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Neutral Arbitrator

MEMBER ARBITRATION

Case No. 11835

Claimant,

vs.

Respondents.

_____/

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND JUDGMENT IN FAVOR OF RESPONDENTS

The motion for summary judgment brought by respondents , came on regularly for telephonic hearing on Tuesday, September 16, 2014 at 4:00 pm. Claimant was represented by , Esq. of , Attorneys at Law. Respondents were represented by , Esq. of A tentative ruling as to the

motion was verbally given at the time of the hearing. A further tentative ruling as to the motion was given via correspondence to counsel on September 19, 2014. Whether or not the statute of limitation had barred the claim of was a major issue presented in the motion. The factual questions presented as to this issue in the motion were very close and my tentative ruling was to deny that portion of the motion. Therefore, I decided to bifurcate the forthcoming arbitration and limit the arbitration solely to the issue of the statute of limitation. When drafting my formal order to cover the tentative rulings, I revisited the respondents' motion as to the statute of limitation defense and the claimant's opposition to whether or not her claim was time barred. The review of the statute of limitation issue and the drafting of the formal order caused me to reach the opinion that the claim of was not filed timely.

The statute of limitation issue in this case is a complicated issue. The medical malpractice statute of limitation found in CCP 340.5 requires suit to be filed within three years after the date of the injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. "Injury" is basically defined as an injury and one being aware that malpractice/negligence may have occurred causing the injury. See Sanchez v. South Hoover Hospital (1976) 18 Cal.3d 93, at 99. In this case, death occurred on October 15, 2009. The plaintiff allegedly read the pertinent records on November 28, 2010. If so, the one year statute would run on November 28, 2011. Notice of the impending

malpractice action was given on September 27, 2011. This notice extended the one year statute by 90 days until February 28, 2012. Suit was filed on February 9, 2012 which arguably was timely.

The statute of limitation defense was first raised by respondents in this arbitration in a demurrer to the original complaint. I overruled the demurrer on the ground that the complaint on its face did not raise sufficient facts to show that should have been placed on a reasonable inquiry. I further noted that the issue of whether a statute had run in this case was a question of fact, as noted by Cleveland v. Internet Specialties West, Inc. (2009) 171 Cal. App.4th 24, at 31, and cases cited therein. The factual issue as to whether the statute had run was fully presented in the motion and the opposition to the motion.

The statute of limitation issue in this case has two facets which are intertwined. The first is whether or not reasonably should have discovered the cause of action for malpractice sooner than she did. The second is whether Bellah v. Greenson (1978) 81 Cal. App.3d 614 controls under the facts of this case. The heart rending portion of this case is that is the mother of the decedent and clearly spent substantial time and effort to obtain the records. 's declaration in opposition to the motion outlines her attempts to obtain the records, see Paragraphs 14 through 24. The time period covered by those attempts is November 24, 2009 through December 18, 2010.

's declaration in Paragraph 28 reads as follows:

> 28. Since I was just putting the pieces together of 's last days on Earth, I was not concerned with a statute of limitation. . . .

The declaration of further indicates that her son was a patient and

outlines in detail the mental and psychiatric issues that her son faced:

1. Bipolar disorder
2. Depression
3. Attempted suicide in 2005 resulting in a 5051 hold and inpatient treatment.
4. A conservatorship granted apparently to Santa Clara County.
5. An anger episode in 2006 which resulted in another 5051 hold and inpatient treatment.
6. In 2008 a visit to a Chemical Dependency Recovery Program (not accepted).

The arbitrator has previously commented upon Jolly v. Eli Lilly & Co. (1988) 44 Cal.3d 1103 and Norgart v. Upjohn Co. (1999) 21 Cal.4th 383 which hold that the statute begins to run when a reasonable person suspects, or should suspect, or otherwise be put on inquiry to investigate that malpractice may have occurred. The detailed declaration of indicates an overriding concern to obtain the medical records, a full understanding of the psychiatric issues that her son faced and a lack of concern regarding the medical malpractice statute of limitation.

Ms. , while acting in propria persona is held to the same standard as a licensed attorney in the State of California. See Nelson v. Gaunt (1981) 125 Cal.App.3rd 623. While I make no comment upon respondents' apparent delay in providing records, the delay itself should have raised a reasonable concern or a strong suspicion relative to the running of the statute of

limitations. Both Bellah, supra, and Sanchez v. South Hoover Hospital (1976) 18 Cal.3d 93, at 100, hold that in the appropriate factual situation, if necessary, suit should be filed to obtain the necessary records. I think that this case falls within the holding of Bellah and Sanchez.

One might ask, when was put on notice? There is no specific date that can be selected. However, during the increasing time span following November 24, 2009 without obtaining the records, the reasonable suspicion should have become critical and steps taken to obtain the records by filing suit with appropriate rights of discovery. In the opinion of the arbitrator, Claimant waited too long to file suit.

From Jolly, at 1112, we find the following:

> The fundamental purpose of the statute [of limitations] is to give defendants reasonable repose, that is, to protect parties from defending stale claims. A second policy underlying the statute is to require plaintiffs to diligently pursue their claims.

Based upon the factual record presented to me, I find that a reasonable person would have been put on notice to investigate that malpractice may have occurred. And, pursuant to Bellah, and Sanchez, filed suit to obtain the appropriate medical records. Her claim, and that of the Estate, is time barred.

IT IS HEREBY ORDERED that Summary Judgment is granted in favor of respondents

, D. O. and , LCSW,

IT IS FURTHER ORDERED that judgment is entered in favor of the above respondents and that

claimant shall recover nothing.

LAST, IT IS NOTED that nothing in the arbitration decision prohibits or restricts the enrollee from discussing or reporting the underlying facts, results, terms and conditions of this decision to the Department of Managed Health Care.

Dated: 9/29/14

Garry L. D. Hubert
Neutral Arbitrator

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Neutral Arbitrator

MEMBER ARBITRATION

Case No. 14162

Claimant,

vs.

AND

Respondents.
_____/

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND JUDGMENT IN FAVOR OF RESPONDENTS

The motion for summary judgment brought by respondents,

and came on regularly for telephonic hearing on Thursday, June 15, 2017 at 10:00 a. m. before the undersigned.

Respondents and moving parties were represented by , Esq. of

. Claimant was present and was representing himself. The matter was argued and submitted.

There are several points that the neutral arbitrator wishes the record to reflect. First, the claimant has been representing himself, *in propria persona,* throughout this arbitration proceeding. As such, he is held to the same standard as a licensed attorney in the State of California. See Nelson v. Gaunt (1981) 125 Cal.App.3rd 623. Claimant has stated that while he sought to retain counsel on several occasions, he was unsuccessful in this regard. Second, communications from the claimant have been through emails and telephone conferences. It is apparent that English is not the claimant's mother tongue. Unfortunately, claimant's ability to communicate is very poor. On multiple occasions, claimant had an inability to respond appropriately to direct questions. Last, claimant made comments during the course of the arbitration that a court had found him incompetent. The claimant gave no further information as to which court, the type of proceeding or whether an applicable court order had been issued. These comments lead the arbitrator to research the issue of capacity to sue. Research indicated that the capacity to sue, or be sued, as contrasted to the standing to sue, is not jurisdictional and can be waived. Claimant was so advised and recommended that the claimant may need to retain an attorney and a *guardian ad litem*. The undersigned made no decision as to whether the claimant was or was not competent to proceed with his claim against respondents. In any event, the claimant did not retain counsel or a *guardian ad litem* to assist him in the prosecution of this action.

The main issue in this case is whether the respondents failed to meet the appropriate standard of care when treating the claimant and, if so, did the failure cause damage to the claimant? The

medical history presented in the motion for summary judgment indicated that after returning from Taiwan, the claimant presented himself to a facility on January 9, 2015 claiming a headache of 5 – 6 days duration. A CT scan revealed a 23 mm Vertebral Artery aneurysmal growth. Following this scan, a CT Angiography was ordered which demonstrated either a large thrombosed pseudoaneurysm, or a meningioma or a focal localized hemorrhage. It was recommended that a MRI be obtained to assist a diagnosis. The claimant was transferred to another facility's intensive care unit in the early morning hours of January 10, 2015. Later that day, claimant began refusing medical treatment and left the facility against medical advice. The medical record indicates multiple attempts made by personnel to have the claimant to return to for treatment. They were unsuccessful in convincing claimant to return.

The motion filed by respondents contained a declaration by , M. D. The declaration of Dr. outlines his education, training, experience, qualifications and practice so as to qualify him as an expert in the field of diagnostic and interventional neuroradiology and the treatment of aneurysms. The declaration was specific as to facts upon which Dr. relied upon to reach his opinion as to the applicable standard of care. It was Dr. 's opinion that, after reviewing the medical records, did not violate the standard of care in treating the claimant nor did cause the claimant to experience any harm. It is well recognized that in medical malpractice cases, expert testimony is required to establish the elements of a plaintiff's case. See *Landeros v. Flood* (1976) 17 Cal.3d 399. When a defendant makes a motion for summary judgment and supports his motion with an expert declaration regarding the applicable standard of care, the defendant is entitled to a summary judgment unless

the plaintiff, through the use of an expert's declaration, creates a question of fact. See *Munro v. Regents of the University of California* (1989) 215 Cal.App.3d 977. Claimant has not filed an expert's declaration opposing respondents' motion. The lack of opposition requires the granting of the motion. The arbitrator is aware of the difficulty faced by a claimant acting *in propria person,* but the claimant is bound by established procedural and evidentiary rules in California. The motion is granted.

IT IS HEREBY ORDERED that summary judgment is granted in favor of respondents

and the

as claimant did not raise a triable issue of fact so as to defeat the instant motion.

IT IS FURTHER ORDERED that judgment is entered in favor of respondents

and and that

shall recover nothing.

Last, it is noted that nothing in this arbitration decision prohibits or restricts the enrollee from discussing or reporting the underlying facts, results, terms and conditions to the California Department of Managed Health Care.

Neutral Arbitrator

Date 6/16/17

Garry J. D. Hubert, Esq.