

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

KAREEM MILHOUSE,
Plaintiff.

vs.

RODWAN K. RAJJOUR M.D., *et al.*,
Defendants.

: CV-19-0716

:

:

: CIVIL ACTION

:

: *Appointment of Counsel*

: *Extension of Time*

ORDER

AND NOW, following argument on Plaintiff Kareem Milhouse's Omnibus Pretrial Motion for Appointment of Counsel and Extension of Time to File a Certificate of Merit ("Omnibus Motion"), the Court hereby issues the following ORDER.

Plaintiff initiated the instant matter by filing a Complaint in the Lycoming County Court of Common Pleas on May 2, 2019. Plaintiff seeks damages from Defendants Rodwan K. Rajjoub, M.D. and Lycoming Neurological Associates for a purported injury allegedly resulting from their negligent medical care.¹ However, Defendant failed to file a Certificate of Merit within sixty (60) days of filing his Complaint, as required in medical malpractice claims under the *Pennsylvania Rules of Civil Procedure*.² On July 12, 2019, Defendant's counsel filed a Notice of Intention to Enter Judgment of Non Pros for Failure to File a Certificate of Merit.³ On July 26, 2019, Plaintiff filed the aforementioned Omnibus Motion. The Court held argument on the Omnibus Motion on October 22, 2019, at which the Plaintiff testified telephonically.

In Pennsylvania, there is no statute vesting the courts with discretion to appoint counsel for indigent civil litigants. However, the Pennsylvania Supreme Court has found that the courts may appoint counsel in extreme circumstances that implicate Fourteenth Amendment Due Process rights.⁴ In determining whether Due Process requires appointment of counsel in civil matters, the Pennsylvania courts first apply the

¹ At the time Plaintiff initiated this action, he was an inmate at the U.S. Penitentiary in Lewisburg, Pennsylvania. Plaintiff is currently housed at the U.S. Penitentiary – Coleman I in Coleman, Florida.

² Pa.R.C.P. No. 1042.3(a) ("In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party[.]").

³ See Pa.R.C.P. No. 1042.6.

⁴ See *Com. v. \$9847.00 U.S. Currency*, 704 A.2d 612, 615 (Pa. 1997).

three-factor balancing test established by the U.S. Supreme Court in *Mathews v. Eldridge*, which weighs: 1. The private interest at stake; 2. The government interest at stake; and 3. The likelihood of an erroneous decision.⁵ The courts must then weigh the *Mathews* factors against the *Lassiter* presumption that “an indigent litigant has the right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”⁶

The Pennsylvania courts have primarily applied this balancing test in cases involving civil forfeiture procedures under the Controlled Substances Act.⁷ There are no precedential opinions on the issue of whether an incarcerated inmate bringing a malpractice claim against physicians is entitled to court appointed counsel. However, the Pennsylvania Superior Court offers some guidance in the unreported *Nicholas v. Kittrell* decision, which involved a civil action for damages following an altercation between a prison inmate and a corrections officer. Upon completing the *Mathews/Lassiter* balancing test, the Superior Court found that although the unrepresented defendant inmate had a “not insignificant interest” in avoiding potential monetary liability to the corrections officer, this interest was ameliorated by the fact that the case was relatively straightforward and the fact that the inmate was already serving a twenty-five to fifty-year sentence.⁸ The Superior Court further found the government interest was negligible because of the existence of a separate administrative process available to inmates for reporting official misconduct.⁹ The Superior Court therefore found that the inmate did not have a Due Process right to court-appointed counsel.

In the instant matter, the Court finds that Plaintiff has failed demonstrate a compelling private interest in obtaining court-appointed counsel. Unlike *Kittrell*, where the defendant inmate faced potential monetary liability, here Plaintiff seeks monetary damages and faces no liability. Generally, parties with viable claims for monetary damages can obtain attorneys on a contingency fee basis. While the Court acknowledges that Plaintiff’s ability to contact attorneys is limited by the conditions of

⁵ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁶ *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 26 (1981).

⁷ See e.g., *Com. v. \$9847.00 U.S. Currency*, 704 A.2d 612 (Pa. 1997); *Com. v. All That Certain Lot or Parcel of Land Located at 605 University Drive*, 104 A.3d 434 (Pa. 2014).

⁸ *Nicholas v. Kittrell*, No. 1617 MDA 2013, 2014 WL 10803018, at *4 (Pa. Super. Aug. 22, 2014).

⁹ *Id.*

his incarceration, he has had ample notice that he would need to file a Certificate of Merit in order to pursue a medical malpractice claim, which counters any potential prejudice.¹⁰ Additionally, Plaintiff testified at argument that he remains in contact with his mother, who could assist him in obtaining an attorney. Plaintiff's ability to obtain an attorney on a contingency fee basis further weighs against providing counsel at the County's expense and mitigates the threat of erroneous deprivation. Furthermore, the fact that Plaintiff does not face any additional threat to his physical liberty through dismissal of this action weighs against appointment of counsel.

In regard to Plaintiff's Motion for Extension of Time to File a Certificate of Merit, the Court first notes that it has the discretionary authority to extend the deadline for the filing of a certificate of merit for good cause shown.¹¹ This discretionary power is limited by the statutory requirement that Plaintiff file his Motion for Extension within thirty days of Defendants filing their Notice of Intention to Enter Judgment of Non Pros for Failure to File a Certificate of Merit.¹² Plaintiff timely filed his Omnibus Motion. The Court is satisfied that Plaintiff has made concerted efforts to contact counsel, medical practitioners, and medical institutions in an effort to obtain a Certificate of Merit.

For the foregoing reasons, the Court hereby DENIES Plaintiff's Motion for Appointment of Counsel. The Court GRANTS Plaintiff's Motion for Extension of Time. The Court will provide Plaintiff sixty (60) additional days from the issuance of this Order to file the Certificate of Merit, or by December 24, 2019.

IT IS SO ORDERED this 25th day of October 2019.

¹⁰ See *Milhouse v. Rajjoub, et al.*, Memorandum of Law in Opposition to Plaintiff's Motion for Appointment of Counsel/Extension of Time 2 (Aug. 22, 2019); see also *Milhouse v. Rajjoub, et al.*, No. 1:18-cv-1529, 2019 WL 2567680 (M.D. Pa. June 21, 2019). Before initiating the instant matter, Plaintiff filed a Federal Tort Claims Act/*Bivens* action in the District Court of the Middle District of Pennsylvania seeking damages against the instant Defendants and Co-Defendants Dr. Andrew Edinger and the United States of America. The District Court ultimately dismissed the *Bivens* action with prejudice, on the basis that the Defendants were not federal actors and therefore not subject to the District Court's jurisdiction. It dismissed the medical malpractice claim without prejudice, allowing Plaintiff to refile in state court. Prior to the District Court's dismissal of the action, on October 10, 2018, Co-Defendants mailed the Plaintiff a Notice of Intention to Move for Dismissal of Medical Negligence Claims for Failure to File a Certificate of Merit. Plaintiff should therefore have had ample notice of the requirement to file a Certificate of Merit.

¹¹ Pa.R.C.P. No. 1042.3(d).

¹² Pa.R.C.P. No. 1042.3(d).

BY THE COURT,

Eric R. Linhardt, Judge

ERL/cp

cc: Kareem Milhouse

BOP Register Number 59904-066

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