[Cite as *OhioHealth Corp. v. Ryan*, 2012-Ohio-60.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

OhioHealth Corporation,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-937 (M.C. No. 2009 CVF 024762)
James M. Ryan, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on January 10, 2012

Weltman, Weinberg & Reis Co., L.P.A., and *Matthew G. Burg*, for appellee.

James M. Ryan, Jr., pro se.

APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶1} Defendant-appellant, James M. Ryan, Jr. ("appellant"), appeals from two judgments entered in the Franklin County Municipal Court. One of those judgments granted summary judgment in favor of plaintiff-appellee, OhioHealth Corporation ("OhioHealth"), on its claim upon an account. The other judgment granted OhioHealth's motion to dismiss appellant's counterclaim, which alleged OhioHealth created false identifiable health information and disclosed that protected health information to a third party, thereby damaging appellant. For the reasons that follow, we affirm the judgments of the trial court.

{¶2} On June 8, 2009, OhioHealth filed this action against appellant to recover on an account for unpaid medical services. Appellant subsequently moved to dismiss the complaint. The trial judge construed the motion to dismiss as a motion for a more definite statement and directed OhioHealth to file an amended complaint. On November 27, 2009, OhioHealth filed an amended complaint which alleged unpaid medical services in the amount of $1,337.07. Attached to the amended complaint was a redacted account statement. On January 15, 2010, appellant filed an answer denying the averments. Appellant also filed a counterclaim alleging that on or about August 4, 2007, OhioHealth created false individually identifiable health information, to wit: that appellant was uninsured, and used, disclosed, and transmitted said information to a third party, MedAssist, Incorporated, without authorization from appellant, thereby damaging appellant.

{¶3} On February 16, 2010, OhioHealth filed a motion to dismiss appellant's counterclaim, pursuant to Civ.R. 12(B)(6), arguing appellant cannot bring a private cause of action under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub.L. No. 104-191, 110 Stat. 1936 (1996) (codified primarily in Titles 18, 26, 29, and 42 of the United States Code). Even if there were a private right of action, OhioHealth further argued the "privacy rule" permits OhioHealth to use and disclose protected health information for purposes of treatment, payment, and health care operation activities, as it did here.

{¶4} Appellant opposed OhioHealth's motion to dismiss, citing to *Biddle v. Warren Gen. Hosp*., 86 Ohio St.3d 395, 1999-Ohio-115, and arguing that an independent tort does exist for the unauthorized, unprivileged disclosure to a third party of nonpublic

medical information learned within a confidential relationship. In its reply, OhioHealth argued: HIPAA governs "covered entities" like itself; HIPAA preempts any state laws which could be (but are not) applicable; and none of the exceptions to the HIPAA preemption statute apply. In his sur-reply appellant argued notice pleading, stating he is not required to prove his case at the pleading stage.

{¶5} On May 19, 2010, the trial court granted OhioHealth's motion to dismiss, finding that, although Ohio law does provide a cause of action for the release of medical information to unauthorized, unprivileged third parties, the disclosure here was in fact privileged. Because HIPAA allows for the release of medical information for payment, the trial court concluded the counterclaim failed to state a claim upon which relief could be granted and therefore granted OhioHealth's motion to dismiss.

{¶6} On June 3, 2010, appellant filed a notice of appeal in this court from the judgment entry ruling on the motion to dismiss. However, we subsequently dismissed the appeal for lack of a final appealable order on June 21, 2010.

{¶7} On June 7, 2010, OhioHealth requested leave to file a motion for summary judgment. The request for leave was granted and OhioHealth immediately filed its summary judgment motion, arguing appellant was indebted to OhioHealth for reasonable and necessary medical goods and services and failed to provide reimbursement. OhioHealth attached the affidavit of Kimberly Fox in support of its assertions. OhioHealth further argued appellant cannot meet his reciprocal burden, pursuant to Civ.R. 56(E), of setting forth specific facts to show there remains a genuine issue of material fact for trial.

{¶8} On June 22, 2010, appellant filed a response to OhioHealth's motion for summary judgment by filing a motion to dismiss.[1] Appellant argued Ms. Fox's affidavit lacked specificity as to the circumstances surrounding the alleged medical treatment on August 4, 2007. Appellant submitted Ms. Fox's testimony was without personal knowledge and provided only generalizations about the events at issue. Appellant also claimed Ms. Fox was without knowledge as to the reasonableness and/or necessity of the medical goods and services purportedly rendered. Appellant further disputed the amount due and argued it did not correctly reflect certain credits and/or insurance. Finally, appellant argued OhioHealth failed to provide a copy of a written agreement for services, which appellant contends is required pursuant to the statute of frauds.

{¶9} On September 2, 2010, the trial court issued a judgment entry finding there were no genuine issues of material fact remaining for trial, and therefore, summary judgment was granted in favor of OhioHealth. Appellant has now filed a timely appeal from this entry, as well as the May 19, 2010 entry dismissing his counterclaim. Appellant asserts two assignments of error for our review:

> FIRST ASSIGNMENT OF ERROR
>
> The trial court erred in granting Plaintiff-Appellee, OhioHealth Corporation's Motion To Dismiss Defendant-Appellant Counterclaimant, James M. Ryan's Counterclaim.
>
> SECOND ASSIGNMENT OF ERROR
>
> The trial court erred in granting Plaintiff-Appellee, OhioHealth Corporation's Motion For Summary Judgment which granted judgment against James M. Ryan in the amount of $1,337.0[7] plus interest at the rate of 4% and costs. The trial court lacked jurisdiction to hear Plaintiff-Appellee, OhioHealth

[1] Appellant filed a corrected response to the motion for summary judgment and motion to dismiss on June 23, 2010 to correct some typographical errors.

> Corporation's complaint; Plaintiff-Appellee, OhioHealth Corporation's Motion For Summary Judgment failed to meet the requirements of Civil Rule 56(C); and Plaintiff-Appellee, OhioHealth Corporation failed to submit adequate evidence to support its Motion for Summary Judgment, leaving genuine issues of material fact yet to be decided and Plaintiff-Appellee, OhioHealth Corporation failed to discharge its duty under Civil Rule 56(C).

{¶10} In his first assignment of error, appellant argues the trial court erred in dismissing his counterclaim, pursuant to Civ.R. 12(B)(6), for failure to state a claim upon which relief can be granted.

{¶11} "A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint." *Volbers-Klarich v. Middletown Mgt*., 125 Ohio St.3d 494, 2010-Ohio-2057, ¶11. The movant may not rely on allegations or evidence outside the complaint. Id. In reviewing whether a motion to dismiss should be granted, we must accept all factual allegations in the complaint as true. *Mitchell v. Lawson Milk Co*. (1988), 40 Ohio St.3d 190, 192. In order to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt that plaintiff can prove no set of facts entitling him to relief. *O'Brien v. Univ. Community Tenants Union, Inc*. (1975), 42 Ohio St.2d 242, syllabus. A judgment granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5.

{¶12} Appellant argues the trial court erred in dismissing his counterclaim because under Ohio law, an individual tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic information that a physician or hospital has learned within a physician-patient relationship. Appellant cites to *Biddle* in support of his position.

In the instant case, appellant alleges OhioHealth disclosed false protected health information (specifically that appellant was uninsured) to MedAssist, Incorporated.

{¶13} OhioHealth, on the other hand, argues the trial court properly dismissed the counterclaim on the grounds that appellant failed to state a claim upon which relief could be granted because: (1) HIPAA protected OhioHealth's disclosure of the account and thus the information cannot be deemed an "unauthorized, unprivileged disclosure" under *Biddle* (which OhioHealth argues has limited application and is inapplicable anyway); and (2) no private cause of action exists under HIPAA, which is the preemptive authority here.

{¶14} In general, HIPAA governs the confidentiality of medical records and regulates how "covered entities" can use or disclose "individually identifiable health (medical) information (in whatever form) concerning an individual." *Stigall v. Univ. of Ky. Hosp*. (Nov. 6, 2009), E.D.Ky. No. 5:09-CV-00224-KSF. HIPAA has established special rules governing the disclosure of individually identifiable health information. *LL NJ, Inc. v. NBC-Subsidiary (WCAU-TV), L.P*. (E.D.Mich.2008), 36 Media L. Rep. 1746. The relevant provisions, which make up the "privacy rule," were promulgated by the Department of Health and Human Services and are found in 45 C.F.R. parts 160 and 164. Id. "The privacy rule prohibits 'covered entities' (generally health care providers who transmit health information in electronic form, see 45 C.F.R. § 160.103) from using or disclosing an individual's 'protected health information' except where there is patient consent or the use or disclosure is for 'treatment, payment, or health care operations[.]' " Id. See also 45 C.F.R. 164.502, 164.506; *Citizens for Health v. Leavitt* (C.A.3, 2005), 428 F.3d 167, 173-74 (the privacy rule allows uses and disclosures without patient consent for " 'treatment, payment, and health care operations'-so-called 'routine uses.' ").

{¶15} Even if we assume that *Biddle* allows a claim for an independent tort against a health care provider for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information learned via a physician-patient relationship where that information involved account information (rather than actual medical records, as was the case in *Biddle*), appellant's claim still fails. First, the disclosure here was not *unauthorized*. This is because HIPAA permits the use or disclosure of individually identifiable health information when it is for purposes of obtaining payment, as is the situation here. Thus, under HIPAA, OhioHealth was permitted to disclose the information for payment without appellant's consent. Consequently, the disclosure cannot be deemed an "unauthorized, unprivileged disclosure" as required under the theory announced in *Biddle*.

{¶16} Second, state laws which are contrary to HIPAA requirements are generally superceded by the federal requirements, unless they meet an exception. See 45 C.F.R. 160.203. For example, the federal regulations shall not supercede a contrary provision of state law if the state law imposes requirements that are more stringent than those imposed under the regulation, such that the state law provides greater privacy protection for the individual who is the subject of the individually identifiable health information than does the standard in the regulation. See 45 C.F.R. 160.202(6); 45 C.F.R. 160.203(b).

{¶17} Here, however, we are aware of no applicable exceptions to preemption, and because HIPAA is applicable to these circumstances, HIPAA is the governing authority. See *Lumley v. Marc Glassman, Inc*., 11th Dist. No. 2007-P-0082, 2009-Ohio-540, ¶89 ("The purpose of the [HIPAA] is to prevent the disclosure of protected health information by health care providers, except under certain exemptions as required by

law."). Therefore, because appellant has failed to cite to any Ohio authority which is contrary to HIPAA regarding the disclosure of protected health information for purposes of payment for medical services and which meets an exception to the federal regulation, appellant's claim is governed by HIPAA.

{¶18} Significantly, HIPAA does not allow a private cause of action, according to Ohio law. See *Henry v. Ohio Victims of Crime Compensation Program* (Feb. 28, 2007), S.D.Ohio No. 2:07-cv-0052 ("Congress neither expressly nor impliedly provided for any private rights of action to enforce HIPAA."); *Shepherd v. Sheldon* (July 21, 2011), N.D.Ohio No. 1:11 CV 127 (plaintiffs apparently conceded HIPAA did not create a private cause of action); *Siegler v. Ohio State Univ*. (May 23, 2011), S.D.Ohio No. 2:11-cv-170, citing to 42 U.S.C. 1320d-5 (in creating HIPAA, Congress did not provide for any private right of action to enforce it); *Wood v. Blyer* (Aug. 9, 2006), N.D.Ohio No. 5:06CV137 ("HIPAA does not provide a private cause of action for improper disclosures of medical information, but rather provides civil and criminal penalties which must be enforced by the Department of Health and Human Services.").

{¶19} In addition, other district courts within the Sixth Circuit have also found no private right of action for alleged violations of HIPAA. See *Murry v. Mich. Dept. of Corr*., (Jan. 11, 2008), E.D.Mich. No. 07-14126, (although HIPAA includes civil and criminal penalties for improper disclosures of medical information, the regulations limit enforcement to the Secretary of Health and Human Services); *Smith v. Smith* (Aug. 13, 2007), E.D.Ky. No. 07-CV-242-JBC (no private right of action can be implied in favor of a private citizen to enforce the HIPAA regulations). See also *Doe v. Bd. of Trustees of the Univ. of Ill*. (N.D.Ill. 2006), 429 F.Supp.2d 930, 944 (every court to have considered the

issue has concluded that HIPAA does not authorize a private right of action; HIPAA does not provide a private cause of action for improper disclosures of medical information; rather, it provides civil and criminal penalties which are enforced by the Department of Health and Human Services); and *Lumley* at ¶90 (the HIPAA regulations specifically state that the Secretary of Health and Human Services shall pursue the action against an alleged offender, not a private individual; causes of action brought by private individuals must be dismissed).

{¶20} Consequently, even if a cause of action did exist under HIPAA, appellant himself is without the authority to bring it to court.

{¶21} Based upon the foregoing, we find the trial court properly dismissed appellant's counterclaim for failure to state a claim upon which relief can be granted, and we overrule appellant's first assignment of error.

{¶22} In his second assignment of error, appellant argues the trial court erred in granting summary judgment in favor of OhioHealth and in awarding judgment against appellant in the amount of $1,337.07, plus interest and costs. Appellant contends genuine issues of material fact remain because OhioHealth failed to provide adequate evidence to support its claim.

{¶23} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. Of Commrs*. (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.* (1997), 122 Ohio App.3d 100, 103. We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the

trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶24} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd*., 78 Ohio St.3d 181, 183, 1997-Ohio-221.

{¶25} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bares the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. A moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. Id. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id. If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. Id.

{¶26} Appellant argues the evidence, including the supporting affidavit of Ms. Fox, fails to: (1) establish Ms. Fox's personal knowledge; (2) prove that OhioHealth provided medical services to appellant; (3) prove the nature of the services provided and the names of the persons or entities who provided those alleged services; (4) state to whom the alleged sums are due and/or establish on whose behalf OhioHealth is seeking reimbursement; (5) establish the existence of a contract for services, implied or otherwise, between OhioHealth and appellant; and (6) support its statement of account via affidavit testimony. Thus, appellant contends genuine issues of material fact remain and the evidence was insufficient for OhioHealth to prevail on its motion for summary judgment.[2]

{¶27} OhioHealth, on the other hand, argues summary judgment was proper because OhioHealth presented evidence demonstrating a balance due on the account for services and appellant failed to establish the existence of a genuine issue of material fact.

{¶28} We find OhioHealth met its Civ.R. 56 burden via sworn testimony and an authenticated business record.

{¶29} OhioHealth produced the affidavit of Ms. Fox, within which Ms. Fox averred she is the authorized keeper of records. Ms. Fox averred she is familiar with the operation of the business and with the circumstances of the records' preparation, maintenance, and retrieval. She further averred appellant owes $1,337.07 on an account for reasonable and necessary medical services and that no credits or unapplied payments were outstanding. Attached to Ms. Fox's affidavit is the account statement

[2] Appellant appears to assert other arguments for the first time on appeal. An appellant cannot present new arguments for the first time on appeal. See *Havely v. Franklin Cty., Ohio*, 10th Dist. No. 07AP-1077, 2008-Ohio-4889, fn. 3; *Brewer v. Brewer*, 10th Dist. No. 09AP-146, 2010-Ohio-1319, ¶23. Generally, appellate courts will not consider arguments that were never presented to the trial court whose judgment is sought to be reversed. Id., citing *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 1997-Ohio-71.

which corroborates the amount due, the name of the creditor, the name of the debtor, and the balance due and owing.

{¶30} Summary judgment is fundamentally governed by Civ.R. 56, and pursuant to Civ.R. 56(E), supporting and opposing affidavits shall: (1) be made on personal knowledge; (2) set forth such facts as would be admissible in evidence; and (3) show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. *Olverson v. Butler* (1975), 45 Ohio App.2d 9; Civ.R. 56(E); *Bank One, N.A. v. Lytle*, 9th Dist. No. 04CA008643, 2004-Ohio-6547.

{¶31} Appellant submits that because the affidavit at issue does not specifically state the information provided is based upon "personal knowledge," the affidavit is insufficient. We disagree.

{¶32} "Personal knowledge" is "knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said." *Bonacorsi v. Wheeling & Lake Erie Ry. Co*., 95 Ohio St.3d 314, 2002-Ohio-2220, ¶26, quoting Black's Law Dictionary (7th ed.Rev.1999) 875; see also *Starinchak v. Sapp*, 10th Dist. No. 04AP-484 2005-Ohio-2715, ¶28. We find the affidavit here is sufficient to establish personal knowledge, despite its failure to use the "magic words," as reasonable inferences can be drawn to infer personal knowledge under these circumstances. See *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶15 ("In the absence of a specific statement of personal knowledge, personal knowledge may be inferred from the contents of an affidavit."). See also *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App.3d 213, 2010-Ohio-2902, citing *Swartz* (where the affidavit attached to the motion for summary judgment stated: the affiant was an employee of the moving party;

the file was under her immediate control and supervision; the documents attached to the complaint were accurate copies of the original instruments; and the account had a specific outstanding balance, the affidavit constituted an averment made upon personal knowledge).

{¶33} In addition, Ms. Fox's statements that she is the keeper of OhioHealth's records, she is familiar with the operation of the business, and she is familiar with the circumstances of the preparation, maintenance, and retrieval of these records all demonstrate her competency to offer testimony in this matter, without reference to the phrase "personal knowledge."

{¶34} Finally, account evidence can be considered admissible evidence under the business records exception when the proper procedures are followed. See Evid.R. 803(6). More importantly, however, appellant failed to move to strike the account evidence exhibit in this case, and therefore any error committed by the trial court in considering the exhibit is waived. See *Capital City Community Urban Redevelopment Corp. v. Columbus*, 10th Dist. No. 08AP-769, 2009-Ohio-6835, ¶19, citing *Stegawski v. Cleveland Anesthesia Group, Inc*. (1987), 37 Ohio App.3d 78, 83 (failure to move to strike or otherwise object to documentary evidence submitted by a party in support of a motion for summary judgment waives any error in considering that evidence under Civ.R. 56(C)).

{¶35} Despite appellant's claims to the contrary, we find Ms. Fox's affidavit meets the requirements of a proper affidavit under Civ.R. 56(E). We further find OhioHealth met its initial burden of producing sufficient evidence to establish the existence of an implied contract between OhioHealth and appellant for services provided to appellant, and that

appellant breached that contract due to his failure to pay, thereby damaging OhioHealth in the amount of the balance due.

{¶36} Under Civ.R. 56, once the moving party discharges its initial burden, the nonmovant must then produce competent evidence showing that a genuine issue exists for trial. In the instant case, once OhioHealth met its initial burden, it was appellant's burden to present Civ.R. 56(E) evidence to refute the claim. See *Dreshler* at 293; Civ.R. 56(E); and *Carrier v. Weisheimer Cos., Inc*. (Feb. 22, 1996), 10th Dist. No. 95APE04-488 (after a proper motion for summary judgment is made, "the nonmoving party must do more than supply evidence of a possible inference that a material issue of fact exists; it must produce evidence of specific facts which establish the existence of an issue of material fact"). However, appellant failed to do this. Here, appellant failed to present his own evidence showing that a genuine issue of material fact existed and that, as a result, summary judgment was not proper.

{¶37} While appellant has provided an affidavit averring that he does not believe he owes the amount alleged in OhioHealth's motion for summary judgment, and he also avers he has never been provided with information as to the reasonable and customary pricing of the medical services purportedly rendered, these bare refutations, without more, do not defeat OhioHealth's motion for summary judgment. "[A] party may not simply use a self-serving affidavit to establish a genuine issue of material fact if such an affidavit contains nothing more than bare contradictions of other competent evidence and a conclusory statement of law." *Sessley* at ¶30.

{¶38} Regarding the amount due, appellant submits he does not believe he owes the amount alleged by OhioHealth. However, he never specifically denies that he

received services on the date in question, nor does he explain how or why the claimed balance due is not accurate. Simply claiming that the amount owed is not accurate is not sufficient to meet his burden. See *Gen. Motors Acceptance Corp. v. Ferguson*, 10th Dist. No. 04AP-795, 2005-Ohio-899, ¶7 (where the defendant questioned the balance due but presented no *evidence* to demonstrate that her payments were not properly applied to the balance due or that the balance due was not correct, summary judgment was properly granted in favor of the plaintiff; defendant raised only non-specific doubt and failed to set forth specific facts showing there was a genuine issue for trial). See also *Carroll v. Alliant Techsystems, Inc.*, 10th Dist. No. 06AP-519, 2006-Ohio-5521, ¶17 (speculation and conjecture are not sufficient to overcome the burden of offering specific facts showing that there is a genuine issue for trial).

{¶39} Based upon the foregoing, we find the evidentiary materials provided by OhioHealth in support of its motion for summary judgment were sufficient to meet its initial burden of showing there were no genuine issues of material fact, and that OhioHealth was entitled to judgment as a matter of law on its claim against appellant. Appellant's evidentiary materials, on the other hand, were not sufficient to meet his reciprocal burden. Accordingly, the trial court did not err by granting OhioHealth's motion for summary judgment. Therefore, we overrule appellant's second assignment of error.

{¶40} In conclusion, we overrule appellant's first and second assignments of error. The judgments of the Franklin County Municipal Court are affirmed.

Judgments affirmed.

KLATT and SADLER, JJ., concur.

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