[Cite as *Boyd v. Univ. of Toledo Med. Ctr.*, 2015-Ohio-5562.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

DANIEL BOYD

Plaintiff

v.

UNIVERSITY OF TOLEDO MEDICAL CENTER

Defendant

Case No. 2014-00186

Judge Patrick M. McGrath

ENTRY GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

{¶1} On July 1, 2014, defendant filed a motion to dismiss plaintiff's complaint pursuant to Civ.R. 12(B)(6) combined with a motion for summary judgment pursuant to Civ.R. 56(C). On August 20, 2014, plaintiff filed a single response to both of defendant's motions. On August 22, 2014, defendant filed a motion for leave to file a reply memorandum. Plaintiff did not file an objection. Upon consideration, that motion is hereby GRANTED, and the court accepts defendant's reply memorandum. The motion for summary judgment is now before the court for a non-oral hearing, pursuant to L.C.C.R. 4(D).

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can 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 or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} Defendant argues that plaintiff's claim should be barred by the one year statute of limitations for medical malpractice claims set forth in R.C. 2743.16 and R.C. 2305.113(A). *See also Canady v. Ohio Dept. of Rehab. & Corr.*, 80 Ohio App.3d 382, 609 N.E.2d 241 (10th Dist.1992). Plaintiff filed his medical malpractice claim in this court on February 27, 2014, alleging he was injured on August 24, 2012 due to a misreading of a CT scan. Therefore, plaintiff's claim was filed more than six months past the one year statute of limitations.

{¶5} Pursuant to R.C. 2305.113(B)(1), the one year statute of limitations can be extended if the plaintiff gives written notice to the defendant that he is considering bringing an action and subsequently files a case within 180 days after the notice is given. Defendant asserts that even though plaintiff gave written notice of his intent to sue, he did not file his claim in the Court of Claims within 180 days of that notice. In support of this assertion, defendant filed an affidavit of Lauri A. Cooper, Esq., Associate Vice President and Senior Legal Counsel of The University of Toledo, Health Science Campus. Ms. Cooper states that the 180-day letter, mailed pursuant to R.C. 2305.113, was received by defendant on June 19, 2013. A copy of the letter, and the envelope confirming the date of delivery was affixed to the affidavit. Plaintiff had until December 16, 2013, to file his claim. He did not file the claim in the Court of Claims until February 27, 2014, and it is therefore barred by the statute of limitations.

{¶6} The one year statute of limitations can also be extended pursuant to R.C. 2305.19(A), the savings statute.

{¶7} R.C. 2305.19(A) states, in pertinent part:

{¶8} "In any action that is commenced or attempted to be commenced, * * * if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of * * * the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later."

{¶9} Plaintiff did file a connected action in Lucas County Court of Common Pleas on December 12, 2013, within 180 days of giving notice. However, defendant argues that the timely filing of the connected action does not extend the statute of limitations in the Court of Claims. It argues that the savings statute does not apply in this case, because the connected action in the Lucas County Court of Common Pleas has not failed otherwise than upon the merits. *See Windsor House, Inc. v. Ohio Dept. of Job & Family Servs.*, 2010-Ohio-257 (10th Dist.) In support of its argument, defendant attached uncertified copies of the docket and an order, dated April 23, 2014, from Lucas County Court of Common Pleas, Case No. CI-2013-05578; *Daniel Boyd v. Elsamaloty Haitham, MD, et al.* Plaintiff confirmed that the above-mentioned case is connected to the case at bar in a Statement of the Existence of Connected Actions filed on August 7, 2014, in this court. On July 9, 2014, defendant filed a motion to substitute certified copies and attached certified copies of the docket and entry. Plaintiff filed no objection to this motion, and the court has no reason to doubt the authenticity of the documents. Therefore, that motion is hereby GRANTED. The attached order from the connected action, signed by Judge Gene A. Zmuda and journalized on April 24, 2014, confirmed the other case has not 'failed otherwise than upon the merits.' The case was merely stayed pending an immunity determination in this court. To date, the parties have not moved this court to conduct an immunity determination pursuant to R.C. 9.86 and R.C. 2743.02(F).

{¶10} "The savings statute does not apply where a plaintiff files a second complaint before failing otherwise than upon the merits in a previous complaint."

Windsor House, Inc. at ¶ 19. Since the connected action has not 'failed otherwise than upon the merits,' the savings statute does not apply and plaintiff's claim was filed in this court outside of the statute of limitations. *See Partin v. Ohio DOT*, 158 Ohio App.3d 200, 2004-Ohio-4038, 814 N.E.2d 551 (10th Dist.). *See also Nye v. Univ. of Toledo*, 2013-Ohio-2311 (10th Dist.).

{¶11} Finally, the statute of limitations can also be extended, or tolled, when plaintiff claims he was legally incompetent during the period of time that the statute of limitations was running. Plaintiff asserts in his reply memorandum that he is legally incompetent and was legally incompetent at the time this claim was filed. Therefore, pursuant to R.C. 2305.16, plaintiff argues he should be entitled to a tolling of the statute of limitations and his complaint should not be dismissed.

{¶12} R.C. 2305.16 states, in part:

{¶13} "After the cause of action accrues, if the person entitled to bring the action becomes of unsound mind and is adjudicated as such by a court of competent jurisdiction or is confined in an institution or hospital under a diagnosed condition or disease which renders the person of unsound mind, the time during which the person is of unsound mind and so adjudicated or so confined shall not be computed as any part of the period within which the action must be brought."

{¶14} Therefore, to successfully claim tolling, a plaintiff must show he has either: 1) been previously adjudicated incompetent, or, 2) was confined in a hospital under a diagnosed condition rendering him of unsound mind. Plaintiff asserts that the steps to begin the incompetency adjudication process have begun. However, he has provided no evidence from which this court could infer that he was adjudicated incompetent prior to the filing of this claim.

{¶15} Since he has not been adjudicated incompetent, plaintiff argues he should be deemed incompetent under the second prong of R.C. 2305.16. He asserts, "* * * he has been confined (and will for the rest of his life) to an institution that provides him with

around-the-clock care for all of his needs * * *." In support of this argument, plaintiff provided a selection of unauthenticated medical records, including his September 5, 2013 discharge summary from HCR ManorCare, a facility where he resided from November 16, 2012 until September 5, 2013, nurse's notes during the same time, and physician's progress notes spanning from November 17, 2012 until April 10, 2013.

{¶16} However, defendant argues the court cannot consider these medical records because plaintiff failed to properly support his claim of incompetency by affidavits or other evidence, as required by Civ.R. 56. Defendant states plaintiff provided excerpts of "what he purports to be his medical records, but he has failed to provide certified copies of those medical records and/or affidavits from any of his physicians attesting to his incompetency." "Documents submitted in opposition to a motion for summary judgment which are not sworn, certified, or authenticated by affidavit have no evidentiary value and may not be considered by the court in deciding whether a genuine issue of material fact remains for trial." *Smith v. Gold-Kaplan*, 2014-Ohio-1424 (8th Dist.), citing *Green v. B.F. Goodrich Co.*, 85 Ohio App.3d 223, 619 N.E.2d 497 (9th Dist.1993); *see also Burkhart v. H.J. Heinz Co.*, 2013-Ohio-723, 989 N.E.2d 128 (6th Dist.); *Douglass v. Salem Cmty. Hosp.*, 153 Ohio App.3d 350, 2003-Ohio-4006, 794 N.E.2d 107 (7th Dist.).

{¶17} If a plaintiff claims entitlement to a tolling of the statute of limitations due to unsoundness of mind, he or she has "the burden of proving that he was suffering from some species of mental deficiency or derangement, so as to be unable to look into his affairs, properly consult with counsel, prepare and present his case and assert and protect his rights in a court of justice* * *." *Almanza v. Kohlhorst*, 85 Ohio App.3d 135, 619 N.E.2d 442 (3d Dist.1992) at paragraph three of the syllabus. *See also Lowe v. Union Trust Co.*, 124 Ohio St. 302, 702, 178 N.E. 255 (1931). Plaintiff has failed to meet this burden.

{¶18} Defendant has objected to the evidence presented by plaintiff, asserting it does not comply with the requirements of Civ.R. 56. The court agrees and accordingly shall not consider the evidence presented by plaintiff with regard to his incompetency for purposes of determining whether tolling applies. As such, plaintiff has failed to establish there is a genuine issue of material fact in this case related to his incompetence, and his argument that the statute of limitations should be tolled is without merit.

{¶19} In its reply memorandum, defendant raised a completely new argument. Defendant argued, even if the court were to consider the noncomplying evidence, plaintiff's complaint should be dismissed because the suit should not have been filed in his own name if he is incompetent and has been since the alleged malpractice in 2012. Defendant contends that Civ.R. 17(B) requires an incompetent individual to be represented by the guardian, duly appointed in accordance with R.C. 2111.02. This court agrees, insomuch as Civ.R. 25(E) requires plaintiff's counsel to inform the court within fourteen days after acquiring actual knowledge of plaintiff's incompetence. Plaintiff claims he became incompetent on August 24, 2012, was incompetent at the time this claim was filed, and has remained incompetent ever since. Yet, plaintiff first raised the issue of incompetence to this court, on August 20, 2014, in a response to defendant's motion for summary judgment. At that time, plaintiff asserted the steps to be adjudicated incompetent had begun. To date (approximately five months after the suggestion of incompetence), plaintiff has not moved this court to substitute parties, pursuant to Civ.R. 25(B). Therefore, while the court is granting defendant's motion based on the statute of limitations argument there may exist other grounds for dismissal, pursuant to Civ.R. 17(B) and Civ.R. 25(E).

{¶20} For the foregoing reasons, the court concludes that there are no genuine issues of material fact and that defendant is entitled to judgment as a matter of law. As a result, defendant's motion for summary judgment is GRANTED, and judgment is

hereby rendered in favor of defendant. Plaintiff's complaint was filed outside of the statute of limitations. The motion to dismiss is DENIED as moot. All previously scheduled events are VACATED. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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PATRICK M. MCGRATH
Judge

cc:

Anne B. Strait
Assistant Attorney General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Thomas H. Blaske
500 South Main Street
Ann Arbor, Michigan 48104

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