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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JAMES LESTER DAVID et al.,

Plaintiffs and Appellants,

v.

SLAKEY BROTHERS, INC.,

Defendant and Respondent.

B244802

(Los Angeles County  
Super. Ct. No. BC479416)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Emilie H. Elias, Judge. Reversed.

Keller, Fishback & Jackson, Stephen M. Fishback, Daniel L. Keller; Law Office  
of Ted W. Pelletier and Ted W. Pelletier for Plaintiffs and Appellants.

Bennett, Samuels, Reynolds & Allard, Richard L. Reynolds, Lauren E. Powe;  
Selman Breitman, A. Scott Goldberg and Jeffrey W. Deane for Defendant and  
Respondent.

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Plaintiff and appellant Rebecca Lee David (Rebecca), individually and as successor-in-interest to James Lester David (James or decedent) (collectively, plaintiffs), appeals a judgment following a grant of summary judgment in favor of defendant and respondent Slakey Brothers, Inc. (Slakey).<sup>1</sup>

Plaintiffs contends the summary judgment must be reversed due to procedural and evidentiary errors, and in any event, the trial court erred in granting summary judgment due to the presence of triable issues of material fact.

By way of background, at the time of the summary judgment hearing, decedent lay dying of mesothelioma. We conclude the trial court abused its discretion in refusing to consider decedent's opposing declaration on the ground it was unsigned, in that by the time of the hearing on the motion for summary judgment, the plaintiffs had submitted a *signed* copy of the opposing declaration. Further, decedent's opposing declaration was sufficient to raise a triable issue of material fact as to whether decedent had been exposed to asbestos-containing products supplied by Slakey. Therefore, the judgment is reversed.

### **FACTUAL AND PROCEDURAL BACKGROUND**

James worked as a sheet metal worker from 1969 through 1995.

Plaintiffs commenced this action on February 22, 2012, alleging James was diagnosed with mesothelioma caused by occupational exposure to asbestos. The complaint named some 120 defendants, including Slakey "individually and as successor-in-interest to Avex Corporation." The complaint included a cause of action by Rebecca for loss of consortium.

The trial court granted calendar preference, expediting the matter. On July 25, 2012, the trial court issued an order setting a trial date of September 24, 2012, with September 18, 2012 as the "Last day to hear Motions for Summary Judgment."

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<sup>1</sup> James died of mesothelioma on November 13, 2012, during the pendency of this appeal. Pursuant to California Rules of Court, rule 8.36(a), the decedent's widow, Rebecca, was substituted in place of decedent.

On July 27, 2012, Slakey filed a motion for summary judgment, contending there was no evidence that it exposed the decedent to any asbestos-containing products. Slakey's counsel erroneously set the motion for hearing on September 19, 2012, one day beyond the September 18, 2012 cutoff date specified in the July 25, 2012 order.

On or about September 6, 2012, plaintiffs filed an objection and motion to strike the motion for summary judgment, on the ground Slakey set the hearing date on the motion for September 19, 2012, one day beyond the motion cutoff date. The plaintiffs' papers did not include a substantive opposition to the motion for summary judgment.

In response to plaintiffs' motion to strike Slakey's motion for summary judgment, Slakey's counsel filed an ex parte application for an order amending the motion for summary judgment to reflect a September 18, 2012 hearing date, or alternatively, to allow the summary judgment hearing to proceed as scheduled, on September 19, 2012.

On September 11, 2012, the date the ex parte application was to be heard, Slakey's counsel was not present and the trial court took the matter off calendar. Later that day, the trial court granted the ex parte application, stating the court was informed "the moving party was present on CourtCall." In granting ex parte relief, the trial court stated, "The Court is allowed to modify its own trial setting order and calendar." The trial court's order allowed the summary judgment motion to remain on calendar for September 19, 2012, and granted plaintiffs additional time, until September 17, 2012, to file substantive opposition to the motion for summary judgment.

On September 17, 2012, plaintiffs filed substantive opposition to Slakey's motion for summary judgment. The opposition papers included an *unsigned* declaration by James, in which he asserted he had worked with asbestos-containing products supplied by Slakey and Avex. The supporting declaration of attorney Tenny Mirzayan indicated a signed copy of the declaration would be provided as soon as possible.

On September 18, 2012, Slakey filed a reply memorandum and objection to James's unsigned declaration, requesting that the unsigned declaration be disregarded.

On September 18, 2012, plaintiffs' counsel sent a facsimile transmission of James's signed declaration to the superior court, and the declaration was filed with the court on September 19, 2012.

On September 19, 2012, the summary judgment motion came on for hearing. The record contains the following colloquy:

"Ms. Powe [for Slakey]: And, your honor, may I point out that his declaration is not signed.

"Mr. Keller [for plaintiffs]: We submitted a signed copy of the declaration yesterday.

"The Court: You can't do, -- you know what, that is really the pot calling the kettle black. Your firm stands here every single day. People rely on the discovery responses from your client. And the papers I get every single day from your firm is 'ha.' They weren't verified; you can't use them.'

"The defense says, 'ha. We put them in the reply when you finally sent them to us two days before the hearing date.'

"And your firm stands up and says it's too late. It has to be in the moving papers. If it wasn't signed at the time of the moving papers, it's not good.

"Mr. Keller: Your honor, with all due respect --

"The Court: "It's not good. It's the same argument your firm makes every single day. And it stays the same for you then. You cannot submit them at the end, and I don't even have a signed copy yet.

"Mr. Keller: There is a difference between what the moving party is required to do with their motion under [CCP § 437c] and what the court may allow on opposition.

"The Court: I am not allowing it in your opposition -- [¶] . . . [¶]

"Mr. Keller: Your honor, with all due respect. There is absolutely due cause. My client is dying of mesothelioma; you are aware of that. He is in and out of the hospital. And getting him to sign a declaration was no easy task.

“The Court: You do know that he has signed declarations in some of the other summary judgments. So you apparently had the ability to get it signed. And I do not even have a copy of the signed declaration.

“Mr. Keller: I have a copy with me, your honor. It was faxed filed yesterday.

“The Court: It’s not going to be considered.”

The trial court granted Slakey’s motion for summary judgment, ruling in substance that plaintiffs lacked facts to show James had been exposed to Slakey’s products.

On October 2, 2012, the trial court entered judgment in favor of Slakey, individually and as alleged successor-in-interest to Avex. This timely appeal followed.

### **CONTENTIONS**

Plaintiffs contend: (1) Slakey’s setting a September 19 hearing rendered its summary judgment motion invalid, and the trial court lacked the power to rectify the error under the guise of “calendar management”; (2) the trial court’s ex parte order allowing the September 19 hearing to proceed was invalid because it rested on an incomplete application and no hearing; (3) Slakey’s summary judgment motion, lacking evidence that plaintiffs could not prove exposure, failed to shift the summary judgment burden to plaintiffs; (4) the trial court violated the summary judgment rules in refusing to consider James’s signed and filed declaration; (5) if the trial court had any discretion to disregard James’s late-filed declaration, it abused that discretion; and (6) even without James’s declaration, the evidence contained in Slakey’s papers raised a triable issue of fact.

### **DISCUSSION**

#### *1. Standard of appellate review.*

“We independently review an order granting summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) We determine whether the court’s ruling was correct, not its reasons or rationale. (*Salazar v. Southern Cal. Gas Co.* (1997) 54 Cal.App.4th 1370, 1376.) ‘In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court’s determination of a motion for summary judgment.’ (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925.) We review

for abuse of discretion any evidentiary ruling made in connection with the motion. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122.)” (*Shugart v. Regents of University of California* (2011) 199 Cal.App.4th 499, 504-505.)

2. *Trial court abused its discretion in refusing to consider decedent’s declaration.*

The record reflects that on the eve of the summary judgment hearing in the Los Angeles Superior Court, James lay dying of mesothelioma. Because plaintiffs’ counsel was unable to obtain James’s signature on the declaration before filing opposition, on September 17, 2012, the date plaintiffs’ opposition papers were due, plaintiffs submitted an unsigned copy of James’s declaration. On September 18, 2012, plaintiffs’ counsel sent a facsimile transmission of James’s *signed* declaration to the superior court, and the signed declaration was filed with the superior court on September 19, 2012. The filed copy showed the declaration had been executed in Los Gatos, California, on September 17, 2012.

Thus, by the time of the summary judgment hearing, plaintiffs had furnished the court with a signed copy of James’s declaration. Nonetheless, for extraneous reasons based on positions taken by plaintiffs’ counsel in other litigation, the trial court’s refused to consider decedent’s declaration.

The transcript of the summary judgment hearing, quoted *ante*, reflects the trial court’s refusal to consider decedent’s declaration did not rest on a finding of a lack of good cause under the circumstances. Rather, as the appellants’ opening brief points out, the trial judge refused to consider the signed, filed declaration as a reprimand to plaintiffs’ counsel for that firm’s alleged litigation conduct in other cases before said judge.

To reiterate, the trial court stated: “you know what, that is really the pot calling the kettle black. Your firm stands here every single day. People rely on the discovery responses from your client. And the papers I get every single day from your firm is ‘ha.’ They weren’t verified; you can’t use them.” [¶] The defense says, ‘ha. We put them in the reply when you finally sent them to us two days before the hearing date.’ [¶] And

your firm stands up and says it's too late. It has to be in the moving papers. If it wasn't signed at the time of the moving papers, it's not good."

Then, in response to plaintiffs' counsel's assertion "[t]here is absolutely good cause for considering [the declaration]," the trial court responded: "*No, counsel. It's not that I don't want to consider it. It's that your firm has taken a position that when you send the verification two days before a hearing that I cannot consider the verification . . .*" (Italics added.)

On this record, the trial court's refusal to consider decedent's declaration, based on the positions taken by plaintiffs' counsel in other litigation, was a manifest abuse of discretion. We conclude Slakey's evidentiary objection to decedent's declaration should have been overruled.

The remaining issue on appeal is whether the erroneous exclusion of decedent's declaration was prejudicial.

3. *Decedent's declaration was sufficient to raise a triable issue of material fact.*

Slakey moved for, and obtained, summary judgment on the ground there was no evidence that it exposed the decedent to any asbestos-containing products.

Decedent's declaration, which the trial court should have considered, stated in pertinent part at paragraph 11: "The asbestos paper, asbestos tape and wheat paste used to wrap tin pipe, corrugated asbestos paper, aircell board, Duro Dyne asbestos flexible duct connectors used to dampen vibration, mastics, sealants, Tuff Bond mastics used to adhere grips, Duro Dyne sealants used to seal duct, blackjack used to seal roofing penetrations, asbestos cement vent and flue pipe were obtained for use [*sic*] my jobsites from Avex/Slakey Brothers from their Santa Clara and Santa Cruz locations. I recognized that these materials came from Avex/Slakey Brothers because I went to these locations many times beginning in 1969 and throughout my career. I also reviewed their catalogs, ordered materials, saw material invoices, and saw their trucks delivering to my jobsites. Additionally, they were discussed widely by my coworkers and I as they were the major supplier of materials to our jobs."

The above is sufficient to raise a triable issue of material fact as to whether James was exposed to asbestos-containing products supplied by Slakey or Avex.<sup>2</sup>

4. *Remaining issues not reached.*

In view of the above, it is unnecessary to address plaintiffs' contention the trial court erred in granting Slakey's ex parte application to extend the hearing date on the summary judgment motion by one day, to September 19, or any other issues.

**DISPOSITION**

The judgment is reversed. Plaintiffs shall recover their costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.

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<sup>2</sup> In addition to objecting below to decedent's entire declaration on the ground it was unsigned, Slakey objected to paragraph 11 on the following grounds: lack of foundation, lack of personal knowledge; hearsay; speculation. Slakey does not rely on any of those alternative bases to urge affirmance on appeal. In any event, those objections to paragraph 11 are not well taken.