Filed 9/25/19 Baehr v. Golshani CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CAROLYN BAEHR, Plaintiff and Appellant, v. S. DANIEL GOLSHANI et al., Defendants and Respondents.	B291769 (Los Angeles County Super. Ct. No. BC625569)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis J. Landin, Judge. Reversed.

Law Offices of Sarah A. Stockwell and Sarah A. Stockwell for Plaintiff and Appellant.

Cole Pedroza, Kenneth R. Pedroza, Scott M. Klausner; Bonne, Bridges, Mueller, O'Keefe & Nichols and Joel B. Douglas for Defendants and Respondents.

Carolyn Baehr (Baehr) filed a complaint against S. Daniel Golshani, M.D. and S. Daniel Golshani, M.D., Inc. (collectively Dr. Golshani) for medical malpractice after elective cosmetic surgery in July 2014 left Baehr with unexpected results. Baehr initially filed a complaint against Avosant Corporation dba S. Daniel Golshani, M.D. in small claims court on February 16, 2016. The small claims action was dismissed without prejudice when the court determined Baehr's claim would require expert testimony and was, therefore, appropriate for consideration by the superior court.

Baehr filed a subsequent complaint against Dr. Golshani in the Los Angeles Superior Court on June 30, 2016. The trial court entered summary judgment in favor of Dr. Golshani, finding Baehr's complaint was barred by Code of Civil Procedure section 340.5's one-year statute of limitations.[1]

We find the circumstances of this case appropriate for the application of common law equitable tolling, and reverse the summary judgment on the ground that Baehr's superior court action was timely filed.

FACTUAL AND PROCEDURAL BACKGROUND

On July 2, 2014, Dr. Golshani performed liposuction of the abdomen and both flanks, a mini tummy tuck, and fat transfer on Baehr. Baehr alleged that, during the surgery, Golshani "removed too much fat" from her abdomen, leaving her stomach looking "like a backwards 3." Baehr further alleged Dr. Golshani

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[1] All further statutory references are to the Code of Civil Procedure.

"performed excessive superficial liposuction" on her back and used either the wrong equipment or technique, resulting in scars and dents.

At a follow-up appointment on September 11, 2014, Baehr complained to Dr. Golshani about the outcome of her surgery, describing "lumpiness" and "unevenness" in her back. Dr. Golshani told Baehr to "massage [it] vigorously" and "acted like it wasn't a big deal."

At some point between September 11, 2014 and April 24, 2015, Baehr "realized that [Dr. Golshani] messed up [her] body and . . . didn't know what he was doing." She returned to Dr. Golshani's office on April 24, 2015, pretending to seek information on further cosmetic procedures. However, Baehr's real purpose was to get Dr. Golshani to admit to his wrongdoing and to the damage he caused in writing. Baehr testified at deposition that, as of April 24, 2015, she realized Dr. Golshani caused her injuries and she "wanted to get it in writing what his plan was to correct his mistake because legally [she] knew [she] needed to get it in writing."

On June 12, 2015, Baehr wrote to Dr. Golshani's office: "I am so upset! I have never looked worse after surgery until now. My stomach and back looks like I went to Mexico and had the surgery. My perfect C-section scar looks horrible now. I was NOT told he would have to leave some of the fat around the incision site. I am filing a complaint." Baehr again wrote to Dr. Golshani on November 18, 2015, stating her June 12, 2015 email constituted notice of her intent to file a lawsuit for medical malpractice.

On February 16, 2016, Baehr filed a complaint in small claims court against "Avosant Corporation dba S. Daniel

Golshani, M.D.," seeking $10,000 in damages "to correct the damage [Dr. Golshani] caused." The small claims court dismissed Baehr's complaint, without prejudice, on June 23, 2016, finding "the standard of care is generally subject to expert testimony" and noting, "[p]laintiff should consider filing suit in Superior Court—see [section] 340.5 regarding statute of limitations."

One week later, on June 30, 2016, Baehr filed a form complaint for negligence in the Los Angeles Superior Court against S. Daniel Golshani and S. Daniel Golshani, M.D., Inc., identifying the action as an "unlimited civil case" with damages "exceed[ing] $25,000."

Dr. Golshani moved for summary judgment against Baehr on the ground Baehr's sole cause of action for negligence was barred by section 340.5's one-year statute of limitations. Dr. Golshani argued Baehr knew she had been "wronged" as early as September 11, 2014, when she complained at a follow-up medical appointment about lumpiness in the areas affected by the surgery, and as late as April 24, 2015, when she returned to the defendant's office for the concealed purpose of getting him to admit his tortious conduct in writing. Dr. Golshani contended Baehr's superior court complaint was time-barred because it was not filed until June 30, 2016, more than one year after she had a "mere suspicion, if not outright belief[,] of wrongdoing" by him on either the earliest date of September 11, 2014, or the latest date of April 24, 2015.

The trial court agreed, finding Dr. Golshani proffered sufficient evidence to establish Baehr discovered, or reasonably should have discovered, her injury by September 11, 2014, and

that Baehr failed to raise a triable issue of fact as to the date of discovery for purposes of the one-year statute of limitation.

DISCUSSION

I. Standard of Review

We review a "summary judgment de novo, applying the same legal standard as the trial court." (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 876; accord, *Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813.) A court must grant summary judgment if the papers submitted show there is no triable issue as to any material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; see § 437c, subd. (c).)

A defendant has met its burden of showing that a cause of action has no merit if it demonstrates that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. (§ 437c, subd. (p)(2).) "The statute of limitations operates in an action as an affirmative defense. [Citation.]" (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1188.) Once the defendant meets this burden, the burden shifts to the plaintiff to prove the existence of a triable issue of fact regarding that element of its cause of action or that defense. (*Ibid.*)

On appeal from a summary judgment, "we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) In performing our de novo review, we view the evidence in the light most favorable to the plaintiff as the losing party. (*Ibid.*; accord, *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) In

doing so, we liberally construe the plaintiff's evidentiary submissions and strictly scrutinize the defendant's evidence in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor. (*Wiener v. Southcoast Childcare Centers, Inc.*, *supra*, at p. 1142.)

II. Based on the Undisputed Facts, the Statute of Limitations on Baehr's Claim Was Triggered No Later than April 24, 2015

"In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first." (§ 340.5.) A plaintiff in a medical malpractice action must satisfy the requirements of both the one-year and the three-year limitations periods. (*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 436-437.) The injury commences both the three-year and the one-year limitations periods. (*Drexler v. Petersen, supra,* 4 Cal.App.5th at p. 1189.) The one-year limitations period, however, does not begin to run until the plaintiff discovers *both* his or her injury *and* its negligent cause. (*Davis v. Marin* (2000) 80 Cal.App.4th 380, 385.)

A. *The September 14, 2014 Appointment*

Dr. Golshani argues Baehr discovered the injury of which she complains—skin contour defects and a lack of smoothness resulting from an allegedly excessive removal of fat—"prior to a follow-up appointment with Dr. Golshani on September 14,

2014. . . . She discussed her concerns with Dr. Golshani at that time, and she decided that she would not return for another follow-up visit because she believed that Dr. Golshani 'messed [her] body up and he didn't know what he was doing.' " Dr. Golshani contends this evidence, which he argues is undisputed, "is enough to support a prima facie showing that . . . Baehr, by her own admission, suspected Dr. Golshani of negligence by September 2014, more than a year before she took any legal action."

We do not agree that the actual evidence supports Dr. Golshani's conclusion. Baehr testified at deposition that, at the September 11, 2014 appointment, she complained to Dr. Golshani about the outcome of her surgery, describing "lumpiness" and "unevenness" on her back. He told her to "massage [it] vigorously" and "acted like it wasn't a big deal." Although she unquestionably concluded at some point prior to April 24, 2015 that the outcome of her surgery was the result of Dr. Golshani's negligence, Dr. Golshani failed to make a prima facie showing that Baehr reached that state of mind on or before September 14, 2014. When questioned at deposition why she did not return for a follow-up appointment with Dr. Golshani between September 14, 2014 and April 24, 2015, Baehr testified, "I'm not sure. . . . I don't recall if I tried to make an appointment or didn't or if that was when I was really feeling like that he did not know what he was doing." A reasonable inference[2] from Dr. Golshani's advice

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[2] "In ruling on [a motion for summary judgment], the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citations], and must view such evidence [citations] and such inferences [citations] in the light

on September 14, 2014 to "massage [her back] vigorously" could be that the "lumpiness" and "unevenness" was not the final result of surgery, but was an interim state that required post-procedure therapeutic massage by Baehr to reach optimal results. "The best medical treatment sometimes fails, or requires long and difficult recuperation, or produces bad side effects." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 899.) "The mere fact that an operation does not produce hoped-for results does not signify negligence and will not cause commencement of the statutory period." (*Bristol-Myers Squibb Co. v. Superior Court* (1995) 32 Cal.App.4th 959, 964, disapproved on other grounds in *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 803 and *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 410, fn. 8.)

In short, the evidence is susceptible to two reasonable interpretations as to whether Baehr knew of her injury and its cause by September 14, 2014. Because we are required to take all inferences in favor of Baehr, Dr. Golshani failed to meet his burden in moving for summary judgment that Baehr's cause of action accrued on that date. (*Davis v. Marin*, *supra*, 80 Cal.App.4th at p. 385.)

B. *The April 24, 2015 Appointment*

Following her visit to Dr. Golshani in September 2014, Baehr did not return to the doctor's office until April 25, 2015. Baehr testified that, on that date, she "wanted to get it in writing what his plan was to correct his mistake because legally I knew I needed to get it in writing. . . . I wanted to see what he was going

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most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 856.)

to say he was going to do to correct it. From what he had said before I was not really expecting a good answer." Dr. Golshani contends that this testimony establishes that, "[b]y April 24, 2015, if not before, . . . Baehr knew that she had been wronged by Dr. Golshani." We agree with this conclusion since, by that date, Baehr certainly suspected Dr. Golshani was negligent in performing her surgery. (*Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1391 [§ 340.5's one-year limitations period " 'begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing' "].)

Baehr suggests that the evidence is "ambiguous as to when the statute of limitations began to run" and that, while Dr. Golshani demonstrated the statute was triggered "sometime between September 12, 2014 and no later than June 12, 2015," it was ultimately a disputed question of fact that the trial court should not have determined.

We disagree. "Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period. [Citations.] *Norgart* [*v. Upjohn Co.*, *supra*, 21 Cal.4th at pp. 405-408] explained that by discussing the discovery rule in terms of a plaintiff's suspicion of 'elements' of a cause of action, it was referring to the 'generic' elements of wrongdoing, causation, and harm. [Citation.] In so using the term 'elements,' we do not take a hypertechnical approach to the application of the discovery rule. Rather than examining whether the plaintiffs suspect facts supporting each specific legal element of a particular cause of action, we look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them." (*Fox v. Ethicon Endo-Surgery, Inc.*, *supra*, 35 Cal.4th at

p. 807.) Since our finding rests exclusively on Baehr's own undisputed testimony that she visited Dr. Golshani on April 24, 2015, with the intent to demand a written plan describing how he might correct her surgical injury, there is no question that Baehr had the requisite suspicion of wrongdoing and its cause on that date to trigger the one-year statute of limitations.

We next address whether Baehr pursued her negligence claim in a timely fashion.

III. Since the Statute of Limitations Was Tolled During the Pendency of Baehr's Small Claims Court Action, Her Superior Court Complaint Was Timely

On February 16, 2016, less than one year after the statute of limitations was triggered on April 24, 2015, Baehr filed a complaint in small claims court against "Avosant Corporation dba S. Daniel Golshani, M.D." Baehr claimed Dr. Golshani owed her $10,000 because "[h]e performed surgery on [her] and wanted to charge [her] approximately $8000 more to correct his mistakes." Approximately four months later, on June 23, 2016, the small claims court called the matter for trial. The court found "that the standard of care is generally subject to expert testimony" and dismissed Baehr's complaint, sua sponte, without prejudice. The court advised Baehr to "consider filing suit in Superior Court" and noted section 340.5's statute of limitations. One week later, on June 30, 2016, Baehr instituted the present action by filing a complaint for negligence in the Los Angeles Superior Court.

Dr. Golshani asks us to affirm the trial court's decision that Baehr's complaint, which was not filed until June 30, 2016, was untimely. Dr. Golshani bases his request on the undisputed fact

that the date of filing in the superior court was more than one year from either of the above-described dates on which Baehr discovered she was injured by Dr. Golshani, as well as his belief that Baehr is not entitled to equitable tolling of the statute of limitations. While we concur with the former statement, we part company with Dr. Golshani on the latter.

" 'It is fundamental that the primary purpose of statutes of limitation is to prevent the assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer fresh and witnesses are no longer available. "[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them." [Citations.] The statutes, accordingly, serve a distinct public purpose, preventing the assertion of demands[,] which through the unexcused lapse of time, have been rendered difficult or impossible to defend.' " (*Thomas v. Gilliland* (2002) 95 Cal.App.4th 427, 434.)

" 'However, courts have adhered to a general policy [of equitable tolling] which favors relieving plaintiff from the bar of a limitations statute when, possessing several legal remedies [s]he, reasonably and in good faith, pursues one designed to lessen the extent of h[er] injuries or damage. [Citations.]' [Citation.]" (*Thomas v. Gilliland*, *supra*, 95 Cal.App.4th at p. 434.) "The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine." (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99.) "It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' [Citation.] Where applicable, the doctrine will 'suspend or extend a statute of limitations as

necessary to ensure fundamental practicality and fairness.' [Citation.]" (*Ibid.*; accord, *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.)

The California Supreme Court has noted that, "[t]hough the doctrine operates independently of the language of the Code of Civil Procedure and other codified sources of statutes of limitations [citations], its legitimacy is unquestioned." (*McDonald v. Antelope Valley Community College Dist.*, *supra*, 45 Cal.4th at pp. 99-100.) The state's highest court has "described it as a creature of the judiciary's inherent power ' "to formulate rules of procedure where justice demands it." ' [Citations.]" (*Id.* at p. 100; see also, *Elkins v. Derby* (1974) 12 Cal.3d 410, 420, fn. 9; *Bollinger v. National Fire Ins. Co.* (1944) 25 Cal.2d 399, 410.)

"Broadly speaking, the doctrine applies . . . where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason. [Citation.]" (*McDonald v. Antelope Valley Community College Dist.*, *supra*, 45 Cal.4th at p. 100) We find this last situation fittingly describes Baehr's small claims action. We next assess whether Baehr's small claims complaint and her subsequent superior court filing satisfy the requirements for equitable tolling.

"[A]pplication of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff." (*Addison v. State of California* (1978) 21 Cal.3d 313, 319.)

We agree with Baehr that the latter two considerations—reasonable and good faith conduct by the plaintiff and lack of prejudice to the defendant—were met here. Baehr, believing she had to give 90 days' notice of intent to sue, filed her small claims complaint on February 16, 2016, exactly 90 days from her last email to Dr. Golshani on November 18, 2015. Since she valued her damages at $10,000, within the jurisdiction of the small claims court, her decision to file a small claims action was both reasonable and appropriate.

The parties disagree, however, as to whether Baehr's small claims complaint was sufficient to put Dr. Golshani on notice of the need to prepare a defense to the superior court complaint. Dr. Golshani, in reliance on the Sixth District's opinion in *Jellinek v. Superior Court* (1991) 228 Cal.App.3d 652 (*Jellinek*), argues equitable tolling should not apply to save Baehr's claim because "[t]he liability one faces in a small-claims proceeding is different in kind from what one faces in an unlimited civil action, and notice of the former does not alert a defendant of the need to prepare a defense that would be adequate in the latter."

In *Jellinek*, the plaintiff sued her physician in small claims court for malpractice connected with plastic surgery, seeking damages of $1,500. (*Id*. at p. 654.) After the statute of limitations had run, the plaintiff voluntarily moved to transfer the action to the superior court, contending her damages exceeded $25,000. (*Ibid*.) The small claims court granted the motion. (*Ibid*.) Following transfer, the plaintiff's attorney mailed a copy of the complaint to the defendant physician, who then unsuccessfully moved to quash the service of summons. (*Ibid*.)

The defendant sought writ review of the order denying his motion to quash, contending the transfer from small claims court

to a court of unlimited jurisdiction violated rules governing small claims court procedures. (*Jellinek*, *supra*, 228 Cal.App.3d at p. 654.) On review, the plaintiff argued she only became aware of the extent of her damages after the statute of limitations expired, so it was unfair for her not to be able to maintain her case in the superior court where those damages could be recovered. (*Id*. at p. 659.) The appellate court disagreed, finding the plaintiff was "no more disadvantaged than any other plaintiff who does not realize the extent of her injury until after the limitations period has run." (*Id*. at p. 660.)

The appellate court was unmoved by the fact that the plaintiff had filed a small claims action within the applicable statute of limitations: the plaintiff "should not be able to derive any special advantage from having filed a small claims action because such an action is not fair notice to the defendant that he may be liable for anything beyond the jurisdictional limit of the small claims court. Also, statutes of limitations are normally tolled by the filing and service of a complaint because that event should cause a prudent defendant to consult a lawyer or to take other protective action. But the filing of the small claims action, as stated above, should not have that effect; defendant should not need to consult an attorney and he should be able to assume a definite monetary limit on his potential liability in the action. Accordingly, no reason of fairness requires that we treat the filing of a small claims action as tolling the statute of limitations for an entirely different kind of liability, namely a lawsuit for much greater damages which requires legal representation. From [the] defendant's standpoint it is fair that after expiration of the limitations period he be entitled to assume immunity from liability except within the scope of the action already filed, an

action limited by the money limit on damages recoverable in small claims court." (*Jellinek*, *supra*, 228 Cal.App.3d at p. 600.)

Bearing in mind that the purpose of equitable tolling is to "ensure fundamental practicality and fairness" (*Lantzy v. Centex Homes*, *supra*, 31 Cal.4th at p. 370), we find there is a key distinction between the facts of *Jellinek* and the present action that justifies a less rigid interpretation of notice than the one applied by the *Jellinek* court. Unlike the plaintiff in *Jellinek*, who unilaterally amended her damage claim and sought to have her case transferred to the superior court on the ground her initially pleaded damages of $1,500 now exceeded $25,000, here the small claims court conclusively declined to hear Baehr's claim. While Dr. Golshani contends Baehr voluntarily dismissed her action, the record does not state that she did so. The record is susceptible to the plausible inference that the small claims court dismissed the matter on its own motion. If she wanted to pursue her malpractice claim against Dr. Golshani, Baehr had no choice but to re-file her complaint in the venue to which the small claims judge directed her: the superior court.

We also note that, notwithstanding the fact that Baehr (representing herself in pro. per.) checked the box on the form complaint indicating her action was an unlimited civil case with concomitant damages "exceed[ing] $25,000," she actually estimated her damages for future medical expenses at $6,000.[3] Even assuming Baehr's estimation does not account for general damages such as pain and suffering, we are not persuaded that any potential difference in liability Dr. Golshani faced in the

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[3] This amount was less than the $8,000 to $10,000 identified in Baehr's small claims complaint.

superior court outweighed Baehr's right to have her malpractice claim heard. This is particularly true where a reasonable inference from the evidence is that it was the trial court, and not Baehr, that dismissed her small claims action. In short, affirmance of the trial court's summary judgment would mock the concept of equitable tolling, which is "designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied." (*Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 38.)

We find that, for purposes of summary judgment, Baehr made the required showing she is entitled to equitable tolling of her medical malpractice claim against Dr. Golshani. Her February 16, 2016 small claims complaint was filed within one year of April 24, 2015, the date Baehr had the requisite knowledge of her injury and suspicion of Dr. Golshani's wrongdoing, and was equitably tolled during the pendency of that action. Thus, her complaint in this action, filed only one week after the involuntary dismissal of her small claims complaint, was timely.

DISPOSITION

The judgment is reversed. Each side is to bear its own costs on appeal.

NOT TO BE PUBLISHED

JOHNSON, Acting P. J.

We concur:

BENDIX, J.

WEINGART, J.*

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