

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

TIMOTHY M. KREAMER,	:	NO. 04-01,402
Plaintiff	:	
vs.	:	CIVIL ACTION - LAW
	:	
HANI J. TUFFAHA, M.D., and SUSQUEHANNA	:	
HEALTH SYSTEM,	:	
Defendants	:	

OPINION IN SUPPORT OF ORDER OF APRIL 14, 2005,
IN COMPLIANCE WITH RULE 1925(A) OF
THE RULES OF APPELLATE PROCEDURE

Plaintiff has appealed this Court's Order of April 14, 2005, which (1) sustained Defendant Susquehanna Health System's preliminary objections and dismissed Plaintiff's Amended Complaint, and (2) dismissed Plaintiff's Motion to Reinstate Original Process, treated as a motion to further amend the complaint. He also indicates in his Notice of Appeal that he seeks review of two other Orders, those of November 29, 2004, which sustained the preliminary objections of both defendants and directed Plaintiff to file an Amended Complaint, and February 11, 2005, which denied Plaintiff's Motion for Stay of Defendant's Request of Non Pros, treated as a Petition for Relief from Judgment of Non Pros.¹

Plaintiff filed his original, six paragraph complaint on August 30, 2004, in which he states in Paragraph 1 that his action "is based in that Dr. Hani Tuffaha and Susquehanna Health System failed in properly informing patient of his treatment process contributing in further injuries of patient", in Paragraphs 2 and 3 that Dr. Tuffaha testified in a May 2004, deposition that he had previously given Plaintiff instructions but that Dr. Tuffaha did not give him any work restrictions until August 30, 2002, in Paragraph 4 that a Dr. Close testified in a May 2004, deposition that "either heavy lifting or repetitive lifting can get them into trouble, and this is what appears to have occurred here", in Paragraph 5 that Dr. Tuffaha and Susquehanna Health System did not properly process physical therapy orders, and in Paragraph 6 that Plaintiff was informed by a medical doctor at Susquehanna Health System in October 2002 that he had

¹ A judgment of non pros had been entered December 2, 2004, with respect to Defendant Tuffaha, for failure of Plaintiff to file a Certificate of Merit under Rule 1042.3.

“retrolisthesis of spine” and that he was never informed of such by Dr. Tuffaha during the treatment process while he was working. Both defendants filed preliminary objections, raising issues of improper service, noncompliance with the rules of civil procedure respecting professional liability claims, and sufficiency of the pleading itself as to both form and content. After argument on the objections, the Court entered the Order of November 29, 2004, overruling the objections based on service, as both defendants had received notice and were represented by counsel, but sustaining the objections as to the content of the complaint itself. Plaintiff was given thirty days in which to file an Amended Complaint and was referred to the rules respecting professional liability claims.

On December 2, 2004, Defendant Tuffaha praeciped for entry of judgment of non pros inasmuch as Plaintiff had not filed a certificate of merit within the time required by Rule 1042.3. A judgment of non pros was entered against Plaintiff in favor of Dr. Tuffaha that day. Plaintiff then filed, on December 9, 2004, a “Motion to Stay Defendants Non Pros”, and on December 27, 2004, a “Request for 30 Day Time Extension to file Amended Complaint”. After argument on both motions, the Court entered the Order of February 11, 2005, treating the motion for stay as a motion for relief under Rule 3051 but denying such, and granting Plaintiff an extension until March 11, 2005, to file the Amended Complaint against Susquehanna Health System.

On March 1, 2005, Plaintiff filed the Amended Complaint, claiming negligence on Dr. Tuffaha’s part in various respects, and negligence of the Williamsport Hospital and Medical Center (not a named defendant). He also states, in Paragraphs 152 and 153, that “Susquehanna Health System is a corporate administrator of the Williamsport Hospital and Medical Center and Divine Providence Hospital Campus” and “Susquehanna Health System as a corporation holds vicarious liability for the administration of its corporately owned facilities, equipment, offices and staff of employees.” Defendant Susquehanna Health System filed preliminary objections to the amended complaint on March 4, 2005. On March 15, 2005, Plaintiff filed a “Motion to Reinstate Original Process of Complaint with Amended Complaint of 2/28/05 through Defendants attorneys Mitchell, Mitchell, Gallagher and Attorneys McCormick Law Firm and to Add Defendants Williamsport Hospital and Medical Center.” Both filings were

addressed at an argument heard on April 14, 2005, after which the Court entered an Order dismissing the Motion to Reinstate, which was treated as a Motion to Amend the Complaint to add Williamsport Hospital and Medical Center as a defendant, inasmuch as the hospital had not been served with a copy of the motion or notice of the argument. The preliminary objections were also sustained and the Amended Complaint was dismissed for failure to state a claim upon which relief could be granted. The instant appeal was filed May 18, 2005.

Plaintiff raises eight claims of trial court error; each will be addressed seriatim.

First, Plaintiff contends the court erred in “not certifying the Complaint on the date of the certified mail of Original Complaint.” It is unclear to the Court what is being addressed in this point of error, but it is noted that Plaintiff’s incorrect service of the Complaint was overlooked, and the defendants’ preliminary objections on that basis were overruled.

Second, Plaintiff contends the Court erred in “not submitting the Complaint to the Office of Administration for Arbitration Panels for Health Care and any other similar agency for review.” If Plaintiff is referring to the arbitration procedure established by the Health Care Services Malpractice Act, 40 Pa.C.S. Sections 1301.101 et seq., the Court notes that the sections of that Act which provided for such procedure were repealed in 1996. While there is a procedure in place for mediation of medical professional liability actions, that procedure is to be instituted only upon request of the defendant. Pa.R.C.P. Rule 1042.21. No request for mediation was made in this case.

Third, Plaintiff contends the Court erred in “not transcribing a record of the November 29, 2004, and February 11, 2005, court hearings”. As noted above, on November 29, 2004, the Court heard argument on the preliminary objections of both defendants, and on February 11, 2005, the Court heard argument on Plaintiff’s request for relief from the judgment of non pros, and his request for extension of time. Neither argument was placed on the record as arguments, as opposed to testimonial hearings, are not usually recorded. Plaintiff does not indicate the purpose to have been served by creating such a record of the arguments, however, and therefore the Court is unable to further address this claim.

Next, Plaintiff contends the Court erred in “not allowing Plaintiff the ability of a continued extension of time as to the certificate of merit because of extraordinary

circumstances in the original complaint and amended complaint.” Initially, the Court notes Plaintiff did not file a request to extend the time for filing the certificate of merit. Therefore, the Court assumes he is referring to the denial of his motion for stay of non pros, treated by the Court as a motion for relief from the judgment of non pros. As explained in the Order of February 11, 2005, the motion was denied because Plaintiff failed to provide a reasonable explanation or legitimate excuse for the failure to file the certificate. The only reason Plaintiff gave was that he was unable to find an attorney to take his case. Even at the time of the argument on the motion, six months after the filing of the complaint, Plaintiff still was not prepared to file the certificate. The Court did not see any “extraordinary circumstances” to justify opening the judgment and does not believe denying the motion was in error.

Next, Plaintiff contends the Court erred in “allowing Plaintiff (sic) to file a judgment of non pros before the Plaintiff was notified of the Amended Complaint due date of March 11, 2005.” The rules of civil procedure govern the filing of the praecipe for a judgment of non pros and the Court plays no part in entering such judgment. Pa.R.C.P. Rule 1042.6. Further, as noted in this Court’s Order of February 11, 2005, the Complaint was the operative document which triggered the 60-day requirement of the rules. As no certificate of merit had been filed within 60 days of the filing of the Complaint, the judgment of non pros was properly entered.

Next, Plaintiff contends the Court erred in “not allowing Plaintiff the ability to perfect service on the additional defendant The Williamsport Hospital and Medical Center.” The Court fails to see how it interfered with Plaintiff’s ability to serve the Hospital and, indeed, Plaintiff offers no explanation in support of this claim. Such will therefore be addressed no further.

Next, Plaintiff contends the Court erred in requiring a certificate of merit with respect to those claims of negligence alleged to have occurred prior to the effective date of the certificate of merit rule, citing Velazquez v. UPMC Bedford Memorial Hospital, 328 F.Supp.2d 549 (W.D. PA. 2004).² While Velazquez does hold that Rule 1042.3 may not be applied to require a certificate of merit where the alleged negligence occurred prior to the effective date of the rule, that holding was vacated when the District Court granted reconsideration and reversed its prior decision, based on the Order entered by the Supreme Court in enacting Rules 1042.1 et

seq., which provides that such rules shall be "applicable to actions commenced on or after the effective date" of the Order. Velazquez v. UPMC Bedford Memorial Hospital, 338 F.Supp.2d 609 (W.D. PA. 2004). The District Court concluded from this language that the Pennsylvania Supreme Court intended for the date the action commences, and not the date the cause of action accrues, to control application of Rule 1042.3 and thus held the certificate of merit rule applies to all actions commenced after the effective date of the Rule.

Finally, Plaintiff contends the Court erred in “dismissing Plaintiff’s Complaint and not applying the Restatement (Second) of Torts – 328D formulation of res ipsa loquitur and allowing Plaintiff to amend his Complaint.” In dismissing the amended complaint, the Court found that any claim of vicarious liability for alleged negligence of Dr. Tuffaha could not survive in light of the dismissal of Dr. Tuffaha as a defendant in this matter, and any claim of corporate negligence could not properly be pursued against Susquehanna Health System, as such entity provides management services to hospitals and is not a “health care provider” subject to the concomitant duties. Plaintiff does not explain how the theory of res ipsa loquitur relates to this matter; no mention thereof is made in either the original complaint or the amended complaint. Inasmuch as the amended complaint failed to set forth facts supporting any theory of liability against Susquehanna Health System, the Court believes dismissal of that complaint was proper.

Accordingly, the Court believes the appeal is without merit and respectfully suggests the Orders of April 14, 2005, February 11, 2005, and November 29, 2004, be affirmed.

RESPECTFULLY SUBMITTED,

DATED: June 8, 2005

Dudley N. Anderson, Judge

cc: Timothy Kreamer, 2113 Hillside Avenue, Williamsport, PA 17701
Brian J. Bluth, Esq.
C. Edward S. Mitchell, Esq.
Gary L. Weber, Esq.
Hon. Dudley N. Anderson

² The Court is mindful of the fact the decision cited by Plaintiff is contained in a Memorandum Opinion, but in light of the subsequent history of the case, this issue need not be addressed.