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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MARIA CRISTINA CANO et al., Plaintiffs and Appellants, v. SURGI WORLD, INC., Defendant and Respondent.	B235031 (Los Angeles County Super. Ct. No. SC102863)

APPEAL from a judgment of the Superior Court of Los Angeles, Gerald Rosenberg, Judge. Affirmed.

Guerrero & Chan and Franky Chan for Plaintiffs and Appellants.

Reback, McAndrews, Warford & Stockalper; Reback, McAndrews, Kjar, Warford, Stockalper & Moore, James J. Kjar and Ryan P. Deane for Defendants and Respondents.

Appellants Maria Cristina Cano and Eduardo Cano appeal the trial court's grant of summary judgment in favor of respondent Surgi World, Inc., contending that the motion was untimely served and that the counterdeclaration of appellants' expert created issues of disputed fact. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 2, 2008, Maria underwent two cosmetic surgeries -- an abdominoplasty and a mammoplasty.[1] The surgeries were performed by Steven Burres, M.D. and John Anastasatos, M.D. at a facility owned by Surgi World, Inc. (Surgi World).

Appellants brought suit against Dr. Burres, Dr. Anastasatos, Surgi World, and an unrelated entity, San Miguel Spa.[2] After demurrers were sustained, claims for medical malpractice, breach of fiduciary duty, negligent infliction of emotional distress, and loss of consortium remained.

In the operative second amended complaint, appellants alleged that Maria suffered unusual bleeding, pain, discomfort and scarring in the aftermath of the surgeries. They attributed her condition to the negligence of "defendants" in performing the surgical procedures, in closing the surgical wound, and in caring for Maria in the aftermath of the surgeries during followup visits. They further contended that after the surgeries, "defendants" failed to disclose "the actual cause of [Maria's] pain, discomfort, fever, excessive bleeding and infection," or the "true state of [her] medical condition." Appellants alleged that this failure to disclose "cause[d] unnecessary delays" in Maria's postoperative treatment.

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[1] As appellants share a surname, they will be referred to individually by their first names to avoid confusion.

[2] Personnel at San Miguel Spa had apparently recommended the defendant doctors to appellants. Appellants settled with the defendant doctors and San Miguel Spa.

The second amended complaint contained few specific references to Surgi World. It described Surgi World as a California corporation and alleged that the procedures were performed and the followup visits occurred at facilities owned by Surgi World; it further alleged that the doctor defendants were Surgi World's "agents, officers, directors, managers, executives, administrators, members, and employees." Surgi World demurred to the second amended complaint, contending, among other things, that there were no charging allegations against Surgi World. In overruling Surgi World's demurrer, the court stated that for purposes of demurrer, "[t]he allegations that 'defendants' were responsible sufficiently includes Surgi World" and that the allegation that the defendant doctors were the agents and employees of Surgi World enabled the claims "to survive demurrer."

Approximately one year after the second amended complaint was filed, Surgi World moved for summary judgment. Through its moving papers and the supporting evidence, it sought to establish that the defendant doctors were not its agents or employees. It further sought to establish that Maria dealt entirely with the defendant doctors in deciding whether to undergo plastic surgery and the type of surgery to be performed. Finally, it sought to establish that the community standard of care for surgical facilities did not require Surgi World to obtain the informed consent of surgical patients for procedures performed by individual physicians in its facilities.

Dr. Burres submitted a declaration in support of the motion stating that although he was the "[m]edical [d]irector" of Surgi World, he was not an employee or agent of the company in his capacity as a physician. He stated that he maintained a separate clinical practice and that he treated Maria as a surgeon and not as an employee or agent of Surgi World. He also stated that Dr. Anastasatos was not an employee or agent of Surgi World. Dr. Burres further stated the community standard of care for facilities such as Surgi World "d[id] not require

Surgi World . . . to [obtain informed] consent [from] surgical patients for procedures performed by individual physicians in its facilities [or] . . . in its surgical clinic."[3]

Appellants conceded that the doctors were not the employees or agents of Surgi World. In their opposition, appellants sought to raise an issue of contested fact by establishing that Surgi World breached the standard of care it owed to Maria by failing to obtain her informed consent with respect to the risks of the use of general anesthesia and by failing to "maintain[] documentation of the surgeries performed at [its] facilities. To this end, appellants submitted the declarations of Maria and of medical expert Jed Horowitz, M.D. Maria stated that she did not read or speak English, that documents given to her regarding the plastic surgeries were in English, and that she was not able to read and understand the language discussing the risks of general anesthesia.

Dr. Horowitz expressed the opinion, based on his review of the medical records, that Maria's surgical wound had not healed properly and that she developed an infection after her surgery, causing her to be hospitalized for four days for treatment. He stated that Surgi World's "failure to provide pre-operative warning and advisory" and "failure to obtain patient's consent" was below the standard of care and "prevented [Maria] from receiving all relevant information concerning the risk associated with the surgeries" and from "giv[ing] her informed consent for the general anesthesia which was required for the surgeries." He also faulted Surgi World for its "failure to properly keep relevant documentation,"

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[3] We presume the term "consent" in that phrase is shorthand for obtaining the patient's informed consent. (See *Quintanilla v. Dunkelman* (2005) 133 Cal.App.4th 95, 114 [explaining that under doctrine of informed consent, physicians are under obligation to make """"reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each""" before obtaining patient's consent to perform medical procedure].)

stating that it had "no records of any kind for [Maria's] surgery," including, "no record of pre-operative informed consent documentation," "no record of the operative general anesthesia documentations," and "no information of the surgical center's procedure and process in its operation, including, but not limited to, its procedure for sterilization of medical equipment, use or lack of use of certain chemicals for sterilization of its facility, [or] proper documentation of the surgeries conducted within its facility." Dr. Horowitz expressed the opinion that "[b]y failing to properly maintain such records, [Surgi World] may have contributed to the development of an unnecessary infection suffered by [Maria]." Finally, Dr. Horowitz stated that for a surgical center to "administer general anesthesia or use any controlled substance for induced sedation," the surgical center must have "appropriate accreditation"; that Surgi World "d[id] not have any credentials or certification to operate as a surgical center"; and that it was below the standard of care for a surgical center to operate without credentialing or certification.

The trial court granted the motion for summary judgment. In its order, the court explained: "[Appellants] allege that Surgi World's conduct fell below the standard of care because [it] failed to maintain proper records and failed to obtain informed consent as to procedures that were performed. See Declaration of Jed Horowitz, M.D. [¶] There are problems with Dr. Horowitz's Declaration. First of all, he fails to lay a sufficient foundation as to the record keeping issues. He is a practicing physician and not a medical administrator. Secondly, record keeping is not a 'medical treatment.' Thirdly, the operative [c]omplaint does not allege negligence based on inadequate record keeping or a lack of informed consent. Finally, the assertions regarding causation lack foundation and are speculative. Dr. Horowitz testifies that the failure to keep records regarding the facility's sterilization procedures 'may' have caused Maria's infection." Judgment was entered. This appeal followed.

DISCUSSION

A. *Service of Summary Judgment Moving Papers*

Initially, appellants contend the summary judgment motion should have been denied because it was not timely served.

1. *Background*

Surgi World's motion for summary judgment and the supporting documents were filed February 24, 2011. The proof of service for Surgi World's moving papers stated that the motion and supporting documents were personally served on Franky Chan, counsel for appellants, on February 25, 2011, at 4:40 p.m. The hearing on Surgi World's motion for summary judgment was set for May 12, 2011, 76 days from the date of alleged service.

In conjunction with appellant's opposition to the motion, Chan submitted a declaration stating that he was at his office until 4:52 p.m. on February 25, 2011 and that no one served any papers on him before he left that day. He further stated that no one had served any papers up to the time the last staff member left and the office closed shortly after 5:00. In addition, Chan obtained video taken from a security camera pointed at the front door of his office. It showed no one approaching the front door between 4:30 and 5:30 on February 25. Chan stated he learned of the filing of the summary judgment motion the following Monday, February 28, when he received a copy via email. Appellants timely filed their opposition approximately two months later, on May 2. Other than the proof of service signed by a registered process server, Surgi World presented no evidence to support the timeliness of service.

After hearing the evidence on service, the court ruled: "There is a rebuttable presumption in favor of personal service. Though [appellants] dispute this contention, the court finds service."

2. *Discussion*

Code of Civil Procedure section 437c provides that summary judgment motions and supporting papers "shall be served" at least 75 days before the time appointed for a hearing. (Code Civ. Proc., § 437c, subd. (a).) Failure to timely serve a summary judgment motion prior to the hearing constitutes sufficient ground for denying the motion. (See, e.g., *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 718-719; *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 636-637.) However, the statutorily mandated minimum notice period for summary judgment may be waived by the party for whose benefit it exists. (*Credit Suisse First Boston Mortgage Capital, LLC v. Danning, Gill, Diamond & Kollitz* (2009) 178 Cal.App.4th 1290, 1301.)

The trial court found that the motion and the supporting papers had been properly served as asserted in Surgi World's proof of service based on the presumption derived from Evidence Code section 647, which provides that the return of a registered process server "establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return." Appellants contend the presumption disappeared once they presented contrary evidence. (See *Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1428 [Evidence Code section 647 presumption affects the burden of producing evidence; once opponent produces evidence undermining it, the presumption is disregarded]; *Bonzer v. City of Huntington Park* (1993) 20 Cal.App.4th 1474, 1481 [upon presentation of credible evidence that document was never received, presumption of receipt from mailing "ceased to exist"].) However, even were we to conclude based on the evidence presented by appellants that service was defective, we would find no ground for reversal.

In order to obtain a reversal based on insufficient notice, "the appellant must demonstrate not only that the notice was defective, but that he or she was

prejudiced." (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1289, italics omitted.) "'Procedural defects which do not affect the substantial rights of the parties do not constitute reversible error. [Citation.]'" (*Id*. at p. 1289, quoting *Lever v. Garoogian* (1974) 41 Cal.App.3d 37, 40.) "'[A] party who appears and contests a motion in the court below cannot object on appeal or by seeking extraordinary relief in the appellate court that he [or she] had no notice of the motion or that the notice was insufficient or defective.'" (*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697, quoting *Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 930.) Appellants filed their opposition two months after receiving notice of the motion. While objecting to the timeliness of service, they fully addressed the merits of the motion. They sought neither a continuance of the hearing nor additional time to prepare their opposition. Neither in their papers nor at the hearing did appellants suggest they had been unable to marshal essential evidence to oppose the motion. In the face of a record demonstrating appellants had ample time to -- and did -- address respondent's motion on the merits, failed to seek a continuance, and failed to demonstrate any prejudice from the allegedly untimely service, we find no basis for reversal.

B. *Merits of Summary Judgment Motion*

Appellants contend the trial court erred in granting summary judgment because the expert declaration they presented in opposition to the summary judgment motion supported that Surgi World did not conform to the standard of care required of surgical centers.

1. *Standard of Review*

"Because the trial court's determination is one of law based upon the papers submitted, the appellate court must make its own independent determination

regarding the construction and effect of the supporting and opposing papers." (*Hernandez v. Modesto Portuguese Pentecost Assn*. (1995) 40 Cal.App.4th 1274, 1279.) "We begin by identifying the issues framed by the pleadings since it is these allegations to which the motion must respond. We then determine whether the moving party's showing has established facts which justify a judgment in movant's favor. . . . [T]he final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue." (*Ibid*.) In assessing a motion for summary judgment, we construe """"the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it.' [Citations.]"""" (*Department of Industrial Relations v. UI Video Stores, Inc*. (1997) 55 Cal.App.4th 1084, 1090.)

2. *Discussion*

The second amended complaint alleged that Maria was injured as the result of the negligent acts of the doctors in performing the surgery and closing the wound. Appellants further alleged that in caring for Maria after the surgeries, the doctors failed to disclose the cause of Maria's "pain, discomfort, fever, excessive bleeding and infection" or the "true state of [her] medical condition," which allegedly caused "unnecessary delay[s]" in Maria's postoperative treatment. The second amended complaint did not allege that Surgi World caused injury to Maria by any deficiency in its equipment or facilities. Surgi World's liability was premised solely on the acts of Dr. Burres and Dr. Anastasatos, who were alleged to be its agents and employees. Appellants did not allege that anyone else associated with Surgi World ever interacted with or provided care or treatment to Maria. Surgi World presented evidence that the two defendant doctors were not its agents

or employees, and appellants conceded this fact.[4] Accordingly, Surgi World was entitled to summary judgment on the second amended complaint.

On appeal, appellants contend that Dr. Horowitz's declaration established that Surgi World's actions fell below the standard of care for a surgical center in several respects, namely, in failing to obtain certification, in failing to keep records of its procedures and operations and in failing to provide pre-operative warnings with regard to anesthesia, with the result that Maria did not provide informed consent for the procedures.

Declarations filed in opposition to a defendant's motion for summary judgment "'may not create issues outside the pleadings'" and "'are not a substitute for an amendment to the pleadings.'" (*Willard v. Hagemeister* (1981) 121 Cal.App.3d 406, 414.) As the trial court noted, the second amended complaint did not state a claim based on lack of informed consent, improper certification or improper record keeping. Nor did it assert that Surgi World or any of its personnel failed to properly maintain or sterilize its equipment or facilities. Thus, Surgi World was not required to present evidence concerning these issues or to refute evidence presented by appellants in their opposition.

Moreover, to establish a claim for medical malpractice, the plaintiff must present evidence not only of the defendant's breach of a duty of care, but also of a causal connection between the negligent conduct and the injury to the plaintiff. (*Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1420.) Dr. Horowitz's declaration provided no connection between the failure to obtain certification or the failure to

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[4] We reject appellants' contention that "[w]ithout [an] expert declaration, Defendant Surgi World was legally incapable of sustaining its burden of proof on the issue of medical malpractice." Surgi World's motion for summary judgment was based on appellants' failure to demonstrate that it owed appellants a duty of care. To the extent respondents relied on Dr. Burres's declaration, it served primarily to establish that neither he nor Dr. Anastasatos was an agent of Surgi World -- a fact conceded by appellants.

provide pre-operative warnings regarding anesthesia and Maria's injuries; accordingly, it could not support that this alleged negligence caused any harm. (See *Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510 ["[A]n expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value . . . . [Citations.]"].) Dr. Horowitz speculated that the failure to keep records regarding sterilization procedures "may" have caused Maria's infection. As the trial court observed, however, speculation as to causation cannot support a medical malpractice claim. (See *Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 133 ["A plaintiff cannot recover damages based upon speculation or even a mere possibility that the wrongful conduct of the defendant caused the harm. [Citations.] Evidence of causation must rise to the level of a reasonable probability based upon competent testimony. [Citations.]"].) The motion for summary judgment was properly granted.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.