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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

TERRY REIGELSPERGER et al., Plaintiffs and Respondents, v. JAMES M. SILLER, Defendant and Appellant.	C045534 (Super. Ct. No. CVCS031466)

APPEAL from a judgment of the Superior Court of Sutter County, Perry Parker, Judge. Affirmed.

Rick A. Cigel, Richard G. Reinjohn, for Defendant and Appellant.

Rich, Fuidge, Morris & Iverson, Roland K. Iverson, for Plaintiffs and Respondents.

Plaintiffs Terry Reigelsperger and his wife Kathleen Reigelsperger (collectively Reigelspergers) filed a complaint

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of Part II of the Discussion.

for medical malpractice and loss of consortium against defendant James M. Siller, D. C., individually and doing business as Siller Chiropractic (hereafter Siller) involving a treatment to Reigelsperger's shoulder in September of 2002.

The case arises out of a single treatment provided by Siller to Terry Reigelsperger two years after a prior single treatment. Siller filed a petition to compel the Reigelspergers to arbitrate their malpractice claim pursuant to a written arbitration agreement, entered into on the occasion of the first treatment, that purported to "bind the patient and the health care provider . . . who now or in the future treat[s] the patient . . . ."

Siller appeals from the denial of his petition. (Code Civ. Proc., §§ 1294, subd. (a), 1294.2.)[1] He contends the court erred (1) by ignoring the plain meaning of the arbitration agreement, (2) by finding no open-book account existed within the meaning of section 1295, (3) by granting relief from failure to file a timely response to his petition, and (3) by deeming Reigelsperger's memorandum of points and authorities in opposition to the petition a response to the petition.

We shall conclude that the arbitration agreement was part of an implied-in-fact agreement establishing a doctor-patient relationship for the first treatment and applies only to that

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[1] All further section references are to the Code of Civil Procedure unless otherwise specified or implied.

treatment for the reason the implied-in-fact agreement did not establish an open book account.

We shall affirm the order denying the petition for arbitration.

FACTUAL AND PROCEDURAL BACKGROUND

On August 11, 2000, the Reigelspergers were inspecting a business in Yuba City. In that process, Reigelsperger twisted his back, causing him severe lower back pain.

The owner of the business arranged for Reigelsperger to see James Siller, a licensed chiropractor, at Siller's office in Yuba City. When the Reigelspergers arrived at the office, it was dark and the office was closed. Siller appeared shortly thereafter, unlocked the office, and escorted Reigelsperger to an examining room, where Reigelsperger advised Siller he was having severe pain in his lower back.

Siller examined and treated Reigelsperger, leaving him in considerably less pain than when he arrived. When Reigelsperger was preparing to leave, he asked Siller what he owed for the treatment and then paid Siller $25 in cash as payment in full. Siller did not give Reigelsperger a bill for the services rendered that day.

About the same time they were discussing the cost of Siller's services, Siller handed Reigelsperger a form arbitration agreement and informed consent waiver, which he told Reigelsperger he needed to sign for Siller's file. Reigelsperger signed the arbitration agreement and waiver.

There was no discussion concerning further treatment. The Reigelspergers and Siller exited the office together and left in their respective vehicles.

The arbitration agreement required that the parties submit to arbitration "any dispute as to medical malpractice" and stated that "[t]his agreement is intended to bind the patient and the health care provider . . . who *now or in the future* treat[s] the patient . . . ." (Italics added.)

Reigelsperger did not return to Siller for further treatment of his lower back. However, about two years later, on September 18, 2002, he again sought chiropractic treatment from Siller, this time for his cervical spine and shoulder.[2] As a result of an injury incurred during that treatment, the Reigelspergers filed a complaint against Siller for medical malpractice alleging injury to his neck, right shoulder and right upper extremity.

On September 9, 2003, Siller filed a petition for an order compelling arbitration and stay of the pending legal action and the notice of hearing. The Reigelspergers filed their opposing papers on September 17, 2003. The trial court denied Siller's petition after finding there was no open-book account between

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[2] Although the evidence regarding the nature of the condition treated in 2002 is scant, at the hearing on the petition, Siller's counsel advised the court that the second visit was for Reigelsperger's shoulder and cervical spine. Because the Reigelspergers did not dispute this statement, we shall assume it is accurate.

Reigelsperger and Siller. Siller now appeals from the denial of his petition.

DISCUSSION

I.

Enforcement of Arbitration Agreement

Siller contends the trial court erred by applying section 1295, subdivision (c), as a ground for denying his petition and by disregarding the plain language of the arbitration agreement.[3]

Siller argues that there is a strong presumption in favor of arbitrability and any doubt must be resolved in favor of arbitration. Thus, he reasons that because there was no waiver or revocation of the agreement, it must be enforced according to its plain meaning. The Reigelspergers contend the agreement is not enforceable because an open-book account was not established on the occasion of the first treatment, the agreement was not explained to Reigelsperger, and Siller did not sign the agreement.

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[3] Siller contends that section 1295 is a restriction on the court's authority to enforce arbitration agreements for medical malpractice and is therefore preempted by the Federal Arbitration Act. (9 U.S.C. § 1 et seq.) We do not reach this claim because the federal act only applies to economic activity, which in the aggregate, bears on interstate commerce in a substantial way (*Citizens Bank v. Alafabco, Inc.* (2003) 539 U.S. 52, 56-57 [156 L.Ed.2d 46, 51-52]; *Hedges v. Carrigan* (2004) 117 Cal.App.4th 578, 586) and Siller did not allege or otherwise establish the predicate facts in support of his preemption claim. (*Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 175.)

We find the agreement is not enforceable because it does not apply to future treatment for the reason there was no ongoing doctor-patient relationship between the parties established on the occasion of the first treatment.[4]

A. Section 1295

Generally speaking, "[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (§ 1281.) Such agreements are enforceable and there is a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 97; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.)

The Legislature has also "codified the right to voluntary arbitration of medical malpractice claims and has declared that agreements to arbitrate, when drafted in a prescribed form, are not unconscionable nor are they contracts of adhesion." (*Hilleary v. Garvin* (1987) 193 Cal.App.3d 322, 325; § 1295, subd. (e).) Subdivision (c) of section 1295 provides that "[o]nce signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within 30

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[4] We do not decide the effect of the lack of Siller's signature on the agreement or his failure to explain it to Reigelsperger.

days of signature. . . ."[5] Because the arbitration agreement before us contains the requisite statutory language, it governs

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[5] Section 1295 provides in pertinent part: "(a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

(b) Immediately before the signature line provided for the individual contracting for the medical services must appear the following in at least 10-point bold red type:

"NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT."

(c) Once signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within 30 days of signature. Written notice of such rescission may be given by a guardian or conservator of the patient if the patient is incapacitated or a minor.

" . . . .

"(e) Such a contract is not a contract of adhesion, nor unconscionable nor otherwise improper, where it complies with subdivisions (a), (b) and (c) of this section."

"all subsequent open-book account transactions for medical services . . . ." (§ 1295, subd. (c).)

Whether an open-book account exists is a question of fact. (*Cochran v. Rubens* (1996) 42 Cal.App.4th 481, 485.) When the question of fact turns on the trial court's determination of disputed facts, we review the court's ruling to determine whether there is sufficient evidence. (*Id*. at p. 486; *Gross v. Recabaren* (1988) 206 Cal.App.3d 771, 778.) The evidence is sufficient if there is substantial evidence to support the ruling, i.e. evidence that is reasonable in nature, credible, and of solid value. (*Ibid*., *Estate of Teed* (1952) 112 Cal.App.2d 638, 644.)

In *Gross v. Recabaren, supra,* 206 Cal.App.3d 771, the court defined an open-book account within the meaning of section 1295.[6] "While an 'open' book account has been defined as '"[an] account with one or more items unsettled,"' it also includes '"an account with dealings still continuing."' [Citation.] By contrast, a 'closed' account is, according to Black's Law

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[6] Section 337a defines a "book account" as follows: "a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonable permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form or manner."

Dictionary, one 'to which no further additions can be made on either side . . . .' Thus, it is clear that the 'open' or 'closed' nature of a book account turns not on the account balance per se, but on the parties' expectations of possible future transactions between them." (206 Cal.App.3d at p. 778; *Cochran v. Rubens, supra*, 42 Cal.App.4th at p. 485.) The court in *Cochran v. Rubens* further explained that whether the parties expect possible future transactions between them in the physician-patient context "naturally depends on whether there is a continuing physician-patient relationship." (42 Cal.App.4th at p. 485.)

In this case the trial court concluded the parties did not have an open-book account and did not contemplate possible future transactions between them. There is substantial evidence to support these findings. There was no open-book account in the technical sense because there was no evidence of a permanent record evidencing an open account of debits and credits. (*Costerisan v. DeLong* (1967) 251 Cal.App.2d 768, 770 [a book account is a permanent record, constituting a system of bookkeeping].) Nor was there an open-book account in the sense that there was an ongoing doctor-patient relationship in which the parties expected possible future transactions. To the contrary, after Siller treated Reigelsperger on August 11, 2000, Reigelsperger paid him in full, thereby closing out his account. Indeed, Siller did not even give Reigelsperger a bill for his services or a receipt for payment received. It was only after

services were rendered that the arbitration agreement was signed.

Siller treated Reigelsperger in 2000 for an acute condition under circumstances in which he needed immediate treatment. Reigelsperger saw Siller once for that problem and did not schedule any further appointment for treatment of his lower back. During the visit, Reigelsperger provided his medical history, which disclosed he had been under chiropractic care in the past, that his major complaint was his lower back, and that he had suffered with this condition for five years. Despite this history, at the end of the appointment, the parties did not set up any future appointments. This last fact alone raises a strong inference that Reigelsperger did not intend to use Siller as his new chiropractor for ongoing treatment of his acute or chronic condition. Accordingly, because the first treatment was not an open-book account transaction, when Reigelsperger returned for treatment two years later for an unrelated condition, the arbitration agreement was no longer binding on him.

Relying on *Cochran v. Rubens, supra*, 42 Cal.App.4th 481, Siller argues that in the context of a chiropractic patient with a five-year history of chronic and serious back pain, there is an expectation of future treatment. Siller's reliance on Reigelsperger's history of chronic back pain is misplaced as is his reliance on *Cochran*.

Reigelsperger's five-year history of chronic back pain does not show an ongoing doctor-patient relationship between the parties because it was not Siller who treated Reigelsperger during the prior five-year period. The inference to be drawn from Reigelsperger's prior chiropractic treatment, if any, is that Reigelsperger was treated by another chiropractor during that period.

Such was the dispositive inference in *Cochran*, where the appellate court affirmed the denial of the defendant's petition for arbitration. The evidence showed the plaintiff's family physician referred him to the defendant, an orthopedic surgeon, for treatment of his ankle. After the treatment, the plaintiff decided not to return to defendant for a follow-up visit. Three years later, he returned to defendant's office because his family physician again referred him to the defendant for evaluation and treatment. The trial court found there was no ongoing doctor-patient relationship between the plaintiff and defendant because during the three-year period, the plaintiff was treated by his family physician, not by the defendant. (42 Cal.App.4th at pp. 486-487.)

Likewise, although Reigelsperger had chronic back problems, he only sought Siller's services for an acute condition at the time he signed the arbitration agreement. Accordingly, we find there is substantial evidence to support the trial court's finding that there was no ongoing doctor-patient relationship between Siller and Reigelsperger.

B. The Agreement

Siller contends that under the plain meaning of the terms of the agreement, Reigelsperger agreed to arbitrate disputes relating to future treatment. While we do not disagree with this statement, we find the agreement does not extend to future treatment outside an ongoing doctor-patient relationship.

The parties may agree to terms other than those required by section 1295 where those terms do not conflict with section 1295. (*Coon v. Nicola* (1993) 17 Cal.App.4th 1225, 1232-1233.) In such case however, the legislative conclusion that the contract is neither a contract of adhesion nor unconscionable, is inapplicable to the additional terms of the agreement. (*Id.* at pp. 1233-1234.) While the Reigelspergers make no claim the agreement contains unconscionable terms, they do contend the agreement does not apply to future treatment because an open-book account was not established at the time the agreement was signed and section 1295 governs the duration of an open-book contract. We agree with the Reigelspergers's theory.

A party cannot be required to arbitrate a dispute to which he has not agreed to submit. (*Pacific Inv. Co. v. Townsend* (1976) 58 Cal.App.3d 1, 9.) Thus, we look to the terms of the agreement to determine whether it established terms applicable to the duration of the doctor-patient relationship and therefore was operative at the time of the 2002 treatment.

That determination turns on the interpretation of the written agreement. Because it is a question of law, we review

it de novo, exercising our independent judgment, unless the interpretation turns upon the credibility of extrinsic evidence. (*Hilleary v. Garvin, supra*, 193 Cal.App.3d at p. 326; *City of Chino v. Jackson* (2002) 97 Cal.App.4th 377, 383; *National City Police Officers' Assn. v. City of National City* (2001) 87 Cal.App.4th 1274, 1278.)

When construing the terms of an arbitration agreement, we are guided by the rules governing all contracts. (Civ. Code, § 1635.) The paramount rule is to give effect to the mutual intention of the parties as it existed at the time of contracting, and to determine that intent from the language of the entire contract. (*City of Chino v. Jackson, supra,* 97 Cal.App.4th at p. 382; Civ. Code, §§ 1636, 1638, 1639, 1643, 2778.) In so doing, the contractual language is given its usual and ordinary meaning. (*Gross v. Recabaren, supra*, 206 Cal.App.3d at p. 777.)

Turning to the pertinent terms of the arbitration agreement, Siller points to language in articles 1 and 2. In particular, he relies on the language in article 1 that requires the parties to submit to arbitration "any dispute as to medical malpractice . . . ." He also points to the phrase in article 2 providing that "[t]his agreement is intended to bind the patient and the health care provider . . . who *now or in the future*

treat[s] the patient . . . . " (Italics added.)[7] Siller argues that, when read together, this language expresses the parties' intention to arbitrate any dispute of medical malpractice for present and future treatment, which in his view includes the present controversy. Although we agree the agreement applies to present and future treatment, it does not evidence anything more than an intention to arbitrate open-book account transactions.

The language in article 1, "any dispute as to medical malpractice," is substantive in nature and refers to the type of dispute in controversy not the period of time the agreement operates. The cited phrase is part of the language required by section 1295, subdivision (a), setting forth the subject matter covered by the agreement. This phrase must be read in context with the rest of the sentence, which defines what is meant by medical malpractice, "that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or

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[7] Siller argues for the first time in his reply brief that the agreement to arbitrate includes disputes as to whether a dispute is subject to arbitration. Although he cited the pertinent language of the agreement in his reply to plaintiffs' opposition to his petition, he did not argue the point, nor did he raise it in his opening brief on appeal. Because it is improper for an appellant to raise new points in a reply brief to which the respondent has no opportunity to respond (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1144), the point will not be considered in the absence of a showing of good cause. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.) Siller has failed to offer good cause for failing to raise this claim in his opening brief. We therefore decline to consider the point. Moreover, the arbitration agreement is subject to the implied doctor-patient agreement, which was limited to a single treatment.

were improperly, negligently or incompetently rendered . . . ." The phrase "any dispute as to medical malpractice" therefore does not serve to broaden the temporal reach of the agreement.

Moreover, because the agreement is silent on the duration of the contract, we may imply that term if the nature of that contract and the surrounding circumstances provide a reasonable basis to do so. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 152, p. 174.) Similarly, according to the Restatement Second of Contracts, section 204 at page 97, the court may supply a reasonable term that the parties have not agreed upon, when that term is essential to a determination of their rights and duties.

The agreement before us exists within the context of the doctor-patient relationship and is governed in part by section 1295. Moreover, the doctor-patient relationship itself gives rise to an implied-in-fact contract between the parties "that defendant would use his best medical judgment to diagnose and treat [Reigelsperger's] condition, and in return, [Reigelsperger] would follow his prescribed treatment and pay for his services." (*Hilleary v. Garvin, supra*, 193 Cal.App.3d at p. 326; Civ. Code, § 1621 ["An implied contract is one, the existence and terms of which are manifested by conduct"].) Because the doctor-patient relationship constitutes the relevant surrounding circumstance, we may imply the operative period of time of the arbitration agreement from the nature of the implied-in-fact agreement establishing the doctor-patient

relationship. (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 152, p. 174.)

Given these circumstances, it is reasonable to assume the parties intended the arbitration agreement to operate during the period of time the doctor-patient relationship existed. In the absence of a term specifying the duration of the agreement, we will imply that period as specified in section 1295, namely to "all subsequent open-book account transactions . . . ." (§ 1295, subd. (c); *Cochran v. Rubens, supra*, 42 Cal.App.4th at p. 485.)

Moreover, the phrase "now or in the future treat[s]" does not require a different conclusion. Rather, this phrase must be understood within the operative time-period of the agreement as we have determined it to be. Under this construction, the agreement would apply to a patient who sought treatment for a particular ailment and, having established an ongoing doctor-patient relationship with the health care provider, returned for continuing treatment of the same or related ailment. (See *Hilleary v. Garvin, supra*, 193 Cal.App.3d 322.) However, this phrase cannot reasonably be construed to bind the parties in perpetuity to arbitrate any condition that might arise sometime in the future without regard to whether there was an expectation of future transactions.

This construction of the agreement is also supported by the language used in the accompanying informed consent agreement, which is part of the same contractual instrument. (Civ. Code,

§ 1642 ["[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together"]; *Peterson Development Co. v. Torrey Pines Bank* (1991) 233 Cal.App.3d 103, 113 [§ 1642 applies to a single instrument].)[8] In construing a contract, we must consider the contract as a whole, in order "to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641; *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 741.)

The informed consent agreement states, "I [the patient] intend this consent form to cover the entire course of treatment for my present condition and for *any future condition*(s) for which I seek treatment." Thus, if the parties intended the arbitration agreement to apply to treatment of future conditions, they would have said so, as they did in the informed consent agreement. Because they did not, we find the arbitration agreement does not apply to future treatment of a different condition not contemplated by the parties at the time Reigelsperger signed the agreement in the absence of an ongoing doctor-patient relationship.

Applying this construction of the agreement, the Reigelspergers are not required by the agreement to arbitrate

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[8] The informed consent waiver is on page two of the form arbitration agreement and was signed by Reigelsperger at the same time he signed the arbitration agreement.

their present claims,[9] because as we concluded in Part A, the parties did not have an open-book account relationship. For these reasons, we find the trial court properly construed the contract and found the treatment in 2002 was not an open-book account transaction.

II.
Relief From Late Filing and Failure to File a Formal Response

Siller contends the trial court erred in granting the Reigelspergers relief from their failure to file a timely response to the arbitration petition and in deeming their opposing papers a sufficient response.

A. Factual Background

Siller served the notice of hearing and petition to compel arbitration on August 29, 2003. He served his memorandum of points and authorities in support of the petition on September 4, 2003. The Reigelspergers did not file a formal response, but on September 17, 2003, filed a memorandum of points and authorities in opposition to the petition along with their declarations.

At the hearing on the petition, the Reigelspergers's counsel asked to be sworn under section 473, which the court accepted under oath, and then told the court that the reason he

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[9] By its terms, the arbitration agreement binds "present or future spouse(s) of the patient in relation to all claims, including loss of consortium." (See *Gross v. Recabaren*, *supra*, 206 Cal.App.3d at pp. 778-783.)

filed his opposing papers beyond the 10-day statutory period for filing a response is because the matter was calendared as a motion by his secretary, the matter was then treated as a motion, and section 1290.6 did not come to his attention. He argued that Siller suffered no prejudice because the matter had been properly briefed.

Counsel for Siller did not object to the request for relief under section 473 or section 1290.6. He merely stated, "whether the Court grants Mr. Iverson relief under 473 is a matter for your discretion," and then objected to the adequacy of the Reigelspergers's response on the grounds they failed to file a formal response to the petition. The court found the Reigelspergers's opposition papers were sufficient under the statute and granted relief under section 473. To the extent the response was late under section 1290.6, the court found good cause to consider the opposition.

B. Relief from Late Filing

Siller argues that neither section 1290.6 nor section 473 provide authority to grant relief where counsel failed to give written notice and counsel did not commit excusable neglect. The Reigelspergers contend Siller waived his claim of error because he did not raise a proper objection in the trial court and any error was harmless because Siller did not request a continuance or leave to file notice of entry of default with respect to the petition. We agree that Siller waived this claim.

Section 1290.6 provides that "[a] response shall be served and filed within 10 days after service of the petition . . . . The time provided in this section for serving and filing a response may be extended by an agreement in writing between the parties to the court proceeding or, for good cause, by order of the court."

A hearing on a petition to compel arbitration is a summary proceeding that is held "in the manner and upon the notice provided by law for the making and hearing of motions . . . ." (§ 1290.2.; *City of Hope v. Bryan Cave LLP* (2002) 102 Cal.App.4th 1356, 1369.) The notice of a motion must state "the grounds upon which it will be made, and the papers, if any, upon which it is to be based" and "a copy of such paper must accompany the notice," if not previously served on the party to be notified. (§ 1010.) The purpose of requiring that the notice be served with a copy of the papers is to enable the party to prepare a defense. (*Alvak Enterprises v. Phillips* (1959) 167 Cal.App.2d 69, 74.)

Siller served the supporting papers six days after he served notice of the petition. Because his memorandum of points and authorities was not served until September 4th, the Reigelspergers's response was not due for another 10 days, which would have been September 14th. However, because the 14th fell on a Sunday, the last date for filing a response was September 15th. (§ 12a and 12b; *Humes v. Margil Ventures, Inc.* (1985) 174

Cal.App.3d 486, 498.) The Reigelspergers served and filed their response on September 17th, two days late.

Section 1290.6 gives the trial court discretion, upon a showing of good cause, to grant relief from late filing of the response. (*Roberts v. Fortune Homes, Inc.* (1966) 240 Cal.App.2d 238, 239-240.) Thus, we need not decide whether the trial court had authority under section 473 to grant relief.[10]

However, Siller cannot show prejudice where he failed to claim he did not receive the opposing papers in sufficient time to respond to them or request additional time to do so. Instead, he served a supplemental declaration in support of his petition on September 26th before the hearing and fully argued the merits of his petition at the hearing in light of the arguments raised in the opposition papers. Accordingly, we reject Siller's claim of error.

C. Failure to File a Response

Siller contends the trial court erred by deeming the Reigelspergers's opposition papers a sufficient response under

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10 Siller has also waived his claim that relief from late filing under section 473 was unauthorized because counsel did not commit excusable neglect. Generally, an appellate court will not consider procedural defects where an objection could have been, but was not presented to the trial court. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, pp. 444-445.) Because Siller conceded that the matter was within the trial court's discretion and raised no objection to the motion under section 473, he waived his claim of error on appeal. (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 998, 1002; *Steven W. v. Mathew S.* (1995) 33 Cal.App.4th 1108, 1117.)

section 1290 and failing to deem the allegations of the petition admitted. According to Siller, once the allegations of his petition are deemed admitted, arbitration is mandatory. The Reigelspergers contend the essential allegations of the petition were met in their declarations and that Siller failed to show prejudice.

We agree with Siller that the allegations of his petition are deemed admitted, but find no prejudice resulted from the trial court's failure to deem them as such.

Section 1290 provides that "[t]he allegations of a petition [to compel arbitration] are deemed to be admitted by a respondent duly served therewith unless a response is duly served and filed." A petition to compel arbitration is basically a suit in equity to compel specific performance of a contract. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 411.) Therefore, the rules applicable to complaints are also applicable to petitions to arbitrate including the requirement that a complaint in a civil action contain "[a] statement of the facts constituting the cause of action, in ordinary and concise language." (§ 425.10, subd. (a)(1); (*City of Hope v. Bryan Cave LLP, supra*, 102 Cal.App.4th at p. 1369.)

Because the allegations of the petition are deemed admitted by the respondent unless a response is duly served and filed (§ 1290; *Main v. Merrill Lynch* (1977) 67 Cal.App.3d 19, 28, overruled on other grounds in *Rosenthal v. Great Western Fin.*

Securities Corp., *supra*, 14 Cal.4th at p. 404; *A.D. Hoppe Co. v. Fred Katz Construction Co.* (1967) 249 Cal.App.2d 154, 157-158), it may be said the purpose of the response is to controvert or avoid the allegations of the petition by denying the allegations and/or alleging defenses to enforcement of the arbitration agreement. (§ 1290; see 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, §§ 499-501, pp. 929-935.) It follows therefore, that the response to a petition to compel arbitration is a pleading that responds to the factual allegations of the petition.

The Reigelspergers never filed a formal response to the petition, they only filed a memorandum of points and authorities and attached declarations. The cases suggest that in the absence of a formal response as required by section 1290, the filing of declarations are sufficient to tender a defense and provide supporting evidence, but are not sufficient to controvert the allegations of the petition. (*Main v. Merrill Lynch*, *supra*, 67 Cal.App.3d at p. 28 [plaintiffs' failure to file response to petition deemed admission of allegations where plaintiffs filed declaration alleging fraud in the inducement of the arbitration contract]; *A.D. Hoppe Co. v. Fred Katz Construction Co.*, *supra*, 249 Cal.App.2d at pp. 157-158 [plaintiff's failure to file response to petition deemed an admission of allegations in petition where plaintiff filed declaration containing everything response would have included].)

The trial court found the Reigelspergers's memorandum of points and authorities and declarations were sufficient, stating "[t]hat's a response. That's close enough." The clear inference from the court's remark is that the court did not deem the allegations of the petition admitted. Nevertheless, we need not decide whether this was error because Siller can show no prejudice.

Whether or not the factual allegations of the petition are deemed admitted, they are not dispositive of the central question raised by the parties, namely whether the arbitration agreement was operative in 2002. A resolution of that question turns on the interpretation of the agreement and whether the parties had an open-book account relationship at the time they entered into the agreement. As noted, the interpretation of the agreement is a question of law based upon the agreement itself. (*Hilleary v. Garvin, supra*, 193 Cal.App.3d at p. 326.) The question of an open-book account is a question of fact. (*Cochran v. Rubens, supra*, 42 Cal.App.4th at p. 485.) As to the factual question, the Reigelspergers filed declarations addressed to the issue of the open-book account as did Siller, who filed a declaration in reply to the plaintiffs' opposition to his petition. We therefore find Siller suffered no harm from the trial court's failure to deem the allegations of his petition admitted.

DISPOSITION

The order denying the petition for arbitration is affirmed. The Reigelspergers are awarded their costs on appeal. (Cal. Rules of Court, rule 27(a)(1).)

BLEASE, Acting P. J.

We concur:

HULL, J.

BUTZ, J.