



## Bellezza v Duffy

2019 | Cited 0 times | M.D. Pennsylvania | July 12, 2019

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NICHOLAS F. BELLEZZA, : CIVIL NO: 3:17-CV-01884 : Plaintiff, :: (Judge Mariani) v. :: (Chief Magistrate Judge Schwab) TERENCE F. DUFFY, M.D., :: Defendant. :

### REPORT AND RECOMMENDATION

I. Introduction. This is a medical malpractice action. Plaintiff Nicholas F. Bellezza claims defendant Terence F. Duffy was negligent by failing to take steps necessary to complete a more thorough testing of his spine. Before the Court is motion to dismiss Bellezza amended complaint. Because Bellezza has not pleaded jurisdiction, we recommend that the Court grant We also recommend that because Bellezza is pro se, he be granted leave to file a second amended complaint that complies with the Federal Rules of Civil Procedure. II. Background and Procedural History. Bellezza began this action on October 16, 2017, by filing a complaint that named Duffy as the defendant and that Doc. 1 at 1-2. For the reasons fully explained in our Report and

Recommendation (doc. 22), adopted by Judge Mariani (doc. 26), the Court February 7, 2019 (doc. 24).

Bellezza alleges the following in his amended complaint. Doc. 24. Bellezza Id. at 4. After this fall, he consulted Duffy. Id. Duffy told him that he needed an MRI of his lumbar spine and that was the only test Duffy ordered. Id. When the results came back, Duffy told Bellezza that it showed he had significant damage to his lumbar spine, including herniated and bulged discs, damaged facet joints, and degenerative disc disease. Id. Bellezza expertise. Id. Because he saw no reason to question Duffy, Bellezza determined

that there was no reason to obtain a second opinion. Id.

Id. at 1. He provide a living for his family. Id. After Bellezza moved to Florida, one of his

doctors suggested that he see an Orthopedic surgeon in relation to his pain. Id. at 2 lumbar and cervical spine, the doctor informed him that he did not feel he was a good candidate for surgery because it would be too risky of a procedure. Id. This is exactly what another Orthopedic surgeon had informed him in Pennsylvania. Id. The doctor 1

would not try any too risky. Id.



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In October of 2015, Bellezza had another serious fall. Id. The fall occurred Id. This pain had occurred before but never resulted in this

serious of a fall. Id. His doctor recommended that he undergo a series of CT scans. Id. at 3. Bellezza underwent CT scans on his entire spine, including cervical, thoracic, lumbar, and he even had scans of his head done. Id. After the s Id.

Id. The rheumatologist also told him that his range of motion is

Id. After Bellezza informed the doctor that he had a serious fall in 2001, the doctor asked him if he had a full spinal MRI or CT scan done at that time. Id. Bellezza 1 Bellezza does not clarify if the doctor who told him this was the one in Florida or the one in Pennsylvania. Doc. 24 at 2. informed the doctor that he had not and that only a lumbar MRI was completed. Id. The doctor then informed him that he should have had a complete spinal diagnosis done in 2001. Id. The doctor further stated that had a thoracic MRI or CT scan been completed in 2001, it would have shown if the disease was already present or if the injury caused the serious damage to his spine. Id.

This doctor further informed Bellezza that he had actually broken his back. Id. But Bellezza was unaware he had done so because it was never diagnosed properly since a complete spinal diagnosis was never completed. Id. The doctor Id. The doctor expressed to Bellezza

that now there is nothing that can be done because his entire spinal cord is Id. As a direct Id. Id.

On February 8, 2019, Duffy filed a Notice of Intention to Enter Judgment of Non Pros on Professional Liability Claim (doc. 25) notifying Bellezza that he intended to seek a Judgment of Non Pros (i.e., dismissal) if Bellezza did not file a Rule of Civil Procedure 1042.3. Thereafter, on February 27, 2019, Duffy filed a motion to dismiss the amended complaint and a brief in support of that motion. See doc. 27.

On March 4, 2019, Bellezza filed a motion for an extension of time suggesting that he needed more time to obtain medical records. Doc. 28. While the motion did not set forth from what deadline Bellezza was seeking an extension of time, it did reference an attached letter from defense counsel that referenced the Notice of Intention to Enter Judgment of Non Pros on Professional Liability Claim. Id. brief in opposition to the motion to dismiss, we granted the motion and ordered Bellezza to file a brief in opposition to the motion to dismiss on or before April 5, 2019. Doc. 29.

Upon further reflection, we concluded that Bellezza was seeking an extension of time to file a COM, and we granted Bellezza an extension of time to file his COM until May 10, 2019. Doc. 30. And since we extended the deadline for Bellezza to file a COM to May 10, 2019, we also extended his deadline to file a brief in opposition to the motion to dismiss until May 10, 2019. Id.



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On May 13, 2019, Bellezza filed a packet of documents. 2

Doc. 31. Given

2 Bellezza included with the various documents he filed several pages titled as an amended complaint and a request to increase the damages he is seeking from \$100,000 to \$186,400. Doc. 31 at 7-12. Bellezza did not seek leave to file a that Bellezza is proceeding pro se, we liberally construed those documents as both Doc. 32. And we accepted the documents as timely filed. Id. Duffy subsequently filed a reply brief on May 24, 2019. Doc. 33. Bellezza also filed a sur-reply brief. 3

Doc. 34. mplaint is ripe for disposition

III. Bellezza has not pleaded grounds for -matter jurisdiction. In our prior Report and Recommendation, we noted that Bellezza failed to establish subject-matter jurisdiction. Doc. 22 at 6. Buried toward the end of his brief, Duffy now complaint because it fails to comply with Federal Rule of Civil Procedure 8(a)(1).

Doc. 27 at 8. stateme s jurisdiction, unless the court already has

any pleading in any civil action pursuant to Fed.R.Civ.P. 8(a)(3) may set forth generally that the party claiming damages is entitled to monetary relief but shall ents as his COM and his brief in opposition to the motion to dismiss. 3 Bellezza needed leave of court to file a sur-reply brief. brief in reply to matters argued in a brief in opposition may be filed by the moving party within fourteen (14) days after service of the brief in opposition. No further briefs may be filed without leave of court. L.R. 7.7. Because Bellezza is pro se we will consider his sur-reply brief. Doc. 34. However, we will not consider the medical files which he attached to his sur-reply brief. Doc. 34 at 10-29. 8(a)(1). Rule 12(b)(1) permits the dismissal of an action for lack of subject-matter jurisdiction. 4

Challenges to subject-matter jurisdiction under Fed.R.Civ.P. Papp v. Fore-Kast Sales Co., 842 F.3d 805, 811 (3d Cir. 2016). A facial attack contests the sufficiency of the pleadings. Id.

motion t In re Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 633 (3d Cir. 2017). In this case, Duffy is making a facial -matter jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). is authorized by Article III of the Constitution and the statutes enacted by Congress

Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 -matter jurisdiction can never be waiv Gonzalez v. Thaler, 565 U.S. 134, 141 (2012). The court has federal- the Constitution, laws, or treaties of 1331. Here, 4 responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject- 12(b)(1). Bellezza does not bring a claim under the Constitution, laws, or treaties of the United States. Thus, the court does not have federal-question jurisdiction.



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Accordingly, we turn to whether the court has diversity jurisdiction. The court has diversity jurisdiction over civil actions where the matter in controversy exceeds the sum or value of \$75,000 and is between inter alia citizens of different states. 28 U.S.C. § 1332. Section 1332 requires complete diversity. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996). There is complete diversity only citizenship of each Id on bears the citizenships such that the existence of complete *Kissi v. Gillespie* 06 (3d Cir. 2009) (quoting *Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 177 F.3d 210, 222 n. 13 (3d Cir. 1999)). Here, Bellezza has not alleged his citizenship or the citizenship of defendant Duffy. 5

Accordingly, as pleaded, the Court does not have diversity jurisdiction pursuant to 28 U.S.C. § 1332. 6

We will, however, recommend that Bellezza be given leave to file a second amended complaint to attempt to cure the deficiencies in his pleading regarding subject-matter jurisdiction, if he can do so honestly. See 5 Bellezza does plead that the amount in controversy exceeds \$75,000. See doc. 24 at 4. 6 subject-matter jurisdiction. See 28 U.S.C. §§1330, 1333-1369. 28 U.S.C. *Pierro v. Kugel*, 38

aint, Bellezza should consider the following principles regarding diversity jurisdiction. here that person is GBForefront, L.P. v. Forefront Mgmt. Grp., LLC, 888 F.3d 29, 34 (3d Cir. 2018). place of habitation. It is the place to which, whenever he is absent, he has the

*McCann v. Newman Irrevocable Tr.*, 458 F.3d 281, 286 (3d Cir. 2006) (quoting *Vlandis v. Kline* domicile, a person must be physically present in a state and intend to remain in that *Pierro* at 309 (emphasis in original). -established *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991). IV. Recommendation.

Accordingly, we re dismiss. 7

Doc. . We also further recommend that Bellezza be granted leave to file a second amended complaint that complies with the Federal Rules of Civil Procedure.

The Parties are further placed on notice that pursuant to Local Rule 72.3: Any party recommendations or report addressing a motion or matter described in 28 U.S.C. ' 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 7 W to dismiss be granted, Bellezza has filed a proper COM. Pennsylvania law expressly allows a plaintiff to proceed on the basis of a certification that expert testimony will not be required to prove her claim.



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Liggon-Redding v. Estate of Sugarman, 659 F.3d 258, 265 (3d Cir. 2011). testimony may be an appropriate basis for summary judgment, but it does not provide a ground for granting a Rule Bilinski v. Wills Eye Hospital Liggon-Redding, 659 F.3d at 265). Although Bellezza filed a proper COM, he is henceforth precluded from obtaining an expert. Horsh v. Clark, No. 17-316, 2019 WL 1243009, at 10 (W.D. Pa., Mar. 4, 2019), appeal docketed, No. 19-1888 (3d Cir. Apr. 23, 2019). Thus, s COM may pass the motion-to-dismiss stage, but there is no guarantee he would survive summary judgment.

The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions. Submitted this 12th day of July, 2019.

S/Susan E. Schwab Susan E. Schwab Chief United States Magistrate Judge

