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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JONATHAN MARTIN ARELLANO,
a Minor, etc.,

Plaintiff and Appellant,

v.

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA et al.,

Defendants and Respondents.

G041485

(Super. Ct. No. 07CC02628)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Randell L. Wilkinson, Judge. Affirmed.

Robinson, Calcagnie & Robinson, Mark P. Robinson, Jr., Kevin F.
Calcagnie; The Arkin Law Firm and Sharon J. Arkin for Plaintiff and Appellant.

Carroll Kelly Trotter Franzen & McKenna, Mark V. Franzen, Betsey J.
Jeffrey; Greines, Martin, Stein & Richland, Martin Stein and Carolyn Oill for Defendants
and Respondents.

* * *

INTRODUCTION

Jonathan Martin Arellano, by and through his guardian ad litem Antonio Arellano, (plaintiff) appeals from the trial court's grant of a motion for summary judgment in favor of defendants the Regents of the University of California, UCI (the University of California at Irvine) Medical Center, and Dr. Terry Shibuya (defendants) as to his claim for medical malpractice. Plaintiff contends the trial court erred by denying his requests for a continuance of defendants' motion.

We affirm. The record shows plaintiff failed to make any showing of good cause in support of his requests for a continuance. Plaintiff's failure to satisfactorily explain to the trial court why no opposition to the motion for summary judgment was ever filed was compounded by his untimely requests for a continuance on the day before and the day of the hearing on the motion. Plaintiff has not argued either in the trial court or on appeal that he satisfied the requirements for a continuance contained in Code of Civil Procedure section 437c, subdivision (h). Applying the abuse of discretion standard of review to the trial court's ruling to the circumstances of this case, we cannot conclude the trial court abused its discretion in denying a continuance.

BACKGROUND AND CHRONOLOGY

In February 2007, plaintiff filed a complaint against defendants for medical malpractice. At the time the complaint was filed, plaintiff was represented by the law firm of Hurley & Patel.¹ The complaint alleged plaintiff was admitted to UCI Medical Center in October 2005 for "surgery of resection of a nasopharyngeal angiofibroma and removal of a tumor" and "[p]ostoperatively[,] plaintiff experienced a right middle

¹ Attorney John A. Hurley signed the complaint on behalf of plaintiff. Attorney Sunil S. Patel of Hurley & Patel, whose name did not appear on the complaint, first appeared in the case on behalf of plaintiff at a case management conference on June 14, 2007. The record refers to plaintiff's law firm of record as Hurley & Patel, Hurley & Associates, and the Law Office of Sunil S. Patel without explanation as to the use of those different firm names.

cerebral artery infarction.”² The complaint further alleged plaintiff has had “subsequent surgeries, extensive rehabilitation and therapy, and has suffered permanent damage.”

In August 2007, trial was set for July 28, 2008. On September 25, 2007, plaintiff’s counsel filed a notice of association of the law firm of Sofonio & Associates and Attorneys Rex P. Sofonio and Maribel B. Ullrich as cocounsel representing plaintiff.

On April 7, 2008, defendants moved for summary judgment or, in the alternative, summary adjudication (the motion) on grounds, inter alia, that “there exist[ed] no triable issues of material fact as to the elements of breach of duty (standard of care) and causation as to these defendants.” The hearing on the motion was noticed for June 25, about a month before the trial date. Pursuant to section 437c, subdivision (b)(2) of the Code of Civil Procedure, any opposition to the motion was due to be filed and served no later than June 11 (14 days before the noticed hearing date).

No opposition was filed on or before June 11, 2008. On June 20, Sofonio & Associates filed a document entitled “Notice of Disassociation of Counsel.” As the appellate record contains only the caption page and proof of service of this document, we take judicial notice of the entire document as contained in the Orange County Superior Court file No. 07CC02628. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).) That document states in relevant part: “PLEASE TAKE NOTICE THAT Rex P. Sofonio and Maribel B. Ullrich from SOFONIO & ASSOCIATES, hereby disassociate as co-counsel for plaintiff, JONATHAN MARTIN ARELLANO, in the above matter. John A. Hurley from HURLEY & ASSOCITES [*sic*] remains as counsel.” The notice of disassociation of counsel is signed by Rex P. Sofonio and by Antonio Arellano as guardian ad litem for plaintiff. The record does not contain any further explanation of the circumstances surrounding the disassociation of counsel. The proof of service shows the notice of

² The record shows plaintiff was 12 years old at the time of the surgery.

disassociation of counsel was served on John A. Hurley and Sunil Patel of Hurley & Associates.

On the day before the scheduled hearing on the motion, June 24, 2008, Attorney Patel (who, at this point, identified himself with the Law Office of Sunil S. Patel) filed an ex parte application on behalf of plaintiff seeking an order that would (1) continue the hearing on the motion; (2) grant plaintiff at least 120 days to file an opposition to the motion; and (3) continue all scheduled proceedings including the July 28 trial date.

The ex parte application was supported by Patel's declaration which stated, "the law firm of Sofonio & Associates has been the lead and only counsel handling this case." The declaration further stated Sofonio & Associates (1) conducted all discovery; (2) obtained plaintiff's expert and "conducted all communications with said expert"; (3) made all court appearances; (4) handled all settlement negotiations with counsel for defendants; and (5) "handled all aspects of litigating this case" including "maintain[ing] sole communication with Plaintiff in this case." Patel's declaration also stated that on June 18, he spoke with "Cory Kemp of Sofonio & Associates" who told Patel that "his firm was waiting for a response from defendants[] regarding a settlement offer." Patel's declaration explained: "Accordingly, I believed that Sofonio & Associates were handling the matter."

In his declaration, Patel further stated that after receiving notice, at 3:00 p.m. on June 23, 2008, of Sofonio & Associates' disassociation as counsel in the case, he tried to contact Sofonio but was informed that he was unavailable. Patel's declaration asserted: "This case is set for a hearing on defendants' motion for summary judgment on June 25, 2008 at 1:30 p.m. Sofonio & Associates has not filed a response to defendants' motion for summary judgment. [¶] . . . This is a complicated, detailed and substantial medical malpractice case in which the plaintiff has suffered permanent damage and paralysis. Sofonio & Associates' disassociation of counsel after handling the

entire case one day before the hearing on the motion for summary judgment, without filing a response, is a miscarriage of justice upon the plaintiff. [¶] . . . I will require time to get up to speed in this case and file the appropriate response to defendant[s'] motion for summary judgment. Additionally, I will require additional time to prepare for any upcoming proceedings as well as trial. [¶] . . . On June 23, 2008 at approximately 3:30 p.m., I personally spoke with counsel for defendants . . . and gave her notice of the date, time, location, and nature of plaintiff's *ex parte* application."

Patel's declaration did not explain why Sofonio failed to file an opposition to the motion or request a continuance even though Sofonio was counsel of record until a week after the opposition was due. No declaration from Sofonio was ever presented to the trial court.

On June 24, 2008, the trial court denied the *ex parte* application because plaintiff failed to provide (1) timely notice of the application; (2) competent evidence "of what notice was given"; and (3) "competent evidence of good cause to justify the requested continuance where counsel of record, Hurley & Patel, or Hurley and Associates, was served the motion for summary judgment on April 7, 2008."

The following day (the day of the hearing on the motion), Patel filed a document entitled "Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment or in the Alternative Summary Adjudication of Issues of Defendants; *or in the Alternative Motion to Continue the Hearing.*" (Italics added.) The memorandum of points and authorities reiterated the contents of Patel's declaration which was filed in support of the *ex parte* application; it did not include any response to the merits of the motion. Plaintiff's "opposition" included a declaration of Patel, which again reiterated the contents of his earlier declaration, and in which Patel added: "I have not been involved in the litigation of this case. When I received a copy of defendants' motion for summary judgment, I immediately contacted Sofonio & Associates who was actually litigating this case. Rex Sofonio represented to me that his

office was handling said motion for summary judgment. Accordingly, I did not prepare or file an opposition.”

Patel and Sofonio appeared at the hearing on the motion. The court stated its intention to grant the motion on the ground defendants had met their initial burden to make a prima facie showing of the nonexistence of a triable issue of material fact as to the elements involving standard of care and causation of plaintiff’s malpractice claim. The court further noted plaintiff had failed to oppose the motion. The following colloquy occurred:

“Mr. Sofonio: Your Honor, if I may be heard.

“The Court: Well you didn’t file any opposition.

“Mr. Sofonio: I agree, Your Honor. A notice of that was given I think to both this court and the defense on June 9 and June 10th.^[3] But due to problems not dealing with the client but with the two firms involved, that no response be given at that time. I also advised the defense at that time to set up an ex parte motion to advise the court of the situation. As you know, this court was on vacation at the time. *I almost brought an ex parte*. I had one set up last week with another judge, but I know this is a housekeeping matter.

“I also have looked up the laws pertaining to my ethical duties under specifically professional code 3700, Your Honor, and I’ve also looked at the case of Manfredi & Levine versus Superior Court in which when I am under the guise [*sic*]—under these circumstances of having a problem with another firm, that there is an ability to go in camera with you to discuss those issues.

“Again I am here and my former clients appeared here. If there’s any evidence to be taken as to why I think there is very good cause a continuance should be

³ The record does not contain or further identify any such notice.

given to their cause of action, as again the non-response had nothing to do with them, Your Honor. It had to do with the two firms.

“The Court: Why didn’t you come in ex parte?”

“Mr. Sofonio: When this happened this was on June 9 and June 10th, I tried to—

“The Court: I mean since I’ve been back.

“Mr. Sofonio: It was just on Monday, Your Honor. I figured the best way to address it—actually what I wanted to come in for was a judicial advisory on how I should handle the situation. I know an ex parte was filed by the other law firm yesterday. I was going to appear at that time to discuss this matter. If you check with the court clerk, I did call. I found at that time it had already been ruled [on] and no appearances were going to be necessary. I didn’t file it on Monday or Tuesday because I thought it was most convenient with your return that we come in today.

“The Court: As you can see it’s not, is it? We’ve got a whole courtroom of people and I have a calendar that will start at 3:00 that will pretty well fill up this court as well. So you guessed wrong.

“Mr. Sofonio: I think I did, Your Honor. I’ve given notice to the defense and all parties of the situation, and that was my decision I guess not to bring it on either Monday or Tuesday. I could have done that. That was my mistake [i]n not bringing it on Monday or Tuesday to your attention, Your Honor.

“The Court: The ruling stands. I’ll have moving party give notice.”
(Italics added.)

In the minute order, the trial court stated: “The motion for summary judgment is granted. [¶] Based on the expert declaration of Dr. Furtan[,] the defendants have met their initial burden of making a prima facie showing of the non existence of a triable issue of material fact as to the elements of duty. Plaintiff has fail[ed] to oppose the motion. [¶] . . . [¶] The court did not consider plaintiff[’]s memorandum filed

June 25, 2008 given that it was submitted to the court mo[m]ents before this case was called.”

Judgment was entered in favor of defendants. Plaintiff appealed.

DISCUSSION

Plaintiff contends the trial court erred by denying his requests for a continuance of the hearing on the motion to enable him to file a substantive opposition to the motion.

I.

CODE OF CIVIL PROCEDURE SECTION 437c, SUBDIVISION (h), IS INAPPLICABLE.

In their appellate briefs, the parties agree that Code of Civil Procedure section 437c, subdivision (h), which *requires* that a trial court grant a continuance of a hearing on a motion for summary judgment under certain circumstances, is inapplicable to this case. Section 437c, subdivision (h) provides: “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. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due.” Plaintiff did not cite section 437c, subdivision (h) to the trial court in support of his requests for a continuance. Indeed, plaintiff has not argued in the trial court or on appeal that “facts essential to justify opposition may exist but [could not], for reasons stated, then be presented” (Code Civ. Proc., § 437c, subd. (h)). Furthermore, no opposition or request for a continuance was filed on or before the date plaintiff’s opposition to the motion was due as required by section 437c, subdivision (h).

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S REQUESTS FOR A CONTINUANCE BECAUSE PLAINTIFF FAILED TO SUFFICIENTLY EXPLAIN HIS FAILURE TO FILE ANY OPPOSITION AND FAILED TO MAKE A TIMELY REQUEST FOR A CONTINUANCE.

To obtain a continuance, a party must make a showing of good cause. (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716.) We review the trial court's denial of a request for a continuance for an abuse of discretion. (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170 (*Mahoney*) [““““Generally, power to determine when a continuance should be granted is within the discretion of the court, and there is no right to a continuance as a matter of law””””].)

In requesting a continuance of the motion, the record shows plaintiff failed to satisfactorily explain to the trial court why no opposition to the motion was ever filed. In support of plaintiff's requests for a continuance, Patel filed declarations explaining that Sofonio had served as lead counsel in the case and had assured Patel his office was “handling” the motion. But Patel's declarations do not explain why Sofonio, who was also counsel of record at the time the opposition to the motion was due and who continued to be counsel of record for a week thereafter, failed to file any opposition. The declarations only explain why Patel, as cocounsel of record, did not personally file an opposition on plaintiff's behalf.

Sofonio never filed a declaration explaining why an opposition was not filed. At the hearing on the motion, Sofonio acknowledged no opposition had been made to the motion, vaguely citing “problems” between his firm and Patel's firm. Neither Sofonio nor Patel, however, stated that any mistake or misunderstanding had occurred, resulting in the failure to file an opposition. Plaintiff's requests for a continuance are therefore based on nothing more than one of his counsel of record's unexplained failure to file an opposition.

This is not a case where an attorney had abandoned his client the day before an opposition to a motion for summary judgment was due, requiring new counsel to take over and get up to speed in the case. As discussed *ante*, Sofonio remained counsel of record for a week after the opposition was due. Sofonio's notice of disassociation of counsel was signed by Antonio Arellano and thus Sofonio's disassociation as counsel appears to have been done with plaintiff's consent (the record does not suggest otherwise). Although Patel served as plaintiff's cocounsel of record since the beginning of the case (albeit in a secondary role), he nevertheless requested the trial court to continue not only the motion, but all proceedings in the case, including the July 28 trial date, for 120 days.

Plaintiff's argument thus boils down to the proposition that a party who is represented by more than one attorney is automatically entitled to a continuance when one of those attorneys fails to do something he or she was required to do, regardless of any explanation for, or the circumstances surrounding, that failure. Good cause for a continuance requires a better explanation for the failure to oppose a motion than the mere fact an opposition was not filed.

Plaintiff's failure to explain why a continuance was needed is compounded by his demonstrable failure to make a timely request for a continuance. In considering whether a trial court has abused its discretion in denying a request for a continuance, we consider whether a prompt request for a continuance was made by a party upon the ascertainment of the need for one. (*Mahoney, supra*, 223 Cal.App.3d at p. 172.)

With the July 28 trial date a little over a month away, and notwithstanding that the June 11 due date for the opposition had come and gone, Patel first sought a continuance on June 24, the day before the hearing on the motion; the record does not contain any explanation for Patel's delay. Neither Sofonio nor his law firm sought a continuance of the hearing on the motion before the hearing itself. At the hearing on the motion, Sofonio orally requested a continuance to the court, stating he had considered

making a request for a continuance earlier, but had not, and further stated he decided he would wait until the hearing on the motion to address the issue with the court. Again, plaintiff makes a similar explanation for the delay as he did for the failure to file an opposition—he did not make a timely request for a continuance because he did not make a timely request for a continuance.

An opinion authored by then Associate Justice Ronald George of the Court of Appeal, Second Appellate District, Division Four, *Mahoney, supra*, 223 Cal.App.3d at page 169, supports the conclusion the trial court did not abuse its discretion in denying plaintiff's requests for a continuance in this case. In *Mahoney*, the plaintiff failed to timely file an opposition to the defendants' motion for summary judgment; the parties thereafter stipulated that the hearing on the motion be continued to a new date. (*Ibid.*) The plaintiff failed to file an opposition before the new hearing date. (*Ibid.*) The plaintiff's attorney explained that he had not done so because a partner in his law firm had left the firm more than four months earlier. (*Ibid.*) The plaintiff's attorney requested a second continuance of 30 days. (*Ibid.*) The trial court asked the attorney why he had not filed a declaration explaining the basis for his request. (*Ibid.*) The attorney stated, "he had not done so because of lack of time, and because he had contracted the flu and a throat infection one and one-half weeks prior to the hearing, resulting in his being partially incapacitated." (*Ibid.*) The court denied the request for a continuance and granted the defendants' motion for summary judgment. (*Ibid.*)

The appellate court concluded the plaintiff's counsel's request for a continuance under the circumstances was not mandated by Code of Civil Procedure section 437c, subdivision (h), and thus "was within the discretion of the court." (*Mahoney, supra*, 223 Cal.App.3d at p. 170.) The appellate court affirmed the trial court's denial of a continuance, concluding that the plaintiff's counsel failed to promptly request a continuance upon ascertaining the need for one and failed to meet the burden of

establishing good cause for a continuance. (*Id.* at p. 172.) No case has since disagreed with *Mahoney*.

Plaintiff cites several cases in which the trial court was found to have abused its discretion in denying a continuance on a motion for summary judgment. Two of those cases, *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633, and *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 392, however, are both inapplicable as each case involved a request for a continuance under Code of Civil Procedure section 437c, subdivision (h) on the ground discovery was ongoing and deposition transcripts essential to opposing the motion had not been received from the court reporter.

The remainder of the cases cited by plaintiff are easily distinguishable. In *Lerma v. County of Orange, supra*, 120 Cal.App.4th at pages 711-712, a panel of this court concluded the trial court abused its discretion in denying a request for a continuance of a motion for summary judgment because the plaintiffs' counsel was admitted to the hospital to have surgery to remove his cancerous bladder the day the motion was served and did not learn about the motion until his release from the hospital two days before the opposition was due. He then filed a request for a continuance along with a timely, albeit perfunctory, opposition to the motion addressing the merits. (*Id.* at p. 713.)

In *Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 91, the appellate court held that, "under the particular circumstances of this case," the trial court abused its discretion by failing to afford the defendant a further opportunity to file a separate statement. In that case, the defendant, appearing in propria persona, mistakenly believed he did not need to file a separate statement of facts in response to the plaintiff's second motion for summary judgment after he had filed a separate statement in response to the plaintiff's first motion for summary judgment. (*Id.* at p. 92.) The court granted summary judgment, based on the defendant's failure to file a separate statement. (*Ibid.*)

In *Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1155 and footnote 1 (*Kalivas*), after the defendant filed a motion for summary judgment, the trial

court's clerk provided the parties with an order which required them to meet and confer within 10 days in an effort to eliminate and narrow the difference between them regarding the undisputed issues and facts in the case, and stated the motion was ordered "off calendar." The defendant's counsel "made no effort to arrange a 'meet and confer' within 10 days," and the plaintiff's counsel neither filed an opposition to the motion for summary judgment nor appeared on the date the motion was originally scheduled for hearing, in reliance on the trial court's order. (*Id.* at p. 1156.) The trial court thereafter granted summary judgment on the merits, noting the plaintiff failed to file an opposition and responsive separate statement of facts. (*Id.* at p. 1157.) The court also denied the plaintiff's motion for reconsideration on the ground the court never took the motion off calendar. (*Ibid.*)

The appellate court in *Kalivas, supra*, 49 Cal.App.4th at page 1154, concluded the trial court abused its discretion by granting summary judgment and denying the motion for reconsideration. The court held the trial court's promulgation of a courtroom local rule presented in the form of the meet and confer order was invalid because it violated Code of Civil Procedure section 437c, subdivision (b) and other statutes governing the promulgation of local rules. (*Kalivas, supra*, at pp. 1158, 1160.) The appellate court also held the trial court's denial of the motion for reconsideration was improper because the order misled the plaintiff's counsel into not filing an opposition or separate statement and not appearing at the hearing on the motion for summary judgment. (*Id.* at p. 1154.) The *Kalivas* court stated: "The flawed courtroom local rule also provides a satisfactory explanation why [the plaintiff] did not produce evidence at an earlier time. [The plaintiff]'s counsel reasonably believed the hearing was canceled. After all, the order recited that 'the pending motion(s) is/are ordered off calendar' and bore the judge's signature. Instead of allowing [the plaintiff] the opportunity to correct her excusable procedural omissions, the court granted summary judgment." (*Id.* at p. 1161, fn. omitted.) Citing *Security Pacific Nat. Bank v. Bradley, supra*,

4 Cal.App.4th 89, the court further stated, “[a]n order based upon a curable procedural defect (such as the failure to file a separate statement), which effectively results in a judgment against a party, is an abuse of discretion.” (*Kalivas, supra*, at p. 1161.)

At oral argument in the instant case, plaintiff’s counsel argued plaintiff’s failure to file an opposition (and responsive separate statement) constituted a mere “curable procedural defect.” Quoting *Kalivas, supra*, 49 Cal.App.4th 1152, plaintiff’s counsel argued the trial court therefore necessarily abused its discretion by denying the requests for a continuance. We disagree. In *Kalivas*, the appellate court found the trial court erred by denying the plaintiff the opportunity to correct “excusable procedural omissions” that the trial court itself had induced. (*Id.* at p. 1161.) As discussed in detail *ante*, unlike the record in *Kalivas*, our record neither contains any explanation as to why no opposition or responsive separate statement was filed, nor shows the trial court created a procedural problem which led to that omission.

Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co. (2005) 133 Cal.App.4th 1197 is also distinguishable in that it addressed the circumstances in which a trial court should provide a party the opportunity to file a proper separate statement after the party filed a procedurally deficient separate statement.

Unlike the above cited cases, this case involves the abject and insufficiently explained failure to oppose a motion for summary judgment, compounded by an untimely, unexplained request for a continuance of the hearing on the motion. Plaintiff failed to otherwise make a showing of good cause for a continuance. Applying the abuse of discretion standard of review to the circumstances of this case, we cannot conclude the trial court’s denial of plaintiff’s requests for a continuance was arbitrary or capricious. Whether we may have made the same decision had we stood in the trial court’s shoes is irrelevant.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.