ROBERT F. SLACK, Plaintiff and Appellant, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants and Respondents.

B164521 c/w B165897

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

2004 Cal. App. Unpub. LEXIS 10758

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PRIOR HISTORY: Appeal from a judgment and order of the Superior Court of Los Angeles County, No. SC066079. Lorna Parnell, Judge.

DISPOSITION: The judgment and the order from which plaintiff has appealed are each affirmed. Costs on appeal to the defendants.

COUNSEL: Alan M. Goldberg for Plaintiff and Appellant.

Maranga-Morgenstern, Kenneth A. Maranga, Jeffrey B. Stoltz; Greines, Martin, Stein & Richland, Martin Stein, Carolyn Oill and Lillie Hsu for Defendants and Respondents.

JUDGES: CROSKEY, J.; KLEIN, P.J., ALDRICH, J. concurred.

OPINION BY: CROSKEY

OPINION:

In these consolidated appeals, plaintiff, Robert F. Slack, challenges a summary judgment granted to defendants, Daniel J. Castro, M.D. (Castro) and the Regents of the University of California (Regents) n1 (B164521). Plaintiff also challenges the partial denial of his motion to tax costs (B165897).

n1 We collectively refer to Castro and the Regents as the "defendants."

[*2]

Plaintiff contends his attorney was negligent in representing him in the motion for summary judgment and therefore the trial court abused its discretion when it refused to continue a hearing on the summary judgment motion to give plaintiff an opportunity to present a triable issue of material fact to the court. Additionally, plaintiff asserts defendants' own moving papers for the summary judgment motion raise triable issues of material fact and thus should have caused the trial court to deny defendants' motion or at least to continue the motion hearing.

We have reviewed the record and conclude that plaintiff's arguments are without merit. The trial court did not abuse its discretion in denying plaintiff's *oral* motion to continue the hearing on defendants' summary judgment motion so that he could pursue additional discovery. Significantly, plaintiff filed no written opposition to the motion nor did he make any objections to the evidentiary showing on which that motion was based. To the extent that a judgment was entered against plaintiff due to the failure of his attorney to (1) file timely and proper written opposition, (2) make appropriate evidentiary objections, and (3) file **[*3]** timely and appropriate written motions to continue the hearing on defendants' summary judgment motion, plaintiff is necessarily chargeable with such dereliction. We therefore will affirm the judgment.

With respect to plaintiff's appeal from the trial court's post-judgment order awarding defendants certain costs, we also affirm. The record reflects that substantial evidence supports the trial court's order and there is no demonstration by plaintiff that the trial court abused its discretion in issuing such order.

BACKGROUND OF THE CASE

1. *The Complaint*

This suit for damages, arising from alleged medical malpractice, was filed in April 2001. The focus of the complaint is nasal surgery plaintiff underwent on January 12, 2000, as well as certain post-operation events. The surgery was performed by defendant Castro at the UCLA medical center.

The complaint alleges a lack of informed consent when plaintiff accepted defendants' medical treatment. According to the complaint, defendants' false and misleading statements, as well as defendants' concealment of facts, caused plaintiff to submit to and undergo an operation, which operation he would not have undergone had **[*4]** defendants disclosed the actual facts to him. He further alleges that the defendants failed to provide him with necessary post-operative care, including a failure to diagnose and treat a post-operative infection. He alleges that he was required to undergo further surgery as a result of the negligent surgery performed on January 12, the negligent post-operative care, and the "failure to provide correct medical care and treatment."

2. *Defendants' Motion for Summary Judgment*

a. *The Moving Papers*

Defendants' motion for summary judgment was filed on August 20, 2002. Their separate statement, which contains ten undisputed facts, is based on the declaration of Paul Toffel, M.D. n2 Defendants argued to the trial court that Dr. Toffel's declaration negated two of the elements of a cause of action for medical malpractice: first, that defendants' medical treatment of plaintiff fell below the applicable standard of care and second, that their treatment was a cause of the injuries of which plaintiff complains. Defendants further asserted that Dr. Toffel negated the allegation that Castro failed to inform plaintiff of essential information.

n2 Defendants also listed Dr. Toffel in their designation of expert witnesses, which they served on plaintiff on August 30, 2002.

[*5]

In his declaration, Dr. Toffel set out his medical background as a source for qualification for testifying as an expert. He stated that he had reviewed certain of plaintiff's medical records, and asserted that, based on this review, he was familiar with the facts and allegations in this case, and based on his education, training and experience, he was familiar with the medical issues raised by the case. He further stated that he was familiar with the standard of care applicable to ear, nose and

throat and otolaryngolosits, and he opined that defendants' treatment of plaintiff met the standard of care in all respects and there was no evidence that defendants were negligent in treating plaintiff. He also expressed the opinion that "no reasonable medical probability exists that any of the care or treatment provided to plaintiff contributed to or was a substantial factor in bringing about, any harm to plaintiff." n3

n3 Specifically, Dr. Toffel testified as to the question of the defendants compliance with the standard of care: "[1] All of the medical treatment rendered by Daniel J. Castro, M.D. and the Regents of the University of California met the standard of care in every respect in this case. There is no evidence that [defendants] were negligent. [2] The operation performed by Dr. Castro ... was medically appropriate based on Plaintiff's past medical history, the results of the flexible laryngoscopy ... and the CT scan ... which revealed a deviated septum, markedly hypertrophic inferior turbinates, and diffuse ethmoid sinusitis. Moreover, the pathology report after the surgery confirmed the existence of sinusitis. [3] The operative technique by Dr. Castro was appropriate and within the standard of care. [4] Dr. Castro's post-operative follow-up care was appropriate and within the standard of care."

With respect to the issue of causation, Dr. Toffel expressed the following opinions: "[1] Plaintiff's poor healing was not the result of the surgery performed by Dr. Castro. Plaintiff had vascular compromise and Hepatitis C which affected his healing. Additionally, plaintiff's history of drug abuse, including reports of snorting cocaine, may also have contributed to plaintiff's poor healing and/or failure to heal. Plaintiff's vascular compromise was likely due to drug abuse, specifically cocaine. [2] The ulcerated turbinates post-operatively were the result of his poor healing and vaculitis. Plaintiff had a normal healing process two months after surgery and then had an ulceration much later. The ulceration much later in time was not the result of the surgery. Furthermore, any subsequent osteitis or osteomyelitis were not caused by the surgery. Rather, the lining in Plaintiff's sinuses were forever damaged from his drug use. That in conjunction with his immune issues, Hepatitis C led to his poor healing. [3] To the extent that Plaintiff had any post-operative crusting, drainage or intermittent infections, those were known risks and complications which Plaintiff consented to. Post-operative drainage and crusting were part of the normal healing process. At the time of his last examination by Dr. Castro, there was no evidence of exposed bone or infection, although there was a slight discoloration of mucous. Plaintiff may have developed a subsequent infection, a known risk and complication, however, the patient never returned to Dr. Castro. Additional surgery was also a known risk and complication. [4] No act or omission on the part of Defendants, caused, or was a substantial factor in causing, any alleged injury claimed by Robert Slack."

[*6]

b. *Plaintiff's Ex Parte Applications*

Defendants' motion for summary judgment was set for hearing on September 18, 2002. As noted, the motion was filed on August 20, 2002. The mailing envelope used for serving the motion on plaintiff's attorney states a metered mailing date of August 10, 2002. The proof of service by mail states the moving papers were mailed from Sherman Oaks, California, to plaintiff's attorney's post office box in Studio City, California, on August 16, 2002.

Because the summary judgment motion was set for hearing on September 18, plaintiff's opposition papers were due on or before September 4. n4 Plaintiff, however, did not file any declarations in opposition to the defendants' motion papers. Instead, on September 13, plaintiff filed ex parte applications to continue the trial date, n5 and to have the summary judgment motion stricken or, alternatively, placed off calendar or the hearing continued. Plaintiff's attorney, June Teecher, stated in declarations filed in support of the ex parte applications that she received the motion on August 23.

n6 She asserted that because her opposition was due on September 4, she had only eight days to prepare opposition. **[*7]** n7

n4 Opposition papers are due at least 14 days prior to the date of the hearing unless the court for good cause orders otherwise. (*Code Civ. Proc., § 437c*, subd. (b).)

n5 The trial of this case was scheduled for October 21, 2002, with a Final Status Conference set for October 8, 2002.

n6 Ms. Teecher did not, however, state how often she checked her post office box, and thus the significance of when she "received" the motion is clouded.

n7 This was not accurate. Counsel admitted receipt of the motion on August 23 and a due date of September 4 for the opposition papers would mean she had 13 days, counting those two dates, to prepare and file opposition to the summary judgment motion.

Plaintiff's ex parte applications were heard on September 13, five days before the date set for hearing defendants' motion for summary judgment. Plaintiff's attorney stated in her declarations that she had previously noticed defendant Castro's deposition for August 12, 2002, but defendants' **[*8]** attorneys had refused to make him available on that day and insisted that the only days Castro was available were September 10 and September 17. When she objected, the attorneys stated he could also be available on August 27; however, that date conflicted with *her* schedule. She apparently was scheduled to be in court that day. Plaintiff's counsel stated that she needed Castro's deposition so that an expert witness could review it and be retained to testify for plaintiff at trial. Moreover, she believed Castro's testimony would lead to further discovery.

Plaintiff's counsel then requested that the hearing on the summary judgment motion be continued so that Castro could be deposed, and also so that additional discovery could be taken, which she said was necessitated by defendants' having produced statements by Castro in their summary judgment motion which, she claimed, were inconsistent with records that had previously been produced. She also stated that she wished to depose defendants' expert, Dr. Toffel, *but that it was necessary to first depose defendant Castro.* n8

n8 Plaintiff's counsel also stated that when she received the notice of defendants' summary judgment motion, it became clear to her why defendant Castro was assertedly unavailable for a deposition on August 12, and was reportedly only available on August 27, September 10 and September 17.

[*9]

Counsel also argued that the summary judgment motion was not timely under *Code of Civil Procedure section 437c* because she had not received the motion until August 23 and was therefore only given 26 days notice, not the 33 days required by section 437c (28 days plus five days for service by mail).

c. *The Trial Court's Rulings*

The trial court denied both of plaintiff's ex parte applications. Finding no triable issue of material fact and determining that defendants are entitled to judgment in their favor as a matter of law, the court granted defendants' motion for summary judgment. The court based its decision to grant the motion on defendants' separate statement and its supporting evidence, namely the declaration of

defendants' expert, Dr. Toffel. The court noted that plaintiff had filed no opposition to the motion, including no opposing separate statement, and it found that the motion was timely served on August 16, 2002.

The court stated that it denied plaintiff's ex parte application to strike the summary judgment motion or have the hearing continued because a request for a continuance should have been sought in opposition papers filed under **[*10]** *Code of Civil Procedure section 437c*, subdivision (h), and because plaintiff's attorney waited approximately three weeks after she received the summary judgment motion to ask for a continuance. Thus, her request had not been filed on or before the date plaintiff's opposition to the motion was due. The court added that only at a late stage in the case, had plaintiff unilaterally noticed defendant Castro's deposition, without checking his available dates, and then rejected alternative dates.

Judgment in favor of defendants was signed and filed on November 14, 2002. Thereafter, plaintiff filed a timely appeal from the judgment (B164521).

3. *The Order Taxing Costs*

On November 20, 2002, defendants filed a memorandum of costs claiming a right to recover costs from plaintiff. Plaintiff filed a motion to tax costs, and on January 16, 2003, the court issued an order taxing certain costs and denied the remainder of plaintiff's motion. The court awarded defendants $ 1,455.50 for service of process fees and expense and $ 3,244.51 as the reasonable costs of obtaining medical, employment and insurance records. A timely appeal was filed by plaintiff from that **[*11]** order (B165897). As indicated, we have ordered that these appeals be consolidated and we deal with them in this single opinion.

CONTENTIONS

Essentially, plaintiff makes two principal arguments with respect to appeal No. B164521. First, he contends that the papers filed by the defendants in support of their motion, themselves, demonstrate that one or more issues of fact exist. Second, plaintiff's failure to file timely and appropriate opposition and objections was due to the inexcusable negligence of his attorney and he should now be relieved of the legal consequences otherwise attendant upon such a failure. n9 With respect to appeal No. B165897, plaintiff argues that the trial court's post judgment order denying (in part) his motion to tax costs and awarding certain costs to defendants was erroneous and an abuse of discretion.

> n9 Plaintiff makes no claim that he sought such relief (e.g., under *Code Civ. Proc., § 473*) in the trial court.

Defendants respond (with respect **[*12]** to appeal No. B164521) that their motion demonstrated that no triable issue of fact existed with respect to *two* of the elements of plaintiff's case: (1) standard of care and (2) causation. Plaintiff filed no opposition to their motion, nor any proper objection to their evidentiary showing. As a result, the summary judgment was properly granted. Defendants argue that plaintiff is responsible and chargeable with his counsel's failure to provide a proper response to their motion and the trial court did not abuse its discretion in denying relief from such failure. Defendants further argue that plaintiff's attempt to obtain relief under *Code of Civil Procedure section 473* (and also in equity) in the appellate court is both untimely and unauthorized and therefore should be rejected. With respect to appeal No. B165897, defendants argue that the record reflects substantial evidence that the awarded costs were reasonable and necessary and the trial court's allowance of such costs was not an abuse of its discretion.

DISCUSSION

1. *Standard of Review*

We conduct a de novo review of this matter. (*Price v. Wells Fargo Bank (1989) 213 Cal. App. 3d 465, 474, 261 Cal. Rptr. 735.)* **[*13]** In doing so, we apply the same rules the trial court was required to apply in deciding the motion for summary judgment.

As the parties moving for summary judgment on the complaint, defendants bore an initial burden of production of a prima facie showing that there is no triable issue of material fact in this case and they are entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850,* ("*Aguilar*").) "A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.] No more is called for." (*Id., at p. 851.)* "From commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . 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. . . . A defendant bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question **[*14]** 'cannot be established,' or that 'there is a complete defense' thereto. (*Id*., § 437c, subd. (o) (2).)" (*Id. at p. 850,* italics and fns. omitted.)

A defendant moving for summary judgment is not required "to conclusively negate an element of the plaintiff's cause of action. . . . All that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action--for example, that the plaintiff cannot prove element *X*. Although he remains free to do so, the defendant need not himself conclusively negate any such element--for example, himself prove *not X*. . . . The defendant has shown that the plaintiff cannot establish at least one element of the cause of action by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence[.]" (*Aguilar, supra, 25 Cal.4th at pp. 853-854,* fns. omitted.)

Summary judgment is required where "there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law." (*Hanson v. Lucky Stores, Inc. (1999) 74 Cal.App.4th 215, 223,* internal quotations omitted; *Code Civ. Proc., § 437c* **[*15]** , subd. (c).) "[A] defendant moving for summary judgment ... 'has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the [plaintiff's] cause of action ... cannot be established.' " (*Brantley v. Pisaro, (1996) 42 Cal.App.4th at p. 1594,* emphasis omitted; *Code Civ. Proc., § 437c,* subd. (p)(2).) To make such a showing, the defendant may either present affirmative evidence negating an essential element of the plaintiff's case or rely on the plaintiff's discovery responses demonstrating that he has no evidence to support an essential element. (*Brantley v. Pisaro, supra, 42 Cal.App.4th at p. 1594; Aguilar, supra, 25 Cal.4th at pp. 853, 855;* Weil & Brown, Civil Procedure Before Trial (The Rutter Group 2003) §§ 10:241, 10:242 p. 10-81-10-82.)

Once the defendant satisfies its initial burden, the burden shifts to the plaintiff to come forward with "admissible evidence" of "specific facts showing that a triable issue of material fact exists as to that cause of action ..." (*Code Civ. Proc., § 437c,* subds. (d) and **[*16]** (p)(2).) "An issue of fact is not created by speculation, conjecture, imagination, or guesswork; it can be created only by a conflict in the evidence submitted to the trial court ... in opposition to the motion." (*Lewis v. County of Sacramento (2001) 93 Cal.App.4th 107, 115; Aguilar, supra, 25 Cal.4th at p. 864* ["Speculation ... is not evidence"].)

2. *There Was No Triable Issue of Fact As To Plaintiff's Claim For*

Medical Malpractice

a. *The Declaration of Defendants' Expert Demonstrated That Plaintiff Could Not Establish His Claim*

Plaintiff, in his complaint, alleged that defendants' performance of nasal surgery upon him was negligent and he thereby suffered damage. Two essential elements of such a claim are (1) a violation of the standard of care and (2) causation. (*Hanson v. Grode (1999) 76 Cal.App.4th 601, 606.)*

The expert's declaration submitted by the defendants in support of their motion clearly stated that, based upon a review of plaintiff's medical records and his training, experience and professional knowledge, the defendants had met the standard of care and, in any event, their actions did not cause **[*17]** the matters of which plaintiff complained. n10 Plaintiff did *not* submit any opposition to this motion - no declaration, no evidentiary matter, no separate statement, no argument.

> n10 Plaintiff filed no objection to either the content of the expert's declaration or the fact that the medical records, upon which it had been based, had not been authenticated. Such failure to object is deemed a waiver of any valid objection that might otherwise have been made. (*Code Civ. Proc., § 437c (b)(5)* and (d).)

Thus, it was not disputed that two essential elements of plaintiff's cause of action for medical malpractice had been negated. It was plaintiff's burden then to produce evidentiary matter that would raise a triable issue of fact with respect to the existence of these two elements. As indicated, he did not. Defendants were not required to do more. It was not necessary, for example, for them to prove that plaintiff could not produce evidence on these elements. Rather, once defendants introduced **[*18]** their own evidence on these issues, the burden shifted to plaintiff to introduce contrary evidence. Because he failed to do so, the trial court was justified in granting summary judgment. (*Munro v. Regents of University of California, (1989) 215 Cal. App. 3d 977, 985, 263 Cal. Rptr. 878* [affirming summary judgment].)

b. *No Triable Issue of Fact Was Created by Plaintiff's Medical Records*

Dr. Toffel's expert declaration filed in support of defendants' motion relied upon plaintiff's medical records which reflected certain preexisting health conditions that, plaintiff *now argues*, contraindicated surgery and that such records, in themselves, raise triable issues of fact as to whether defendants were aware of such records or had been negligent in performing the surgery in light of such conditions or that adequate precautions to avoid post surgical complications were not taken.

Unfortunately, plaintiff did not make these arguments before the trial court and simply raises them here for the first time on appeal. This he cannot do. (*Munro v. Regents of University of California, supra, 215 Cal. App. 3d at pp. 988-989.)* In addition, there was **[*19]** no allegation in plaintiff's complaint that he had preexisting conditions which defendants had negligently ignored, or carelessly failed to discover. In the absence of an amendment to his pleadings by plaintiff, which he did not seek, defendants were not required to address such issues in support of their motion. (*Lewinter v. Genmar Industries, Inc. (1994) 26 Cal.App.4th 1214, 1223-1224; Distefano v. Forester (2001) 85 Cal.App.4th 1249, 1264-1265.)*

In addition, plaintiff's appellate argument is not supported by any expert declaration (or other evidence) as to what effect or impact plaintiff's preexisting conditions should have had on defendants' medical decision to go forward with the surgery or on the manner in which that surgery was conducted. These are not matters that are within common knowledge and expert opinion on the points was required. (*Munro v. Regents of University of California, supra, 215 Cal. App. 3d at pp. 983-984; Jambazian v. Borden, (1994) 25 Cal.App.4th 836, 844.)* Whether a reasonable physician would perform surgery or take specific preventive measures given plaintiff's condition, or would discover **[*20]** that plaintiff had such conditions in the first place, were all issues beyond the com-

mon knowledge of lay people. Thus, expert testimony was required. (Cf. *Betterton v. Leichtling (2002) 101 Cal.App.4th 749, 756* ["the effect of [plaintiff's] aspirin use on the risk of surgical complications was a subject beyond the general knowledge of lay people," requiring expert testimony]; *Munro, supra, 215 Cal. App. 3d at p. 984* ["the circumstances under which genetic testing for Tay-Sacks disease is indicated, are beyond a layman's knowledge. Accordingly, expert testimony was required"].)

Moreover, defendants did produce expert evidence on the subject. Dr. Toffel's declaration shows that, as an expert reviewing the case, he was aware plaintiff had Hepatitis C and vascular compromise and had used cocaine. Taking these conditions into account, he opined that "*all* of the medical treatment rendered by [defendants] met the standard of care *in every respect*." (Italics added.) Nowhere does the declaration say that defendants knew or should have known plaintiff had such conditions, or that he should have contacted plaintiff's prior physicians or reviewed **[*21]** his past medical records to try to discover them. Thus, the declaration reflects that defendants' knowledge of plaintiff's preexisting conditions was *irrelevant* to whether the treatment rendered by defendants met the standard of care.

Moreover, Dr. Toffel's declaration does not, as plaintiff argues, establish that the complications plaintiff suffered were significant risks that contraindicated surgery, required special precautions, or required discussion or disclosure by defendants prior to surgery. Rather, it establishes only that plaintiff's post-operative problems *were not caused by the surgery performed by defendants*, but may have resulted instead from plaintiff's preexisting condition.

Nothing more was required. No triable issue of fact is raised by plaintiff's conclusionary argument based solely on the bare contents of his medical records.

c. *There Is No Triable Issue of Fact As To The Issue of*

Informed Consent

It is well settled that a physician has a duty to disclose all information material to any proposed treatment or procedure. (*Mathis v. Morrissey (1992) 11 Cal.App.4th 332, 346.)* The patient should also be provided with "*such* **[*22]** *additional information as a skilled practitioner of good standing would provide under similar circumstances.*" (*Morgenroth v. Pacific Medical Center, Inc. (1976) 54 Cal. App. 3d 521, 531, 126 Cal. Rptr. 681;* italics in original.)

The defendants' expert, again based upon a review of the relevant medical records, stated in his declaration that this obligation had been satisfied. He noted that after the defendant Castro had taken plaintiff's history and conducted an examination (including a flexible laryngoscopy), he explained to plaintiff (as documented in plaintiff's medical records): "The pros and cons of continuing conservative medical treatment versus surgical approaches were thoroughly discussed with the patient who desired to proceed with surgery due to the poor response to previous treatment, the significance of his symptoms, the impact on his life quality, and the findings on physical evaluation. The patient was found to be a candidate for bilateral endoscopic sinus surgery, septoplasty, partial turbinate reduction, a suspension laryngoscopy and a biopsy and possible CO2 laser of the true vocal cord ... the pros and cons of this approach, including the risks **[*23]** and complications were thoroughly shared with the patient who desired to proceed with this approach ..."

In addition, according to Dr. Toffel's declaration, plaintiff "signed a handwritten Physician's Note for informed consent that listed the risks to include bleeding, infection, recurrence, no improvement, worsening, damage to eyes, fracture, blindness, damage to brain/CSF leak, smell, perforation, crusting, tearing, changes in voice, swallowing, cosmetic deformity, further surgery or death. The alternatives included no surgery at all. The consent was signed by the patient in addition to a standard Consent to Operation and Rendering of Other Services."

This showing by defendants established, at least prima facie, that they had obtained plaintiff's informed consent for the surgery. As we have discussed exhaustively above, plaintiff did not object to or attempt to refute this showing. As a result, it stands before us undisputed except by arguments made by plaintiff for the first time on appeal. This is not sufficient.

We also reject plaintiff's argument that the records fail to show that defendants had informed him of the risk complications that might arise in light of his preexisting **[*24]** conditions. This contention fails for the same reasons as already discussed. Plaintiff did not plead this claim or otherwise assert it in the trial court nor did he provide the court with the necessary expert opinion that would be required to sustain it.

3. *The Trial Court Did Not Abuse Its Discretion When It Denied His Request For A Continuance*

Code of Civil Procedure section 437c, subdivision (h), permits a trial court to continue a summary judgment motion to allow further discovery "if it appears from the affidavits submitted in opposition to [the] motion for summary judgment . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented. . . ." A continuance under this provision is not granted as a matter of course, simply for the asking. Specifically, it " 'is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show "facts essential to justify opposition may exist." ' " (*Bahl v. Bank of America (2001) 89 Cal.App.4th 389, 397.)* Moreover, he must demonstrate **[*25]** by affidavit: "(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." (*Wachs v. Curry (1993) 13 Cal.App.4th 616, 623; Frazee v. Seely (2002) 95 Cal.App.4th 627, 633.)*

Plaintiff argues that the trial court erred in denying his request to continue the hearing on defendants' motion. The record, however, reflects several reasons why the court was justified in making the ruling that it did. First, plaintiff's request was not timely. It was submitted just three days prior to the scheduled hearing on defendant's motion and more than a week after plaintiff's opposition to the motion was due. The trial court stated that, "there was no valid reason for plaintiff's counsel to have waited for at least three weeks after receiving the motion" before attempting to seek the requested relief. This fact alone would justify rejection of plaintiff's request. (*Roth v. Rhodes (1994) 25 Cal.App.4th 530, 547-548.)*

Second, plaintiff stated that the reason for the needed continuance was to take the deposition of the defendant **[*26]** Castro. Yet, there was no explanation as to what testimony Castro might give or how it might be of assistance *in opposing the defendants' motion.* Plaintiff's counsel simply stated that such discovery "could and would reasonably lead to facts essential to justify plaintiff's opposition." This, of course, is merely a statement of counsel's conclusionary opinion, not a recitation of the required *facts*. (See *Roth v. Rhodes, supra, 25 Cal.App.4th at pp. 547-548.)*

Finally, plaintiff provided no adequate explanation as to why the deposition of Castro had not been taken earlier. The case had been pending for nearly 18 months. Given that the trial date was less than a month away when plaintiff sought to take that deposition, the trial court was entirely justified in concluding that the request came too late. This is particularly true when as the trial court noted, we consider that plaintiff had not been diligent in pursuing any discovery. She had not even designated or hired an expert or made any attempt to notice the deposition of defendants' expert, Dr. Toffel. n11

n11 The trial court's minute order sums up our reaction to this record as well. "At the hearing on the summary judgment motion, with no opposition to the motion having been filed, plaintiff's counsel argued that she needed to depose defendants' expert because all of the material set forth in his declaration in support of defendants' summary judgment motion was

'lies.' As noted, the defendants' motion (supported by the declaration of defendants' expert) was served by mail on August 16. Plaintiff's counsel contends that she did not 'receive' that motion until August 23. However, as pointed out by defendants, the address given by plaintiff's counsel is a post office box, rather than a regular street address. There is no indication that plaintiff's counsel checked the post office box every day. In any event, the service was timely. Plaintiff's counsel waited for three weeks after the date on which she admitted that she 'received' the motion to make her ex parte application. At no time during that three week period did plaintiff's counsel notice, or even attempt to notice, the deposition of defendant's expert. Plaintiff had noticed the deposition of the individual defendant doctor unilaterally without clearing the dates in advance with the defendants. Defendants and their counsel were not available on the dates which were unilaterally set by plaintiff. Defendants suggested several alternative dates which plaintiff's counsel rejected. The responsibility for not having deposed the individual defendant lies with plaintiff. Further, plaintiff has not set forth how he believes that the deposition of the defendant doctor would provide facts essential to justify opposition to the summary judgment motion. In summary, even though this medical malpractice case has been pending for nearly one and one-half years with a trial date of October 21, 2002, plaintiff (1) has not designated or hired any expert, (2) failed to file any opposition to defendants' motion for summary judgment, (3) never noticed or attempted to notice the deposition of defendants' expert, and (4) unilaterally noticed the deposition of the individual defendant at a late stage in the proceeding without checking the dates in advance with defendants, and rejected alternative dates suggested by defendants. Plaintiff's request for a continuance is denied."

[*27]

4. *Plaintiff Is Not Entitled To Relief From The Consequences Of His Attorney's Procedural and Case Management Decisions*

Plaintiff now argues before us that his attorney was negligent in discharging her procedural and case management responsibilities and therefore he should be relieved of the consequences of her failures and omissions. We decline to find fault with the trial court's ruling on such a ground. To the extent that his attorney may have mishandled this matter (an issue as to which we need not comment further), plaintiff cannot offer such circumstance as an excuse for relief. An attorney's negligence is imputed to the client. (*Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal.3d 892, 898, 187 Cal. Rptr. 592.)* n12

n12 As the Supreme Court noted in *Carroll*, there is an exception to this rule. As the court put it, " 'Excepted from the rule are those instances where the attorney's neglect is of that extreme degree amounting to *positive misconduct*, and the person seeking relief is relatively free from negligence. [Citations omitted.] The exception is premised upon the concept the attorney's conduct, in effect, *obliterates the existence of the attorney-client relationship*, and for this reason his negligence should not be imputed to the client.' [Citations.] Courts applying that exception have emphasized that 'an attorney's authority to bind his client does not permit him to impair or destroy the client's cause of action or defense.' [Citation.]" (*Carroll v. Abbott Laboratories, Inc., supra, 32 Cal.3d at p. 898;* emphasis in original.)

In its application of this exception, however, the Supreme Court appears to confine it to those types of cases where there has been a *total failure* on the part of the attorney to represent the client, in effect, a de facto substitution out of the client's case. Put another way, what is required is an *abandonment* of the client. (*Carroll v. Abbott Laboratories, Inc., supra, 32 Cal.3d at p. 900.)* As this record reflects, that is not the case before us. A gross mishandling of the client's matter is not the same as abandonment. (*Ibid.*)

[*28]

Likewise, plaintiff cannot, as he attempts to do for the first time on appeal, seek relief under *Code of Civil Procedure section 473*. We need not let this argument detain us long. Leaving aside the question as to whether a motion for relief from a trial court judgment can even be *initially* made in the appellate court under section 473, plaintiff's motion is patently untimely. The trial court granted summary judgment on September 18, 2002. Plaintiff seeks relief from judgment for the first time in his appellant's opening brief, filed on January 20, 2004 - over a year later. Section 473 explicitly provides that an application for relief from judgment must be made within six months after judgment or entry of judgment. (*Code Civ. Proc., § 473*, subd. (b).) The six-month limit is jurisdictional; a court has no power to grant relief under section 473 after that time. (*Rappleyea v. Campbell (1994) 8 Cal.4th 975, 980-981; Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 735, fn. 3, 216 Cal. Rptr. 300.)* Because an application for relief under section 473 would be untimely even **[*29]** if it had been brought in the trial court, this court cannot grant such relief in the first instance. (Cf. *Crespo v. Cook (1959) 168 Cal. App. 2d 360, 361, 363* [refusing to accept affidavits in support of motion for new trial based on jury misconduct after expiration of statutory time limit for filing such affidavits].)

Plaintiff's response to this conclusion is that he is entitled to *equitable* relief from the judgment if he cannot succeed under *Code of Civil Procedure section 473*. Again, he is addressing his argument to the wrong court. A claim for equitable relief from judgment must be addressed to the trial court, either by a motion in the same action or by a separate equitable action. (*Bloniarz v. Roloson (1969) 70 Cal.2d 143, 146, 74 Cal. Rptr. 285; Olivera v. Grace (1942) 19 Cal.2d 570, 574; Desper v. King (1967) 251 Cal. App. 2d 659, 662, 59 Cal. Rptr. 657.)* These are the *only* permissible methods for raising such a claim. (See *Bloniarz v. Roloson, supra, 70 Cal.2d at pp. 148-149.)*

We are aware of no authority authorizing this court to grant such relief **[*30]** and plaintiff has cited us to none.

5. *The Award of Costs By The Trial Court Is Supported By Substantial Evidence And Was Not An Abuse Of Discretion*

Plaintiff challenges the trial court's post judgment order awarding defendants' costs in the amount of $ 1,455.50 for service of process fees and $ 3,244.51 for obtaining medical, employment and insurance records. Defendants were the prevailing parties in the trial court and as such they are entitled to recover their allowable costs. (*Code of Civ. Proc., §§ 1032* and *1033.5*.)

When a losing party challenges costs claimed by the prevailing party in a motion to tax costs, the court's first step is to determine whether the statute expressly allows the particular items claimed and whether they appear proper on the face of the cost bill. (*Nelson v. Anderson (1999) 72 Cal.App.4th 111, 131.)* If the items are allowed by statute and appear facially proper, the burden is on the objecting party to show that the costs are not reasonably necessary. (*Id. at pp. 130-131; Decoto School Dist. v. M. & S. Tile Co. (1964) 225 Cal. App. 2d 310, 316-317, 37 Cal. Rptr. 225;* **[*31]** see *Code Civ. Proc., § 1033.5*, subds. (c)(2) and (a)(3).) Whether a cost item is reasonably necessary is a question of fact for the trial court and is reviewed for abuse of discretion. (*Applegate v. St. Francis Lutheran Church (1994) 23 Cal.App.4th 361, 363-364; Gibson v. Bobroff (1996) 49 Cal.App.4th 1202, 1209.)* "Absent an explicit statement by the trial court to the contrary, it is presumed the court properly exercised its legal duty" "to determine whether a cost is reasonable in need and amount." (*Thon v. Thompson (1994) 29 Cal.App.4th 1546, 1548-1549; Rappenecker v. Sea-Land Service, Inc. (1979) 93 Cal. App. 3d 256, 266, 155 Cal. Rptr. 516* [order awarding costs is "presumed correct"].)

Verification of the memorandum of costs by the prevailing party's attorney establishes a prima facie showing that the claimed costs are proper. (*Jones v. Dumrichob (1998) 63 Cal.App.4th 1258, 1267.)* "There is no requirement that copies of bills, invoices, statements, or any other such docu-

ments be attached to the memorandum." (*Ibid.*) To overcome this prima facie showing, the **[*32]** objecting party must introduce evidence to support his claim that the costs are not reasonably necessary. He may do this by way of declaration; but mere conclusory assertions are insufficient to rebut a prima facie showing by the prevailing party. (*Rappenecker v. Sea-Land Service, Inc., supra, 93 Cal. App. 3d at p. 266.)*

After a review of the record, we are satisfied that substantial evidence was presented to the trial court to demonstrate that defendants had in fact incurred the claimed costs and that they were both reasonable and necessary to the conduct of the litigation. The record reflects a factual basis for such conclusions and the trial court acted well within its discretion in approving the costs set out in the order.

Plaintiff's arguments in opposition are just that, arguments. He presents no facts sufficient to compel the conclusion that defendants' was false. He engages in conclusionary and speculative assertions and we need not prolong this opinion to further describe them. The critical fact is that the trial court was presented with sufficient evidence of expenses incurred and a description of records sought and obtained through service of subpoenas **[*33]** that were reasonably necessary to the conduct of the litigation, that its order was proper and appropriate. We have nothing before us that demonstrates error or an abuse of discretion.

DISPOSITION

The judgment and the order from which plaintiff has appealed are each affirmed. Costs on appeal to the defendants.

CROSKEY, J.

We Concur:

KLEIN, P.J.

ALDRICH, J.