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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PAUL AARON LOTT,
Plaintiff and Appellant,

v.

EDEN MEDICAL CENTER et al.,
Defendants and Respondents.

A140091

(Alameda County Super. Ct.
No. RG12640770)

Plaintiff and appellant Paul Aaron Lott (appellant) appeals from the trial court’s grant of summary judgment to defendants and respondents Sutter Health (Sutter), Eden Medical Center (Eden), and HealthPort Technologies LLC (HealthPort) (collectively, respondents). The trial court rejected appellant’s claim that respondents violated Evidence Code section 1158 (Section 1158) by exceeding the statute’s limits on charges for copying patient medical records requested by an attorney. We affirm.

BACKGROUND

In July 2011, appellant received treatment at Eden for injuries he sustained in a bicycle accident. He retained the law firm Andrus Anderson LLP (Andrus) to evaluate whether to file a personal injury action based on the accident.

Andrus sent Eden a facsimile requesting that copies of appellant’s patient records be sent to Andrus’s San Francisco office; Andrus included an authorization signed by appellant. Andrus asked, “Please send to the above-listed address all records . . . as well as a Custodian of Records declaration and the Private Health Information disclosure log, for Paul Aaron Lott, your patient, our client, for services rendered from June 1, 2011 to

present. . . . Please advise our office of the cost of production of records and a check will be forwarded promptly.”

Eden provided appellant’s patient records to HealthPort personnel located on-site at Eden under the terms of a contract between Sutter and HealthPort’s predecessor, Chart One. HealthPort sent an electronic copy of the records to its office in Georgia. HealthPort then mailed two documents to Andrus: (1) an invoice for copies of appellant’s records, totaling \$87.09; and (2) a “California Agent Fee Information” sheet.

The invoice stated, “Your request for copies of medical records has been processed . . . PLEASE SEE ATTACHED AGENT FEE INFORMATION SHEET FOR DETAILS . . . Payment implies that you agreed to employ HealthPort as your professional photocopy representative for purposes of this request and that you accepted the charge denoted below on this invoice.” The invoice indicated the \$87.09 total included a \$30 basic fee, a \$15 retrieval fee, \$27.25 for 109 copies at \$0.25 per page, \$8.70 for shipping, and \$6.14 for sales tax.

HealthPort’s “Agent Fee Information” sheet quoted from Section 1158 and stated, “The rates that HealthPort is charging do not fall under §1158.” The sheet indicated Andrus could pay the invoice through an online registration process or, “As another option, you may pay for this specific request by following the directions on your invoice. By doing so, you are agreeing to assign HealthPort as your agent of record for this particular request only. Upon receipt of full payment, HealthPort will release your requested records and you will receive them shortly thereafter.”

Andrus sent HealthPort a check in the full invoice amount. Appellant eventually reimbursed Andrus. In October 2011, Andrus received copies of appellant’s patient records from HealthPort, along with a second invoice showing no amount owing.

In July 2012, appellant filed the present lawsuit, on behalf of himself and others similarly situated, alleging causes of action against respondents for violations of Section 1158 and section 17200 of the Business & Professions Code. In May 2013, respondents moved for summary judgment, or in the alternative summary adjudication.

In July 2013, the trial court granted the motion, concluding Andrus’s request for copies of appellant’s records was outside the scope of Section 1158, Andrus’s payment of the HealthPort invoice created an agency relationship to which the cost limitations of Section 1158 did not apply, and Andrus’s payment of the invoice constituted waiver of the cost limitations in Section 1158. The trial court entered judgment in favor of respondents, and this appeal followed.

DISCUSSION

At issue in the present case is the application of Section 1158 to the facts of the current case. This statute provides that, upon a request by a patient’s attorney, a medical provider must make the patient’s records “available for inspection and copying by the attorney at law or his, or her, representative.”¹ The statute also provides the patient may be charged “reasonable costs incurred . . . in making patient records available,” including copying costs of ten cents per page. (§ 1158.) Section 1158 “states a clear public policy of permitting a patient, before filing any action, to inspect and to copy any medical records concerning the patient. The legislative purpose behind the enactment is not stated, but its apparent goal is to permit a patient to evaluate the treatment he or she received before determining whether to bring an action against the medical provider. Section 1158 also enables the patient to seek freely advice concerning the adequacy of medical care and to create a medical history file for the patient’s information or subsequent use. It operates to prevent a medical provider from maintaining secret notes which can be obtained by the patient only through litigation and potentially protracted discovery proceedings.” (*National Football League Management Council v. Superior Court* (1983) 138 Cal.App.3d 895, 903, fn. omitted.)

¹ The first paragraph of Section 1158 provides in relevant part, “Whenever, prior to the filing of any action or the appearance of a defendant in an action, an attorney at law or his or her representative presents a written authorization therefor signed by an adult patient . . . a licensed hospital, shall make all of the patient’s records under his, hers or its custody or control available for inspection and copying by the attorney at law or his, or her, representative, promptly upon the presentation of the written authorization.”

The trial court concluded Andrus's request that Eden *copy and mail* appellant's medical records was not within the scope of Section 1158, which applies to requests for *access* to patient records for copying by attorneys or their representatives. On appeal, appellant does not argue that Section 1158 *requires* hospitals to copy and mail medical records upon a request for copies, but appellant does argue that when "a health care provider opts to provide copies in response to a pre-litigation attorney request," the provider is bound by the cost limitations in the statute. However, even if we assume for purposes of the present decision that Eden's election to copy and mail appellant's medical records subjected Eden to the cost limitations contained in Section 1158, appellant would not prevail against HealthPort.

As respondents argue, HealthPort was not bound by the cost limitations of Section 1158 because HealthPort acted as Andrus's agent in copying and delivering the requested copies. Respondents emphasize that the invoice sent to Andrus in response to the request for records was accompanied by a "California Agent Fee Information" sheet. That sheet quoted Section 1158 and indicated HealthPort was proposing to act as Andrus's representative for the purpose of obtaining copies of appellant's records; it stated, "HealthPort has agreed to copy records for you, upon your hiring of HealthPort as your representative/agent for purposes of making such copies." Further, the sheet explained HealthPort's rates, and asserted, "The rates that HealthPort is charging do not fall under §1158." The invoice itself referenced the information sheet and stated "[p]ayment implies that you agreed to employ HealthPort as your professional photocopy representative for purposes of this request."

"An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." (Civ. Code, § 2295.)" (*van 't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 570.) " 'Proof of an agency relationship may be established by "evidence of the acts of the parties and their oral and written communications." ' ' ' (*Id.* at p. 573.) The trial court concluded the undisputed evidence showed HealthPort acted as Andrus's agent in copying and delivering appellant's medical records. The court reasoned, "[Andrus's] act of accepting the terms

set forth on the Information Sheet, by paying the invoice, *created* the relationship [between Andrus and HealthPort] and caused HealthPort to deliver the records. . . . nothing in the statute regulates the rates that a copy service retained by the requesting attorney may charge.” The court also stated, “There is no evidence that [Andrus] did not understand, when it paid the pre-billing invoice, that it was retaining HealthPort to make copies at non-section-1158 rates. Nor is there any evidence that, having received the Information Sheet and pre-billing invoice, [Andrus] objected to Sutter or Eden or demanded that they (not HealthPort) make records available for inspection and copying as required by section 1158. Although [appellant] argues that the *only way* for [Andrus] to obtain [appellant’s] medical records was to pay HealthPort’s bill, he provides no evidence to support that contention.”

On appeal, appellant cites no evidence showing a triable issue of fact whether the exchange between Andrus and HealthPort created an agency relationship. Appellant argues the agency agreement was an illegal “exculpatory contract.” Section 1668 of the Civil Code defines exculpatory contracts as “contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent” (See *Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal.App.4th 224, 235 [“[Civil Code] section 1668 prohibits the enforcement of any contractual clause that seeks to exempt a party from liability for violations of statutory and regulatory law, regardless of whether the public interest is affected.”]; *In re Marriage of Fell* (1997) 55 Cal.App.4th 1058, 1065 [“Agreements whose object, directly or indirectly, is to exempt its parties from violation of the law are against public policy and may not be enforced.”].) However, the agency agreement between Andrus and HealthPort did not purport to exempt HealthPort from liability for violations of Section 1158; instead, it created a relationship that was *outside the scope* of the statute.²

² We recognize that, when a hospital elects to form a relationship with a copy service that then in turn offers to act as a representative for attorneys in obtaining copies of records, it may render largely irrelevant the statutory cost limitations on copies vis-à-vis that

Finally, appellant contends any agency relationship between Andrus and HealthPort did not relieve HealthPort of its obligation to comply with the cost limitations in Section 1158, because HealthPort assumed the duty of responding to Section 1158 requests, like the copy service in *Thornburg v. Superior Court* (2006)138 Cal.App.4th 43 (*Thornburg*). In *Thornburg*, a copy service entered into an agreement with a hospital, whereby the hospital agreed to forward requests for patient records to the copy provider, which would copy and mail the requested records and collect all fees. (*Thornburg*, at p. 47.) The copy service charged fees in excess of the amounts permitted in Section 1158. (*Thornburg*, at p. 47.) *Thornburg* held the limits in Section 1158 applied because the copy service “assumed the duty of responding to section 1158 requests.” (*Thornburg*, at p. 53.) The hospital could not “avoid the cost limitations set forth in . . . the statute by simply retaining a copy service.” (*Id.* at p. 52.) *Thornburg* involved an appeal from the sustaining of a demurrer, and the court concluded the plaintiff could allege the copy service had wholly assumed the hospital’s obligations under Section 1158. (*Thornburg*, at pp. 53–54.)

While the factual situation in *Thornburg* was in many ways similar to that in the present case, there was no evidence of the agency relationship that is decisive here. Further, as the trial court pointed out, appellant cites to no evidence sufficient to create a triable issue regarding whether Andrus tried to obtain access to the records directly from Eden for review and copying by a representative other than HealthPort. There is no evidence Andrus made any such request of Eden, and appellant cites to no other evidence which “ ‘would allow a reasonable trier of fact to find’ ” (*Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 945) Eden would have rejected such a request.³ Absent a basis to

hospital. However, because Section 1158 does not *mandate* that medical providers provide *copies* of records, and because attorneys have the right to elect to use a different copy service than the service selected by the hospital, the system evidenced in the present case does not run afoul of Section 1158.

³ Appellant asserts generally that he submitted evidence “that HealthPort contracted with Sutter to fulfill Section 1158 requests.” But appellant fails to cite to any language in the

find Andrus could only obtain appellant's health records from HealthPort, there is no basis to conclude HealthPort was bound by the cost limitations in Section 1158 in the circumstances of the present case.⁴

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

relevant agreement that prohibited the hospital from making the records available for review and copying by a different representative selected by Andrus.

⁴ We need not and do not consider the trial court's alternate conclusion that appellant waived the cost limitations in Section 1158.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A140091)