

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

(FILED – FEBRUARY 2, 2009)

STEPHANIE M. O’BRIEN and
MICHAEL O’BRIEN, Individually
and as Natural Parents and Next
Friends of BRENDAN M. O’BRIEN,
A Minor

VS.

K.C. No. 05-957

AARON R. SHERMAN, M.D.;
WEST BAY CENTER FOR WOMEN’S
HEALTH, INC.; KENT COUNTY
MEMORIAL HOSPITAL;
JOHN DOES, M.D., JAMES ROE and
ABC CORPORATION

DECISION

LANPHEAR, J. This matter is before the court on Dr. Aaron R. Sherman’s “Motion to Vacate Order for Summary Judgment” and “Motion for Time to Correct Rule 36B Admission.”

FACTS AND TRAVEL

On November 28, 2002, Stephanie M. O’Brien visited the Kent County Hospital Emergency Room, believing that she was having contractions. After a fetal heart monitor was applied, other tests were conducted and assessments were made, she was discharged. Ms. O’Brien gave birth to Brendan M. O’Brien on November 29, 2002. The plaintiffs, Stephanie and Michael O’Brien, allege that Brendan suffers from cerebral palsy which was caused by the negligence of the defendants.

The complaint herein was filed in October 2005. Dr. Sherman, Kent County Memorial Hospital and the West Bay Center for Women's Health, Inc. promptly responded, through counsel. Significant discovery ensued. In December 2006, counsel moved to withdraw from his representation of Dr. Sherman and the West Bay Center. Appended to the motion is a consent form, wherein Dr. Sherman and the West Bay Center¹ consented to the withdrawal. The motion was continued several times, then granted by the Court (apparently without objection) on February 1, 2007.

On February 19, 2007, the plaintiffs issued a Request for Admissions to Dr. Sherman. It asked him to admit, inter alia, his treatment of Ms. O'Brien, the applicable standard of care and whether he discharged her from the hospital. Dr. Sherman did not timely respond. The case continued to proceed actively with contested motions concerning credentialing issues, peer review, production of Ms. O'Brien's personal notebook, and depositions of the nurses. Dr. Sherman ignored the litigation.

On September 3, 2008, a control calendar was held by the Court. Notice was sent to Dr. Sherman and the attorneys for the other parties. While the attorneys appeared, Dr. Sherman did not. Dr. Sherman was defaulted by the Court for his failure to appear.²

In September 2008, the plaintiffs moved for summary judgment. The motion was based, in large part, on Dr. Sherman's failure to respond to the Request for Admissions, but also contained independent proof of his negligence (an affidavit, medical records, deposition transcripts and interrogatory answers). Again, Dr. Sherman failed to respond. The plaintiffs,

¹ Dr. Sherman signed the consent for himself and as the representative of West Bay Center for Women's Health, Inc.

² Dr. Sherman has not moved to vacate the default. All that appears to remain for the entry of default judgment is proof of the judgment amount. See System 95 Construction, Inc. v. Lance Industries, Inc., 711 A.2d 657, 658 (R.I. 1998). Vacating a summary judgment on liability may not assist him as he is already in default. See generally Reyes v. Providence Place Group, L.L.C., 853 A.2d 1242, 1245-1246 (R.I. 2004).

more than accommodating, cooperated with continuing the hearing several times. On October 27, 2008, the Motion for Summary Judgment came on for hearing. Summary judgment was granted on liability in favor of the plaintiffs' against Dr. Sherman, without opposition.

Apparently, this stirred Dr. Sherman. On October 31, 2008, Dr. Sherman filed a "Motion to Vacate Order for Summary Judgment." He submitted with this motion, a "Motion to Correct Rule 36B Admission" and "Defendant's Memorandum in Opposition of Motion for Summary Judgment"³ The plaintiffs objected and attached a transcript of a deposition of Dr. Sherman held on October 10, 2008, by the attorney for Kent County Memorial Hospital.

On November 24, 2008, the matter came on for hearing before the Court. No witnesses or evidence was presented. With Dr. Sherman present, the Court denied the motion to modify his admissions. Indicating that summary judgment was a harsh remedy, the Court reserved decision, provided the parties until December 8, 2008, to submit additional memoranda and to request a hearing, if a hearing was desired. Neither party requested a hearing. Plaintiff's counsel submitted a memoranda, but Dr. Sherman did not submit any additional documents.⁴

This case came before the Court on the Control Calendar, for a status conference, on December 10, 2008. Dr. Sherman was issued a notice to attend and failed to do so.

ANALYSIS

Obviously, Dr. Sherman has left the Court with a procedural morass. He failed to attend court sessions when his attendance was vital. When his attorney withdrew, Dr. Sherman ignored the progress of the case. After summary judgment was granted, he produced an objection to the

³ To be explicit, there was no memorandum relative to the Motion to Correct Rule 36B Admission, or the Motion to Vacate. The memorandum submitted pertained to the Motion for Summary Judgment which had already been granted.

⁴ Plaintiff's memorandum focused on the notice given to Dr. Sherman. Dr. Sherman's only submission was the December 1 memorandum pertaining to the summary judgment, not the Motion to Vacate.

motion and a Motion to Vacate the Summary Judgment Order. As the Motion to Vacate Order for Summary Judgment is the only matter properly before the Court, the Court will focus there.

1. The Summary Judgment Setting.

As the plain meaning of the words connote, a motion for summary judgment is of critical importance. As our high court has said:

When a motion for summary judgment has been filed and properly supported, a litigation death knell begins to toll. Unless the opposing parties—in this lawsuit a boatbuilder and its sundry corporate affiliates—can still this doleful dirge by showing the existence of a genuine issue of material fact, all legal clamor will soon subside into a final judgment for the movant and the opponents' case will be pronounced dead in the water. Bourg v. Bristol Boat Co., 705 A.2d 969, 970 (R.I. 1998).

Accordingly, our courts set a rigid procedure for motions for summary judgment.

Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Super. R. Civ. P. 56(c).

Form of Affidavits; Further Testimony; Defense Required. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Super. R. Civ. P. 56(e).

These requirements are of critical importance, for they come at a most pivotal part of the case. Judgment itself is threatened. Accordingly, extended notice of the motion is required. If the motion is supported, the non-moving party may not lie idle, but must respond by showing facts (or law) in its favor.

To ensure that the Court has sufficient opportunity to review the documents and the parties are sufficiently prepared, this Court has issued an Administrative Order.⁵ The Order requires 30-days advance notice of dispositive motions. The non-moving party must submit its documents 12 days before the hearing. If a party fails to appear “the Court may deem the parties have rested on their pleadings and may render a decision accordingly.”

In this action, the Motion for Summary Judgment was filed and mailed to Dr. Sherman in early August 2008. The motion was continued several times and granted in late October 2008, without any objection from Dr. Sherman.⁶ Simply put, Dr. Sherman had sufficient time and never responded.

As the Summary Judgment Motion has already been submitted, continued, argued, considered and decided, the Court cannot simply reconsider it and declines to do so. Dr. Sherman must first obtain relief from the Summary Judgment Order which already entered.

2. The Motion to Vacate.

Dr. Sherman submitted a Motion to Vacate Order for Summary Judgment. The motion is barebones and was submitted without a supporting memorandum.⁷ It describes his attendance at

⁵ The Administrative Order was promulgated on August 1, 2008. Similar orders were promulgated by other justices on the Kent County Superior Court Civil Calendar and by the other justices assigned to civil calendars across the state. Although this rule is circulated at the clerk’s office and elsewhere, a copy of the Order is filed in this action.

⁶ On October 31, 2008, after summary judgment was granted, Dr. Sherman filed a memorandum in opposition to the summary judgment, with the Motion to Vacate. No affidavits were submitted with these documents.

⁷ Submitted at approximately the same time was Dr. Sherman’s tardy memorandum in objection to the summary judgment. However, it does not address his grounds for seeking relief from the Order; rather, it addresses only the

a deposition in October 2008 and accuses plaintiff's counsel of failing to notify him of the continued date of the summary judgment hearing. The motion fails to include a hearing date.

Rule 60 of the Rhode Island Rules of Civil Procedure sets forth the requirements for relief from an order or judgment. Other than for the court's clerical mistakes, relief is limited:

b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. ...

Dr. Sherman does not cite a specific subpart of the rule as grounds for relief. The motion itself, however, focuses only on his failure to receive adequate notice of the summary judgment hearing.

3. The Adequacy of Notice.

The motion to vacate focuses solely on the adequacy of the notice of the summary judgment hearing. In his motion, Dr. Sherman acknowledges that he was aware of the pending Summary Judgment Motion at the time of his deposition on October 10, 2008, but was not provided with the new hearing date. This contention fails in five different respects:

summary judgment itself. It references his failure to receive his mail, but does not allege that the plaintiffs acted inappropriately.

First, Dr. Sherman had an affirmative to monitor the hearing date himself. He knew he was representing himself, he alleges that he knew of problems with his mail delivery and he knew a Summary Judgment Motion was pending. This should have prompted him to obtain counsel or telephone the Court. Although the motion was scheduled for hearing and then continued, Dr. Sherman never appeared.⁸

Second, plaintiffs' memoranda and certifications establish the extensive notice given to Dr. Sherman.

Third, any confusion concerning Dr. Sherman's mailing address was self-inflicted. In August 2008, he was using, and the Court file reflects a home address in Coventry. He then alleges a number of New York addresses interchangeably. His October deposition transcript and his November 1 filings reveal a Sea Cliff, New York, address. At the hearing on November 24, he filed a change of address to the Glen Head, New York. His December 2 memorandum uses the Glen Head, New York, address.

Fourth, there is no affirmative proof that Dr. Sherman informed the Court or counsel of his new addresses during the discovery or summary judgment phases; and,

Fifth, there is no affirmative proof that Dr. Sherman filed a change of address form with the United States Post Office at any time.

In sum, it is Dr. Sherman alone who let this case proceed without him. His inferences in his memorandum that the confusion was caused by others or by his experience are directly contradicted by the statements made in open court and at the deposition.

4. Excusable neglect

Presuming that Dr. Sherman seeks to vacate the Order by alleging excusable neglect, a more thorough analysis of that term is helpful:

⁸ Dr. Sherman is an educated man who has been involved with litigation in the past.

“Excusable neglect” is a more rigorous standard than “good cause,” and it requires a party to show “that the neglect . . . was occasioned by some extenuating circumstances of sufficient significance to render it excusable.” We have held that the excusable neglect that would qualify a party for relief “is generally that course of conduct that a reasonably prudent person would take under similar circumstances.” . . . Furthermore, “[t]he burden of proof is on the moving party.” Reyes v. Providence Place Group, L.L.C., 853 A.2d 1242, 1248 (R.I. 2004) (citations deleted.)

A more recent case held:

It is well settled that unexplained neglect, whether by a party or its counsel, standing alone, will not automatically excuse noncompliance with orderly procedural requirements.” Jacksonbay Builders, Inc. v. Azarmi, 869 A.2d 580, 584 (R.I. 2005) (quoting Astors’ Beechwood v. People Coal Co., 659 A.2d 1109, 1115 (R.I. 1995)). This Court has described excusable neglect as: “[A] failure to take the proper steps at the proper time, not in consequence of the party’s own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party.” Id. (quoting Small Business Loan Fund Corp. v. Gallant, 795 A.2d 531, 533 (R.I. 2002)); Pleasant Management, LLC v. Carrasco, 960 A.2d 216, 224-226 (R.I. 2008).

Dr. Sherman never told the Court that he had moved. He knew that depositions and the like were proceeding but did nothing, except to abandon the case and let it take its course. It did. Dr. Sherman should know better and did know better. Dr. Sherman offered no explanation for failing to inform the Court, or counsel, of his change of address. He simply assumed the Court would eventually track him down. As he summarized on November 24, 2008, “I made a few egregious . . . errors in my pro se defense.” None are excusable.

Dr. Sherman cannot place blame on the other attorneys when he did not even attempt to notify them of his changed addresses.⁹ Dr. Sherman admits that he did not participate in the case

⁹ Dr. Sherman’s attempts to blame plaintiffs’ counsel fail. He infers that plaintiffs’ counsel made some sort of assurance about the admissions, but he did not prove it. He did not present evidence, counsel’s testimony, or even

from July 2007 until November of 2008. It is his own unexplained inattention (either via his gross neglect or his willful disregard for the Court processes) that resulted in his failure to respond to the summary judgment.

To put it simply, a prudent person in reasonable circumstances would not ignore this case. A prudent person would not change addresses without some concern about this case. The standard is higher for a reasonably prudent person “under similar circumstances.” Dr. Sherman’s circumstances only move the bar even higher. He is fortunate to be highly educated and to have some familiarity with contested, medical malpractice litigation. His neglect (or intentional avoidance) is clearly not “excusable.” Accordingly, vacating the previous order granting summary judgment on liability is inappropriate.

5. Representation of One’s Self.

Before leaving the matter, the Court must address another issue in Dr. Sherman’s memorandum: that his pro se status and inexperience should weigh in his favor. While it is obviously a goal of the Court to address all cases on the merits, dealing with a party representing himself presents any court with challenges. It is important, however, to apply the law fairly. Judge Bruce M. Selya of the First Circuit Court of Appeals put it best:

A pro se litigant, like any litigant, is guaranteed a meaningful opportunity to be heard. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 437, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265 (1982). While courts have historically loosened the reins for pro se parties, see, e.g., Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972) (suggesting that courts should construe a pro se litigant’s pleadings with liberality), the “right of self-representation is not ‘a license not to comply with relevant rules of procedural and substantive law.’” Andrews v. Bechtel

his own affidavit to establish the point. Dr. Sherman has participated in extensive litigation in several cases and is no fool (though at argument he claimed himself to be an idiot). The Court does not find that plaintiffs’ counsel made any assurances to Dr. Sherman regarding the admissions, but even if he did, the Court is convinced that Dr. Sherman would not have reasonably relied upon any such statements. Frankly, his argument lacks any credibility.

Power Corp., 780 F.2d 124, 140 (1st Cir.1985) (quoting Faretta v. California, 422 U.S. 806, 835 n. 46, 95 S.Ct. 2525, 2541 n. 46, 45 L.Ed.2d 562 (1975)), cert. denied, 476 U.S. 1172, 106 S.Ct. 2896, 90 L.Ed.2d 983 (1986). The Constitution does not require judges-or agencies, for that matter-to take up the slack when a party elects to represent himself. See McKaskle v. Wiggins, 465 U.S. 168, 183-84, 104 S.Ct. 944, 953-54, 79 L.Ed.2d 122 (1984) (explaining that courts need not “take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course”).

Although Faretta and McKaskle are criminal cases, the principles for which they stand are fully applicable in this instance. Indeed, there is a long line of authority rejecting the notion that pro se litigants in either civil or regulatory cases are entitled to extra procedural swaddling. See Julie M. Bradlow, Comment, Procedural Due Process Rights of Pro Se Civil Litigants, 55 U. Chi. L. Rev. 659, 668 nn. 41, 42 (1988) (collecting cases); see also Andrews, 780 F.2d at 140 (declining to carve out a pro se exception to Fed. R. Evid. 103(a)(2)). While we can imagine cases in which a court appropriately might extend special solicitude to a pro se litigant, see, e.g., Rana v. United States, 812 F.2d 887, 889 n. 2 (4th Cir.1987) (dictum), the instant case is clearly not cut from that cloth. Appellants simply appear to have been penny wise and pound foolish; they knowingly chose to handle their own defense, forsaking professional assistance; they lost; and no miscarriage of justice looms. Consequently, appellants must reap the predictable harvest of their procedural default.

* * *

Hence, parties who choose to represent themselves must be held to anticipate what trained counsel would ordinarily anticipate. In other words, if a reasonably well-prepared litigant could have foreseen an issue, and would have raised it, then the exception contained in the regulation does not pertain. So it is here. Eagle Eye Fishing Corp. v. U.S. Department of Commerce, 20 F.3d 503, 506 -507 (C.A.1) (Mass.1994).

It was Dr. Sherman’s obligation, in representing himself, to respond to the Request for Admissions. He did not. It was Dr. Sherman’s obligation, in representing himself, to respond to the Summary Judgment Motion. He did not. It was Dr. Sherman’s obligation, in representing himself, notify the Court, and counsel, of his new addresses. He did not. Certainly this much is expected of a pro se litigant.

CONCLUSION

Dr. Sherman's Motion to Vacate the Summary Judgment is denied. For clarification, the Motion for Time to Correct Rule 36B Admission was previously denied.

