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IN THE ARBITRATION BETWEEN:

Claimant,
vs.
Respondents.

Arbitration No. 11836

**ORDER AND ARBITRATION AWARD
IN FAVOR OF RESPONDENTS
GRANTING MOTION FOR SUMMARY
JUDGMENT**

**DATE: December 12, 2013
VIA TELEPHONE CONFERENCE**

Arbitration date: January 14, 2014

I. INTRODUCTION

Claimant's counsel served a motion to continue hearing on summary judgment on December 10, 2013. Hearing on the motion for summary judgment was set for December 13, 2013. On the arbitrator's own motion, the hearing on the motion to continue summary judgment was continued one week, so that the respondents could serve opposition to the motion to continue hearing on summary judgment.

II. PROCEDURAL HISTORY

The motion for summary judgment was noticed for hearing on December 13, 2013. Notice of the hearing was served on September 26, 2013. Claimant's counsel did not serve opposition to the motion.

Rather, on December 10, 2013, claimant's counsel served a written request seeking a continuance of the summary judgment for 60 days, and also requested a continuance of the

1 arbitration of this matter 60 days.

2 **III. LEGAL ANALYSIS**

3 **A. Request for Continuance to Obtain Evidence**

4 Code of Civil Procedure section 437c(b) authorizes granting a continuance of summary
5 judgment motion if there is an evidentiary showing that facts essential to justify opposition may
6 exist but cannot, for reason stated, then be presented. Stated otherwise, the party moving for a
7 continuance of a hearing for a motion for summary judgment must submit an affidavit that shows
8 facts establishing a likelihood that controverting evidence may exist and why the information
9 sought is essential to opposing the motion. The party moving for a continuance must also present
10 specific reasons why the evidence cannot be obtained at the present time, as well as an estimate of
11 the time necessary to obtain such evidence. Code of Civil Procedure section 437c(b).

12 A continuance is not mandatory where the declaration fails to meet the requirements
13 identified above. *Lerma vs. County of Orange* (2004) 120 Cal.App.4th 709, 716.

14 Applied, claimant's counsel provided a three paragraph declaration. Paragraph 3 stated:

15 "I am informed and believe that facts essential to justify
16 opposition may exist, including, but not limited to, the declaration of
17 expert witnesses as to the actions of the treating medical providers
18 and their compliance with the applicable standard of care. These
19 facts essential to justify the opposition may exist, but as a result of
20 the failure to properly calendar the motion, cannot be properly
21 presented."

22 Claimant's declaration does not estimate the time necessary to obtain the evidence. The
23 declaration also does not set forth why claimant's counsel could not have obtained this evidence in
24 the one year period of time before respondents served the motion for summary judgment. The
25 declaration is conclusory, by only disclosing that there "may be facts essential to justify
26 opposition." What those facts are, however, are left to conjecture. Claimant only states those
27 facts include, but are not limited to, "a declaration of expert witnesses as to the actions of treating
28 medical providers and their compliance with the standard of care." Claimant's counsel fails to

1 indicate, however, the identity of the expert witnesses, let alone what facts those expert witnesses
2 may testify about that would sufficiently controvert the facts set forth in respondents' motion for
3 summary judgment.

4 Where a party's lack of diligence results in having insufficient information to know if facts
5 essential to justify opposition may exist, and the party is therefore required to provide the requisite
6 affidavit under Code of Civil Procedure section 437c(h), a request for continuance may be denied.
7 See, *Rodriguez vs. Oto* (2013) 212 Cal.App.4th 1020, 1038. Applied, claimant's counsel contends
8 inadvertence and mistake in not opposing the motion, however, claimant's counsel does not set
9 forth facts why claimant's counsel did not conduct discovery in the over one year period of time
10 before hearing on the motion for summary judgment was to be heard. This is particularly poignant
11 as the purpose of the declaration required by Code of Civil Procedure section 437c(h) is to inform
12 the court of outstanding discovery necessary to resist a summary judgment motion. To be entitled
13 to a continuance, the party opposing the motion for summary judgment must show that its
14 proposed discovery would have led to facts essential to justify opposition. *Scott v. Ciba Vision*
15 *Corp.* (1995) 38 Cal.App.4th 307, 325-326. Consequently, the request for a continuance on this
16 ground is denied.

17 B. Request for Continuance Because of Mistake

18 Claimant's counsel claims mistake and inadvertence because his "office staff" failed to
19 calendar the motion on either an electronic or hard copy of claimant's counsel's calendar.
20 Claimant's counsel did not inform the arbitrator when this mistake was appreciated, and does not
21 identify the specific facts of how the calendaring mistake occurred.

22 Statutorily, claimant relies upon Code of Civil Procedure section 473(b). That provision
23 relates to a party seeking relief from a judgment, order, or other action taken against him.
24 Specifically, Code of Civil Procedure section 473(b) provides, in pertinent part:

25 "The court may, upon any terms as may be just, relieve a party
26 or his or her legal representative from a judgment, dismissal, order,
27 or other proceeding taken against him or her through his or her
28 mistake, inadvertence, surprise, or excusable neglect."

1 Claimant's reliance upon Code of Civil Procedure section 473(b) is premature. Claimant
2 filed a motion to continue the hearing on summary judgment and to continue the arbitration
3 hearing. Claimant's counsel has not filed or served a motion to seek relief from an *order of*
4 *summary judgment* on the ground of a mistake, inadvertence, surprise or excusable neglect.
5 Claimant's counsel even admits at page 4 of his motion that Code of Civil Procedure section
6 473(b) is designed to provide relief *after summary judgment is granted*, based upon attorney's
7 mistake, inadvertence or neglect, as well as other means for relief.

8 Claimant's counsel's reliance upon this provision to continue the motion for summary
9 judgment and arbitration hearing is misplaced and premature.

10 C. Request to Continue Arbitration Hearing

11 Claimant's counsel served a demand for arbitration on September 24, 2012. Since that
12 date, however, claimant's counsel has conducted no discovery. Claimant's counsel contends that
13 if granted a postponement of the arbitration hearing, that he will then conduct discovery.

14 Rule 28(a) of the Arbitrations Administered by
15 , amended as of January 1, 2013, requires that a request for
16 postponement of an arbitration date set forth good cause. Rule 28(a) provides:

17 "Any postponement of the dates other than that set out in Rule 21,
18 shall be requested in writing from the Neutral Arbitrator . . . the
19 request shall set out good cause for the postponement and whether
20 the other Party agrees. Postponements, absent extraordinary
21 circumstances, shall not prevent the Arbitration Award from being
22 served within the time period specified in Rule 24. Failure of the
23 parties to prepare for a scheduled hearing or to keep the hearing
24 dates free from other commitments does not constitute extraordinary
25 circumstances."

26 Applied, claimant's counsel has not identified good cause to continue the hearing. Had
27 claimant's counsel diligently conducted discovery in the last 14 months, good cause may have
28 been established more persuasively. Continuing the arbitration, however, because of a calendaring

1 error in the office, when no discovery was conducted in the over one year period of time since the
2 Demand for Arbitration was served, does not constitute good cause. Claimant's counsel has had
3 over one year of time to conduct discovery to identify facts. Claimant served a demand for
4 arbitration on September 24, 2012. The motion for summary judgment was served on
5 September 26, 2013. In that approximate one year period of time, claimant's counsel failed to
6 conduct any discovery whatsoever. Consequently, good cause does not exist to continue or
7 postpone the arbitration hearing. The law does not reward delay. As stated by our Maxims of
8 Jurisprudence: "The law helps the vigilant, before those who sleep on their rights." (defined in
9 Civil Code section 3527).

10 **IV. ORDER**

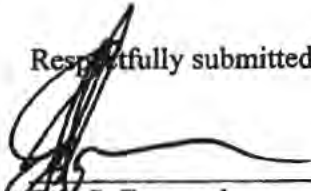
11 Based upon the foregoing, it is hereby ordered as follows:

- 12 1. Claimant's motion for a continuance of the hearing for summary judgment is
13 denied;
- 14 2. Claimant's request for a postponement of the arbitration hearing is denied; and
- 15 3. The motion for summary judgment is granted in favor of respondents. Arbitration
16 award is in favor of respondents. This is because there is no triable issue of material fact that
17
18 fell below the standard of care in relation to treatment to claimant

19
20 **NOTHING IN THIS ORDER PROHIBITS OR RESTRICTS THE ENROLLEE**
21 **FROM DISCUSSING OR REPORTING THE UNDERLYING FACTS, RESULTS, TERMS**
22 **AND CONDITIONS OF THIS SETTLEMENT AGREEMENT TO THE DEPARTMENT**
23 **OF MANAGED HEALTH CARE.**

24 IT IS SO ORDERED.

25 DATED: December 23, 2013

26
27 Respectfully submitted,

28 Eric S. Emanuels
Arbitrator

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(State Bar No.)
(State Bar No.)

Telephone:
Facsimile:

Attorneys for Respondents,
non-profit corporation; and
, a non-profit corporation

IN RE: THE ARBITRATION BETWEEN:

Claimant,
vs.
, a non-profit corporation; and
non-profit corporation, and
Respondents.

**[PROPOSED] ORDER GRANTING
MOTION FOR SUMMARY
JUDGMENT**

The Motion for Summary Judgment of Respondents,
, a non-profit corporation, and
, a non-profit corporation, came on for telephonic hearing on October 2, 2017,
, Esq., neutral arbitrator, presiding. , Esq. appeared on
behalf of Respondents, and no appearance was made by Claimant. After consideration of the
moving papers and file for this matter, and after hearing oral argument,

IT IS HEREBY ORDERED that the Motion is GRANTED.

Claimant, , claimed that Respondents committed medical
negligence in the care and treatment of his finger, which caused injury to him.

Respondents have presented evidence in the form of the expert testimony of


1 ; M.D. (hand surgeon), ; M.D. (emergency medicine) and
2 M.D. (cardiology), that Respondents' conduct did not breach the applicable standard of care and
3 did not cause the claimant injury. Claimant has not responded with expert testimony that
4 Respondents breached the standard of care or caused him injury, as he must in this action based
5 on medical malpractice. Landeros v. Flood (1976) 17 Cal.3d 399, 410, 131 Cal. Rptr. 69; Cobbs
6 v. Grant (1972) 8 Cal.3d 229, 236-237, 104 Cal. Rptr. 505; Huffman v. Lindquist (1951) 37 Cal.
7 2d 465, 473; 234 P.2d 34.

8 For that reason, Respondents have established that there is no triable issue of fact that
9 Respondents' complied with the standard of care in their treatment of Claimant, and, moreover,
10 anything that Respondents did or failed to do, did not cause Claimant injury. Respondents are
11 entitled to summary judgment.

12 Nothing in this decision prohibits or restricts the enrollee from discussing or
13 reporting the underlying facts, results, terms, and conditions of this decision to the
14 Department of Managed Health Care.

15 IT IS SO ORDERED

16 DATED: October 4, 2017.


ERIC S. EMANUELS, ESQ.
NEUTRAL ARBITRATOR

(State Bar No.)
(State Bar No.)

Telephone:
Facsimile:
E-mail:

Attorneys for Respondent(s), a
non-profit corporation; and a non-profit corporation

IN RE THE ARBITRATION BETWEEN:

Claimant(s),

NOTICE OF ENTRY OF ORDER

vs.

, a non-profit corporation; and
non-profit corporation, and
Respondent(s).

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 4, 2017, the neutral arbitrator, Eric S. Emanuels, entered an Order granting respondents',
, a non-profit corporation; and , a non-profit corporation's, Motion for Summary Judgment.

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NOTICE OF ENTRY OF ORDER

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An executed copy of said Order is attached hereto as Exhibit "A".

DATED: October 5, 2017.

By: _____

Attorney for Respondent(s),
a non-profit corporation; and
non-profit corporation