No. 3--10--0309

Order filed February 23, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

HARRY PROCTOR, JR.,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit
Plaintiff-Appellant,	)	Peoria County, Illinois
	)	
v.	)	No. 09--L--172
	)	
JULIUS P. BONELLO, M.D. and THE PEORIA SURGICAL GROUP, LTD.,	)	
	)	Honorable Joe Vespa,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

Held: The trial court did not err in dismissing plaintiff's complaint with prejudice where plaintiff failed to timely file a certificate of merit in a refiled action even though plaintiff timely filed a certificate in the original, voluntarily dismissed action.

Plaintiff, Harry Proctor, sued defendants, Julius Bonello,

M.D., and the Peoria Surgical Group, Ltd., for medical malpractice. Defendants moved pursuant to section 2-619 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2008)) to dismiss the suit on the basis that plaintiff failed to file a certificate of merit. The circuit court of Peoria County granted defendants' motion finding plaintiff offered "no argument as to any 'good cause' for his inability to timely file the documents in question." Plaintiff appeals, claiming he substantially complied, as a matter of law, with all pleading requirements. Plaintiff also asserts that the trial court erred "by denying his request to file an amended affidavit." .

FACTS

Plaintiff's original complaint, case No. 06-L-417, alleged that on November 15, 2004, Dr. Bonello performed surgery on plaintiff to excise cancerous tissue, being a polyp in plaintiff's colon. During the surgery, defendant severed plaintiff's left ureter. This, plaintiff alleged, violated the standard of care of a reasonably well-qualified physician and surgeon practicing in central Illinois. Plaintiff filed suit on November 6, 2006, along with a section 2-622 affidavit noting that defense counsel "was unable to obtain a consultation with a

licensed healthcare professional *** before the expiration of the statute of limitations."

On January 26, 2007, plaintiff filed another section 2-622 affidavit in case No. 06-L-417 indicating counsel consulted with a medical doctor who believed Dr. Bonello committed medical malpractice. Attached to the January 26, 2007, affidavit was a report from Dr. Herbert Rubin of Tallahassee, Florida. This report is dated January 23, 2007.

On May 30, 2008, the trial court entered an agreed order in case No. 06-L-417 dismissing the matter pursuant to plaintiff's "motion for dismissal without prejudice to refile pursuant to 735 ILCS 5/2-1009(a)."

On the last day available for plaintiff to refile his action, June 1, 2009, plaintiff, with new counsel, filed another suit, case No. 09-L-172, making the same allegations contained in case No. 06-L-417. Plaintiff's counsel attached an affidavit pursuant to section 2-622 of the Code indicating he "was unable to obtain a consultation with a licensed healthcare professional *** and the consultation could not be obtained before the expiration of the statute of limitations."

In response to plaintiff's complaint in case No. 09-L-172, defendants filed a motion to dismiss on September 11, 2009. In

this motion, defendants allege that the "90 day grace period" contained within the Code to allow a plaintiff to file a healthcare professional's report had expired and no such report had been filed by plaintiff. On November 5, 2009, plaintiff's counsel filed a section 2-622 affidavit indicating he had consulted with a healthcare professional who determined that a reasonable and meritorious cause of action existed in this matter. Counsel attached a copy of the healthcare professional's written report to the affidavit. The new report, dated November 2, 2009, is also from Dr. Rubin and mirrors his January 23, 2007, report.

After briefing and oral argument, the trial court granted defendants' motion to dismiss. In its order, the court noted that "plaintiff offers no argument as to any 'good cause' for his inability to timely file the documents in question." The court further noted that "denial of the defense motion would render meaningless the statute of limitations and 735 ILCS 5/2-622." Plaintiff filed this timely appeal.

ANALYSIS

In the briefs filed with this court, plaintiff makes three distinct claims of error. Initially, plaintiff argues that the trial court erred in finding he offered no good cause for failing

to timely file a copy of the healthcare professional's written report. Second, plaintiff argues that the trial court erred in finding that denying defendants' motion would render the statute of limitations and section 2-622 of the Code meaningless. Finally, plaintiff submits that the trial court abused its discretion by denying his request to file an amended affidavit. During oral arguments, plaintiff seemingly combined the claims made in his brief and requested that we hold, as a matter of law, that a plaintiff need not file a section 2-622 certificate of merit in a properly refiled action if one was filed in the original action prior to the original action's voluntarily dismissal.

The ultimate issue is whether the trial court erred in granting defendants' motion to dismiss plaintiff's complaint with prejudice. "On appeal from a section 2-619 motion, the reviewing court 'must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.'" *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 436 (2008), quoting *Kedzie & 103rd Currency Exchange, Inc., v. Hodge*, 156 Ill. 2d 112 (1993). "A court's disposition of a section 2-619 motion is reviewed *de novo*.

O'Casek, 229 Ill. 2d at 436.

Our legislature has amended section 2-622 of the Code more than once in recent history. Each change has ultimately been struck down by our supreme court. See *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217 (2010), and *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997). Each potentially applicable version of section 2-622 contained the same language concerning the 90-day extension of time in which to file a "certificate of merit." Nevertheless, given our supreme court's opinions in *Lebron* and *Best*, we feel compelled to clarify that the appropriate version of section 2-622 for our review is contained within the 1994 Illinois Compiled Statutes.

Section 2-622 states:

> "Healing art malpractice. (a) In any action *** in which the plaintiff seeks damages for injuries or death by reason of medical *** malpractice, the plaintiff's attorney or the plaintiff *** shall file an affidavit, attached to the original and all copies of the complaint, declaring the following:
>
> ***
>
> 2. That the affiant was unable to obtain a

> consultation required by paragraph 1 because a statute of limitations would impair the action and the consultation required could not be obtained before the expiration of the statute of limitations. If an affidavit is executed pursuant to this paragraph, the certificate and written report required by paragraph 1 shall be filed within 90 days after the filing of the complaint.
>
> ***
>
> (g) The failure to file a certificate required by this Section shall be grounds for dismissal under Section 2-619." 735 ILCS 5/2-622 (West 1994).

A clear reading of this statute suggests that the trial court properly dismissed plaintiff's complaint. Plaintiff filed his complaint on June 1, 2009. The 90-day extension pursuant to section 2-622(a)(2) expired on August 31, 2009. Plaintiff did not file a certificate and written report in the case before us until November 5, 2009.

Plaintiff claims, in essence, that the certificate of merit filed in case No. 06-L-417 satisfied his duty, as a matter of

law, to file a certificate in case No. 09-L-172. However, plaintiff cites no authority for this proposition. Conversely, defendants make compelling arguments as to why plaintiff did not satisfy his duty under 2-622 and his complaint was properly dismissed.

The most compelling argument, as noted above, is the plain language of the statute; specifically subsection (g) which states that failure to file the certificate shall be grounds for dismissal. 735 ILCS 5/2-622(g)(West 1994). Moreover, section 2-622(a)(1) mandates that plaintiff's counsel as affiant consult with and review "the facts of the case with a health professional" who the affiant reasonably believes "has determined in a written report *** that there is a reasonable and meritorious cause for the filing of such action." 735 ILCS 5/2-622(a)(1) (West 1994). Plaintiff changed counsel between the dismissal of case No. 06-L-417 and the filing of case No. 09-L-172. The plain wording of subsection (a)(1) prohibited plaintiff's new counsel from summarily refiling the original certificate (filed in case No. 06-L-417) without first consulting with the author thereof.

Our supreme court has unequivocally stated that if "there was any doubt whether this court viewed the refiling of a

voluntarily dismissed count as a new action, it was resolved in *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496 (1997), in which this court explained that a refiled count was a new, distinct action." *Hudson v. City of Chicago*, 228 Ill. 2d 462, 474 (2008). Case No. 09-L-172 is undoubtedly an entirely new action, separate and apart from case No. 06-L-417. We are aware of no authority that allows us to find that plaintiff could rely, for purposes of his duty to file a certificate in case No. 09-L-172, on the certificate filed in case No. 06-L-417 any more than we could find that defendants were excused from filing an appearance and answer in case No. 09-L-172 since defense counsel already filed them in case No. 06-L-417.

Plaintiff claims *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421 (2008) mandates reversal of the trial court's ruling. We disagree. In *O'Casek*, after filing the original suit and affidavit stating her attorney had been unable to meet with a healthcare professional to review her case, plaintiff failed to file a certificate of merit within the 90-day extension period. *O'Casek*, 229 Ill. 2d at 433. Facing a motion to dismiss, plaintiff took a voluntary dismissal and one year later, refiled her cause of action. *O'Casek*, 229 Ill. 2d at 433. Attached to the new cause of action was another affidavit stating

that plaintiff's counsel had not been able to meet with a healthcare professional. *O'Casek*, 229 Ill. 2d at 433. In the refiled action, however, the *O'Casek* plaintiff did, in fact, file the certificate of merit within 90 days. *O'Casek*, 229 Ill. 2d at 433.

The *O'Casek* defendant moved to dismiss the action, arguing in light of the earlier voluntary dismissal of plaintiff's complaint, plaintiff could not satisfy certain requirements of section 2-622. *O'Casek*, 229 Ill. 2d at 433. The trial court agreed and dismissed the action, but the Fourth District reversed the dismissal of plaintiff's case. *O'Casek*, 229 Ill. 2d at 434. The appellate court noted that the trial court based its ruling upon a version of section 2-622, later found to be unconstitutional, that required a plaintiff to file an affidavit verifying that the refiled action had not previously been voluntarily dismissed. *O'Casek*, 229 Ill. 2d at 433; 735 ILCS 5/2-622(a)(2) (West 2002). The appellate court stated that the versions of section 2-622 relied on by the trial court "disappeared with *Best* and was never reenacted." *O'Casek v. Children's Home & Aid Society of Illinois*, 374 Ill. App. 3d 507, 513 (2007), *aff'd*, 229 Ill. 2d at 451. Ultimately, our supreme court found that "no dispute exists that the plaintiff filed her

certificate of merit within 90 days of her refiled complaint. Therefore, we affirm the judgment of the appellate court reversing the circuit court's dismissal of plaintiff's complaint." *O'Casek*, 229 Ill. 2d at 450.

O'Casek certainly does not support plaintiff's claim herein. O'Casek actually filed the certificate of merit within the applicable 90-day time period in her refiled cause of action. Plaintiff did not. Plaintiff claims that "[h]ere, like in *O'Casek*, the requisite attorney's affidavit and physician's report were timely filed." Plaintiff seemingly reads *O'Casek* to stand for the proposition that a plaintiff need only file one certificate of merit, as a matter of law, in a scenario involving a voluntarily dismissed medical malpractice action that is later refiled. That was not the holding of *O'Casek* and we find no authority to support such a contention. *O'Casek* simply held that the appellate court correctly found the amendment to section 2-622 requiring an affidavit verifying that the matter had not previously been voluntarily dismissed "disappeared with *Best* ***." *O'Casek*, 229 Ill. 2d at 451. That fact, coupled with the fact that the *O'Casek* plaintiff filed the certificate of merit within the 90-day time frame, led our supreme court to find that dismissal of the refiled action was error. *O'Casek*, 229 Ill. 2d

at 451.

In the case at bar, it is undisputed that the plaintiff failed to file a certificate of merit within the applicable 90-day time frame in the refiled action. Section 2-622(g)'s pronouncement that the "failure to file a certificate required by this Section shall be grounds for dismissal under Section 2-619" (735 ILCS 5/2-622(g) (West 1994)) is, by itself, sufficient authority to support the trial court's dismissal of plaintiff's case. However, our inquiry does not end there.

When a plaintiff fails to file an affidavit as required by section 2-622, he "may be granted leave to amend a complaint to correct defects resulting from a failure to comply with section 2-622 or the trial court may dismiss the complaint with or without prejudice." *Cookson v. Price*, 393 Ill. App. 3d 549, 552 (2009). The "failure to comply with section 2-622 of the Code does not require the trial judge to dismiss the complaint with prejudice." *Premo v. Falcone*, 197 Ill. App. 3d 625, 629 (1990), citing *McCastle v. Sheinkop*, 121 Ill. 2d 188 (1987). "The decision whether to grant leave to amend the pleadings is within the sound discretion of the trial court. However, we will not hesitate to overturn the trial court's determination where there has been a manifest abuse of discretion. [Citation.] Here, the

trial court proceeded under the erroneous belief that section 2-622 requires dismissal with prejudice." *McCastle*, 121 Ill. 2d at 194. Where there is nothing in the record "which would indicate that the trial court found the dismissal with prejudice was statutorily required" and plaintiff "has shown no good cause for the delay and has failed to present any evidence of good cause for failure to file the certificate and report as required by section 2-622", affirmation of the trial court's dismissal is warranted. *Garland v. Kauten*, 209 Ill. App. 3d 30, 35 (1991).

Supreme Court Rule 183 (Ill. S. Ct. R. 183) does allow late filing of a pleading for good cause. It states,

> "The court, for good cause shown on motion after notice to the opposite party, may extend the time for filing any pleading or the doing of any act which is required by the rules to be done within a limited period, either before or after the expiration of the time."

In plaintiff's response to defendants' motion to dismiss, plaintiff requested leave to file a new affidavit of merit or an amended complaint with a new affidavit of merit and physician report. Following a hearing, the trial court made a specific

finding that plaintiff "offers no argument as to any 'good cause' for his inability to timely file the documents in question." When determining whether a trial court abused its discretion by denying a party's motion to amend, we consider: (1) whether the proposed amendment will cure the defective pleading; (2) whether the proposed amendment would surprise or prejudice the opposing party; (3) whether the proposed amendment was timely filed; and (4) whether the movant had previous opportunities to amend. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, (1992).

Undoubtedly, factors three and four weigh heavily against the plaintiff. Plaintiff's proposed amendment was not timely filed and he had ample opportunities to amend. Even if factors one and two favor plaintiff, at best a balancing of the factors is a wash. As such, we cannot say that no reasonable person would take the view adopted by the trial court. Therefore, we find the trial court did not abuse its discretion when finding good cause did not exist to allow plaintiff to amend his pleadings. This finding, coupled with the finding that plaintiff showed no good cause for his failure to comply with the requirements of section 2-622, leads us to hold that the trial court did not err in dismissing plaintiff's complaint with

prejudice.

It is axiomatic to note that an appellate court may affirm for any reason evident in the record. *Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006 (2010). Having found that sufficient authority existed to support the trial court's dismissal of plaintiff's complaint with prejudice, we need not address plaintiff's contention that the trial court erred when stating that a denial fo defendants' motion would render meaningless the statute of limitations and section 2-622.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

Affirmed.