

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Rodney Whipple,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-253
v.	:	(C.C. No. 2008-08990)
	:	
Warren Correctional Institution,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 10, 2009

Rodney Whipple, pro se.

Richard Cordray, Attorney General, and *Brian M. Kneafsey, Jr.*, for appellee.

APPEAL from the Court of Claims of Ohio.

McGRATH, J.

{¶1} Plaintiff-appellant, Rodney Whipple ("appellant"), appeals from a judgment of the Court of Claims of Ohio that dismissed his complaint alleging medical malpractice pertaining to care he received during his incarceration.

{¶2} Though the record contains a plethora of motions and pleadings, we will focus our attention on those relevant to this appeal. Appellant filed this complaint against defendant-appellee, Warren Correctional Institution ("appellee"), on August 13, 2008, alleging in essence that he suffered a stroke and did not get proper care prior to, during, and after the event. Appellee filed a motion for definitive statement on September 12,

2008. On October 27, 2008, the trial court filed an entry finding that appellant asserted a medical claim as defined by R.C. 2305.113(E), which requires, pursuant to Civ.R. 10(D), an affidavit of merit. Therefore, because appellant's complaint did not contain an affidavit of merit, the trial court ordered appellant to file an amended complaint and an affidavit of merit within 90 days of the date of the entry.

{¶3} On January 26, 2009, appellant filed a motion for extension of time to file the amended complaint and affidavit of merit. On February 12, 2009, the trial court denied appellant's motion for extension of time and dismissed appellant's complaint without prejudice for failure to prosecute. This appeal followed, and appellant brings the following three assignments of error for our review:

ASSIGNMENT OF ERROR NO. 1:

The trial court had committed error when it denied the plaintiff an extension of time, when good cause was shown.

ASSIGNMENT OF ERROR NO. 2:

The trial court committed reversible error when defendants precluded him from obtaining an affidavit of merit, and thereby, prohibiting him from access to relevant evidence that the trial court had ordered be given to the plaintiff twice.

ASSIGNMENT OF ERROR NO. 3:

The trial court's dismissal of the plaintiff's claims was a manifest miscarriage of justice.

{¶4} Because they are interrelated, these three assigned errors will be addressed together. Reduced to their essence, these errors present two issues: (1) whether the trial court properly denied appellant's motion for an extension of time; and (2) whether the trial court properly dismissed appellant's complaint.

{¶5} Civ.R. 10(D)(2) provides, in relevant part:

(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in section 2305.113 of the Revised Code, shall include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence. Affidavits of merit shall include all of the following:

(i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;

(ii) A statement that the affiant is familiar with the applicable standard of care;

(iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

(b) The plaintiff may file a motion to extend the period of time to file an affidavit of merit. The motion shall be filed by the plaintiff with the complaint. For good cause shown and in accordance with division (c) of this rule, the court shall grant the plaintiff a reasonable period of time to file an affidavit of merit, not to exceed ninety days, except the time may be extended beyond ninety days if the court determines that a defendant or non-party has failed to cooperate with discovery or that other circumstances warrant extension.

(c) In determining whether good cause exists to extend the period of time to file an affidavit of merit, the court shall consider the following:

(i) A description of any information necessary in order to obtain an affidavit of merit;

(ii) Whether the information is in the possession or control of a defendant or third party;

(iii) The scope and type of discovery necessary to obtain the information;

(iv) What efforts, if any, were taken to obtain the information;

(v) Any other facts or circumstances relevant to the ability of the plaintiff to obtain an affidavit of merit.

(d) An affidavit of merit is required to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment. Any dismissal for the failure to comply with this rule shall operate as a failure otherwise than on the merits.

{¶6} Though appellant did not comply with Civ.R. 10(D)(2) when he filed his complaint, the trial court allowed appellant 90 days to do so. At the expiration of this deadline, appellant sought an additional extension of time contending more time was needed because appellee was refusing to comply with the trial court's discovery orders. Thus, appellant contends the trial court erred in denying his motion for extension of time because he was in essence precluded from filing the requisite affidavit of merit. We review a trial court's denial of a motion for extension of time under an abuse of discretion standard. *Johnson v. Univ. Hosp. Case Med. Ctr.*, 8th Dist. No. 90960, 2009-Ohio-2119, ¶5. An abuse of discretion connotes more than a mere error in judgment; it signifies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶7} In his motion for extension of time, appellant contended he was unable to timely comply with the trial court's order because appellee had failed to comply with the trial court's discovery orders and provide appellant with his medical records. To the contrary, appellee argued all ordered discovery was provided. Though appellant was charged a fee for the copying of the medical records, appellant failed to pay. Thus, the trial court found appellant did not establish good cause for the requested extension of time, and, upon review of the record, we find no abuse of discretion in its finding.

{¶8} We next consider the dismissal of appellant's complaint for failure to submit an affidavit of merit. A court correctly dismisses a medical claim that lacks the affidavit of merit. *Nicely v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-187, 2009-Ohio-4386, ¶6, citing *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, ¶15. Here, appellant presented a medical claim and, thus, pursuant to Civ.R. 10(D)(2) was required to file an affidavit of merit. It is undisputed appellant failed to file an amended complaint and affidavit of merit as required by the Civil Rules and ordered by the trial court. Further, we have already determined the trial court did not abuse its discretion in finding appellant did not establish good cause for an extension of time to file the same. Therefore, we conclude the trial court did not err by dismissing appellant's complaint for lack of a Civ.R. 10(D)(2) affidavit of merit. See, e.g., *Nicely*, supra (no error in dismissing a complaint asserting an R.C. 2305.113 medical claim for failure to file a Civ.R. 10(D)(2) affidavit of merit); *Johnson*, supra (plaintiff's complaint was properly dismissed because it stated a medical claim and required an affidavit of merit that plaintiff failed to file).

{¶9} For the foregoing reasons, we find the trial court did not abuse its discretion in denying appellant's motion for extension of time, and the trial court properly dismissed appellant's complaint without prejudice. Accordingly, appellant's three assignments of error are overruled, and the judgment of the Court of Claims of Ohio is hereby affirmed.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
