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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLLATE DISTRICT

DIVISION EIGHT

POINTE SAN DIEGO RESIDENTIAL COMMUNITY, L.P., Plaintiff and Appellant, v. ROBBIN L. ITKIN et al., Defendants and Respondents.	B277040 (Los Angeles County Super. Ct. No. BC566791)

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick C. Shaller, Judge. Affirmed.

Carl M. Hancock for Plaintiff and Appellant.

Hill Farrer & Burrill, Kevin H. Brogan, Neil D. Martin, Dean E. Dennis and William A. Meyers for Defendants and Respondents.

SUMMARY

Plaintiff Pointe San Diego Residential Community, L.P. filed a lawsuit against defendants Robbin L. Itkin and Steptoe & Johnson, LLP, alleging legal malpractice and breach of fiduciary duty during their representation of plaintiff in a bankruptcy proceeding. The trial court denied plaintiff's ex parte motion to substitute an expert witness after the discovery cutoff date had passed (and denied a second ex parte motion to permit a late designation), finding plaintiff's conduct in connection with the expert designation and its delay in seeking the substitution were unreasonable. At a bench trial, the court granted a motion for judgment for defendants after plaintiff presented its evidence.

Plaintiff contends the trial court abused its discretion in denying plaintiff's motion to substitute a new expert. This purported error, plaintiff contends, was the result of an earlier ruling that a limited partnership (plaintiff) could not appear in propia persona, a ruling plaintiff claims was erroneous.

There was no abuse of discretion in denying the expert witness substitution. The record clearly shows the basis for the court's ruling was plaintiff's unreasonable conduct, not the in propria persona ruling, so we have no occasion to decide whether a limited partnership may represent itself. We affirm the judgment.

FACTS

Plaintiff is a limited partnership, and Robert Gosnell is "a limited partner," "not the general partner," in plaintiff. Mr. Gosnell is not a lawyer.

Plaintiff brought its legal malpractice lawsuit in December 2014. On August 24, 2015, and on March 3, 2016, the trial court granted motions by two successive attorneys to be relieved as

counsel for plaintiff.[1] The final status conference and the trial remained on calendar for May 9 and May 18, 2016, respectively.

Then, on April 4, 2016, a hearing was held at which Mr. Gosnell was present. According to the trial court's minute order, Mr. Gosnell was "present on behalf of the plaintiffs, but he is not an attorney and cannot represent the corporate plaintiffs in this case." The minute order stated that the court had "given notice to Plaintiffs' attorneys and agents who appeared in court at several prior hearings and in the substitution of attorney's order of 3/3/2016 of the requirement to have counsel represent the corporations or the case must be dismissed." The court ordered plaintiff to "file the Substitution of Attorney by Thursday, April 7, 2016," and stated that if plaintiff failed to do so by the deadline, the court would dismiss the entire action on the following day.

Plaintiff filed a substitution of counsel on April 6, 2016.

Meanwhile, on March 30, 2016, Mr. Gosnell filed an expert witness designation, naming Gerald Smith as an expert to testify on the standard of care and causation in connection with defendants' representation of plaintiff in the bankruptcy proceeding. Mr. Gosnell's declaration stated, among other things, that Mr. Smith "has agreed to testify at the trial in this matter." After that:

On April 7, 2016, after receiving defendants' deposition notice, Mr. Smith e-mailed defense counsel (with a copy to plaintiff), stating: "I have withdrawn as an expert for [plaintiff].

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[1] There were also two other plaintiffs (a corporation and another limited partnership), but they are not parties to this appeal.

Please cancel the deposition. But in any event, I will not appear for a deposition."

On April 14, 2016, Mr. Smith e-mailed plaintiff, saying, "Bob: I have given this a lot of thought and concluded I will not get involved. You might want to contact [two potential experts], both in the Los Angeles area. Please do not contact me again. I will not take on any type of role in this matter."

On May 5, 2016, plaintiff's counsel filed an ex parte application for leave to substitute Dr. Geoffrey Hazard for Mr. Smith. (On April 27, Mr. Gosnell advised defense counsel of the proposed substitution and requested their concurrence, but defendants declined to stipulate to the substitution.)

The ex parte application was supported by a declaration from Mr. Gosnell. Among other things, Mr. Gosnell stated that plaintiff "was made aware that Mr. Smith did not have the capacity to testify effectively on [plaintiff's] behalf" on April 14, 2016 (citing the April 14 e-mail quoted above); that plaintiff "had no knowledge or reason to suspect that Mr. Smith might not have the capacity to testify on the matters for which he was designated"; and the need for a new expert "was the result of surprise, as [plaintiff] had no warning that Mr. Smith would be unavailable." Plaintiff contended these were "exceptional circumstances" (Code Civ. Proc., § 2034.610, subd. (b)), allowing augmentation of expert witness designations after the discovery cutoff has passed.[2]

Defendants opposed the application, contending it was "untimely, prejudicial to Defendants' trial preparation, and fails

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[2] Further statutory references are to the Code of Civil Procedure.

to meet *any* of the statutory factors required to substitute in a new expert."[3] Defendants also contended the substitution request was "the latest example of Robert Gosnell attempting to act in *pro per* on behalf of Plaintiffs," repeatedly attempting "to engage in direct communications with Defendants' counsel," "despite counsel's requests that he cease doing so," and the "ex parte request should be denied on that basis alone."

At the hearing on May 9, 2016, plaintiff's counsel stated that "Mr. Smith is of an advanced age and is developing memory difficulties"; "it has become apparent . . . he does not have the mental capability to do what he's been retained to do"; and "without him we have no case."

The trial court pointed out there was nothing in the correspondence "to suggest there was some kind of medical reason for [Mr. Smith's] withdrawal," and "someone with personal knowledge should be able to say they have a medical issue that came up," "so I don't really actually see that as an excuse."

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[3] Section 2034.620 authorizes the trial court to allow amendment of an expert witness list "only if all of the following conditions are satisfied." These conditions include taking into account "the extent to which the opposing party has relied on the list of expert witnesses"; a determination the opposing party will not be prejudiced in maintaining its action or defense on the merits; and a determination either that the moving party "would not in the exercise of reasonable diligence have determined to call that expert witness" or that the moving party failed to do so "as a result of mistake, inadvertence, surprise, or excusable neglect . . . ." (§ 2034.620, subds. (a)-(c).)

The court stated: "So what we have here . . . actually demonstrates how unreasonable the plaintiffs were in seeking a last-minute expert [(Mr. Smith)] who was designated as ready to give a deposition when the day after the designation he writes a letter to Mr. Gosnell saying he needs more information before he can get involved in the case or help or be ready for . . . any expert opinion. [¶] So clearly the original designation by Mr. Gosnell was false. His declaration was not true and then to come into court later on when it turns out that what clearly was evident from the outset he wasn't going to be an expert until he designated his availability to give expert opinion, and then come here and say we need, on the basis of surprise, to substitute an expert witness, I mean, . . . it's disingenuous at best, if not out and out misleading, and demonstrates to me that this case was not ready for expert designation and that the plaintiff never complied with the original designation in good faith or accurately and that the first leg of the requirement under [section] 2034.300 for any kind of relief under [section] 2034.610 was there was a finding that the plaintiff acted reasonably and I just think it's totally unreasonable. I don't think it's defendable what happened here."[4]

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[4] Section 2034.300 authorizes the trial court to exclude an expert opinion "offered by any party who has unreasonably failed to . . . . [¶] . . . [l]ist that witness as an expert under Section 2034.260." (*Id.,* subd. (a).) Section 2034.260 governs the exchange of expert information, and among other things requires a declaration that includes a representation "that the expert has agreed to testify at the trial." (§ 2034.260, subd. (c)(3).) Section 2034.610 gives the trial court authority to allow augmentation or amendment of an expert witness list where a party has engaged in a timely exchange of expert witness

The court summarized:

"[T]he motion to amend is denied because the conduct of plaintiff was unreasonable and the original designation being one of an expert that was never retained, the delay being unreasonable between the time of discovery of this expert not having an opinion and now . . . trying to get a supplemental motion, when a motion could have been made as early as April 8th to try and get relief, now here on the verge of trial, we don't have relief. I think that the requirements of [section] 2034.610 have not been met.

"And one of the main things is that to me the fact that the burden on the defense would be substantial to try and re-tool the defense at this late stage when we're on the verge of trial, even though we're going to trail the [trial] a little, I don't see that making any difference whatsoever.

"And . . . I just don't find any of the claims made by Mr. Gosnell on the reasoning for Mr. Smith's unavailability are reasonable or credible.

"So it's, to me – and I have to exercise my discretion with care, and I try to, but like I say, I was a plaintiff's attorney for years and if I were in this scenario, I would not think I would have a chance of succeeding in this motion.[5]

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information, if the motion is made in time to permit the expert's deposition to be taken within the time limit for completion of discovery, or at a later time "[u]nder exceptional circumstances[.]" (§ 2034.610, subds. (a)&(b).)

5 Earlier, the trial court said, "I don't think that I would ever expect that an expert would be ready to go on a legal malpractice case until he has stated he's reviewed what he needs to review and has a final opinion as to the issues at hand."

"As a judge, I look at it from a totally different standard. But objectively under the statutory scheme, I see there's no basis for me to grant relief. [¶] So I'm going to deny the motion and exclude . . . Dr. Hazard."

In its minute order, the court explained its findings, as just described, at length.[6] In addition, the minute order stated (as

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[6] The minute order explained, for example, that Mr. Gosnell's March 30 declaration stated that Mr. Smith had agreed to testify at trial and was "ready to give a deposition in this case," and that plaintiff "knew on April 7, 2016, not April 14, 2016 as alleged by Mr. Gosnell in his declaration," that Mr. Smith had declined the engagement. And, there was "no admissible evidence that indicates the reason for Mr. Smith's withdrawal as an expert." Plaintiff's supplemental evidence submitted on the day of the hearing showed Mr. Smith told Mr. Gosnell on March 31 that he (Mr. Smith) "need[ed] the signed engagement letter, the retainer and a schedule," as well as "an understanding of what is in the entire file since [defendants were] retained" and copies of many other documents "[i]f you wish me to get on top of this." The court observed this correspondence "belie[s] the representation made by Mr. Gosnell" in the expert witness designation. The court stated it was "evident that Plaintiff waited almost one month from the date that Mr. Smith withdrew from the case to seek relief, although it appears to the court that Mr. Smith never stated a favorable opinion on behalf of Plaintiff either before or after the designation . . . ." Thus the court found Mr. Gosnell's declaration "lacks credibility," and "the failure to designate an expert who is ready to testify [was] unreasonable in light of all the circumstances."

The court also found plaintiff did not show grounds for relief under section 2034.710. (That section authorizes the court to allow a party who has failed to submit expert witness information on the date specified in a demand "to submit that

defendants had argued at the hearing) that legal authorities have held "any filing by a non-attorney purporting to be on behalf of a fictitious entity is void." On this point, the trial court's minute order stated that the authorities "compel the court to strike Mr. Gosnel[l]'s purported disclosure of experts [(the initial March 30 designation of Mr. Smith)] on behalf of the Plaintiffs and declare the designation to be null and void."[7]

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information on a later date," and may permit the motion to be made after the statutory time limitation "[u]nder exceptional circumstances." (§ 2034.710, subds. (a)&(b).)) The conditions for granting leave to submit tardy expert witness information include an absence of prejudice to the opposing party and a determination that the failure to submit the information was "the result of mistake, inadvertence, surprise, or excusable neglect." (§ 2034.720, subds. (b)&(c)(1).) The court concluded: "It is evident that Plaintiff could have filed a motion on April 7, 2016 when he discovered his witness had withdrawn. The motion could have been heard without the need for resort to an ex-parte or for the requirement [of] 'exceptional circumstances.' " The court found no showing of "mistake, surprise, or excusable neglect. Plaintiffs never had an expert who would testify as shown by the correspondence. Plaintiffs cannot now complain that they were surprised and should be granted leave to designate a new expert to replace one that did not exist. The motion is nothing more than an attempt to designate belatedly an expert on standard of care, causation, and damages. There is nothing in the record to suggest why an expert was not ready as of the date of the original disclosure." Further, it was "apparent to the court" that the late designation of Dr. Hazard would prejudice defendants.

[7] The court relied on a case defendants cited at the hearing, *Paradise v. Nowlin* (1948) 86 Cal.App.2d 897, 898 (dismissing a corporation's appeal because its notice of appeal and opposition to

Not to be deterred, plaintiff then filed a notice of late designation of expert under section 2034.720. Counsel explained at the hearing that he agreed that Mr. Gosnell's original designation was "void from the beginning," and "we treat it as if it never happened." "And since we're taking a brand-new late designation, it really doesn't matter whether Mr. Smith was available or not," since "[t]hat notice never happened" as a legal matter.

The court responded by saying, "the crux of my decision was not so much that particular finding, although that was an alternative basis which – but my understanding was that a designation was made in a timely manner and it made a misrepresentation of fact, which was that Mr. Smith was, in fact, retained as an expert, number one. [¶] Number two, that he was sufficiently familiar with the subject matter of the matter to give a meaningful deposition. [¶] And, number three, that he was ready to testify at trial." This was "coupled with the fact that

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dismissal were filed in propria persona and were "void by reason of the corporation's lack of power to represent itself in an action in court"). Later authorities have "question[ed] the present day validity of *Paradise*'s summary conclusion that a notice of appeal (or, impliedly, another document) filed on behalf of a corporation by a nonattorney is automatically void, that is, of no legal effect whatever, an absolute nullity," and have found it "more appropriate and just to treat a corporation's failure to be represented by an attorney as a defect that may be corrected." (*CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1147, 1149.) That, in effect, is exactly what the trial court did here when it denied plaintiff's substitution motion, filed by counsel, based on the merits of plaintiff's claim that "exceptional circumstances" justified the substitution.

there was this delay from April the 7th . . . all the way through to . . . whatever date it was that we had our last discussion, almost a month . . . ."

After hearing arguments from both sides, the court took the matter under submission, observing it was "very mindful of the importance of this to the plaintiff," and plaintiff was "entitled to a full and complete re-review of this," and particularly the argument that the original designation was void.

The court later issued its ruling denying plaintiff's motion, again explaining its ruling at length. The court found the motion was an impermissible motion for reconsideration, with no showing that "new argument or evidence now submitted . . . was unavailable and could not have been previously presented to the court." Further, the court found that "[e]ven if timely presented, the new evidence does not support a basis for relief." (The new evidence included a declaration from Mr. Smith, stating he "ha[d] been taking medication for short term memory loss for over two years," and initially believed he was still competent to handle an engagement as an expert witness, but with constant email communications "and no longer having the support staff I once had, I just could not keep up with the matters.") The court observed Mr. Smith was not "suddenly incapacitated after being retained"; "the evidence is that he was not even retained before the disclosure" and neither Mr. Smith nor his son (who also submitted a declaration) "are qualified to render an opinion on competency." The court found there was "nothing in the present motion to change [the] determination" that plaintiff acted unreasonably in delaying the motion for relief, and there was "no excusable neglect, surprise, or cognizable mistake shown relative to Smith's alleged competence to act as an expert."

At the bench trial on May 24, 2016, the trial court denied defendants' oral request for a nonsuit. After plaintiff presented its evidence, the court granted defendants' motion for judgment under section 631.8.

Judgment was entered, and plaintiff filed a timely notice of appeal.

DISCUSSION

Plaintiff asserts the trial court erred when it concluded a limited partnership could not appear in propria persona, and abused its discretion in denying plaintiff's motion to substitute a new legal malpractice expert. These two errors are connected, plaintiff claims, because the court denied the substitution "primarily on the legal fiction that since [plaintiff] could not represent itself, it could not legally designate an expert."

We reject plaintiff's claims for multiple reasons.

First, plaintiff has failed completely to provide "a summary of the significant facts" (Cal. Rules of Court, rule 8.204(a)(2)(C)) relevant to this appeal. The absence of expert testimony made the judgment for defendants inevitable, and yet plaintiff tells us nothing at all about the reasons the trial court gave for denying the expert substitution. (See our recitation at pp. 5-8 & fn. 6, *ante*.) On this basis alone – the failure to describe accurately the rulings from which it appeals – we may affirm the judgment.

Second, plaintiff misstates the standard of review. The trial court's denial of plaintiff's motion to substitute an expert is reviewed for abuse of discretion. Plaintiff's assertion the ruling was based on an error of law and therefore subject to de novo review is meritless. The record shows the ruling was based on facts the court described in detail (and which plaintiff has omitted from its brief).

Third, the assertion the court's ruling on the in propria persona issue was the "primar[y]" reason for the court's refusal to allow the expert substitution is plainly false. The in propria persona ruling was, at most, an alternative ruling, as the trial court itself stated. It is impossible to read the transcript of the two hearings, or the trial court's minute orders, without understanding that the trial court refused to allow the substitution on the merits, based on plaintiff's unreasonable conduct and unreasonable delay.

As the court stated at the outset of its minute order: "Plaintiff's motion . . . is DENIED pursuant to [section] 2034.300 and [section] 2034.610. Plaintiff has unreasonably failed to comply with the exchange requirements" and "has not fulfilled the requirements of [section] 2034.610. Additionally, there are no exceptional circumstances shown to permit relief at this late date." Plaintiff offers no basis – no argument, no analysis, no legal authorities – upon which to conclude this ruling was in any way erroneous. That being so, we necessarily affirm the judgment, and have no reason to consider whether a limited corporation may represent itself.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. ROGAN, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.