regents filed and served its motion for summary judgment, arguing that its medical care of Schulman met the standard of care and that its medical care of Schulman was not a substantial factor in causing any harm to her. In support of the motion, [*3] the Regents submitted two expert declarations. The motion was scheduled to be heard on August 29, 2006. Thus, Schulman's opposition was due by August 15, 2006. (*§ 437c, subd. (b)(2)*.)

Schulman's First Request for a Continuance is Granted

Schulman did not file an opposition to the Regents's motion. Instead, on August 21, 2006, her counsel, Peter S. Forgie (Forgie), submitted an ex parte application for an order allowing him to withdraw as counsel. According to Forgie, his communications with Schulman had broken down and she had recently retained new counsel. Forgie also requested that the hearing on the Regents's motion be reset to allow Schulman's new counsel time to review the file and prepare an opposition to the summary judgment motion.

The trial court granted Forgie's request to withdraw. At the hearing, Forgie assured the trial court that the substitution would be filed very shortly because new counsel was "waiting in the wings." Simultaneously, the trial court granted Schulman's request for a continuance of the hearing on the Regents's motion for summary judgment, resetting it for October 5, 2006. In so ruling, the trial court noted that, if need be, Schulman's new counsel could [*4] make a showing that the extension was insufficient.

Because the trial court was dark on October 5, 2006, it subsequently reset the hearing for October 4, 2006. Thus, the new due date for Schulman's opposition was September 20, 2006. (*§ 437c, subd. (b)(2)*.)

Schulman's Second Request for a Continuance is Denied

Schulman's new attorneys were James R. Dowell (Dowell), whose law firm is located in Portland, Oregon, and who is admitted to the Texas and Oregon bars, and Robert B. Treister (Treister), who was to serve as local counsel.

On September 25, 2006, Treister contacted counsel for the Regents and requested that he stipulate to another continuance. The Regents's counsel declined. Dowell then submitted an ex parte application and supporting declaration for a continuance of the summary judgment motion and for sanctions against the Regents's counsel for declining to stipulate to a continuance. In his declaration, Dowell asserted that neither he nor Treister would be available on October 4, 2006, and that he needed more time to complete his review of the file. The Regents opposed the ex parte application on numerous grounds.

On September 27, 2006, the trial court determined that it had no authority [*5] to consider the ex parte application because neither Treister (who appeared at the hearing) nor Dowell (who authored the application and supporting declaration) had substituted in as attorney of record for Schulman. Moreover, Dowell was not licensed to practice law in California and had not moved to be admitted *pro hac vice.* The trial court then noted that even if it were to consider the ex parte application, it would deny it because there was insufficient evidence of good cause for a continuance.

Schulman's Third Request for a Continuance is Denied

On October 3, 2006, the day before the hearing on the Regents's motion, Forgie appeared at an ex parte hearing, seeking an order setting a date for Schulman's motion to allow Dowell's admission *pro hac vice*, and a 60-day continuance of the hearing on the Regents's motion for summary judgment. Treister submitted a supporting declaration, in which he stated that he had been awaiting Dowell's certificates of good standing from

Texas and Oregon before filing a substitution of attorney form and had only received them on September 26, 2006. He further averred that he and Dowell "had insufficient time to prepare an adequate opposition" to the Regents's [*6] motion. Dowell also submitted a declaration.

The Regents again opposed any continuance.

At the October 3, 2006, hearing, the trial court denied Schulman's request for a continuance, leaving the motion for summary judgment on calendar for the following day. The trial court noted that Dowell's declaration indicated the need for time to "get up to speed," but failed to establish the lack of adequate time with reference to dates so that the trial court could determine whether in fact that was so.

The trial court further found that neither Dowell's nor Treister's declaration satisfied the requirements of *section 437c, subdivision (h)*. In addition, while Treister had attributed their delay in filing a *pro hac vice* application and effecting substitution to the time it took to obtain certificates of good standing from the Oregon and Texas state bars, these certificates were executed more than a month earlier (on August 23 and August 29, 2006, respectively); thus, new counsel had had substantial time to file a *pro hac vice* application prior to the hearing. Finally, the trial court noted that there was still no substitution of counsel, although the form had been executed, because Treister had conditioned [*7] the substitution on the trial court's continuing of the October 4, 2006, hearing date, and Schulman's request for a continuance had been denied.

Schulman's Request for Reconsideration of the Denial of Her Request for a Continuance

Schulman appeared on her own behalf at the summary judgment hearing on October 4, 2006, with an ex parte application for the *pro hac vice* admission of Dowell. Despite the lack of noticed motion and Dowell's failure to file a proper declaration, the trial court provisionally granted the application, subject to Dowell's filing of a proper declaration before the end of the day.

Dowell, who was also in court that day, then asked the trial court to reconsider its denial of Schulman's request for a continuance. He represented to the trial court that he had "spoken with medical doctors about this case and there are favorable opinions"; however, he presented no declarations or affidavits to that effect. The trial court then read *section 437c, subdivision (h)* aloud and explained to Dowell that the statute required an affidavit, but none was before the court. The trial court gave Dowell until noon that day to file an application for a continuance with a supporting affidavit. [*8] The Regents were given until 4:00 p.m. to respond.

Schulman Requests Another Continuance; Dowell Submits a Declaration

Later that day, Schulman filed yet another ex parte application for a continuance, with a supporting declaration by Dowell (the October 4 Declaration). [2] In the October 4 Declaration, Dowell stated: "In the medical review of the above captioned and styled case, [Schulman's] . . . counsel has discussed the medical issues contained in [the Regents's motion for summary judgment] . . . with duly licensed medical doctors in good standing with their respective medical licensing boards. During the course of such discussion, there were indications from such doctors that there may be issues of material fact as to the standard of care and medical opinions rendered favorable to [Schulman]. Additionally, [Schulman's] counsel's discussion with same may result in proper affidavits or declarations in opposition to [the Regents's motion for summary judgment] to be filed within the next four to six weeks."

> 2 Schulman did not designate this last ex parte application or the October 4 Declaration as part of the record on appeal. On May 12, 2008, she filed a motion to augment the record with [*9] the October 4 Declaration. As discussed below, we deny Schulman's motion to augment the record. Nevertheless, for the sake of completeness, we include the contents of the October 4 Declaration here and, below, explain why it is deficient.

Dowell continued: "[C]ounsel attempted every reasonable means to procure all medical records and file several weeks prior. [Schulman's] complete file was only received . . . from former counsel on September 20, 2006."

The Regents again opposed any continuance of its motion for summary judgment.

On October 5, 2006, the trial court denied Schulman's request for a continuance and adopted its tentative ruling granting the Regents's motion for summary judgment. In so ruling, the trial court

summarized Schulman's multiple requests for a continuance, including the repeated failure of her new attorneys' applications to "meet the statutory requirements for a continuance." Specifically, the trial court found that the October 4 Declaration: (1) did not meet *section 437c, subdivision (h)*'s requirements because it set forth no specific facts, and (2) did not explain Dowell's lack of diligence in bringing it. Moreover, the trial court noted that while Dowell had been [*10] preparing to represent Schulman since August 2006, he failed to explain "why he took no steps to seek a continuance until the very last minute."

Judgment and Appeal

Judgment was entered on October 30, 2006. This timely appeal ensued.

DISCUSSION

I. *The Record is Inadequate for Review*

"[I]t is settled that: 'A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of constitutional doctrine of reversible error.'" (*Denham v. Superior Court (1970) 2 Cal.3d 557, 564.*) "'A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.'" (*Gee v. American Realty & Construction, Inc. (2002) 99 Cal.App.4th 1412, 1416.*)

As aptly pointed out by the Regents, the record on appeal provided by Schulman is woefully inadequate. According to her opening brief, her sole contention on appeal is that the requirements of *section 437c, subdivision (h)* were "unquestionably met" by the October [*11] 4 Declaration and thus the trial court erred in denying her request to continue the motion for summary judgment. However, Schulman failed to designate the October 4 Declaration as part of the record. Absent a copy of the October 4 Declaration, we cannot review the trial court's order in connection with that document.

In an effort to cure the error, Schulman moved to augment the appellate record. Her motion is denied. It is well-established that "augmentation is *not* a matter of right; it lies solely within the appellate court's *discretion.*" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) P 4:301, p. 4-63; see also *id.* at P 5:131, p. 5-39; *Cal. Rules of Court, rule 8.155(a)(1).*) "The parties are expected to be diligent in initially preparing an adequate record and in seeking augmentation as soon as an omission in the record is discovered. Thus, a request for augmentation may be denied where the moving party fails to show surprise, excusable neglect, or good cause of any delay in seeking relief." (Eisenberg et al., *supra,* P 5:132, p. 5-39.)

Our local rules provide that an "[a]ppellant should file requests for augmentation in one motion within 40 days [*12] of the filing of the record. . . . Thereafter, motions to augment will not be granted except upon a showing of good cause for the delay." (Ct. App., Second Dist., Local Rules, rule 2(b).)

Schulman's motion to augment the record is untimely. Although the record on appeal was filed on May 30, 2007, Schulman's motion to augment was not filed until May 12, 2008, nearly one year later. Aside from violating local rule 2(b), this delay is unreasonable. She should have realized her failure to designate the October 4 Declaration when she prepared her opening brief and quoted from it, yet offered an incorrect record citation. Even if she was unaware of her error at that time, the Regents pointed it out in its respondent's brief, when it argued that we should affirm the judgment on this ground alone. The Regents filed its respondent's brief on February 13, 2008; however, Schulman waited nearly three months before moving to augment the record. She offers no explanation for her delay.

In light of the foregoing, we decline to grant Schulman's motion to augment the record with the October 4 Declaration. Absent that document, the appellate record is inadequate, and we have "no occasion to consider further [*13] the merits" of Schulman's appeal. (*Ballard v. Uribe (1986) 41 Cal.3d 564, 574-575.*)

We could affirm on this ground alone.

II. *The Trial Court Did Not Abuse Its Discretion in Denying Schulman's Request for a Continuance*

For the sake of completeness, we turn to the merits of Schulman's challenge to the trial court's order denying her request to continue the Regents's motion for summary

judgment.

Section 437c, subdivision (h) provides, in relevant part: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." (*§ 437c, subd. (h)*.) Thus, "[t]he statute mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted [*14] affidavit fails to make the necessary showing under *section 437c, subdivision (h)*. [Citations.] Thus, in the absence of an affidavit that requires a continuance under *section 437c, subdivision (h)*, we review the trial court's denial of appellant's request for a continuance for abuse of discretion. [Citation.]" (*Cooksey v. Alexakis (2004) 123 Cal.App.4th 246, 253-254*.)

"A declaration in support of a request for continuance under *section 437c, subdivision (h)* must show: '(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]'" (*Cooksey v. Alexakis, supra, 123 Cal.App.4th at p. 254*.)

Here, the October 4 Declaration hardly satisfies the requirements of *section 437c, subdivision (h)*. First, it was not timely filed. As set forth above, *section 437c, subdivision (h)* requires that a request for a continuance be made "on or before the date the opposition response to the motion is due." (*§ 437c, subd. (h)*.) Here, the Regents's motion was set for hearing on October 4, 2006; thus, Schulman's opposition, and any request for a continuance, was due by [*15] no later than September 20, 2006, 14 days before the hearing. (§ 437, subd. (b)(2).) Because Schulman did not file the October 4 Declaration until October 4, 2006, *after* the scheduled hearing on the Regents's motion for summary judgment, her request was untimely, and therefore there was no abuse of discretion in its denial.

Second, the October 4 Declaration failed to satisfy *section 437c, subdivision (h)*'s requirement that Schulman demonstrate that "facts essential to justify opposition may exist." (*§ 437c, subd. (h)*.) In order to establish that "facts essential to justify opposition may exist" (*§ 437c, subd. (h)*), an affidavit must provide details and set forth specific facts. "There is good reason for this more exacting requirement. The statute cannot be employed as a device to get an automatic continuance by every unprepared party who simply files a declaration stating that unspecified essential facts may exist. The party seeking the continuance must justify the need, by detailing both the particular essential facts that may exist and the specific reasons why they cannot then be presented." (*Lerma v. County of Orange (2004) 120 Cal.App.4th 709, 715-716*.)

Applying these principles, [*16] we readily conclude that the vague and general representations contained in the October 4 Declaration are simply inadequate. All Dowell asserts is that he "discussed the medical issues contained in [the Regents's motion for summary judgment] with duly licensed medical doctors in good standing with their respective medical licensing boards. During the course of such discussion, there were indications from such doctors that there may be issues of material fact as to the standard of care and medical opinions rendered favorable to [Schulman]. Additionally, [Schulman's] counsel's discussion with same may result in proper affidavits or declarations in opposition to [the Regents's motion for summary judgment] to be filed within the next four to six weeks." The potential experts are unnamed, and their conclusions are uncertain: the generic "they" "may" render opinions favorable to Schulman and may agree to provide expert testimony on Schulman's behalf. Such a representation hardly satisfies the statutory requirement for a continuance. (*Roth v. Rhodes (1994) 25 Cal.App.4th 530, 547-548*; *Lerma v. County of Orange, supra, 120 Cal.App.4th at p. 715*.)

Moreover, the October 4 Declaration is utterly [*17] silent regarding causation. Thus, even if Dowell's averments were adequate (which they are not) regarding the standard of care, he offers nothing that would tend to defeat the Regents's motion for summary judgment on the grounds of lack of causation.

Throughout her opening brief, Schulman attributes her delay in requesting a continuance to problems that Dowell had in obtaining the file from Forgie. We are not convinced. Nothing prevented Dowell from timely and promptly requesting a continuance of the motion for

summary judgment. At the time Forgie withdrew, Dowell was "waiting in the wings." He was retained by August 15, 2006, and had obtained certificates of good standing from Texas and Oregon by August 29, 2006, and August 23, 2006, respectively. By that time, the Regents's motion had been filed and served; Dowell could have obtained a copy of the motion in order to begin preparing an opposition, including a request for a continuance if he believed that one was necessary. At a minimum, Treister received a copy of the Regents's motion on September 5, 2006. And, as Schulman admits, she knew that she needed expert opinions to support her case. Yet, Schulman does not explain why her attorneys [*18] delayed between the time Dowell was retained and the time he finally requested a continuance.

In a similar vein, Schulman blames Forgie for his lack of diligence in doing what was necessary to oppose the Regents's motion for summary judgment. This argument is unavailing. It is well-established that in these circumstances, an attorney's negligence is imputed to the client. (See, e.g., *Tustin Plaza Partnership v. Wehage (1994) 27 Cal.App.4th 1557, 1563*.) Thus, by blaming Forgie, Schulman is in effect admitting a lack of diligence in opposing the Regents's motion.

Last, we note that in her reply brief, Schulman argues for the first time that the judgment should be reversed pursuant to *Garibay v. Hemmat (2008) 161 Cal.App.4th 735* because the declarations offered by the Regents in support of its motion for summary judgment were inadequate. [3] In so arguing, Schulman violates at least two well-established rules of appellate practice. (1) We do not consider arguments first raised on appeal. (*Algeri v. Tonini (1958) 159 Cal.App.2d 828, 832*.) Schulman never submitted any opposition to the Regents's motion for summary judgment (other than her repeated requests for a continuance), and thus never [*19] argued below that the Regents's motion was insufficient or defective. (2) We do not consider arguments first raised in a reply brief. (*Reichardt v. Hoffman (1997) 52 Cal.App.4th 754, 764*.) It follows that we decline to reverse the judgment based upon this new and "wholly independent" theory.

3 Schulman also focused on this theory at oral argument.

DISPOSITION

The judgment of the trial court is affirmed. The Regents is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ASHMANN-GERST, J.

We concur:

DOI TODD, Acting P. J.

CHAVEZ, J.