Filed 6/25/12 Tsang v. Willardsen CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SUSIE TSANG, Plaintiff and Appellant, v. JOHN E. WILLARDSEN, Defendant and Respondent.	E052345 (Super.Ct.No. CIVDS900102) OPINION

APPEAL from the Superior Court of San Bernardino County. Janet M. Frangie, Judge. Affirmed.

Kenneth A. Roberts for Plaintiff and Appellant.

Kramer, DeBoer, Endelicato & Keane, and Constance Endelicato, for Defendant and Respondent.

Plaintiff and appellant Susie Tsang (Tsang) filed an action against defendant and respondent John E. Willardsen, who is a doctor of dental surgery (Dr. Willardsen), arising out of alleged negligent performance of "dental treatment, implant surgery and related dental care, which caused her to suffer permanent damage to her teeth, gums,

mouth and nervous system." Dr. Willardsen moved for summary judgment, which the trial court granted. Tsang appeals, contending the trial court erred in granting the motion since there were triable issues of fact as to Dr. Willardsen's negligence.

I. STANDARD OF REVIEW

The well-known principles generally governing appellate review of an order granting a motion for summary judgment are as follows: "A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477, citing Code Civ. Proc., § 437c, subd. (*o*)(2).)

II. PROCEDURAL BACKGROUND AND FACTS

A recitation of the facts is difficult to provide. The notice designating the record on appeal listed only five items. It also expressly elected to waive a reporter's transcript while acknowledging that "without a record of the oral proceedings in the superior court,

the Court of Appeal will not be able to consider what was said during those proceedings in determining whether an error was made in the superior court proceedings." As finally filed, the 46-page clerk's transcript contains only the following: (1) register of actions; (2) [proposed] order granting motion for summary judgment by defendant; (3) judgment by court under Code of Civil Procedure section 437c; (4) notice of entry of order granting motion for summary judgment; (5) notice of entry of judgment by court under Code of Civil Procedure section 437c; (6) notice of appeal; and (7) notice designating record on appeal. No other pleadings or documents were included.

Subsequently, Tsang, apparently recognizing a deficiency in the record, filed a motion, along with a stipulation by the parties, to augment the record with Tsang's opposition to the motion for summary judgment and supporting declaration of Daniel Kantarovich, D.D.S. However, Tsang has failed to provide this court with her complaint, which sets forth the operative pleadings, and Dr. Willardsen's motion for summary judgment. The court cannot conduct a de novo review when it has not been provided with a complete record of the proceedings below. (Cal. Rules of Court, rules 8.120-8.122; see *Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1670 [appellate court must ignore issues requiring review of documents not provided by appellant]; *Estate of Fain* (1999) 75 Cal.App.4th 973, 987 ["where the appellant fails to produce a complete record of oral trial proceedings, a challenge based on the claim of evidence insufficiency will not be heard"].) Thus, our review is limited to Tsang's opposition and Dr. Kantarovich's supporting declaration and

the order of the trial court stating its reasons for granting summary judgment in favor of Dr. Willardsen.

According to the record on appeal, specifically, the declaration of Dr. Kantarovich, on June 25, 2007, Tsang went to Dr. Willardsen for a consultation regarding her "oral condition." They discussed her "mandibular posterior missing teeth and the need for a CT scan." On July 10, Tsang was quoted $12,000 for four dental implants/implant crowns. She went back to see Dr. Willardsen on September 18 to provide a $1,000 advance, complete a presurgical visit, and sign an implant treatment, surgery and anesthesia consent form for "an, 'EXT #2, graft membrane, 4 implants, plus 1 if necessary.'" On September 25, she paid $6,000 more towards her treatment and surgery was performed. On October 8, 2007, the implants were "surgically uncovered and master impressions were made and sent to the lab for final implant crown fabrication." When she returned for implant crown delivery, she disagreed with Dr. Willardsen regarding the implant crown size, shape, and form.

On January 8, 2009, fifteen months after her disagreement with Dr. Willardsen, Tsang initiated this action. Although we do not have a copy of the complaint, according to the trial court's decision, Tsang's claims were limited to Dr. Willardsen's "negligent performance of the dental treatment, implant surgery and related dental care, which caused her to suffer permanent damage to her teeth, gums, mouth and nervous system." On April 30, 2010, Dr. Willardsen moved for summary judgment. Tsang opposed the motion, offering the declaration of Dr. Kantarovich, who did not address the issue of negligent performance of dental treatment. Rather, Dr. Kantarovich opined that this case

is one involving "a gross mismanagement of proper informed consent for the need of interdisciplinary dentistry." At the July 15, 2010, hearing on the motion, the trial court continued the matter "for further briefing on the following issues: 1. Whether or not the allegations of the complaint broadly encompass a claim for negligence based upon an alleged lack of conformed [*sic*] consent; 2. Further opposition based upon [Tsang's] claim of lack of reliability of [Dr. Willardsen's] expert opinion with respect to the January letter in [Dr. Willardsen's] files, and 3. Whether or not the court has the authority/discretion to grant leave to amend the complaint at the hearing of the summary judgment motion." (Capitalization omitted.)

Following supplemental briefing, the trial court considered all the evidence and reasonable inferences. Recognizing there were no allegations of a lack of informed consent, and finding that Dr. Willardsen provided an expert's declaration showing he had met the standard of care and did not cause Tsang's injury, the trial court found that Dr. Willardsen's evidence was sufficient to meet the initial burden of proof. Because Tsang's evidence was not directed at the issues raised in the pleading, the court granted summary judgment in favor of Dr. Willardsen.

III. DISCUSSION

Tsang challenges the trial court's decision to grant summary judgment in favor of Dr. Willardsen, arguing that "the allegations in the original complaint are stated in broad terms that cover lack of informed consent." (Capitalization omitted.) In his reply brief, Dr. Willardsen argues that Tsang's form complaint containing a single cause of action for negligence failed to allege that he "had a duty to advise her of the risks and complications

of certain treatment and that [he] negligently failed to do so." Dr. Willardsen further points out Tsang's failure to designate a complete record from which this court can evaluate the propriety of the lower's court findings and decision. In response, Tsang contends the record on appeal is not deficient or lacking evidence of judicial error because it includes the trial court's order that "referenced and stated the language alleged in the original complaint that raise the issues on appeal herein." We disagree.

Here, without the complaint and the motion for summary judgment, this court is unable to conduct a de novo review. "Appealed judgments and orders are presumed correct, and error must be affirmatively shown. [Citation.]" (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) The burden is on the appealing party to provide an adequate and accurate record on appeal to demonstrate error. The failure to do so "precludes an adequate review and results in affirmance of the trial court's determination. [Citation.]" (*Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1.) Without the complaint and the motion for summary judgment, "we cannot review the basis of the court's decision." (*Hernandez v. California Hospital Medical Center*, *supra*, at p. 502.) Accordingly, we have no basis to conclude there was any error with respect to the court's decision to grant summary judgment in favor of Dr. Willardsen.

IV. DISPOSITION

The judgment is affirmed. Dr. Willardsen shall recover costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.