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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HAROLD J. BERNHARDT,

Plaintiff and Appellant,

v.

THE STEINER GROUP,

Defendant and Respondent.

B238764

(Los Angeles County  
Super. Ct. No. BC443131)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Mark V. Mooney, Judge. Affirmed.

Forgie & Leonard, Peter S. Forgie for Plaintiff and Appellant.

Foreman Friedman, Darren W. Friedman, admitted pro hac vice, and  
Teresa C. Senior for Defendant and Respondent.

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Harold J. Bernhardt (Bernhardt), a resident of New Jersey,<sup>1</sup> appeals from a judgment of dismissal in favor of Steiner Transocean Limited (Steiner), a Bahamian corporation, and Hu Alaric Toy (Toy), an acupuncturist employed by Steiner, subsequent to an order granting a summary judgment motion. Bernhardt contends that he raised triable issues of material fact and, therefore, the trial court erred in granting respondents' motion. We disagree and will affirm the judgment.

### ***FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>***

While a passenger on the Diamond Princess, a cruise ship, Bernhardt underwent acupuncture treatments over a three-day period in August of 2009 performed by Toy at the Lotus Spa operated by Steiner onboard the ship. During the treatments, Toy inserted acupuncture needles into Bernhardt's left foot as well as other parts of his body. About a week after his return home from the cruise, Bernhardt began experiencing pain in his left foot for which he sought medical care. His physician determined that the pain was caused by a foreign object lodged in Bernhardt's foot. Surgery to remove the foreign object was performed on September 1, 2009. The object was a short, thin piece of metal similar to a needle or wire. Bernhardt believed the object to be a broken piece of

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<sup>1</sup> Although Bernhardt is a resident of New Jersey, the case was properly filed in California pursuant to a contract governing the cruise through which the parties specifically agreed to Los Angeles County jurisdiction.

<sup>2</sup> The factual and procedural background is drawn from the record, which includes a one-volume Clerk's Transcript and a one-volume Reporter's Transcript. As this is an appeal after a summary judgment motion, we treat all of Bernhardt's facts as true. (*Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th 246, 251-252 (*Waisbren*).)

acupuncture needle and filed a complaint on August 5, 2010 against Steiner and Toy for negligence.

The complaint alleged that Bernhardt had suffered an injury that was likely permanent and incurred damages as the result of Toy's failure to inform him that an acupuncture needle had broken off in his foot, to remove the needle, and to advise him that he should seek medical care. In addition, Bernhardt alleged that it will be necessary for him to continue receiving medical care and treatment for an indefinite period of time. He also sought lost earnings.

Respondents filed a motion for summary judgment on August 17, 2011 on the grounds that Bernhardt had not established a prima facie case of (1) breach of duty, or (2) causation, because he could not show that the foreign object removed from his foot was a piece of an acupuncture needle from the Lotus Spa. Bernhardt opposed the motion on October 17, 2011 and respondents replied on October 26, 2011.

The trial court sustained all of respondents' evidentiary objections, which decision is not being challenged on appeal. The trial court then found that respondents had made a prima facie showing that the object was not an acupuncture needle of the specified kinds routinely provided for use in its spas by Steiner and Bernhardt failed to offer any admissible evidence to the contrary. As a result, it granted respondents' motion. The judgment dismissing Bernhardt's case was entered on December 2, 2011. Bernhardt filed a notice of appeal on January 26, 2012.

## *CONTENTIONS*

Bernhardt contends that a triable issue of material fact was raised as to whether the foreign object removed from his left foot was a piece of a broken acupuncture needle from the Lotus Spa. As a result, he argues, the trial court erred in granting respondents' motion for summary judgment.

## *DISCUSSION*

### 1. *Standard of Review*

Code of Civil Procedure section 437c, subdivision (a), states, "Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding."

Section 437c goes on to state in subdivision (c) that a "motion for summary judgment 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."

(Italics added.) An appellate court reviews a trial court's ruling on a motion for summary judgment de novo. (*Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 734-735.)

"We first identify the issues framed by the pleadings since it is these allegations to which the motion must respond. We then determine if the moving party has established a prima facie entitlement to judgment in its behalf. Only if the moving party has satisfied this burden do we consider whether the opposing party has produced evidence demonstrating there is a triable issue of fact with respect to any aspect of the moving party's prima facie case." (*Rio Linda Unified School Dist. v. Superior Court*,

*supra*, 52 Cal.App.4th at pp. 734-735.) “ ‘In making this determination, the moving party’s affidavits are strictly construed while those of the opposing party are liberally construed.’ [Citations.] We accept as undisputed facts only those portions of the moving party’s evidence that are not contradicted by the opposing party’s evidence. [Citation.] In other words, the facts alleged in the declarations of the party opposing summary judgment must be accepted as true. [Citation.]” (*Waisbren v. Peppercorn Productions, Inc.*, *supra*, 41 Cal.App.4th at pp. 251-252.)

2. *No Triable Issue of Material Fact Was Raised to Counter the Expert’s Opinion that the Foreign Object Was Not an Acupuncture Needle*

“To establish negligence, it must be shown that (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached that duty, and (3) the breach was a proximate or legal cause of the plaintiff’s injuries. [Citations.] The absence of any one of these three elements is fatal to a negligence claim.” (*Gilmer v. Ellington* (2008) 159 Cal.App.4th 190, 195.)

Bernhardt argues that the trial court erred in finding that he presented no triable issue of material fact with respect to the issue of causation. We disagree. “In California, the causation element of negligence is satisfied when the plaintiff establishes (1) that the defendant’s breach of duty (his negligent act or omission) was a substantial factor in bringing about the plaintiff’s harm and (2) that there is no rule of law relieving the defendant of liability. [Citation.]” (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 481.) Respondents do not raise the issue of whether any law relieves them of liability and we, therefore, do not discuss it.

Along with their motion for summary judgment, respondents submitted the declaration of David J. Coates, who has a Ph.D. in metallurgy. Dr. Coates was selected and retained by both parties pursuant to stipulation in order to analyze the object removed from Bernhardt's foot in comparison to sample needles of the kind Steiner provided for use in its spas. Based on his analysis, Dr. Coates stated that, in his expert opinion, the object removed from Bernhardt's foot (1) was substantially dissimilar to the sample needles provided and therefore was *not* a piece that had broken off from any of those types of needles;<sup>3</sup> and (2) was *not* a piece broken off from an acupuncture needle *at all*. Based on this evidence the burden shifted to Bernhardt to show a triable issue of material fact.

In response to this evidence, Bernhardt submitted his own declaration stating that the only time a foreign object was lodged in his foot was during the acupuncture treatment and, therefore, the object is most likely to be an acupuncture needle. He also disputed Dr. Coates' expert opinion, arguing that the foreign object removed from his

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<sup>3</sup> According to Dan Brown (Brown), the Director of Oriental Medicine Programs for Steiner, Steiner provided three types of acupuncture needles to be used in its spas in 2009. These were: (1) DBC Springsten 25X30; (2) DBC Springsten 20X30; and (3) Seiren J. Type 16X40. Although, in his deposition, Brown admitted that the supply of needles was not tightly controlled and that some acupuncturists could conceivably bring their own needles, Toy stated in his declaration that he used only these three types of needles on his patients.

In his analysis of the needles and the foreign object removed from Bernhardt's foot, Dr. Coates ultrasonically cleaned the samples in acetone and examined the samples with a scanning electron microscope with energy dispersive X-ray capabilities. He noted that the foreign object showed a wave pattern and longitudinal forming extrusion marks on its surface. He also noted that the foreign object was made of an iron-chromium-manganese alloy and that both ends were blunt. The needles in comparison were smooth with no extrusion marks, were composed of an iron-chromium-nickel alloy and each had a pointed end.

foot does resemble, in significant part, an acupuncture needle. However, he failed to present any competent and admissible evidence, beyond that of his own speculation, that conflicted with Dr. Coates' conclusion that the foreign object found in Bernhardt's left foot was, in fact, not a piece broken off from any acupuncture needle. (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1487 [speculation is insufficient to rebut the definitive testimony of . . . experts].) As a result, he failed to raise any triable issue of material fact and the trial court properly granted respondents' motion for summary judgment.

***DISPOSITION***

The judgment of dismissal is affirmed. Respondents shall receive their costs on appeal.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.