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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LANANH LEDUC,

Plaintiff and Appellant,

v.

KAISER FOUNDATION HEALTH
PLAN, INC., et al.,

Defendants and Respondents.

B232692

(Los Angeles County
Super. Ct. No. GC044364)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Joseph F. De Vanon, Judge. Affirmed.

Lananh Leduc, in pro. per., for Plaintiff and Appellant.

La Follette, Johnson, De Haas, Fesler & Ames, Mark M. Stewart, Scott A.
Blakeley and David J. Ozeran for Defendants and Respondents.

* * * * *

Plaintiff Lananh Leduc appeals from the judgment entered following the grant of a summary judgment motion by defendants Kaiser Foundation Health Plan, Inc., and Kip Taylor, M.D. (collectively, Kaiser). Leduc contends the trial court erred both in sustaining without leave to amend the second cause of action for breach of contract against Kaiser and in granting summary judgment in favor of Kaiser.

We affirm the judgment. The trial court properly sustained the demurrer without leave to amend, because Leduc failed to allege facts sufficient to state a cause of action sounding in contract and did not offer any facts to cure this fatal defect. The court also properly granted summary judgment in favor of Kaiser, because Leduc failed to carry her burden to present competent evidence, which countered the declaration of Kaiser's medical expert that established Kaiser did not act negligently toward Leduc.

BACKGROUND

Leduc filed a two-count complaint against Kaiser. The first cause of action for professional negligence alleged on or about October 2 or 3, 2008, Leduc engaged Kaiser “as emergency medical care providers to treat and care for her in connection with the onset of severe pelvic pain. Included in said care was lap[a]roscopic surgery to remove a cyst on her ovary, and a D & C.”¹ Kaiser “failed to exercise the reasonable care and skill which . . . should have [been] exercised, and fell below the applicable standard of care in the providing of medical care to [Leduc.]”²

¹ “D&C” is shorthand for a dilation and curettage medical procedure.

² Specifically, she alleged Kaiser was negligent “in the following respects, *inter alia*:

(1) Kaiser “failed to check the results of an ultrasound test or [obtain] sufficient information to give and obtain informed consent before convincing [Leduc] to consent and performing, the lap[a]roscopic surgery for what [Kaiser] told her was a ‘torted ovary’, a benign condition on her ovary; instead, [Kaiser] removed a mass which turned out to be a neoplasm, a malignant granulose cell tumor. The result of so doing was . . . likely [to] cause the cancer to metastasize, thereby endangering her life and/or significantly shortening her life expectancy.”

(2) Kaiser “failed to obtain informed, or any, consent for the D & C.”

As damages, Leduc alleged: (1) Leduc “is now in a life threatening situation due to the likelihood that the cancer will spread”; (2) “[s]he now has a shortened life expectancy”; (3) “[s]he has and will incur large medical bills to treat her condition(s)”; (4) she will sustain “[f]uture loss of earnings and earning capacity”; (5) she has sustained “[e]motional distress and resultant physical damages”; and (6) she has sustained or will sustain “[o]ther recoverable damages proximately caused by [Kaiser’s] negligence pursuant to Civil Code §3333.”

The second cause of action for breach of contract incorporated by reference the allegations of the first cause of action and further alleged: “In doing the things herein alleged during [Kaiser’s] care and treatment of [Leduc], [Kaiser] breached [Kaiser’s] implied agreement with [Leduc] to provide competent medical care.” Leduc sought recovery of attorney fees and damages. (Civ. Code, § 3300.)

Kaiser filed a demurrer to the second cause of action and a motion to strike the claims for attorney fees and damages. Leduc filed opposition. Kaiser filed a reply to the motion to strike opposition.

Following a hearing, the trial court sustained the demurrer without allowing leave to amend and granted the motion to strike.

(3) Kaiser “failed to obtain informed consent from [Leduc] before performing the lap[a]roscopic surgery by not advising her of the risks attendant with the possible need to remove a mass on her ovary, including the risk that the mass could be malignant and that by removing it lap[a]rscopically, there was a risk of leaving malignant cells behind and causing the cancer to metastasize.”

(4) Kaiser “failed to adequately consider [Leduc’s] prior medical history before recommending and performing the type of surgery [Kaiser] performed, including, but not limited to, the fact that she had a history of prior pelvic pain in approximately 2004, prior to the onset of menses, when an ovarian cyst was the probable diagnosis, whereas she was now post menopausal, which should have put them on notice to consider more serious, life threatening possibilities such as ovarian cancer before performing lap[a]r[o]scopic surgery and removal of the tumor.”

(5) Kaiser committed “[o]ther acts of professional negligence, the exact nature of which is not presently known but which will be inserted with leave of court to assert same if and when ascertained.”

Kaiser answered the complaint with a general denial and asserted 13 affirmative defenses. Leduc filed a “response.”

Kaiser moved for summary judgment on the remaining first cause of action for professional negligence and filed a separate statement of undisputed facts. The evidentiary support for the motion included the declaration of Ronald S. Leuchter, M.D., Kaiser’s medical expert.

Leduc filed opposition. She also filed a separate statement conceding certain material facts and disputing others asserted by Kaiser.

Kaiser filed a reply. Leduc filed a reply to Kaiser’s reply.

Following a hearing, the trial court granted Kaiser’s summary judgment motion. Judgment in favor of Kaiser was entered subsequently.³

DISCUSSION

1. No Leave to Amend Breach of Contract Claim Following Demurrer Proper

Leduc contends the trial court committed reversible error by sustaining without leave to amend Kaiser’s demurrer to the second cause of action for breach of contract. No error transpired. Leduc’s claim for breach of duty sounded in tort, not contract.

a. Procedural Background

Kaiser filed a demurrer to the second cause of action for breach of contract on the ground “it is merely alleged that [Kaiser] was negligent in rendering emergency medical care, which sounds in medical negligence and not breach of contract.”

In opposition, Leduc argued sufficient facts were pleaded to state a breach of contract cause of action and, if not, leave to amend was appropriate.

Following a hearing, the trial court sustained the demurrer “for the reasons set forth in the moving papers.” No leave to amend was granted.

³ The order granting summary judgment was entered on February 24, 2011. On April 25, 2012, we dismissed the appeal, because no appeal lies from an order granting a summary judgment motion. The remittitur issued on June 25, 2012. On July 19, 2012, having received a copy of the judgment entered on April 3, 2012, we recalled the remittitur, vacated the order dismissing the appeal, and reinstated the appeal.

b. Standard of Review

“‘A demurrer tests the pleadings alone and not the evidence or other extrinsic matters. Therefore, it lies only where the defects appear on the face of the pleading or are judicially noticed [citations]. The only issue involved in a demurrer hearing is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action [citation].’ [Citation.]” (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747.)

On appeal from a ruling sustaining a general demurrer to a cause of action, the standard of review is de novo. (*Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 853.) As a reviewing court, we must assume the truth of the properly pleaded or implied factual allegations of the complaint, “‘but not contentions, deductions or conclusions of fact or law.’” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The complaint must be read in context and given a reasonable interpretation. Our role is to determine whether the complaint sets forth facts sufficient to state a cause of action. When the demurrer is without leave to amend, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. If this is the case, we shall conclude the trial court abused its discretion and reverse, but, if not, no abuse of discretion has occurred. The plaintiff has the burden of proving that an amendment would cure the defect. (*Ibid.*)

c. Alleged Violation of Professional Duty Sounds in Tort, Not Contract

In the first cause of action of her complaint, Leduc alleged Kaiser committed various acts of professional negligence. “To state a cause of action . . . , a party must show ‘(1) the duty of the professional to use such skill, prudence and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence.’ [Citation.]” (*Giacometti v. Aulla, LLC* (2010) 187 Cal.App.4th 1133, 1137.)

In the second cause of action for breach of contract, Leduc incorporated by reference the factual allegations of the first cause of action and alleged Kaiser breached the “*implied* agreement . . . to provide competent medical care.”⁴ (Italics added.)

An action against a medical provider, such as Kaiser, arising out of the provider’s alleged negligent treatment of a patient is “an action sounding in tort and not one based upon a contract.” (*Bellah v. Greenson* (1978) 81 Cal.App.3d 614, 625.) In contrast, when the medical provider unequivocally promised a particular result or cure pursuant to an *express* contract, and the patient relied upon such promise, a breach of contract claim may be based on the violation of that promise. (*Depenbrok v. Kaiser Foundation Health Plan, Inc.* (1978) 79 Cal.App.3d 167, 170-171.) In her second cause of action, Leduc did not allege the existence of an express contract guaranteeing a particular result or cure.

d. No Leave to Amend Not Abuse

The subject complaint is devoid of any alleged facts that would support a breach of a duty sounding in contract, and Leduc did not offer any facts to cure this defect. The trial court therefore did not abuse its discretion in not affording Leduc leave to amend.

2. Summary Judgment In Favor of Kaiser Proper

Leduc contends the trial court erred in granting summary judgment in favor of Kaiser. We disagree. She failed to raise any triable issue of material fact.

a. Background

Kaiser filed a motion for summary judgment on the ground Leduc could not demonstrate any negligence on the part of Kaiser. As support, Kaiser relied primarily on the declaration of Ronald S. Leuchter, its medical expert.

Leduc filed opposition. She did not offer a declaration by a medical expert. Instead, she relied mainly on copies of information gathered from a John Hopkins Ovarian Cancer Center Internet posting and from a Mayo Clinic Internet posting and

⁴ Leduc alleged entitlement to attorney fees pursuant to Civil Code section 3300 as part of her breach of contract damages. The trial court granted Kaiser’s motion to strike the claim for attorney fees. Leduc does not challenge the order striking the attorney fees claim.

copies of various excerpts from a revised version of the book entitled, “A Gynecologist’s Second Opinion” by William A. Parker, M.D., whose curriculum vitae she also attached to her opposition.

Kaiser countered “[o]nly a medical expert can explain the complicated medical issues [and] determine whether the standard of practice in the community was met, or whether to a reasonable degree of medical probability the alleged injury was caused by a breach.”

The trial court granted Kaiser’s summary judgment motion.

b. Standard of Review

“The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.”⁵ (*Aguilar, supra*, 25 Cal.4th at p. 843.)

“A ‘motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.’ The trial court’s grant of summary judgment is subject to de novo review. . . .

“A moving defendant may prevail by presenting evidence conclusively negating an element of the plaintiff’s cause of action

“In order to meet the initial burden, ‘the defendant must present evidence that would preclude a reasonable trier of fact from finding . . . it was more likely than not . . . the material fact was true [citation], or the defendant must establish . . . an element of the

⁵ In her opening brief, Leduc contends summary judgment is not proper in view of Kaiser’s improper conduct amounting to a battery and fraudulent concealment. Battery and fraudulent concealment, however, are not pleaded as theories in the complaint. Accordingly, Leduc’s unpleaded and unsupported claims of battery and fraudulent concealment cannot serve to foreclose summary judgment in favor of Kaiser. (See, e.g., *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*); *Fireman’s Fund Ins. Co. v. City of Turlock* (1985) 170 Cal.App.3d 988, 994, disapproved on another point in *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 841, fn 13.)

claim cannot be established, by presenting evidence . . . the plaintiff “does not possess and cannot reasonably obtain, needed evidence.” [Citation.]’ Once this burden has been met, the burden shifts to the plaintiff to demonstrate through specific facts, not simply allegations in the pleadings, the existence of a triable material factual issue as to the cause of action.” (*Kasparian v. AvalonBay Communities* (2007) 156 Cal.App.4th 11, 18-19, fns. omitted.)

c. No Professional Negligence Existed As a Matter of Law

Leduc essentially contends summary judgment was improper, because material questions of fact remain: (1) Did Dr. Taylor negligently rupture her tumor during the surgery and thereby spread the cancer cells, and (2) did Dr. Taylor perform a D&C procedure on Leduc without her informed consent? We disagree.

The record reflects Leduc admitted certain material facts and failed to controvert the remaining material facts offered by Kaiser through Dr. Leuchter’s declaration, which demonstrated Leduc could not establish Kaiser had acted negligently in treating her.

“‘[I]t is settled that an opponent’s failure to file counteraffidavits [or declarations] admits the truth of the movant’s affidavit [or declaration].’” (*Tresemmer v. Barke* (1978) 86 Cal.App.3d 656, 668.) In a medical malpractice action, when “““a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.””” (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 607.)

Leduc’s failure to refute Dr. Leuchter’s declaration with any medical expert declaration therefore was fatal, because she is deemed to have admitted the following:

“It is Dr. Leuchter’s expert opinion as a gynecologic oncologist, wholly familiar with the standard of practice in the community, that the actions of [Kaiser] were at all times well within the standard of care, and nothing [Kaiser], or the treating medical professionals who may have been acting as agents of [Kaiser] did or failed to do that was allegedly below the standard of practice, in any way, to a reasonable degree of medical probability, caused or contributed to the damages and injuries alleged by [Leduc].”

“Dr. Taylor discussed with [Leduc] the procedure, indications, and potential benefits, as well as risks and alternatives.” “All of [Leduc’s] questions were answered, and [Leduc] signed the consent form.”

“During [Leduc’s] laparoscopic procedure, Dr. Taylor noted a large, ruptured, hemorrhagic left ovary.” “The ultrasound was correctly read, as an adnexal mass was identified, which was believed to be either a torsion or tumor.” “Pathology also found evidence of extensive hemorrhage consistent with torsion.”

“Defense expert Dr. Leuchter, who has reviewed [Leduc’s] medical records, discovery responses, and deposition testimony, did not find a breach in the standard of care.” Leduc “was appropriately and timely worked up upon presentation to the Kaiser Permanente Anaheim facility on October 2, 2008.” “By the time [Leduc] presented for medical attention, the adnexal mass had already ruptured, the cells had spread, and Dr. Taylor met the standard of care by removing as much of the cancer as was possible.” “Prior to surgery, it would not have been readily apparent from the ultrasound findings that the adnexal mass had ruptured.” Even if it was known that the adnexal mass had ruptured, it may have been benign, and may not have necessarily been cancerous.” “During surgery, Dr. Taylor discovered that the adnexal mass had ruptured, but [he] would not have known that the cells were cancerous, as the appearance would have been only that of a hemorrhagic cyst and free fluid blood.”

“An exact diagnosis of either a torsion or tumor could not be determined until surgery was performed.” “It was reasonable to believe that [Leduc’s] pain was the result of an ovarian torsion, as a torsion is a common cause of the type and severity of pain [Leduc] described, and a tumor does not typically cause pain.” “The ultrasound and pathology results found evidence of a torsion, so the suspected diagnosis was correct, and the informed consent obtained by Dr. Taylor was reasonable, appropriate, and met the standard of care.”

“To a reasonable degree of medical probability, [Leduc’s] sudden and severe pelvic pain on the evening of October 2, 2008, which caused her to seek medical attention at the Kaiser Permanente Anaheim facility, was caused by the rupture of her left

ovarian tumor.” “To a reasonable degree of medical probability, the tumor ruptured spontaneously prior to the surgery, and was not macerated by Dr. Taylor during the procedure.” “To a reasonable degree of medical probability, [Leduc’s] tumor ruptured spontaneously prior to surgery, not as a result of the surgery.” “To a reasonable degree of medical probability, the cancerous cells spread spontaneously following the rupture, not as a result of Dr. Taylor’s surgical technique.”

“D&C did not require a separate consent.” “There [was] no evidence that Dr. Taylor performed a [D&C] on [Leduc].” “The D&C tissue sample would have been sent to pathology, and there are no pathology results.” “Even if Dr. Taylor did perform a D&C, for which there is no evidence, it would have been acceptable, as the cervix is required to be widened during surgery, and a [D&C] would have been one method to do so.”

CONCLUSION

Leduc has failed to establish any ground for reversal of the judgment. The trial court properly sustained Kaiser’s demurrer to the second cause of action for breach of contract without leave to amend and granted Kaiser’s summary judgment motion on the remaining cause of action for professional negligence.

DISPOSITION

The judgment is affirmed. Each party shall bear own costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.