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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-706

No. COA21-116

Filed 21 December 2021

Wake County, No. 19 CVS 17467

EMILY CRAM, on behalf of herself and all others similarly situated, Plaintiff,

v.

RALEIGH RADIOLOGY, LLC d/b/a, RALEIGH RADIOLOGY BLUE RIDGE,
Defendant.

Appeal by Plaintiff from order entered 30 September 2020 by Judge Michael O’Foghludha in Wake County Superior Court. Heard in the Court of Appeals 2 November 2021.

The Paynter Law Firm PLLC, by Stuart M. Paynter, David D. Larson, Jr., & Sara Willingham, for plaintiff-appellant.

Yates McLamb & Weyher, LLP, by Jennifer D. Maldonado & David M. Fothergill, for defendant-appellee.

MURPHY, Judge.

¶ 1

Plaintiff’s complaint disclosed facts that necessarily defeat her claim for breach of contract and the trial court did not err in dismissing her complaint. Further, the trial court considered Plaintiff’s request to dismiss without prejudice and did not abuse its discretion in dismissing with prejudice as the trial court’s decision was not

manifestly unsupported by reason.

BACKGROUND¹

¶ 2

Defendant Raleigh Radiology, LLC d/b/a Raleigh Radiology Blue Ridge (“Raleigh Radiology”) is one of the largest mammogram service providers in the Raleigh area. Patients contract with Raleigh Radiology to provide scientifically reliable mammograms that meet Food and Drug Administration (“FDA”) and American College of Radiology (“ACR”) accreditation standards. On its website, Raleigh Radiology promises patients that it uses the “most advanced mammography technology available” and that its “digital mammography screening” is the “best tool available to help detect breast cancer in its earliest stages.” Raleigh Radiology promises patients that “all [its] offices are accredited by the [ACR] and certified by the FDA.”

¶ 3

As part of its accreditation process, the ACR reviewed a sample of images to ensure they comply with the accreditation standards. However, during a 2019 review, the ACR found substandard images for mammograms performed at Raleigh

¹ As we are reviewing Defendant’s *Motion to Dismiss*, the following facts are derived directly from Plaintiff’s complaint and viewed as true. *See Toomer v. Garrett*, 155 N.C. App. 462, 468, 574 S.E.2d 76, 83 (2002) (mark and citation omitted) (“The question before a court considering a motion to dismiss for failure to state a claim is whether, if all the plaintiff’s allegations [as stated in the complaint] are taken as true, the plaintiff is entitled to recover under some legal theory. . . . In reviewing a dismissal of a complaint for failure to state a claim, the appellate court must determine whether the complaint alleges the substantive elements of a legally recognized claim . . .”), *disc. rev. denied, appeal dismissed*, 357 N.C. 66, 579 S.E.2d 576 (2003).

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Radiology for the time period 7 November 2017 through 6 November 2019. Due to these substandard images, the ACR denied Raleigh Radiology's accreditation and, as a result, the FDA suspended all mammography services going forward.

¶ 4 On 11 December 2019, Raleigh Radiology sent a letter to all patients who received a mammogram between 7 November 2017 and 6 November 2019 ("affected patients") informing them that the FDA suspended it from performing mammography services as a result of the ACR review. The letter stated that "neither the FDA nor the ACR identified any images where cancer or disease was 'overlooked,' but admit[ted] that the ACR's review was 'limited to a very small sample of mammography cases' and 'related only to the technical quality of the mammography images generated.'" "The letter claim[ed] that the 'majority' of cases reviewed by the ACR were 'acceptable' but [did] not tell the patient (1) whether her mammogram images were part of the review; or (2) whether her mammogram images were acceptable." "To the contrary, it advise[d] patients to consult with their referring physician at their own expenses and that it may be necessary to re-review or repeat mammograms taken between [7 November 2017] and [6 November 2019]."

¶ 5 Raleigh Radiology also sent a certified letter later in December 2019 to the affected patients. In that letter, Raleigh Radiology specifically advised patients that prior mammograms likely would need, at minimum, to be "reviewed" again and "possibly repeated." The affected patients were advised to talk with their referring

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physicians “as soon as possible.” “Despite acknowledging that its mammography services failed ACR and FDA standards, Raleigh Radiology did not offer to refund patients for breast cancer screenings now known to be worthless.”

¶ 6 Plaintiff Emily Cram had a total of three mammograms done at Raleigh Radiology from 7 November 2017 through 6 November 2019, making her an “affected patient.” On 31 December 2019, Cram filed a class action complaint against Raleigh Radiology on behalf of herself and all others similarly situated to seek damages for breach of contract, asserting “despite having paid for breast cancer screenings that meet FDA quality standards and ACR accreditation standards, [Cram] now has no way of knowing whether, in fact, her prior mammograms actually detected any clinically significant abnormalities.” Cram’s only cause of action was for breach of contract.

¶ 7 Raleigh Radiology did not file an answer, but rather filed a *Motion to Dismiss* with prejudice pursuant to Rules 9(j), 12(b)(6), and 41(b) of the North Carolina Rules of Civil Procedure, arguing Cram “instituted an action for damages arising out of the furnishing of professional services in the performance of medical or other healthcare services by a healthcare provider” and her action for breach of contract was, in substance, an action for medical malpractice. Raleigh Radiology asserted that because Cram’s action was an action for medical malpractice and it did not comply with Rule 9(j) of the North Carolina Rules of Civil Procedure, the action must be

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dismissed with prejudice. *See* N.C.G.S. § 1A-1, Rule 9(j) (2019) (“Any complaint alleging medical malpractice by a health care provider . . . in failing to comply with the applicable standard of care . . . shall be dismissed unless: (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness . . . and who is willing to testify that the medical care did not comply with the applicable standard of care; (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness . . . and who is willing to testify that the medical care did not comply with the applicable standard of care . . . ; or (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*.”). In the alternative, Raleigh Radiology argued Cram’s complaint “fails to state a claim for relief and should be dismissed [with prejudice] pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure because . . . [Cram] fails to allege a ‘breach’ of any alleged contract”

¶ 8

A hearing on the motion was held on 1 September 2020. At the conclusion of the hearing, Cram requested that the action be dismissed without prejudice if the trial court determined dismissal to be the appropriate action:

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[CRAM'S COUNSEL]: Thank you, Your Honor. So, one more point, Your Honor.

THE COURT: Go ahead.

[CRAM'S COUNSEL]: I'd be very remiss not to mention that the one thing I do think goes without a doubt is that in [*Goss v. Solstice East, LLC*, COA18-1158, 267 N.C. App. 130, 831 S.E.2d 121, 2019 WL 3936268 (2019) (unpublished)], [the trial court] did dismiss without prejudice. So, to the extent [the trial court] is inclined to dismiss, we would ask that it be done without prejudice.

THE COURT: That's interesting. . . .

. . . .

[CRAM'S COUNSEL]: They dismissed it twice without prejudice.

THE COURT: Okay. Did they say why?

[CRAM'S COUNSEL]: No, sir.

THE COURT: Okay.

[CRAM'S COUNSEL]: If I had to posit, I would say it was because it's such a confusing issue.

¶ 9

On 30 September 2020, twenty-nine days after the hearing, the trial court entered an *Order Granting Raleigh Radiology, LLC d/b/a Raleigh Radiology Blue Ridge's Motion to Dismiss* ("Order"), dismissing Cram's breach of contract action with prejudice. The trial court found "[Cram's] action, which is one for medical malpractice, was filed in violation of Rule 9(j) and, therefore, is subject to dismissal." The trial court also found

[Cram’s complaint] does not adequately allege a breach of the implied contract [and] affirmatively alleges that [Cram] and the putative class members do not know whether their actual mammogram images were deficient or revealed any clinically significant abnormalities. Thus, the [c]omplaint fails to state a claim for relief for this alternative reason.

Cram timely filed a *Notice of Appeal*.

ANALYSIS

¶ 10 Cram argues the trial court erred by dismissing her breach of contract claim because (A) she adequately alleged that Raleigh Radiology breached its implied contract with her and the putative class; and (B) her claim for breach of contract—seeking damages purely for economic injury, not personal injury—fell outside the purview of the malpractice statute and thus did not require compliance with Rule 9(j).

A. Failure to State a Claim Upon Which Relief May Be Granted

1. Breach of Contract

¶ 11 “On a motion to dismiss pursuant to Rule 12(b)(6) . . . , the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.” *Highland Paving Co. v. First Bank*, 227 N.C. App. 36, 39, 742 S.E.2d 287, 290-91 (2013). “The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient.” *Tennessee v. Evtl.*

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Mgmt. Comm'n, 78 N.C. App. 763, 765, 338 S.E.2d 781, 782 (1986). A complaint is legally insufficient “(1) when the complaint on its face reveals that no law supports [the] plaintiff’s claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; [or] (3) *when some fact disclosed in the complaint necessarily defeats the plaintiff’s claim.*” *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985) (emphasis added).

¶ 12 Cram argues the trial court erred by dismissing her complaint for failure to state a claim upon which relief may be granted. While the trial court found Cram did not adequately allege a breach of implied contract, Cram argues she “adequately alleged that Raleigh Radiology breached its implied contract with her and the putative class by failing to provide valid breast cancer screenings by a facility accredited by the ACR and certified as compliant with quality standards by the FDA.”

¶ 13 “The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract.” *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000).

A contract implied in fact arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract.

Snyder v. Freeman, 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980) (marks omitted).

“Such an implied contract is as valid and enforceable as an express contract.” *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998).

¶ 14

The parties do not dispute that Cram’s complaint adequately alleged the existence of an implied contract. The issue on appeal is whether the trial court erred by dismissing Cram’s complaint for failure to state a claim because she did not properly allege a *breach* of the terms of that implied contract. The pertinent parts of Cram’s complaint that relate to her implied contract are as follows:

19. On or about [11 December 2019], Laura O. Thomas, M.D., radiologist and Chair of Breast Imaging for Raleigh Radiology, sent a letter to affected mammogram patients .

...

....

22. The letter claims that the “majority” of cases reviewed by the ACR were “acceptable” but does not tell the patient (1) whether her mammogram images were part of the review; or (2) whether her mammogram images were acceptable. . . .

....

45. Between [7 November 2017] and [6 November 2019], [Cram] and class members entered valid contracts with [Raleigh Radiology] to screen for breast cancer.

46. [Cram] and class members paid money for their breast cancer screenings.

47. [Raleigh Radiology] breached its contracts with [Cram] and class members by providing breast cancer screenings, the results of which it now acknowledges may or may not have been “wrong” and were performed at a facility that

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was not in compliance with FDA quality standards and ACR accreditation standards. As a result, [Cram] and class members *have no idea whether, in fact, previous mammograms detected any abnormalities of clinical significance*. As a result, [Cram] and class members will be forced to undertake costly re-evaluations of the previously purchased mammograms.

48. To date, [Raleigh Radiology] has not refunded any money that [Cram] and class members paid for breast cancer screenings despite the fact that it has acknowledged that this screening did not provide [Cram] and class members with any useful information as a result of Raleigh Radiology’s failure to comply with FDA quality standards and ACR accreditation standards.

49. Through this action, [Cram] and class members seek to recoup all monies paid for breast cancer screenings provided from [7 November 2017] to [6 November 2019]. In addition, [Cram] and class members seek any costs associated with any necessary re-review or repeating of prior mammograms.

(Emphasis added).

¶ 15 Cram’s complaint pleads no other facts or allegations that her own mammograms were not in compliance with FDA and/or ACR standards. According to Cram’s complaint, the last mammogram she had performed was on 5 June 2019, and the results came back “normal.” Her complaint also alleges that she “ha[s] no idea whether . . . previous mammograms detected any abnormalities of clinical significance.” While the complaint alleges that the ACR denied Raleigh Radiology’s accreditation because *a sample* of mammogram images were “substandard and deficient,” it does not allege that *Cram’s* mammogram images were a part of that

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sample. The complaint merely alleges that “[a]s part of the mammography accreditation process, the ACR recently reviewed a sample of mammogram images produced by [Raleigh Radiology]”; “[t]he ACR found substandard and deficient mammogram images during its review”; and “the FDA suspended all mammography services at [Raleigh Radiology].” While, on appeal, Cram asserts she paid for accredited breast cancer screenings and did not receive them, instead receiving worthless images of her breasts, the complaint does not allege that. Instead, the complaint merely alleges she “was not informed” whether her mammograms met accreditation standards or not.

¶ 16 The trial court did not err in dismissing Cram’s complaint for failure to state a claim for relief under Rule 12(b)(6) “because [Cram’s complaint] does not adequately allege a breach of the implied contract.”

2. Dismissal with Prejudice

¶ 17 Cram also argues that “if [we] hold[] . . . that [she] did not adequately plead her breach of contract claim, the trial court’s dismissal with prejudice should be reversed so that [Cram] can amend her complaint to adequately allege breach of contract” We disagree.

¶ 18 Ordinarily, an involuntary dismissal operates as an adjudication of the merits. N.C.G.S. § 1A-1, Rule 41(b) (2019). However, Rule 41(b) bestows upon the trial court the discretion “to specifically order that the dismissal is without prejudice and,

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therefore, not an adjudication on the merits.” *Whedon v. Whedon*, 313 N.C. 200, 210, 328 S.E.2d 437, 443 (1985); *see* N.C.G.S. § 1A-1, Rule 41(b) (2019).

“[I]t is the burden of the party whose claim is being dismissed to convince the court that he deserves a second chance, and he should formally move the court that the dismissal be without prejudice.” Furthermore, “the trial court’s authority to order an involuntary dismissal without prejudice is exercised in the broad discretion of the trial court and the ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion.”

Trent v. River Place, LLC, 179 N.C. App. 72, 77, 632 S.E.2d 529, 533 (2006) (quoting *Whedon*, 313 N.C. at 212-13, 328 S.E.2d at 444-45). “Appellate courts should not disturb the exercise of the [trial] court’s discretion pursuant to Rule 41(b) unless the challenged action is manifestly unsupported by reason.” *Id.* (marks omitted).

¶ 19 The trial court did not abuse its discretion in dismissing Cram’s claim with prejudice, rather than without prejudice. Raleigh Radiology clearly made its *Motion to Dismiss* pursuant to Rule 41(b). At the conclusion of the hearing on the motion, Cram made the following statement to the trial court: “[T]o the extent [the trial court] is inclined to dismiss, we would ask that it be done without prejudice.” The trial court took this request under advisement and considered it for thirty days before entering its dismissal order.

¶ 20 The Record reflects the trial court considered whether to dismiss the claim without prejudice as requested by Cram. In its broad discretion, the trial court

declined to dismiss the claim without prejudice. We cannot conclude that the trial court’s dismissal of the action with prejudice was “manifestly unsupported by reason.” *Id.*

B. Rule 9(j)

¶ 21 Our holding in Part A(1)—that the trial court did not err by dismissing Cram’s action for failure to state a claim in accordance with Rule 12(b)(6)—renders Cram’s remaining argument, regarding whether the trial court erred in ruling that her complaint alleged medical malpractice and required compliance with Rule 9(j), moot. *See Nicholson v. Thom*, 236 N.C. App. 308, 317, 763 S.E.2d 772, 779 (2014) (“In North Carolina, an issue is moot whenever during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue. In those circumstances, the [argument] should be dismissed as moot, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.”), *disc. rev. denied, disc. rev. dismissed*, 368 N.C. 434, 778 S.E.2d 87 (2015). Regardless of whether a Rule 9(j) certification was required for Cram’s breach of contract claim, Cram failed to state and plead sufficient facts to allege a breach of the implied contract by Raleigh Radiology.

CONCLUSION

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¶ 22 Cram did not adequately allege a claim upon which relief could be granted. Accordingly, the trial court did not err in dismissing her breach of contract claim in accordance with Rule 12(b)(6). Further, the trial court did not abuse its discretion in dismissing the claim with prejudice as the trial court's dismissal of the action was not manifestly unsupported by reason. As the complaint was properly dismissed under Rule 12(b)(6), we need not address whether Cram's complaint was required to meet the heightened pleading requirements of Rule 9(j).

AFFIRMED.

Judges ARROWOOD and GRIFFIN concur in result only.

Report per Rule 30(e).