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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

GEORGE NUNES et al.,

Plaintiffs and Appellants,

v.

THE HOSPITAL COMMITTEE FOR
LIVERMORE-PLEASANTON AREAS,

Defendant and Respondent.

A131060

(Alameda County
Super. Ct. No. RG09440098)

Plaintiffs George Nunes and his son Travis Nunes filed a putative class action against defendant The Hospital Committee for Livermore-Pleasanton Areas, based on its alleged practice of billing uninsured patients its full standardized rates for services. Such actions have been deployed in numerous courts –almost universally without success. (See, e.g., *Kolari v. New York–Presbyterian Hospital* (S.D.N.Y. 2005) 382 F.Supp.2d 562, 565–566 [vacated in part on jurisdiction grounds in *Kolari v. New York–Presbyterian Hospital* (2d Cir. 2006) 455 F.3d 118]. See also *Grant v. Trinity Health–Michigan* (E.D. Mich. 2005) 390 F.Supp.2d 643, 647, fn. 6 [listing 28 other cases in various federal districts where defendant hospitals obtained dismissals in suits presented by uninsured and/or indigent patients].) Here, plaintiffs appeal from a summary judgment, and also contend certain sealed records should be unsealed. After independently examining the record, we find no triable issues of material fact and affirm the judgment and the ruling regarding the sealed records.

FACTUAL BACKGROUND

On November 1, 2007, Travis received medical services at defendant's medical facility.¹ He was not covered by health insurance at this time. Upon admission, he received and signed a Financial Assistance Notice (FAN), which states: "Financial assistance is available to low income uninsured or under insured patients at ValleyCare Health System. Please call 925-373-8057 to request an application for charity care to determine if you may qualify for financial assistance for services provided here. Thank you." He also received and signed a Conditions of Admission form (COA), which states in part: "The undersigned agrees . . . to pay the account of the hospital in accordance with the regular rates and terms of the hospital, including its financial assistance policies." Notices informing patients of the availability of financial assistance were posted in the emergency department and registration areas of the hospital. Subsequently, Travis was billed \$609.45 for the medical services he received. He did not apply for financial assistance. George voluntarily paid the bill for Travis. Later, Travis repaid his father for the amount of the bill.

On June 18–19, 2008, Travis again received medical care at defendant's facility. He was later billed \$5,992 for this visit. This time, he did apply for financial assistance. Defendant's employees requested additional information from him in connection with his financial assistance application. After the information was provided, he was given 100 percent financial assistance and he was released from any obligation to pay the \$5,992 bill for medical treatment he received. It is undisputed that his financial circumstances were the same at the time of his November 1, 2007 visit as they were for the later visit—he was unemployed, uninsured, and could not afford to pay when billed.

II. Procedural History

On September 11, 2009, plaintiffs, for themselves and on behalf of those similarly situated, filed a first amended complaint (FAC) against defendant.² The FAC alleges

¹ We refer to the plaintiffs by their first names to avoid confusion.

² Along with defendant, the FAC names Valley Healthcare System, Valleycare Medical Center, and Valleycare Medical Services as defendants.

defendant charges unfair, unreasonable, and inflated prices for medical care to its uninsured patients. Defendant allegedly maintains documents called “chargemasters,” which are spreadsheets that list the gross price for each product and service provided. Defendant represents to its uninsured patients that the gross price is its “regular rate,” when in fact the rates are the starting point for negotiations with health insurance providers who negotiate reduced rates. Additionally, while defendant maintains that it has charitable policies, it fails to disclose that its financial assistance program merely offers reductions from already inflated chargemaster prices. The FAC states five causes of action: breach of contract, breach of implied covenant of good faith and fair dealing, declaratory and injunctive relief, unfair business practices under the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.), and violation of the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.).

On May 13, 2010, defendant filed its motion for summary judgment. In connection with their opposition to this motion, plaintiffs filed defendant’s supplemental responses to a set of special interrogatories conditionally under seal.

On August 3, 2010, the trial court filed its order granting defendant’s motion for summary judgment.

On August 31, 2010, defendant filed a motion to maintain seal in connection with the documents submitted with plaintiffs’ opposition to the motion for summary judgment.

On October 7, 2010, the trial court granted defendant’s motion to maintain seal.

On December 15, 2010, judgment was entered in favor of defendant. This appeal followed.

DISCUSSION

I. Standard of Review for Summary Judgment

The standard of review for summary judgment is well established. The motion “shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) “We independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving

party.” (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1196; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) In performing our independent review of the evidence, “we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue.” (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.) Where “the facts are undisputed, the issue is one of law and the ‘appellate court is free to draw its own conclusions of law from the undisputed facts.’ [Citations.]” (*Suburban Motors, Inc. v. State Farm Mut. Auto. Ins. Co.* (1990) 218 Cal.App.3d 1354, 1359.)

II. Whether Plaintiffs Have Standing

The trial court concluded plaintiffs do not have standing to assert the claims stated in the FAC. We agree that summary judgment was properly granted on that basis as to George with respect to all causes of action. As to Travis, we conclude there are no triable issues of material fact and judgment was properly entered in favor of defendant.

A. Legal Principles

It is elemental that a named plaintiff generally must have standing to prosecute an action. (Code Civ. Proc, § 367 [“Every action must be prosecuted in the name of the real party in interest, except as [otherwise] provided [by statute].”].) “ ‘A real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law.’ [Citation.]” (*Redevelopment Agency of San Diego v. San Diego Gas & Electric Co.* (2003) 111 Cal.App.4th 912, 920–921.) Stated otherwise, “The existence of standing generally requires that the plaintiff be able to allege injury, i.e., an invasion of his legally protected interests.” (*Surrey v. TrueBeginnings, LLC* (2008) 168 Cal.App.4th 414, 417 (*Surrey*)). “The real party in interest has ‘ ‘an actual and substantial interest in the subject matter of the action,’ and stands to be “benefited or injured” by a judgment in the action.’ [Citation.]” (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 54–55.)

“The prerequisites for standing to assert statutorily based causes of action are to be determined from the statutory language, as well as the underlying legislative intent and the purpose of the statute.” (*Surrey, supra*, 168 Cal.App.4th 414, 417–418, citing *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1385–1386.) “Standing requirements will vary from statute to statute based upon the intent of the Legislature and the purpose for which the particular statute was enacted.” (*Midpeninsula, supra*, at p. 1385.)

Standing is a threshold legal matter to be decided by the court. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 103.) Because it is a fundamental threshold issue, allegations supporting standing “should be direct and unequivocal and not inferential” (*Kline Hawkes California SBIC v. Superior Court* (2004) 117 Cal.App.4th 183, 194), and standing may be challenged at any time, even, in the first instance, on appeal. (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1345.)

B. George Does Not Have Standing

The trial court concluded George lacks standing to pursue any of the claims alleged in the action against defendant stemming from Travis’s November 2007 visit. The court noted there was no contractual relationship between George and defendant. George stated in his declaration that he voluntarily loaned Travis the money to pay the bill, not because he was obligated to pay, but because he did not want Travis’s credit rating to be negatively affected. It is also undisputed that George was insured and never qualified or applied for financial assistance from defendant for the entire duration of the proposed class period. Additionally, the complaint does not raise any issue as to medical services sought or acquired from defendant by George. The suit is only addressed at medical services Travis received on November 1, 2007. Accordingly, as George cannot allege that he suffered any injury as a result of the acts complained of, he has no standing to pursue the instant lawsuit.

C. Travis Has Standing To Raise Contract Claims

As to the contract-based claims, it is undisputed that Travis is a party to the agreement with defendant regarding the medical services that he received. Accordingly,

he has standing to bring those claims. We will address standing with respect to his statutory claims below.

III. Summary Judgment in Favor of Defendant is Proper

We conclude the trial court properly granted summary judgment with respect to Travis's claims in the FAC. We address each claim in turn.

A. Breach of Contract

To establish his claim for breach of contract, Travis had to prove the existence of a contract, his performance or excuse for nonperformance, breach by defendant, and resultant damages. (See, e.g., *First Commercial Mortgage Co. v. Reece* (2001) 89 Cal.App.4th 731, 745; *McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 104.) A breach is an unjustified failure or refusal to perform a contractual obligation. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277; *Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 514 & fn. 3.) The facts show no breach occurred here.

The FAC asserts defendant breached the agreement with Travis by charging him “the highest and full undiscounted cost of medical care and/or charging [him] significantly more than insured and otherwise covered patients for the same medical services” even though it promised to charge “its regular rate for healthcare services and/or in accord with its financial assistance policies.” The FAC also claims defendant breached the contract by “failing to fulfill its promise to reasonably apply its financial assistance policies in accord with the agreement” and by “charging charity qualifying patients who did not sufficiently apply its full and inflated chargemaster or list prices.”

Travis contends that defendant's “regular rate” was “neither regular nor reasonable.” In support of this assertion, he cites to defendant's supplemental responses to a set of special interrogatories (the responses were designated as “confidential” and hence presented under seal). The responses indicate that commercial insurance companies receive substantial percentage discounts off chargemaster rates for the same type of emergency room services that Travis received. Travis claims chargemaster rates are thus not “regular” because only uninsured patients are required to pay them. We note

the language of the COA explicitly states that defendant's "regular rate" is *not* based solely on the chagemaster amount because the rate *includes* its financial assistance policies.

Travis asserts the COA's language regarding financial assistance is not dispositive, reasoning that "[i]t is simply unlikely that any person in the circumstance of appearing at a hospital and reading this language would have any idea . . . that a rate many times the regular rate would be charged if an uninsured patient did not apply and obtain financial assistance." The trial court disagreed, finding the phrase "including its financial assistance policies" to be critical to the understanding of the COA's reference to "regular rates," and distinguishing this case from *Hale v. Sharp Healthcare* (2010) 183 Cal.App.4th 1373 and *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350 (*Durell*), two cases in which the relevant billing documents made no reference to financial assistance. (*Hale*, at pp. 1377–1378; *Durell*, at p. 1356.)

We agree with the trial court that defendant's financial assistance policies are highly relevant to Travis's claims, as demonstrated by the events surrounding his second hospitalization. As noted above, after he applied for financial assistance defendant relieved him of the entire \$5,992 that he had been charged. It is also undisputed that his financial situation in November 2007 was the same as when his bill was forgiven. Thus, it is highly probable he would have received a substantial discount had he applied for assistance in connection with the earlier charges. The undisputed facts establish that Travis never applied to defendant for financial assistance in connection with the November 2007 emergency room visit. As he voluntarily failed to avail himself of those policies he cannot now prove defendant breached a contractual duty to bill at less than the chagemaster rate. Nor can he show that defendant failed to properly apply its financial assistance policies.

B. Breach of Duty of Good Faith and Fair Dealing

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. [Citation.] The covenant

thus cannot “be endowed with an existence independent of its contractual underpinnings.” [Citations.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349–350.) The “covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party’s rights to the benefits of the agreement.” (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36.)

We have already concluded, based on the undisputed facts, that Travis cannot prove a cause of action for breach of contract. Importantly, there is nothing to suggest defendant did anything to frustrate or interfere with Travis’s ability to have applied for financial assistance in connection with the November 2007 hospital visit. Further, the evidence indicates that he likely would have received such assistance had he asked for it, as he did receive substantial assistance in connection with his second hospitalization. Summary judgment was properly granted in favor of defendant with respect to this cause of action.

C. Unfair Business Practices Under The UCL

The FAC alleges defendant violated the UCL by charging uninsured patients higher rates than those it charges insured patients, and by failing “to reasonably allow qualifying patients to understand and avail themselves of [the financial assistance] policies.” Under the UCL, an act or practice is deemed “unfair competition” if it is “ “forbidden by law or, even if not specifically prohibited by law, is deemed an unfair act or practice. . . .” ’ ” (*Troyk v. Farmers Group, Inc., supra*, 171 Cal.App.4th 1305, 1335, quoting *Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1479–1480.) We agree with defendant that Travis lacks standing to raise this claim because he cannot prove causation.

“ ‘The purpose of a standing requirement is to ensure that the courts will decide only actual controversies between parties with a sufficient interest in the subject matter of the dispute to press their case with vigor.’ [Citation.] In 2004, the electorate substantially revised the UCL’s standing requirement; where once private suits could be

brought by ‘any person acting for the interests of itself, its members or the general public’ [citation], now private standing is limited to any ‘person who has suffered injury in fact and has lost money or property’ *as a result of* unfair competition [citations].” (*Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 788, italics added.) “Proposition 64 requires that a plaintiff’s economic injury come ‘as a result of’ the unfair competition or a violation of the false advertising law. [Citations.] ‘The phrase “as a result of” in its plain and ordinary sense means “caused by” and requires a showing of a causal connection or reliance on the alleged misrepresentation.’ [Citations.] ” (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 326.) While Travis did use defendant’s services, the undisputed facts show defendant did not unfairly cause him to suffer injury or lose money.

In *Durell*, an uninsured patient filed a putative class action against a health care provider, based on its practice of billing uninsured patients its full standardized rates for services. The plaintiff’s second amended complaint alleged violation of the UCL, violation of the CLRA, unjust enrichment, breach of contract, breach of the implied covenant of good faith and fair dealing, and the Unruh Civil Rights Act. (183 Cal.App.4th 1350, 1356, & fn. 2.) The trial court sustained the provider’s demurrer without leave to amend and entered a judgment of dismissal. The court of appeal affirmed the judgment, finding, as to the statutory claims, that the plaintiff lacked standing because he failed to allege causation. (*Id.* at pp. 1362–1363, 1367.)

The appellate court held that to have standing to bring a claim under the “unlawful” prong of the UCL, in which the predicate unlawful conduct is based on misrepresentations, actual reliance is an element of the claim. (*Durell, supra*, 183 Cal.App.4th 1350, 1363, citing to *In re Tobacco Cases II* (2009) 46 Cal.4th 298, 325.) The complaint did not allege the patient relied on the provider’s representations in going to the provider’s hospital or in seeking or accepting services once he was transported there. (*Durell, supra*, at p. 1363.) As to the “unfair” prong, the complaint did not allege the provider’s conduct was tethered to any underlying constitutional, statutory, or

regulatory provision, or that it threatened an incipient violation of the antitrust law, or violated the policy or spirit of an antitrust law. (*Id.* at p. 1366.)

In the companion case of *Hale*, the appellate court upheld the order overruling the defendant's demurrer, finding the plaintiff had adequately pleaded actual reliance for purposes of the UCL and CLRA. (*Hale, supra*, 183 Cal.App.4th 1373, 1386–1387.) In that case, the plaintiff patient had signed an admission agreement obligating her to pay the hospital's regular rates. Her complaint alleged misrepresentation, claiming that instead of the regular rates she had expected to pay, she was charged grossly excessive rates because of her uninsured status. (*Id.* at p. 1378.) The appellate court noted that because no statutes either permitted disparate rates or disallowed actions challenging them, a UCL action was not barred. (*Id.* at pp. 1379–1380.) The plaintiff consumer was required to plead actual reliance in order to pursue her claim of unlawful misrepresentation, and she adequately did so by alleging that she had expected to pay regular rates when she signed the contract. (*Id.* at pp. 1385–1386.)

Here, Travis did not rely to his detriment on any alleged misrepresentation by defendant or on any violation of any statute or regulatory provision. As to reliance, he received the COA, the FAN, and a bill for his November hospital visit. The bill itself was a two-sided document, with financial assistance information on the second side. He signed the COA and the FAN, and was supplied with a telephone number to call for further information. Unlike the case in *Hale*, defendant explicitly stated that its regular rate includes the potential for reduction by the provision of financial assistance. Thus, there is no evidence defendant misrepresented the manner in which its patients are to be billed.³

Travis contends defendant failed to disclose the “effect” of failing to apply for financial assistance and that this is in itself an unfair business practice. Defendant's

³ On appeal, Travis asserts that “circumstances may provide for a presumption or inference of reliance.” In the context of this summary judgment motion, there is no need to indulge in presumptions or inferences. The facts demonstrate that defendant's rates include the provision of financial aid and that Travis's failure to apply for such aid was not caused by any conduct on the part of defendant.

statutory obligation is to advise the patient that he or she has the option to receive financial assistance. (Health & Saf. Code, § 127410, subd. (a).) When a party complies with a statutory obligation or “safe harbor” it is complying with the law and a plaintiff may not use the UCL against such a party. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182–183.) Because the COA complies with the relevant statute, it cannot be deemed unconscionable. Significantly, both the policy itself and the notice of the policy were the same during both of Travis’s hospitalizations. He applied for assistance, as directed, the second time and received a 100 percent discount. In sum, defendant was not responsible for Travis’s payment outcome. Summary judgment as to the UCL claim was therefore properly granted.

D. Consumer Legal Remedies Act

Civil Code section 1780, subdivision (a) provides: “Any consumer who suffers any damage *as a result of* the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person to recover or obtain any of the following: [listing generic types of recoveries].” (Italics added.) “[T]he analysis of the phrase ‘as a result’ found in *Tobacco II, supra*, 46 Cal.4th 298, 324–326, [can be applied] to this phrase in Civil Code section 1780, subdivision (a), which means that reliance is required for CLRA actions, with the limitations noted in *Tobacco II.*” (*Princess Cruise Lines, Ltd. v. Superior Court* (2009) 179 Cal.App.4th 36, 46.)

Plaintiffs’ CLRA claim suffers from the same errors as his UCL claim. Only consumers who suffer damages as a result of a defendant’s alleged wrongful conduct can prevail on a CLRA cause of action. (Civ. Code, 1780, subd. (a); *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 641 (*Meyer*).) Claimants must prove that reliance on a defendant’s deception caused the harm. (*Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292.) Here, Travis’s problem arose solely because he failed to avail himself of the opportunity to apply for financial assistance. It cannot be said that defendant’s conduct triggered this state of affairs. (See *Durell, supra*,

183 Cal.App.4th 1350, 1367.) The trial court did not err in granting summary judgment on this claim to defendant.

E. Declaratory and Injunctive Relief

Travis contends he has standing to maintain his cause of action for declaratory and injunctive relief under Code of Civil Procedure section 1060. We disagree.

“Code of Civil Procedure section 1060, which provides that a court ‘*may* make a binding declaration’ (italics added) of a litigant’s rights or duties, must be read together with section 1061, which states: ‘The court may refuse to [grant declaratory relief] in any case where its declaration or determination is not necessary or proper at the time under all the circumstances.’ [Citation.] ‘The trial court’s decision to entertain an action for declaratory relief is reviewable for abuse of discretion. [Citation.]’ [Citation.] This discretion is not boundless: ‘Where . . . a case is properly before the trial court, under a complaint which is legally sufficient and sets forth facts and circumstances showing that a declaratory adjudication is entirely appropriate, the trial court may not properly refuse to assume jurisdiction’ [Citation.]” (*Meyer, supra*, 45 Cal.4th 634, 647.)

Travis’s claims rest entirely on the allegations asserted in the FAC. As defendant’s summary judgment motion was properly granted in favor of defendant with respect to all of Travis’s substantive claims, the trial court did not abuse its discretion in denying declaratory and injunctive relief.

IV. Decision to Preclude Discovery to Locate Alternative Class Representatives

The trial court did not allow Travis to pursue discovery to locate a superior class representative. Our review of discovery rulings is assessed under the abuse of discretion standard. (*Parris v. Superior Court* (2003) 109 Cal.App.4th 285, 301.)

We conclude the trial court did not abuse its discretion. Attorneys are not permitted to make an end-run around the requirement of Proposition 64 by filing class actions in the name of one plaintiff and then using precertification discovery to find a better class representative. (*First American Title Ins. Co. v. Superior Court* (2007) 146 Cal.App.4th 1564, 1577.) In fact, the filing of a class action under conditions in which a plaintiff cannot satisfy standing in good faith may be deemed “an abuse of the class

action procedure.” (*Safeco Ins. Co. of America v. Superior Court* (2009) 173 Cal.App.4th 814, 833.) To the trial court, it appeared clear that Travis did not satisfy standing obligations when he filed his complaint and was thus legally inadequate from the outset. We also observe that, insofar as defendant’s practices regarding financial assistance comply with both statutory obligations and professional health care standards, there may not be any other plaintiffs available to represent the proposed class.

V. Decision to Seal the Record

Travis challenges the trial court’s decision to seal a portion of the record including defendant’s supplemental discovery responses. It ordered sealed the direct costs of treatment for Travis’s care in 2007, along with the discount rates for the same class of treatment for defendant’s 10 largest commercial insurance payers and Medicare and Medi-Cal. (See *NBC Subsidiary (KNBC-TV) v. Superior Court* (1999) 20 Cal.4th 1178, 1222, fn. 46; Cal. Rules of Court, rule 2.550(d).) Appellate review assesses this decision by abuse of discretion standards. (*McGuan v. Endovascular Technologies, Inc.* (2010) 182 Cal.App.4th 974, 988.)

By separate order, we have denied plaintiffs’ motion to unseal the record on appeal. As a practice, defendant derives economic value from the discount rates and payment formula not being publicly available. If made public, these insurance providers could benefit from the information by using it to challenge their current rates for better ones. Also, competitors of defendant could use this information to lure the third parties away from defendant. The discount rates are analogous to intellectual property, and have been cultivated in the long term by defendant and applied to its projections for long-term business goals. Obviously, hospitals compete with one another, and their rates have commercial value. (See *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1455; *Courtesy Temporary Service, Inc. v. Camacho* (1990) 222 Cal.App.3d 1278, 1288.)

DISPOSITION

The judgment and the order granting defendant's motion to seal records are affirmed.

Dondero, J.

We concur:

Marchiano, P. J.

Banke, J.