2013 IL App (2d) 120954-U
No. 2-12-0954
Order filed May 7, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JON PAGELS, Plaintiff-Appellant, v. JOHN C. BULGER, Individually and as Agent/Employee of JOHN BULGER, M.D., S.C., and MIDWEST CENTER FOR DAY SURGERY, INC., Defendants-Appellees.	)	Appeal from the Circuit Court of Du Page County. No. 11-L-745 Honorable Ronald D. Sutter, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in dismissing with prejudice plaintiff's medical malpractice complaint: plaintiff repeatedly failed to comply with section 2-622, delaying the litigation considerably, and plaintiff's ultimate attempt to comply consisted of a conclusory report from an unidentified physician, without the required attorney consultation affidavit.

¶ 2 The dispositive issue raised in this appeal is whether the trial court abused its discretion in dismissing with prejudice the medical malpractice complaint filed by plaintiff, Jon Pagels, after finding that plaintiff's counsel failed to establish good cause for not timely filing the required health

care professional's report (report) and attorney affidavit. We determine that the trial court did not abuse its discretion. Accordingly, we affirm.

¶ 3 The facts relevant to resolving this appeal are as follows. On June 29, 2011, plaintiff's counsel filed a medical malpractice complaint on plaintiff's behalf. In the complaint, counsel alleged as follows. "On June 29, 2009, plaintiff *** presented to [defendant] John Bulger, M.D., S.C. and [defendant] Midwest Center for Day Surgery, Inc. [(Midwest)], by and through its agent [defendant] John C. Bulger, M.D. and John C. Bulger, M.D., individually, for sub mucous resection of the nasal septum, spreader graft and sub mucous resection of the turbinate." Defendants improperly performed this procedure, causing plaintiff to need corrective surgery for his nose. Plaintiff told defendants that he did not want to undergo cosmetic surgery on his face; yet, despite plaintiff's instructions, defendants performed cosmetic surgery on plaintiff's nose. As a result of defendants' negligent conduct in failing to diagnose and treat plaintiff's condition, and to obtain plaintiff's informed consent for performing cosmetic surgery, plaintiff sustained personal and pecuniary damages.

¶ 4 Plaintiff's counsel also asserted in the complaint that, pursuant to section 2-622(a)(2) of the Code of Civil Procedure (Code) (735 ILCS 5/2-622(a)(2) (West 1994)),[1] he was filing plaintiff's

[1]Our citation to the 1994 edition of the Illinois Complied Statutes comports with our supreme court's observation that, in light of *Lebron v. Gottlieb Memorial Hospital*, 237 Ill.2d 217, 250 (2010), which invalidated a 2005 amendment to section 2-622, section 2-622 now reads as it did prior to 1995 (except for certain language added in 1998 that has no bearing on this case). *Cookson v. Price*, 239 Ill. 2d 339, 341-42 (2010). However, we note that, after this cause was dismissed in the trial court, section 2-622 was amended by Public Act 97-1145, § 5 (eff. Jan. 18, 2013).

complaint without the necessary report (see 735 ILCS 5/2-622(a)(1) (West 1994)), because the statute of limitations was about to expire. Attached to the complaint was counsel's affidavit attesting to this fact.

¶ 5 Seven months later, on January 23, 2012, counsel for Dr. Bulger and his office (Dr. Bulger's counsel) filed a motion to dismiss plaintiff's complaint (735 ILCS 5/2-619 (West 2010)), claiming, among other things, that plaintiff's counsel never filed the necessary report (735 ILCS 5/2-622(g) (West 1994)).[2] In the motion, Dr. Bulger's counsel noted that plaintiff's counsel had until September 27, 2010, to file the report, that counsel never asked for an extension of time to file the report, and that, to date, counsel had not filed the report. On that same date, plaintiff's counsel orally moved for an extension of time to file the report. The court denied the motion and ordered counsel to file a written motion seeking such relief.

¶ 6 On March 7, 2012, plaintiff's counsel filed a response to the motion to dismiss. In the response, plaintiff's counsel contended that, although he had contacted Dr. Bulger, he had not received a complete copy of plaintiff's medical records. Thus, counsel was unable to file the necessary report.

¶ 7 A few weeks later, on March 26, 2012, plaintiff's counsel filed a motion for leave to file the report. Attached to the motion was a document titled "Medical Report."[3] No affidavit prepared by

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[2]Counsel for Midwest later joined in that motion and filed a separate motion to dismiss raising the same issues.

[3]The record does not disclose the name of the health care professional who prepared the report, the report is not signed, and the report contains only conclusory statements concerning defendants' alleged negligence.

plaintiff's counsel was filed along with the report as required by section 2-622(a)(1) of the Code (735 ILCS 5/2-622(a)(1) (West 1994)).

¶ 8 The next day, Dr. Bulger's counsel filed a reply in support of the motion to dismiss. In the reply, counsel asserted:

> "Plaintiff did not seek an extension to file his 2-622 report until approximately seven months after suit was filed and four months after his initial extension expired and, when he finally did so, he did so orally only in response to Dr. Bulger's motion to dismiss. Plaintiff has not established that he timely requested any records necessary to the completion of the report or that any request for records was not timely complied with.
>
> Plaintiff's failure to comply with the requirements of Section 2-622, his failure to timely seek an extension under Section 2-622, and his failure to establish good cause for these failures, warrants dismissal of his Complaint with prejudice pursuant to 735 ILCS 6/2-622(g) [(West 1994)]."

¶ 9 Soon thereafter, on March 28, 2012, counsel for Midwest filed a reply in support of the motion to dismiss. Counsel for Midwest claimed, like Dr. Bugler's counsel did, that plaintiff's counsel did not establish good cause for failing to comply with section 2-622 of the Code.

¶ 10 On April 4, 2012, the trial court held a hearing on defendants' motion to dismiss. At that hearing, plaintiff's counsel admitted that his failure to comply with section 2-622 of the Code was due to inadvertence. Specifically, counsel stated, "I can only assume that what ended up happening here and what I think happened was we filed this electronically and just through a clerical error, we normally diary for 30 days, it didn't get diaried." Counsel went on to note that "[w]e then got the notice from the clerk's office, which is why I appeared in [December] to answer counsel's question."

¶ 11 Following the hearing, the court noted the time line of events in the case. The court then found:

"The case law indicates that the plaintiff needs to show good cause for the delay in complying with the requirements of 622. The plaintiff in his response brief filed on March 1, 2012 indicates the plaintiff still as of March 1, 2012 did not have copies of his medical records. Plaintiff gives no explanation for the failure to have medical records. The failure to have these medical records does not establish in my opinion good cause.

Section 5/8-2001 of the [C]ode establishes a procedure for plaintiffs to obtain their medical records, apparently that was not done in this case. And in addition, the plaintiff could have filed an affidavit with his complaint pursuant to 622(a)(3), but did not.

The plaintiff's attempts to show good cause by alleging he was continuing to undergo treatment to correct the alleged malpractice in my opinion does not establish good cause. The plaintiff now attaches a report from an unidentified physician, which in my opinion is conclusory and does not comply with the requirements of 622.

In addition, the plaintiff's attorney has not offered the consultation affidavit required by the statute. The statute requires both a sufficient physician's report and an attorney affidavit regarding personal consultation. I do find that the facts in this case are similar to the factual scenario in *Hobbs [v.] Lorenz*[, 337 Ill. App. 3d 566 (2003)] ***. However, I also find that the plaintiff in this case has done very little to advance this litigation. Under all of the circumstances in this case, even with the liberal reading and application of Section 622, I do not believe that it excuses the plaintiff's neglect of his obligations."

¶ 12 Plaintiff's counsel moved to reconsider, contending that defendants would suffer no discernable prejudice if the court allowed the cause to be decided on the merits and that his inadvertence should be excused because, once he discovered what had happened, he acted diligently in obtaining the records and materials necessary to complete the section 2-622 report. Along with the motion, plaintiff's counsel attached a first amended complaint, an unsigned report, and his affidavit attesting to the merit of plaintiff's complaint.

¶ 13 The trial court denied the motion. In doing so, the court reiterated that plaintiff's counsel failed to establish good cause for failing to comply with section 2-622. That is, although the court recognized that inadvertence could be considered in determining whether good cause was shown, the court believed that counsel's conduct amounted to "more than inadvertence." The court recited that counsel failed to file a report within 90 days after filing the complaint, did not ask for an extension of time to file the report within that 90 days, waited to serve defendants until almost six months after the complaint was filed, searched for a consulting physician only after he served defendants, and orally asked for an extension of time to file the report only after defendants moved to dismiss. Moreover, once the court denied counsel's oral motion to file the report, counsel did not promptly move in writing to file the report. Rather, at that point, counsel claimed that he had not obtained all of the necessary medical records, but he failed to provide any reasonable explanation as to why the records had not been obtained. Further, the conclusory report that was eventually filed was from an unidentified physician and was not accompanied by an attorney's affidavit. Thus, it was insufficient to comply with section 2-622. Given all of this, the court found that "[t]he facts and circumstances in this case go beyond the type of inadvertence that in [the court's] opinion could constitute good cause." This timely appeal followed.

¶ 14 At issue in this appeal is whether the dismissal of plaintiff's complaint with prejudice was proper. More specifically, we consider whether plaintiff's counsel established good cause for his failure to timely file a report and attorney affidavit as required by section 2-622(a)(1) of the Code.

¶ 15 Section 2-622 provides that, when a plaintiff files a medical malpractice complaint, attached to the complaint must be one of three documents. Pursuant to section 2-622(a)(1), a plaintiff may attach a report from a qualified health care professional stating that the physician has reviewed the plaintiff's medical records and believes that the plaintiff has a reasonable and meritorious cause of action. 735 ILCS 5/2-622(a)(1) (West 1994). A plaintiff who is represented by counsel must file along with the report an affidavit from counsel indicating that counsel discussed the case with a qualified physician and that there is merit to the plaintiff's claims. *Id.* Under section 2-622(a)(2), a party may attach to the complaint an affidavit indicating that a report could not be obtained and that the complaint is being filed anyway because the statute of limitations is about to expire. 735 ILCS 5/2-622(a)(2) (West 1994). If an affidavit is prepared pursuant to section 2-622(a)(2), then the plaintiff has 90 days in which to file the necessary report and consulting affidavit. *Id.* Section 2-622(a)(3) essentially allows a complaint to be filed without a report if an affidavit attached to the complaint indicates that medical records necessary to prepare the report have been requested and not yet received. 735 ILCS 5/2-622(a)(3) (West 1994).

¶ 16 The purpose behind section 2-622 is to deter the filing of frivolous medical malpractice actions and to ensure that the ones that are filed are meritorious. *Cato v. Attar*, 210 Ill. App. 3d 996, 998 (1991). This does not mean, however, that section 2-622 should be construed in such a way that plaintiffs lose substantive rights merely because they failed to strictly comply with the statute's mandates. *Hobbs*, 337 Ill. App. 3d at 569. Rather, if a plaintiff fails to comply with section 2-622,

the trial court may, based on the unique facts of the case, allow amendment of the pleadings or may dismiss the complaint with or without prejudice. *Cato*, 210 Ill. App. 3d at 999; *Wasielewski v. Gilligan*, 189 Ill. App. 3d 945, 950 (1989). The trial court's decision regarding which option to take rests within its sound discretion and will not be reversed absent an abuse of that discretion. *Cato*, 210 Ill. App. 3d at 999.

¶ 17 When a court considers whether to dismiss a complaint with prejudice for the untimely filing of the report and consulting affidavit, the court may consider whether there is good cause for the late filing of the required documents. Ill. S. Ct. R. 183 (eff. Feb. 16, 2011); *Premo v. Falcone*, 197 Ill. App. 3d 625, 630 (1990). Although good cause has not been defined specifically, our supreme court has provided some guidance in outlining what may be considered in determining whether the party seeking an extension of time to file the necessary documents has established good cause. See *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 353 (2007). For example, good cause may arise even when "the party's original delinquency was caused by mistake, inadvertence, or attorney neglect." *Id.* However, in deciding whether there is good cause, a court "may not engage in an open-ended inquiry which considers conduct that is unrelated to the causes of the party's original noncompliance." *Id.* Thus, in deciding whether good cause has been shown, a court cannot consider whether the nonmoving party would be inconvenienced or suffer any prejudice if the moving party were granted an extension of time to file the necessary documents. *Id.* at 350.

¶ 18 With these principles in mind, we turn to the facts presented here. Plaintiff's counsel argues that the complaint should not have been dismissed with prejudice because, "[b]ut for the inadvertence that occurred early on, [he] was diligent in obtaining the records and materials necessary to complete the requisite 2-622 report." In making this argument, counsel argues that the

court failed to consider the "level" of counsel's inadvertence. Counsel urges that his failure to diary the case after he filed the complaint is the precise "level of inadvertence" that constitutes "good cause" as envisioned by our supreme court. Not surprisingly, defendants disagree. They essentially contend that, on a number of occasions, plaintiff's counsel should have been aware of his failure to comply with section 2-622 and immediately sought to rectify that. Because plaintiff's counsel did not timely act to comply with section 2-622 when he was made aware of his noncompliance, defendants claim that the court did not abuse its discretion in dismissing plaintiff's complaint with prejudice. We agree with defendants.

¶ 19 Here, counsel for plaintiff filed the complaint on June 29, 2011, indicating that he filed the complaint without the required report. Thus, plaintiff was given 90 days in which to file the report. Because of a diarying error, no report was filed within that 90-day period. When plaintiff's counsel was reminded about this case in December 2011, he did not act to file the report or seek an extension of time to file it. Rather, plaintiff's counsel acted only when defendants moved to dismiss the complaint a month later, and counsel acted by orally moving to file the report which he admittedly still did not have. The court denied the oral motion and required plaintiff's counsel to file a written motion. Instead of filing a written motion, plaintiff's counsel responded to defendants' motion to dismiss and indicated that he was unable to file a report because he did not have all of the records he needed to have a report prepared. Then, two weeks later, and nine months after the complaint was filed, plaintiff's counsel filed a conclusory report from an unidentified physician without filing along with it the consulting affidavit. Given the repeated failures to comply with section 2-622 in any way, we conclude that the trial court did not abuse its discretion in dismissing plaintiff's complaint with prejudice.

¶ 20 Supporting our position is *Hobbs*. There, like in this case, the plaintiff's counsel filed a medical malpractice complaint along with an affidavit indicating that he was filing the complaint without the necessary report because he was unable to obtain the report and the statute of limitations was about to expire. *Hobbs*, 337 Ill. App. 3d at 567-68. During the following 90 days, counsel neither filed the report nor requested an extension of time within which to file it. *Id.* at 568. Almost three months after the 90-day extension had expired, the defendants moved to dismiss, citing the fact that compliance with section 2-622 was not had. *Id.* The plaintiff's counsel filed a response, attaching an affidavit indicating that he had not received all of the plaintiff's medical records (see 735 ILCS 5/2-622(a)(3) (West 2000)). *Id.* According to the affidavit, counsel had sought to obtain some of the records within days after filing the complaint and had contacted the defendants' counsel about some of the records a few weeks before the motion to dismiss was filed; however, as of the date that the response to the motion to dismiss was filed, counsel had not received the records. *Id.* The trial court dismissed the complaint with prejudice, and the plaintiff appealed. *Id.* at 568-69.

¶ 21 On appeal, this court considered, among other things, whether the trial court abused its discretion in dismissing the plaintiff's complaint with prejudice. *Id.* at 570. We concluded that the trial court did not, as the "[p]laintiff's [counsel's] unexcused lapses delayed the litigation considerably." *Id.* In reaching that result, we noted that counsel did "little or nothing toward supplying the report." *Id.* That is, counsel never sought an extension of time to file the report before the 90 days expired, he waited for about five months after filing the complaint before he sought to obtain from the defendants the medical records needed to prepare the report, and, when the complaint was dismissed seven months after it had been filed, the plaintiff's counsel still had not obtained the necessary report. *Id.*

¶ 22 As in *Hobbs*, plaintiff's counsel's unexcused lapses delayed the litigation considerably. Although, unlike in *Hobbs*, plaintiff's counsel eventually filed a report, that report was lacking in many respects, and, when the case was dismissed, counsel had failed to include with the report his own affidavit attesting to the merit of plaintiff's claims. Given these defects, we cannot conclude that the trial court abused its discretion. See *Batten v. Retz*, 182 Ill. App. 3d 425, 427, 429-30 (1989) (in case where the plaintiff failed to file a timely report, but filed conclusory reports from an unidentified internist, unidentified registered nurse, and unidentified physician after the 90-day extension had expired, court found that no authority of which it was aware "requires the exercise of discretion in favor of a plaintiff in a medical malpractice action when the certificates and medical reports suffer from numerous defects in addition to being untimely filed").

¶ 23 For these reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 24 Affirmed.