

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ELAINE SEERY, :
 :
 Plaintiff, :
 :
 v. : Civil Action No. 98-671-JJF
 :
 UNITED STATES OF AMERICA, :
 :
 Defendant. :

Martin J. Siegel, Esquire of DOROSHOW, PASQUALE, KRAWITZ, SIEGEL & BHAYA,
Pennsville, New Jersey.
Attorney for Plaintiff.

Paulette K. Nash, Esquire, Assistant United States Attorney, of UNITED STATES
DEPARTMENT OF JUSTICE, Wilmington, Delaware.
Attorney for Defendant.

MEMORANDUM OPINION

May 1, 2001
Wilmington, Delaware

FARNAN, District Judge.

Presently before the Court is Defendant's Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(b), or in the Alternative, for Summary Judgment (D.I. 29). For the reasons stated below, the Court will grant the motion.

BACKGROUND

On December 7, 1996, Elaine Seery ("Plaintiff") was admitted to the Veterans Administration Hospital ("the Hospital") in East Orange, New Jersey to receive breast cancer treatment. (D.I. 1 at ¶ 6). Plaintiff alleges that during the course of breast reconstruction surgery, she suffered significant personal injuries as a result of the carelessness, negligence, and battery committed by various health care providers serving as agents of the United States ("Defendant") at the Hospital. (D.I. 1). On December 2, 1998, Plaintiff filed a Complaint against Defendant under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671-80 ("FTCA"), seeking compensatory damages for her injuries. (D.I. 1). Defendant filed an Answer to Plaintiff's Complaint on July 3, 2000. (D.I. 21).

On September 13, 2000, Defendant filed the instant motion, claiming that Plaintiff failed to timely provide Defendant with an affidavit of merit as required by New Jersey law. (D.I. 29)(citing N.J.S.A. 2A: 53A-27).¹ Since Plaintiff has not filed a paper in opposition to

¹ The New Jersey Affidavit of Merit Statute, N.J.S.A. 2A:53A-27, states in relevant part: In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists

Defendant's motion as required by an Order entered on October 25, 2000, the Court will resolve the motion on the papers submitted.

STANDARD OF REVIEW

When a court analyzes a motion to dismiss brought under Rule 12(b)(6), the factual allegations of the complaint must be accepted as true. Langford v. City of Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000). The Court must draw all reasonable inferences in favor of the nonmoving party. Id. In sum, the only way a court can grant a Rule 12(b)(6) motion to dismiss is "if it appears that the [nonmoving party] could prove no set of facts" consistent with the allegations that would entitle it to relief.² Id.

DISCUSSION

Defendant contends that Plaintiff has failed to provide it with an affidavit of merit, as required by New Jersey state law; therefore, Defendant seeks dismissal of Plaintiff's Complaint with prejudice. (D.I. 30). As a threshold issue, the Court must determine whether New Jersey's Affidavit of Merit Statute applies to the instant action.

In diversity actions, a district court must apply state substantive law and federal procedural law. Chamberlain v. Giampapa, 210 F.3d 154, 158 (3d Cir. 2000). Under the FTCA,

a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.

² The Court will analyze Defendant's motion under the standard for Rule 12(b)(6) rather than a Rule 56 summary judgment standard because, when a Plaintiff fails to satisfy New Jersey's Affidavit of Merit Statute, such failure means that Plaintiff has failed "to state a cause of action." N.J.S.A. 2A:53 A-29.

the applicable substantive law is that of the jurisdiction where the acts or omissions giving rise to the claim occurred. Richards v. United States, 369 U.S. 1, 10 (1962); Taylor v. Plouisis, 101 F. Supp. 2d 255, 269-71 (D.N.J. 2000). Although New Jersey state courts have not addressed the instant issue, the Court of Appeals for the Third Circuit has held that the New Jersey Affidavit of Merit Statute is substantive state law that should be applied to FTCA actions. Chamberlain, 210 F.3d at 161. Since all of the complained of conduct occurred in New Jersey, the Court concludes that the New Jersey Affidavit of Merit Statute is applicable to the instant action.

New Jersey's Affidavit of Merit Statute requires that a plaintiff in a medical malpractice action provide each defendant with an affidavit from an appropriately licensed person that there is a "reasonable probability" that the plaintiff's injuries resulted from conduct that "fell outside acceptable professional or occupational standards or treatment practices." N.J.S.A. 2A:53A-27. A failure to comply with this statute³ is deemed a failure to state a cause of action and will result in a dismissal of the complaint with prejudice unless "extraordinary circumstances" exist that warrant dismissing the Complaint without prejudice. Alan J. Cornblatt, P.A. v. Barow, 708 A.2d 401, 413 (N.J. 1998).

Courts have found that "extraordinary circumstances" existed when a stay was placed on all proceedings during mediation, when the defendants delayed in providing the information necessary for a licensed physician to complete the affidavit of merit, and when an incapacitating physical condition prevented the plaintiff from meeting the filing deadline. Hyman, Zamft &

³ New Jersey courts have recognized a limited "substantial compliance" exception to the Affidavit of Merit Statute when: (1) there is no prejudice to the defendants, (2) a "series of steps" in an attempt to satisfy the statute was taken, (3) there was general compliance with "the purpose" of the statute, (4) there was reasonable notice of the claim, and (5) a reasonable explanation was provided as to why there was not strict compliance with the statute. Mayfield v. Community Med. Assocs., P.A., 762 A.2d 237, 240 (N.J. Super. Ct. 2000). This exception is inapplicable in the instant case because Plaintiff has failed to respond to Defendant's motion, and accordingly, has not satisfied any of the above factors.

Manard, L.L.C. v. Cornell, 707 A.2d 1068, 1071-72 (N.J. Super. Ct. App. Div. 1998), Barreiro v. Morais, 723 A.2d 1244, 1248 (N.J. Super. Ct. App. Div. 1999). Carelessness, lack of circumspection, lack of diligence on the part of counsel, ignorance of the law, or failure to seek legal advice are not extraordinary circumstances. Zamft, 707 A.2d at 1071. See also Greig v. Macy's Northeast, 1998 U.S. Dist. LEXIS 12770, at *23 (D.N.J. May 13, 1998).

Plaintiff, who retained counsel in February of 1999, has failed to respond to the Court's October 25, 2000 Order (D.I. 33) requiring a response to Defendant's motion. The time for Plaintiff to file an affidavit of merit has long since expired, (D.I. 21; D.I. 30, Exh. A), and there is no evidence of record suggesting that "extraordinary circumstances" exist. Accordingly, pursuant to New Jersey's Affidavit of Merit Statute, the Court will dismiss Plaintiff's Complaint with prejudice.

CONCLUSION

For the reasons discussed, the Court will grant Defendant's Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(b), or in the Alternative, for Summary Judgment (D.I. 29).

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ELAINE SEERY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

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Civil Action No. 98-671-JJF

FINAL ORDER

At Wilmington this 1 day of May, 2001, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that Defendant’s Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(b), or in the Alternative, for Summary Judgment (D.I. 29) is **GRANTED**, and therefore, judgment is entered in favor of Defendant and against Plaintiff on all counts.

UNITED STATES DISTRICT JUDGE