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FIRST DIVISION
May 16, 2016

No. 1-15-1860
2016 IL App (1st) 151860-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARY MCNAIR,)	
)	
Plaintiff-Appellant,)	
)	
v.)	Appeal from the
)	Circuit Court of
)	Cook County.
RUSH UNIVERSITY MEDICAL CENTER f/k/a)	
RUSH PRESBYTERIAN – ST. LUKE’S)	
MEDICAL CENTER, UNIVERSITY)	
ANESTHESIOLOGISTS, S.C., UNIVERSITY)	14 L 003971
PAIN CENTER, LTD., UNIVERSITY PAIN)	
CENTERS, LLC, RUSH PAIN CENTER,)	
TIMOTHY LUBENOW, M.D., ARNOLD)	
DELEON, M.D., and JAVIER PENA, M.D.,)	Honorable
)	Janet Brosnahan,
Defendants-Appellees.)	Judge Presiding.
)	
and)	
)	
ASOKUMAR BUVANENDRAN, M.D.,)	
(To Preserve Issue for Appeal).)	
)	
Respondent in Discovery-Appellee.)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

ORDER

Held: Circuit court properly denied plaintiff's motion to
convert respondent in discovery to a defendant

where respondent had timely complied with discovery.

¶ 1 Plaintiff Mary McNair filed a medical negligence claim following knee replacement surgery. She named several people and entities as respondents in discovery, including Asokumar Buvanendran, M.D. When plaintiff filed a motion to convert nine respondents in discovery, including Buvanendran, to defendants, Buvanendran objected on the basis that the motion was not timely. The trial court agreed and denied plaintiff's motion to convert Buvanendran to a defendant, and terminated Buvanendran as a respondent in discovery. Plaintiff now appeals, alleging that the trial court erred in denying her motion because plaintiff was diligent in conducting discovery and filed her motion to convert in a timely manner, in full compliance with the trial court's orders. Plaintiff further alleges that Buvanendran is estopped from asserting the statute of limitations as a defense against plaintiff's cause of action. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 On April 8, 2014, plaintiff filed her complaint, alleging permanent injuries caused by medical malpractice related to anesthesia procedures and post-anesthesia care surrounding her knee surgery. One of the named respondents in discovery was Buvanendran.

¶ 4 On June 17, 2014, the trial court entered an order requiring the written discovery by respondents in discovery to be answered by July 17, 2014. Buvanendran filed responses to plaintiff's interrogatories on July 17, 2014. Buvanendran responded to requests for production on August 4, 2014.

¶ 5 Also on July 17, 2014, the trial court entered an order requiring the deposition of Buvanendran to take place on September 8, 2014. On September 8, 2014, Buvanendran sat for a deposition.

¶ 6 On September 24, 2014, plaintiff filed an emergency motion for an extension of time to convert respondents in discovery to defendants. She alleged that she needed discovery from the other respondents in discovery before she could determine if Buvandendran should be converted to a defendant. On September 26, 2014, the trial court, over the objection of Buvanendran, granted plaintiff's motion and extended the time for plaintiff to file a motion to convert respondents in discovery to December 1, 2014.

¶ 7 On November 7, 2014, plaintiff again filed an emergency motion for an extension of time to convert respondents in discovery to defendants. The trial court granted plaintiff's motion, over the objection of Buvanendran, and on January 23, 2015, the trial court set the final deadline of April 30, 2015, for plaintiff to file her motion to convert.

¶ 8 Plaintiff filed her motion to convert certain respondents in discovery, including Buvanendran, to defendants on April 30, 2015. On May 14, 2015, Buvanendran filed his written objection to plaintiff's motion to convert. He alleged that according to section 2-402 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-402 (West 2008)), plaintiff had six months from the filing of her complaint to convert him from a respondent in discovery to a defendant, and instead the trial court allowed several extensions of time, totaling 204 days, for plaintiff to file her motion to convert. Buvanendran argued that by statute, the court was only permitted to provide one 90-day extension for good cause, and additional reasonable extensions beyond the 90 days for the failure or refusal by respondent to comply with timely filed discovery requests. Buvanendran contended that since he completed all discovery requested of him, additional extensions of time should not have been given.

¶ 9 Plaintiff responded that the court's orders extending the time for conversion were proper because at the time of each extension, despite plaintiff's due diligence, all discovery "as to"

Buvanendran had not been completed. Namely, plaintiff argued that outstanding discovery from other defendants and respondents in discovery pertained to Buvanendran and could have had a bearing on whether or not he should be converted to a defendant.

¶ 10 A hearing was held on this matter. After hearing arguments from both sides, the trial court stated that pursuant to section 2-402 of the Code, the first six-month deadline to convert respondents in discovery to defendants was October 8, 2014. The court noted that a 90-day extension beyond that would expire before April 30, 2015, the final deadline given. The court explained, however, that in reading the statute, it assumed that it was allowed to give extensions based on the language of the statute that allowed for extensions if the respondent refused or failed to respond to discovery requests. The trial court admitted that it read that sentence as "any" respondent, but that really the extension should only have been given for the respondent at issue. And because Buvanendran did not fail to respond to discovery, but rather complied, the extensions should not have been given.

¶ 11 The trial court found that plaintiff's motion to convert Buvanendran to a defendant was denied for reasons stated on the record, and that Buvanendran was terminated as a respondent in discovery. Plaintiff now appeals.

¶ 12 ANALYSIS

¶ 13 On appeal, plaintiff first contends that the trial court erred in denying her motion to convert Buvanendran from a respondent in discovery to a defendant, and terminating him as a respondent in discovery, because plaintiff was diligent in conducting discovery and filed her motion to convert in a timely fashion and in full compliance with the trial court's orders and with the language contained in section 2-402 of the Code. Buvanendran responds that the trial court

had no authority to grant the extensions of time past the time period specified in the statute. We agree with Buvanendran.

¶ 14 Section 2-402 of the Code states in pertinent part:

"The plaintiff in any civil action may designate as respondents in discovery in his or her pleading those individuals or other entities other than the named defendants, believed by the plaintiff to have information essential to the determination of who should properly be named as additional defendants in the action.

Persons or entities so named as respondents in discovery shall be required to respond to discovery by the plaintiff in the same manner as are defendants and may, on motion by the plaintiff, be added as defendants if the evidence discloses the existence of probable cause for such action.

A person or entity named as a respondent in discovery in any civil action may be made a defendant in the same action at any time within 6 months after being named as a respondent in discovery, even though the time during which an action may otherwise be initiated against him or her may have expired during such 6 month period. An extension from the original 6-month period for good cause may be granted only once for up to 90 days for: (i) withdrawal of plaintiff's counsel or (ii) good cause. Notwithstanding the limitations in this Section, *the court may grant additional reasonable extensions from this 6-month period for a failure or refusal on the part of the respondent to comply with timely filed discovery.*

***. " (Emphasis added) 735 ILCS 5/2-402 (West 2008).

¶ 15 In this case, plaintiff's complaint was filed on April 8, 2014. Accordingly, plaintiff had six months, until October 8, 2014, to convert respondents in discovery to defendants. "Section 2-402 established a special statutory action on the condition that suit be brought within the specified time period." *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1024 (2009) (citing *Robinson v. Johnson*, 346 Ill. App. 3d 895, 902 (2003)). "Section 2-402 provides for broad discovery unknown to the common law and makes the six-month time requirement an inherent element of the right." *Robinson*, 346 Ill. App. 3d at 902. "Meeting its requirements is a condition of the liability itself and not of the remedy alone, complying with its provisions is a condition precedent to plaintiff's right to seek a remedy." *Id.* See also *Hugley v. Alcaraz*, 144 Ill. App. 3d 726, 734 (1986) (such a statute is not a statute of limitations – rather, such a provision is a condition precedent to plaintiff's right to seek a remedy).

¶ 16 However, the statute allows for one extension, of up to 90 days, for good cause. On September 26, 2014, plaintiff was granted an extension until December 1, 2014, based on plaintiff's allegations that she needed discovery responses from other respondents in discovery before she could determine if Buvanendran should be converted to a defendant. Accordingly, plaintiff had until December 1, 2014, to convert Buvanendran from a respondent in discovery to a defendant. Instead, plaintiff requested another extension, which was granted, until April 30, 2015. However, the statute clearly states that an extension may be granted "only once." 735 ILCS 5/2-402 (West 2008). Accordingly, subsequent extensions should not have been given. While the statute does provide that additional reasonable extensions may be granted "for a failure or refusal on the part of the respondent to comply with timely filed discovery," the record reveals that Buvanendran timely responded to interrogatories and requests for production, and sat for a

deposition. 735 ILCS 5/2-402 (West 2008). Accordingly, there was no refusal or failure on the part of Buvanendran to comply with discovery.

¶ 17 Plaintiff nevertheless maintains that at the time of plaintiff's additional extension request, there was outstanding discovery "as to" Buvanendran, and thus an extension was proper based on the failure of other respondents in discovery to comply with discovery. However, the statute does not allow extensions for outstanding discovery "as to" certain respondents. Rather, it specifically states that a person or entity named as a respondent in discovery in a civil action may be made a defendant at any time within 6 months after being named as a respondent in discovery, and that the court may grant additional reasonable extensions from this 6-month period for a failure or refusal on the part of "the respondent" to comply with timely filed discovery. 735 ILCS 5/2-402 (West 2008). This language is not ambiguous, and therefore we will not read it to mean "a" respondent or "any" respondent. See *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 504 (2000) (when the language of an enactment is clear, it will be given effect without resorting to other interpretive aids).

¶ 18 Plaintiff's final contention on appeal is that Buvanendran should be estopped from raising the defense of statute of limitations because "his own conduct contributed to the delay in [p]laintiff naming him as a defendant." Specifically, plaintiff contends that Buvanendran knew of the Rush University policies and procedures that related to the Anesthesiology Department and yet he did not identify them as requested in discovery. We first note that this argument is being raised for the first time on appeal. Arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal. *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15. Moreover, plaintiff conceded in the circuit court that Buvanendran had complied with discovery when she admitted that Buvanendran answered interrogatories, responded to

requests to produce, and sat for a deposition. Plaintiff also admitted that she did not file a motion to compel when her counsel stated "I agree," in response to the trial court's statement that Buvanendran "was never a subject of a motion to compel." Accordingly, we find this argument meritless because it was never raised in the trial court, and plaintiff even conceded the opposite – that Buvanendran complied.

¶ 19

CONCLUSION

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.