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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DEBORAH SILVERSTEIN, Plaintiff and Appellant, v. JOEL ARONOWITZ, Defendant and Respondent.	B291890 (Los Angeles County Super. Ct. No. BC631687)

APPEAL from the judgment of the Superior Court of Los Angeles County. Elizabeth R. Feffer, Judge. Affirmed.

Law Offices of James Silverstein and James J. Silverstein for Plaintiff and Appellant.

Kjar, McKenna & Stockalper, Robert L. McKenna III and Danielle Corkhill Velazquez for Defendant and Respondent.

* * * * * * * * * *

Plaintiff and appellant Deborah Silverstein appeals from the entry of judgment in favor of defendant and respondent Joel Aronowitz, M.D., following his successful motion for summary judgment on plaintiff's complaint for breach of contract.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The context for this contract dispute is illuminated by several undisputed facts. In August 2015, plaintiff underwent a lumpectomy to remove a carcinoma in her right breast. The surgery was performed by Dr. Dennis Holmes who is not a party to the underlying action or this appeal. After the lumpectomy, defendant performed reconstructive surgery. Before the surgery, plaintiff received a written estimate of surgical fees from defendant which said that if "revisionary procedures" are necessary within the first year following surgery, defendant would not charge a surgeon's fee.

Plaintiff's postoperative care revealed another surgery was necessary, and on September 11, 2015, Dr. Holmes performed a partial right breast mastectomy, among other procedures. Defendant performed reconstructive surgery on plaintiff's breast which included insertion of a silicone gel implant.

Plaintiff suffered a post-operative infection and the implant was removed. Plaintiff underwent a course of radiation treatment that was completed in January 2016 and was then advised to wait six months before proceeding with any further reconstructive procedures.

On August 17, 2016, plaintiff saw defendant at his office to discuss reconstructive procedures. It is at this appointment that the alleged oral agreement was made upon which plaintiff's claim is based. Plaintiff contends it was agreed the reconstructive

surgery would be performed by the end of September 2016 and that defendant agreed to accept as payment only what her insurance would cover and nothing more. She says when she spoke two days later with defendant's office administrator to confirm scheduling, she was told for the first time that defendant believed it was in her best interest to postpone the surgery and she should call back in five to six months. Plaintiff demanded an explanation but never received a return phone call from defendant so she requested her medical records. She says she received her records from defendant's office via e-mail and none of the records included any notation by defendant that he felt surgery should be delayed.

Plaintiff filed this action on August 24, 2016, but did not serve defendant until mid-2017. Plaintiff's operative pleading (the second amended complaint), alleges a sole cause of action for breach of an oral contract. Plaintiff alleged she and defendant entered into an oral agreement on August 17, 2016, in which defendant "agreed to accept insurance only for a corrective breast surgery" to be performed on plaintiff. Plaintiff alleged the agreement was a modification of the written agreement in which defendant represented that "[i]f [r]evisionary [p]rocedures are necessary within the first year there may be no surgeon[']s fee." Plaintiff alleged the parties had agreed to a "revision surgery date in September 2016" but defendant refused, providing the "illegitimate excuse" that the surgery should be postponed for six months. Because defendant "refused to timely operate," plaintiff was forced to have the corrective surgery performed by another surgeon at a cost in excess of $14,000.

Defendant moved for summary judgment. Among other things, defendant argued it was within the standard of care to

postpone the elective reconstructive surgery based on defendant's assessment of plaintiff's emotional state. Defendant's motion was supported by the expert declaration of Dr. Neal Handel, a board-certified plastic surgeon with over 40 years of experience. The motion was further supported by defendant's medical records regarding plaintiff's care and treatment, including his entry for the August 17, 2016 appointment in which he reported "[d]ue to patient's emotional state, I do not recommend surgery at this time." The entry was signed and dated by defendant August 26, 2016.

Plaintiff opposed defendant's motion arguing the August 26 entry by defendant in the medical records was a fabrication to justify defendant's effort to renege on his agreement to perform the reconstructive surgery without a fee. Plaintiff contends the delay was solely to push the surgery date to a point more than a year after the 2015 surgeries. Plaintiff did not submit an expert declaration. Plaintiff's opposition papers were not timely filed.

Defendant objected to plaintiff's untimely opposition and filed written objections to plaintiff's evidence.

After entertaining oral argument, the court took the motion under submission and then issued its written ruling granting defendant's motion the next day. In its written order, the court stated it had considered plaintiff's opposition even though the opposition papers were untimely. The court sustained defendant's objections to plaintiff's evidence on the grounds the evidence lacked authentication.

Judgment was entered in favor of defendant on June 20, 2018.

This appeal followed.

DISCUSSION

A defendant moving for summary judgment must show "that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) Our Supreme Court has made clear the purpose of the 1992 and 1993 amendments to the summary judgment statute was " 'to liberalize the granting of [summary judgment] motions.' " (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542; *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 854.) Summary judgment is no longer a "disfavored" remedy. (*Perry*, at p. 542.) Rather, it "is now seen as a 'particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Ibid.*)

On appeal, "we take the facts from the record that was before the trial court . . . . ' "We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers *except that to which objections were made and sustained*." ' " (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1037, italics added, citation omitted.)

Here, as in the trial court, plaintiff's entire argument rests on her belief that defendant made up the excuse of her emotional state and falsified her medical record in order to avoid having to perform the corrective surgery within the one-year limitation period. Plaintiff relies solely on the unauthenticated medical record she purportedly received via e-mail which does not contain the entry signed by defendant on August 26, 2016.

Plaintiff has not demonstrated a material disputed fact that requires reversal of the summary judgment for defendant. There is no allegation or evidence the one-year limitation period was a term in the oral agreement made on August 17, 2016. The

one-year limitation period was a representation in defendant's written fee disclosure from 2015. There was also no evidence defendant ever said he would not adhere to his oral agreement at the August 17 appointment to accept only insurance proceeds if the surgery was postponed for six months. There is simply no material disputed evidence showing an anticipatory breach or repudiation of the agreement to accept only insurance proceeds if the surgery was postponed.

Moreover, defendant's expert, Dr. Handel, opined the reconstructive surgery plaintiff desired was an elective, nonemergency procedure and "[a]s such, it is the plastic surgeon's duty to proceed with scheduling such an elective procedure only when he feels it is appropriate based on his assessment of the patient's health and emotional state." "It is within the standard of care for a physician to change the date of an anticipated elective procedure, or even change his overall recommendation about proceeding with an elective procedure, based on his best medical judgment." Plaintiff offered no expert declaration in opposition, arguing instead that since she alleged breach of contract, and not medical malpractice, an expert declaration was unnecessary.

We agree with defendant that what constituted a reasonable time for performance on these facts or what constituted a reasonable basis for postponing an elective procedure is a matter of medical expertise that required expert testimony. (See, e.g., *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001.) Plaintiff's opposition wholly failed to address this basis for judgment. The trial court did not err in granting judgment to defendant.

DISPOSITION

The judgment entered in favor of defendant and respondent Joel Aronowitz, M.D. on June 20, 2018, is affirmed. Defendant and respondent shall recover his costs of appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

WILEY, J.