IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Aaron Jones and Rashad Jones, as co-independent administrators of the estate of Tonia Jones, deceased,	)	
Plaintiffs,	)	
v.	)	20 L 11559
Nursepower Services Corp., an Illinois corporation, Alpha Home Health, Inc., an Illinois corporation, and Alpha Home Care Services, Inc., an Illinois corporation,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

A physician's report is to be attached to a medical malpractice complaint within 90 days after receipt of all requested medical records. Although the plaintiff failed to comply with the requirement, based in part on procedural errors, the defendant has not produced the records needed for the plaintiff to submit a physician's report of merit. Accordingly, this court enters and continues the defendants' motion to dismiss pending the filing of a physician's report.

Facts

Thirteen-year-old Tonia Jones suffered from cerebral palsy and had been fitted with a gastro-jejunal feeding tube. Alpha Home Health, Inc. and Alpha Home Care Services, Inc. (together, "Alpha defendants") provided Tonia with in-home healthcare. Nursepower Services Corp., provided Tonia with in-home medical care, treatment, nursing, and attendant care services.

On November 2, 2018, Nursepower provided Tonia with in-home care from 3:00-11:00 p.m. Nursepower's licensed practical nurse documented in Tonia's medical records various symptoms, including an irregular heart rate, an elevated pulse, labored breathing, and vomiting. From November 2, 2018 at 11:00 p.m. to November 3, 2018 at 7:00 a.m., an Alpha defendants' licensed practical nurse continued to care for Jones and documented in the medical records the care administered. Neither the Nursepower nor the Alpha defendants' nurse contacted Tonia's treating physician, called 9-1-1, or advised her family that such calls should be made.

On November 3, 2018, Tonia's condition worsened. She eventually went into in cardiac arrest and died that day from multisystem organ failure and septic shock. Post-mortem records showed the presence of bacteremia, Candidemia, Escherichia coli, bronchopneumonia, and a urinary tract infection.

On January 27, 2021, Aaron and Rashad Jones, as co-independent administrators of Tonia's estate, filed an amended four-count wrongful death and survival action against the defendants. As to the Alpha defendants, the estate alleges in counts three—Survival Act—and four—Wrongful Death Act—that the in-home care providers owed Tonia a duty of care based on a professional nursing standard. The estate claims the Alpha defendants breached their duty by failing, among other things, to: (1) examine Tonia in a timely and proper manner and appreciate the signs and symptoms of an evolving infection; (2) document adequately information in Tonia's chart; (3) coordinate Tonia's care with Nursepower; (4) contact Tonia's physician or 9-1-1; and (5) advise Tonia's family as to her symptoms or instruct them to contact her physician or 9-1-1.

On May 27, 2021, the Alpha defendants filed their motion to dismiss. The parties subsequently filed their response and reply briefs.

<u>Analysis</u>

The Alpha defendants seek to dismiss counts three and four pursuant to the Code of Civil Procedure. Specifically, the Alpha

defendants argue that, sections 2-619(a)(5) and (9), 735 ILCS 5/2-619(a)(5) & (a)(9), authorize a dismissal with prejudice because the estate failed, pursuant to section 2-622(g), 735 ILCS 5/2-622(g), to file timely the physician's report of merit required by section 2-622(a)(1), 735 ILCS 5/2-622(a)(1). A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but argues that some defense or affirmative matter defeats the claim. 735 ILCS 5/2-619; *Norabuena v. Medtronic, Inc.*, 2017 IL App (1st) 162928, ¶ 14 (citing *Ball v. County of Cook*, 385 Ill. App. 3d 103, 107 (1st Dist. 2008)). Section 2-619(a)(5) authorizes an involuntary dismissal if "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5). In turn, section 2-619(a)(9) authorizes an involuntary dismissal if "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). Affirmative matter encompasses "some kind of defense 'other than a negation of the essential allegations of the plaintiff's cause of action.'" *Smith v. Waukegan Park Dist.*, 231 Ill. 2d 111, 120-21 (2008) (quoting *Kedzie & 103rd Currency Exch. v. Hodge*, 156 Ill. 2d 112, 115 (1993)). In ruling on a section 2-619 motion, a court may consider the pleadings, depositions, and affidavits on file. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). "When supporting affidavits have not been challenged or contradicted by counteraffidavits or other appropriate means, the facts stated therein are deemed admitted." *Id.* (citing *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995)). A party moving for dismissal under section 2-619 "has the burden of proof on the motion, and the concomitant burden of going forward." *Reynolds v. Jimmy John's Enters.*, 2013 IL App (4th) 120139, ¶ 37.

Code of Civil Procedure section 2-622(a)(1) provides that in any action "in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice," there must be attached to the complaint an affidavit from a qualified health professional stating she or he has reviewed the medical records and believes the plaintiff has a reasonable and meritorious cause of action. 735 ILCS 5/2-622(a)(1). Section 2-622 contains two exceptions providing for a 90-day extension. These two exceptions have been described as "safety valves" to the general rule. *Horlacher v. Cohen*, 2017 IL App (1st) 162712, ¶ 62 (citing *Fox v. Gauto*, 2013 IL App (5th)

11032, ¶ 18). Under the first exception, an affiant must aver the report cannot be procured before the running of the statute of limitations, in which case the plaintiff has 90 days to obtain and file the required documents. 735 ILCS 5/2-622(a)(2). Under the second exception, an affiant must aver that counsel requested medical records and the requested party has not yet provided them. 735 ILCS 5/2-622(a)(3). In such an instance, the plaintiff has 90 days from the time the records are received to file the required report. *Id.*

"The purpose of section 2-622 is to deter frivolous or non-meritorious medical negligence claims." *Lee v. Berkshire Nursing & Rehab Cntr., LLC*, 2018 IL App (1st) 171344, ¶ 18. The statute accomplishes this goal by requiring technical pleading. *Thompson v. Heydemann*, 231 Ill. App. 3d 578, 582 (1st Dist. 1992). Given these requirements, the statute "should be liberally construed so that plaintiffs do not lose substantive rights merely because they have not strictly complied with the statute." *Hobbs v. Lorenz*, 337 Ill. App. 3d 566, 569 (2d Dist. 2003). Further, section 2-622 is not to be considered another statute of limitation cutting off all relief. *Lee*, 2018 IL App (1st) at ¶ 18 (citing *Walter v. Hill*, 156 Ill. App. 3d 708, 710 (3d Dist. 1987)).

If minor technical errors arise, plaintiffs should be permitted to amend their complaints so as to further the statute's purpose. *Thompson*, 231 Ill. App. 3d at 582; *Owens v. Riverside Med. Cntr.*, 2020 IL App (3d) 180391, ¶ 23 (plaintiff's dismissal with prejudice for failing to comply places form over substance). Further, "[w]hen there is no indication of bad faith or an intent to frustrate justice by plaintiff, and no prejudice would have inured to defendant if the court had allowed amendment or dismissed the complaint without prejudice," granting a plaintiff leave to amend the complaint is proper. *Cato ex rel. Cato v. Attar*, 210 Ill. App. 3d 996 (2d Dist. 1991). Conversely, a dismissal with prejudice may be merited if the plaintiff has either: (1) inexplicably failed to act in a meaningful and timely way to comply with section 2-622, *see, e.g., Hobbs v. Lorenz*, 337 Ill. App. 3d 556, 569 (2d Dist. 2003); or (2) been provided multiple opportunities to comply with section 2-622, yet has not done so. *See, e.g., Horlacher v. Cohen*, 2017 IL App (1st) 162712, and *Tucker v. St. James Hosp.*, 279 Ill. App. 3d 696, 665 (1st Dist. 1996).

As a threshold matter, the parties disagree as to whether the estate invoked section 2-622(a)(2) as to the Alpha defendants. The Alpha defendants argue the estate did, but the estate argues it invoked subsection (a)(2) as to Nursepower only. Count three, paragraph 37, and count four, paragraph 36, plainly indicate the estate invoked both subsections (a)(2) and (a)(3) as to each defendant. The estate's attorney's affidavit clarifies that subsection (a)(2) is generally applicable to each defendant while subsection (a)(3) is invoked specifically as to the Alpha defendants. In any event, the estate's invocation of subsection (a)(2) as to Alpha defendants is of no consequence as explained below.

It is undisputed that the estate has yet to file a physician's report as required by section 2-622(a)(1). What is disputed, however, is: (1) whether the estate otherwise complied with section 2-622(a)(3) by requesting Jones' medical records from the Alpha defendants pursuant to section 8-2001; and (2) whether the estate's delay in complying with section 2-622 is excusable. As to the first issue, it is plain the estate has not complied with section 2-622(a)(3). Even if the estate's argument that the two subpoenas served on the Alpha defendants in December 2020 substantively complied with section 8-2001, the subpoenas were ineffective substitutes given this court's findings in June 2021. In a June 7, 2021 e-mail to counsels, this court explained that the Alpha defendants need not respond to a subpoena since they are parties. The next day, this court entered an order quashing both subpoenas as improper.

As to the second issue, the court finds the estate's delay in complying with section 2-622 is excusable for a variety of reasons. First, section 2-622 does not address errors arising from ineffective subpoenas. Second, the estate's failure to request properly medical records from the Alpha defendants is a procedural failure and, as noted above, section 2-622 is to be liberally construed. Third, shortly after this court quashed the estate's subpoenas, the estate issued a proper section 8-2001 request. Fourth, the estate demonstrated consistent, good faith, if misdirected, efforts to comply with section 2-622. Fifth,

and perhaps most persuasive, the estate has yet to receive a complete and legible set of medical records.

The Alpha defendants' reliance on *Hobbs v. Lorenz*, 337 Ill. App. 3d 566 (2d Dist. 2003), and *Horlacher v. Cohen*, 2017 IL App (1st) 162712, to argue that dismissal with prejudice is proper, is misplaced. This set of facts is distinguishable because the estate has not been afforded, and it has not squandered, multiple opportunities to comply with the requirements of section 2-622, and the estate has not failed to show good cause for the delay. Even if the estate took procedural missteps, section 2-622(a)(3) provides that a plaintiff need not file the certificate and physician's report mandated under section 2-622(a)(1) until after the receipt of the records. The estate was, therefore, entitled to refrain from filing the required documents because the Alpha defendants have not produced them.

This court briefly addresses the parties' remaining arguments. First, the Alpha defendants argue this court should sanction the estate. According to the Alpha defendants, the estate improperly invoked the exceptions provided in sections 2-622(a)(2) and 2-622(a)(3) and filed incorrect or deficient affidavits and pleadings to delay the filing of the required physician's report. This argument is not well taken because, as explained above, the estate's attorney averred that he concluded there was a reasonable basis for filing against Nursepower, but that the estate could not yet comply with section 2-622(a)(1) as to the Alpha defendants given the lack of a complete and legible set of medical records.

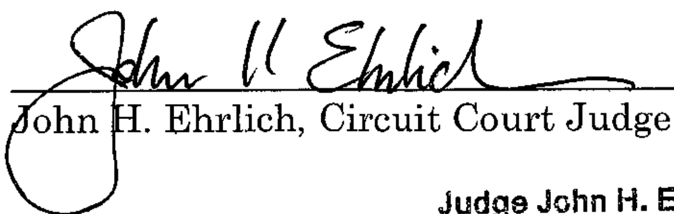
Second, the Alpha defendants maintain that the estate has misrepresented the amount of medical records in its possession and exaggerated their illegibility. The Alpha defendants point out that at the time the estate filed the original complaint, the estate possessed 49 pages of medical records that had been produced in a Probate Division matter. Additionally, Tonia and her co-administrator-siblings lived with their grandmother, Marie Jones, who had 156 pages of clinical care addenda at her home. The Alpha defendants also argue the estate could have translated Marie's records at any time. These arguments are easily rejected.

As to the records produced in the Probate matter, nearly half were cellphone photographs of handwritten nursing notes. Many of the dates and words are blurred or indecipherable, and some photos were shot at such an angle that certain words appear to have been cropped entirely. Additionally, there are, inexplicably, four nursing notes that postdate Tonia's death. The parties also dispute whether the estate knew Marie had a binder of 156 medical records. Simply because Marie kept such records does not necessarily impute knowledge or possession to the estate because, at this point, it is unknown whether Aaron and Rashad knew Marie kept such records. And even if Marie had such documents, the estate ultimately requested translation of the 49-page set received in Probate, and the 156-page set Marie possessed. Finally, it is of no consequence whether Marie had copies of some or all of Tonia's medical records. Quite simply, the estate has yet to receive a complete and legible set of Tonia's medical records. Regardless of the extensive delay in the filing of a section 2-622 report of merit, subsection (a)(3) permits the estate to refrain from filing the report until after it has received the records requested.

Conclusion

For the reasons presented above, it is ordered that:

1. The Alpha defendants' motion to dismiss is entered and continued pending the estate's filing of a physician's report of merit;
2. The Alpha defendants' motion for sanctions is denied.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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