

No. 1-09-3378

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NADINE ACACIA,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 08 M1 302209
)	
MARYLIS EWA,)	Honorable
)	Laurence J. Dunford,
Defendant-Appellee.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Gallagher and Justice Lavin concurred in the judgment.

ORDER

HELD: Where plaintiff did not support her dental malpractice claim and related consumer fraud claim with the requisite affidavit and health professional report despite multiple opportunities to do so, the trial court did not err in dismissing her case with prejudice.

Plaintiff Nadine Acacia appeals from an order dismissing with prejudice her civil action against defendant Marilyns Ewa for dental malpractice and consumer fraud on the grounds that it was filed beyond the limitation period and was not properly supported with an affidavit and health professional report as required by section 2-622 of the Code of Civil Procedure (Code). 735 ILCS 5/2-622 (West 2008). Plaintiff contends on appeal that defendant fraudulently

concealed her injuries in a continuous course of negligent conduct so that her claim should not have been dismissed under the statute of limitations. Plaintiff also contends that the dismissal would allow defendant to escape consequences for spoliation of evidence. Defendant responds that plaintiff did not properly argue or allege fraudulent concealment or spoliation in the trial court, that the trial court did not err in finding that plaintiff knew or should have known of her injuries within the limitation period, and that plaintiff failed to comply with the requirements of section 2-622.

In her *pro se* complaint, filed August 1, 2008, plaintiff alleged that defendant was her dentist from 2002 into 2006. The complaint described a series of allegedly unsuccessful and painful dental procedures and erroneous dental diagnoses over that period, with no further specificity regarding time. Plaintiff also alleged that she repeatedly but unsuccessfully requested her dental records from defendant. The complaint was not accompanied by plaintiff's affidavit or a health professional report, but plaintiff did, within the complaint, request leave to amend the complaint once she received records from defendant.

In August 2009, after defendant appeared and answered and discovery had commenced, plaintiff's counsel filed an amended complaint. The new complaint set forth specific dates from May 3 through July 18, 2006, for specific dental care, diagnoses, and

recommendations of care by defendant. Plaintiff alleged that, after defendant suggested a bridge implant for \$10,000 on July 18, plaintiff requested her dental records in order to obtain a second opinion but on August 1, defendant refused to release the records. She also alleged that defendant recommended a root canal on August 1 due to gum disease, but upon consulting another dentist on August 2, that dentist told plaintiff that she did not have gum disease and a bridge implant was not recommended. On these facts, plaintiff made claims of dental malpractice, consumer fraud, and breach of fiduciary duty. The latter two counts were based on allegations that defendant erroneously diagnosed her with gum disease, billed her insurance for treating gum disease, and refused to provide her records. The amended complaint was not accompanied by an affidavit from plaintiff's counsel or a health professional report.

Defendant filed a motion to dismiss the amended complaint, arguing that plaintiff had not complied with the requirements of section 2-622 and that the complaint was filed when the applicable two-year limitation period had passed. See 735 ILCS 5/13-212(a) (West 2008). Plaintiff's last treatment by defendant was on July 18, 2006, but she did not file suit until August 1, 2008. This limitation period applied to all of plaintiff's claims, defendant argued, because the relevant statute covers all causes of action based on malpractice whether sounding in tort or

otherwise. Defendant also argued that, while a physician may have a fiduciary duty to her patients, our courts have not recognized a cause of action based on that duty.

On September 3, 2009, the court granted defendant's motion to dismiss, giving plaintiff leave to amend her complaint.

Plaintiff filed her second amended complaint in September 2009, substantially identical to the amended complaint except that it no longer contained a breach of fiduciary duty count. Attached to the complaint was a September 2009 report from a dentist to plaintiff's attorney describing the condition of plaintiff's teeth after "review[ing] her medical history" and examining her on September 2, 2006. While the report recommended treatment and alluded to issues with previous care ("tooth #20 and tooth #18 are loose due to the extraction of tooth #19," and "[t]ooth #31 had a poor endodontic fill but is asymptomatic"), it did not mention defendant nor did it include a finding that any earlier dentist breached the standard of care or that plaintiff had a meritorious claim against any earlier dentist. It also did not set forth the dentist's qualifications except for the D.D.S. following the dentist's name. No affidavit from plaintiff or her counsel was attached.

Defendant filed a motion to dismiss the second amended complaint. Regarding section 2-622, she noted that plaintiff's attorney had failed to provide an affidavit and that the

professional report failed to mention defendant, much less find a violation of the standard of care or a meritorious claim.

Regarding limitations, plaintiff argued that consumer fraud claims arising out of medical malpractice are governed by the limitation period for medical malpractice claims.

Plaintiff responded to the motion to dismiss, arguing that she alleged in her second amended complaint that she first learned of defendant's "medical malfeasance and deception" on August 2, 2006, so that the original complaint was timely filed on August 1, 2008. She also argued that her claim of consumer fraud was separate from her dental malpractice claims because it was based "in part" on matters other than defendant's negligent dental care such as her refusal to provide records. As to the affidavit and report required by section 2-622, plaintiff asked for the court's understanding as she "had a communication breakdown with her dentist [and] was not able to procure more than what was attached to her complaint." She also noted that dismissal of her second amended complaint for non-compliance with section 2-622 need not be a dismissal with prejudice.

On November 9, 2009, the court granted defendant's motion to dismiss with prejudice. The court expressly found that the professional report was insufficient, that plaintiff knew or should have known of her injury earlier than two years before she

filed suit, and that failure to provide records does not constitute consumer fraud. This appeal timely followed.

On appeal, plaintiff contends that the dismissal of her case with prejudice should be reversed because defendant fraudulently concealed plaintiff's injuries in a continuous course of negligent conduct and because dismissal would allow defendant to escape consequences for spoliation of evidence. Defendant responds that plaintiff did not properly allege or argue spoliation or fraudulent concealment in the trial court, that the complaint was filed outside the limitations period, and that it was not supported by an affidavit and professional report as required by section 2-622.

Section 2-622 of the Code requires that the complaint in "any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice" must be supported by an affidavit of merit from the plaintiff or her counsel. 735 ILCS 5/2-622(a) (West 2008); see also *Bloom v. Guth*, 164 Ill. App. 3d 475, 477-78 (1987) (entire complaint, including breach of contract and consumer fraud claims, deemed to sound in malpractice and thus governed by section 2-622).

In the affidavit of merit, the plaintiff or counsel must aver that she consulted and reviewed the facts with a qualified health professional -- a licensed dentist where the defendant is

a dentist, who practiced or taught in that field within the last six years, with "experience or demonstrated competence" in the subject of the case -- that the professional reported in writing after reviewing the medical record and other relevant material that the plaintiff has a meritorious claim, and that the plaintiff or counsel believes based on that report that she has a meritorious claim. 735 ILCS 5/2-622(a) (West 2008). A plaintiff or counsel may instead aver that she could not consult with a health professional because it could not be done before the limitation period would expire, or without records that the defendant has failed to produce as requested, but an affidavit based on and accompanied by a professional report must then be filed within 90 days of the complaint or the production of records respectively. 735 ILCS 5/2-622(a) (West 2008).

A separate professional report must be filed for each defendant named in the complaint as amended. 735 ILCS 5/2-622(b) (West 2008). While this does not require that the defendant be identified in the report, nor is the report required to include the statutory language of a "reasonable and meritorious cause for filing the action," there must be sufficient facts and conclusions in the report -- that is, a discussion of the deficiencies in the health care provided by the defendant or defendants -- to clearly identify the reasons that a meritorious cause of action exists. *Hull v. Southern Illinois Hospital*

Services, 356 Ill. App. 3d 300, 307 (2005); *Avakian v. Chulengarian*, 328 Ill. App. 3d 147, 160 (2002). The professional's qualifications to issue a report, as defined in section 2-622, must be set forth in the report. *Hull*, 356 Ill. App. 3d at 304-305.

The failure to file an affidavit and report pursuant to section 2-622 is grounds for dismissal under section 2-619 of the Code. 735 ILCS 5/2-619, 2-622(g) (West 2008). We review *de novo* a dismissal under section 2-619. *Cedzidlo v. Marriott International, Inc.*, 404 Ill. App. 3d 578, 581 (2010). Because a party may amend its pleading "on just and reasonable terms," the right to do so is not absolute or unlimited and the decision whether to allow an amendment is a matter of the trial court's discretion that we review for an abuse of discretion. 735 ILCS 5/2-616(a) (West 2008); *Cedzidlo*, 404 Ill. App. 3d at 581-82.

Here, plaintiff did not comply with the requirements of section 2-622 despite ample opportunities to do so. Though she consulted a new dentist in August 2006 and filed suit in August 2008, she did not accompany her complaint with an affidavit either supported by a professional report or explaining why one was unavailable. Plaintiff's amended complaint, filed with the assistance of counsel over a year after the initial complaint, could have remedied this oversight but did not. By the time plaintiff filed her second amended complaint, she (or more

precisely her counsel) did not include the requisite affidavit though she had a document purporting to be a health professional report. Thus, her argument in support of her second amended complaint that she "was not able to procure more than what was attached to her complaint" does not ring true.

Moreover, the professional report finally provided in September 2008 -- though expressly based on an August 2006 consultation -- did not comply with section 2-622. It did not mention the standard of care, include a finding or conclusion that a meritorious cause of action exists, or discuss shortcomings in plaintiff's previous dental care except briefly and in an off-hand manner. The only conclusions the report reached concerned plaintiff's future care, and one does not come away from reading it with a clear sense that, or why, plaintiff has a meritorious cause of action. Moreover, the report did not establish the dentist's qualifications except for his dental degree (D.D.S.). We conclude that the court did not err in dismissing plaintiff's second amended complaint, nor did it abuse its discretion in entering that dismissal with prejudice.

Because non-compliance with section 2-622 is an independent basis for dismissal under section 2-619, as noted above, we need not consider whether plaintiff's complaint was filed within the applicable statute of limitations.

Accordingly, the judgment of the circuit court is affirmed.

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Affirmed.