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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CLAUDIO AMAYA,

Plaintiff and Appellant,

v.

BILLY P. LEON, M.D.,

Defendant and Respondent.

B256238

(Los Angeles County  
Super. Ct. No. BC504019)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elia Weinbach, Judge. Reversed with directions.

Samantha S. Bigonger for Plaintiff and Appellant.

Reback, McAndrews, Kjar, Warford, Stockalper & Moore, M. Alexandra Coffey, Lisa M. McLain, and Robert C. Reback for Defendant and Respondent.

In this medical malpractice action the trial court granted the defendant's motion for summary judgment after the plaintiff failed to timely file an expert's declaration raising a triable issue of fact as to whether the defendant complied with the applicable standard of care in treating plaintiff's broken ankle. The court denied plaintiff's applications for reconsideration and relief from mistake. We conclude the court erred in not considering the late-filed declaration. We reverse the judgment and remand the cause to the trial court to reconsider the motion for summary judgment including consideration of plaintiff's expert's declaration and any objections to the declaration that defendant may assert.<sup>1</sup>

### **FACTS AND PROCEEDINGS BELOW**

Defendant Leon treated plaintiff Amaya for a fractured ankle. The treatment included two surgeries. Following the second surgery, the surgical wound became infected. Amaya alleges this infection required him to obtain medical attention from other physicians, caused him permanent injury to his ankle and caused him pain and suffering. He further alleges that the infection was caused by Leon's negligent post-surgical performance in treating the ankle.

Leon answered Amaya's complaint and moved for summary judgment. His motion was based on a declaration from a board certified orthopedic surgeon who testified that the second surgery was required because Amaya failed to adhere to Leon's instructions for care of the ankle following the first surgery and that "[a]ll of Dr. Leon's post surgical follow up care was appropriate and within the standard of care."

Amaya responded to Leon's summary judgment motion with a "medical legal report" by Dr. Steven R. Graboff, a board certified orthopedic surgeon. (Block capitals and boldface omitted.) Graboff's report concluded that Leon "fell below reasonable and expected standards of medical care in his treatment of Claudio Amaya." Graboff then

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<sup>1</sup> This opinion only addresses the issue of whether the trial court erred in not considering Amaya's late-filed expert declaration. Nothing in this opinion should be construed as a resolution of a disputed issue of fact or as a determination that certain facts are undisputed.

described 10 instances of alleged negligence on the part of Leon in treating Amaya's injury.

Leon objected to Graboff's report on numerous grounds including Graboff's failure to execute the document under penalty of perjury under the laws of the State of California as required by Code of Civil Procedure section 2015.5, and that the report wasn't based on personal knowledge as required by Evidence Code section 702.<sup>2</sup>

The day before the hearing Amaya filed a new document in which Graboff restated essentially the same facts and medical conclusions that he stated in his earlier report. The new document was executed "under penalty of perjury under the laws of the State of California." A declaration by Amaya's counsel accompanied the declaration. In her declaration, counsel explained why she initially submitted Graboff's "medical legal report" instead of his declaration, explained why Leon would not be prejudiced by the court's consideration of Graboff's late-filed declaration and, in the alternative, asked the court to continue the hearing to allow Leon time to respond to the declaration. (Block capitals and boldface omitted.)

The court denied Amaya's request to consider Graboff's late-filed declaration and sustained Leon's objection to the admission of Graboff's timely filed report on the grounds that the report did not comply with the requirements for a declaration under section 2015.5 and that it was not admissible under Evidence Code section 702.

Finding that Leon's expert had shown that the care Leon rendered complied with the applicable standard of care, the court granted summary judgment in favor of Leon. The court did not mention counsel's explanation for the late declaration or her agreement to a continuance. The record does not show whether the court read either declaration.

Thereafter Amaya filed a motion for reconsideration under section 1008, subdivision (a), or in the alternative, for relief from default under section 473, subdivision (b). Leon opposed the motion. Prior to the hearing on Amaya's motions,

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<sup>2</sup> All statutory references are to the Code of Civil Procedure unless otherwise stated.

the court entered judgment for Leon and Amaya filed a notice of appeal.<sup>3</sup> Treating the motion for reconsideration heard after judgment as a motion for new trial (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 192), the court denied the motion on the ground that it failed to show new facts justifying a new hearing. With regard to the request for relief under section 473, subdivision (b) based on mistake or neglect, the court ruled that such relief is not available after a contested hearing.

### DISCUSSION

The trial court abused its discretion in failing to consider Graboff's declaration and to grant a continuance for Leon to respond.

In reaching this conclusion we are guided by our Supreme Court's opinion in *Mann v. Cracchiolo* (1985) 38 Cal.3d 18. The summary judgment motion in *Mann* occurred before there was a statutory deadline for filing an opposition to such a motion. The cut-off time was set by a local court rule and, at least in the Los Angeles Superior Court, there was no "good cause" exception for the late filing.<sup>4</sup> (*Id.* at p. 28.) Plaintiffs filed their opposition to defendants' motion for summary judgment one day past the three-day deadline. The trial court refused to consider the opposition papers on the ground that they were not timely filed. (*Id.* at pp. 27-28.) The Supreme Court held that "weighing the potential for interruption and delay [caused by late filing] against the policy in favor of disposition of cases on their merits, the drastic nature of the summary judgment remedy, and the potentially short time available to respond to the summary judgment motion, we are satisfied that courts were required to exercise their discretion and relieve the attorney from tardy opposition filings when his conduct was reasonable." (*Id.* at pp. 29-30.) The court found that under the circumstances of the case before it

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<sup>3</sup> The record shows that Amaya also filed a request that the court grant reconsideration on its own motion. The request itself is not in the record but the record shows the court denied the request.

<sup>4</sup> Section 437c, subd. (b)(2) now provides opposition papers shall be filed and served at least 14 days before the hearing "unless the court for good cause orders otherwise."

“the trial court abused its discretion in enforcing the three-day limitation by refusing to consider the opposition rather than shortening the time [for filing opposition] or continuing the hearing.” (*Id.* at p. 30.)

Here, counsel for Amaya accompanied the Graboff declaration with a declaration of her own explaining why Graboff’s declaration was not timely filed, why Leon was not prejudiced by the late filing, and agreeing to a continuance of the hearing to allow Leon to respond.

Amaya’s counsel explained why she erred in not initially preparing a declaration for Graboff to sign: “When putting together my Opposition papers, I operated under the mistaken assumption that the ‘Medical *Legal* Report’ of our expert Dr. Steven R. Graboff would mimic a declaration or affidavit since it was signed by him as the party to be charged with his legal opinion. [¶] . . . [U]pon realizing the serious error I made in assuming the appropriateness of the form of my Opposition papers, I contacted Dr. Graboff’s office in order to get a signed and sworn declaration conveying his medical opinion in this case.”

Counsel pointed out that although the declaration was not filed and served until the day before the hearing Leon was not prejudiced because “the contents of the ‘Declaration of Steven R. Graboff, M.D.’ [are] in substance the same as the ‘Discussion’ portion of the ‘Medical Legal Report of Dr. Steven R. Graboff’ which the Defendant has had in his possession for over two months.” Leon does not dispute this claim. On the contrary, he admits that the evidence contained in Graboff’s declaration “is actually the same evidence that was filed in support of plaintiff’s Opposition [i.e. the Graboff Medical Legal Report].” He acknowledges that Amaya’s counsel simply cut and pasted the relevant portions of the Medical Legal Report into the declaration for Graboff’s signature.

Counsel’s undisputed declaration shows that her delay in filing Graboff’s declaration was caused by her misunderstanding of the rules of procedure in opposing

motions for summary judgment. Once she realized her mistake she wasted no time in submitting a declaration in proper form.

In any event, the undisputed evidence shows that Leon would not have been prejudiced by the court's consideration of Graboff's declaration since by his own admission it contained the same evidence that appeared in Graboff's report that was served on him at least two months before the hearing. Furthermore, Amaya agreed to a continuance to allow Leon more time to respond.

We conclude that given the circumstances of this case and the strong policy favoring deciding cases on their merits the trial court abused its discretion by refusing to consider Graboff's declaration at the time set for the hearing or continuing the hearing.

### **DISPOSITION**

The judgment is reversed and the cause is remanded to the trial court with directions to reconsider Leon's motion for summary judgment. That reconsideration is to include consideration of the Graboff declaration and any objections to the declaration that Leon may assert. Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.