IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James D. Schneller,	:	
Appellant	:	
	:	
v.	:	No. 1713 C.D. 2007
	:	Submitted: January 11, 2008
William E. Donnelly, Prothonotary of Montgomery County	:	

OPINION NOT REPORTED

MEMORANDUM OPINION
PER CURIAM FILED: March 19, 2008

James D. Schneller, *pro se*, appeals from the May 8, 2007 order issued by Judge Emanuel A. Bertin of the Court of Common Pleas of Montgomery County denying Schneller's petition and affidavit for leave to proceed *in forma pauperis* (Petition and Affidavit) in a mandamus action that Schneller filed against William E. Donnelly, the Prothonotary of Montgomery County. Schneller questions whether the trial court abused its discretion by declining his requests for reconsideration and rehearing and his request for a hearing, misapprehending facts and misapplying the law in finding that his poverty is insufficient and effectively dismissing the complaint pursuant to Pa. R.C.P. No. 240(j) and on a jurisdictional basis of lack of clear right to the writ and law of the case.[1]

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[1]Schneller's complaint in mandamus against Prothonotary Donnelly was docketed on May 2, 2007. It alleges that Schneller is the sole living plaintiff in Civil Action No. 04-06045 in Montgomery County, naming himself and heirs and beneficiaries of Marjorie C. Schneller as plaintiffs and Main Line Hospitals, Inc. et al. as defendants. It further alleges that on December 13, 2005 Schneller filed five praecipes for reinstatement of the medical malpractice complaint, and the Prothonotary reinstated the five copies and handed them to Schneller. The

(Footnote continued on next page…)

I

In the opinion in support of his order, Judge Bertin notes Schneller's allegation that his income derives solely from a trust fund and public assistance food stamps. *See* Petition and Affidavit ¶3(c), Reproduced Record (R.R.) 13. Regarding current employment he stated: "I litigate fulltime due to successive and serious harms which befell my parents and I [sic]," and also stated that he has no money left after litigation expenses. *Id.* ¶3(b); R.R. 11. His costs for "printing, postage, transcript fees, appeal fees, related costs, and transportation" come to "$315.00/mo." *Id.* ¶3(b), (f); R.R. 11, 15.

Judge Bertin noted that ¶16 of the complaint in mandamus alleged that Schneller previously asked for the same relief in the medical malpractice action that he filed against Main Line Hospitals, Inc., et al. Judge Bertin reviewed the medical malpractice action, which was assigned to the Honorable Stephen R. Barrett, and found that Schneller had filed on March 7, 2007 a document styled a "petition for an order directing the Prothonotary to enter on the docket the reinstatement of the complaint which occurred on December 13, 2005." Trial Court Opinion, p. 2. As in the complaint, the petition to Judge Barrett at No. 04-06045 asked the court to order the Prothonotary to restore the docket to indicate

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(continued…)

same day he delivered the reinstated complaints to the Sheriff with five orders for service, and the Sheriff accepted them. Service was made on the defendants and entered on the docket. Nevertheless, the Prothonotary returned the praecipes for reinstatement with a note stating that they were not to be of record, and some time before January 1, 2006 removed the entries for reinstatement from the docket. The complaint asserts that the Prothonotary is required to docket all papers presented to him that are correct as to form, regardless of underlying legal issues and may not remove any item except by order of court. The Prothonotary has refused Schneller's demands to re-docket the reinstatement or the praecipes for No. 04-06045.

that Schneller filed praecipes to reinstate the medical malpractice complaint on December 13, 2005. Judge Barrett denied Schneller's petition by order of March 14, 2007, stating that the court lacked jurisdiction because (1) judgment of non pros was entered in the medical malpractice action on October 6, 2005; (2) the court denied Schneller's petition to open the judgment on April 4, 2006; and (3) the Superior Court dismissed Schneller's appeal on January 27, 2007.

Judge Bertin concluded that the same request for relief had previously been denied by a different judge of the same court some seven weeks earlier. He denied Schneller's request to proceed *in forma pauperis*, explaining that Judge Barrett had decided the matter and that his decision was binding. Schneller sought reconsideration and filed an application to appeal *in forma pauperis*. Judge Bertin denied reconsideration on June 5, 2007 but granted leave to appeal *in forma pauperis*. In a June 25, 2007 opinion Judge Bertin quoted Pa. R.C.P. No. 240(j) regarding the court's authority when *in forma pauperis* status is sought:

> If, simultaneous with the commencement of an action or proceeding or the taking of an appeal, a party has filed a petition for leave to proceed in forma pauperis, the court prior to acting upon the petition may dismiss the action, proceeding or appeal if the allegation of poverty is untrue or if it is satisfied that the action, proceeding or appeal is frivolous.

It quoted also the Note to Rule 240(j) (quoting *Neitzke v. Williams*, 490 U.S. 319, 325 (1989)), which states: "A frivolous action or proceeding has been defined as one that 'lacks an arguable basis either in law or in fact.' "

Judge Bertin concluded that the complaint in mandamus was frivolous first because mandamus is not available to collaterally attack a judge's decision. In *Pennsylvania Dental Ass'n v. Insurance Department*, 512 Pa. 217, 227 - 228, 516 A.2d 647, 652 (1986), the Supreme Court stated:

> The writ cannot be used to control the exercise of discretion or judgment by a public official or administrative or judicial tribunal; to review or compel the undoing of an action taken by such an official or tribunal in good faith and in the exercise of legitimate jurisdiction, even though the decision was wrong; to influence or coerce a particular determination of the issue involved; or to perform the function of an appeal or writ of error.

Judge Bertin explained that when Judge Barrett refused Schneller's request to order the Prothonotary to restore the docket, the proper means to challenge was to appeal to the Superior Court rather than to mount a collateral attack by filing a complaint in mandamus. Although styled a complaint against the Prothonotary, it actually asked Judge Bertin to reverse Judge Barrett under a different docket number.

Judge Bertin determined that Schneller's complaint in mandamus was frivolous under the doctrine of the law of the judicial district, quoting *Yudacufski v. Department of Transportation*, 499 Pa. 605, 612, 454 A.2d 923, 926 (1982): "It is well-settled that, absent the most compelling circumstances, a judge should follow the decision of a colleague on the same court when based on the same set of facts." Judge Barrett laid down the rule that the facts alleged in the mandamus complaint fail to give rise to a right to relief. The court stated that the complaint was frivolous because it pertained to a case that Judge Barrett had non-prossed.

Judge Bertin concluded that even if the complaint were not frivolous, Schneller would not qualify for *in forma pauperis* status, which is limited to a "party who is without financial resources to pay the costs of litigation…." Pa. R.C.P. No. 240(b). Schneller's applications to proceed *in forma pauperis* of April 26, 2006 and on appeal included a verified statement reflecting an expense of $315 per month ($3780 per year) for postage, printing, transcripts and filing fees. Deletion of this improper expense would result in a surplus of $336 per month

($4032 per year), from which Schneller could pay the $219.50 filing fee. The expense was not a regular expense for the operation of a business, profession or farm, as the form provides, and it was not an anticipated cost for this case but rather for other cases.[2]

II

Schneller first questions whether the trial court abused its discretion in declining his requests for reconsideration and for a hearing. He contends that the motion for reconsideration and the application to appeal *in forma pauperis* raised numerous reasons for rescinding the order and that matters of fact have escaped the proceedings in a transgression of due process rights. The Court refers Schneller to a well-settled rule: "Pennsylvania case law is absolutely clear that the refusal of a trial court to reconsider, rehear, or permit reargument of a final decree is not reviewable on appeal." *Thorn v. Newman*, 538 A.2d 105, 108 (Pa. Cmwlth. 1988) (quoting *Provident Nat'l Bank v. Rooklin*, 378 A.2d 893, 897 (Pa. Super. 1977)).

Schneller argues that the trial court abused its discretion when it misapprehended facts and misapplied the law to find that Schneller's poverty is an insufficient reason because of the cause of his poverty and effectively dismissed the complaint pursuant to Pa. R.C.P. No. 240(j). First, he states that the trial court raised *sua sponte* the assertion that his poverty is caused by his endeavors to litigate a set of cases that he filed. Schneller ignores the fact that he raised the issue of the legitimacy of his claim of poverty by filing his motion and that Pa.

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[2]The Court's review of an order denying an application to proceed *in forma pauperis* is limited to determining whether constitutional rights were violated or whether the trial court abused its discretion or committed an error of law. *See Thomas v. Holtz*, 707 A.2d 569 (Pa. Cmwlth. 1998).

R.C.P. No. 240(j) further authorizes the trial court to dismiss the action if it finds the allegations not true.

Schneller characterizes his spending time litigating as the exercise of "a right to pursue his chosen profession," Brief of Appellant, p. 13, protected by a Fourteenth Amendment liberty interest. He submits that a litigant who is denied the ability to bring a cause of action due to inability to pay the cost is effectively put out of court. *Grant v. Blaine*, 582 Pa. 1, 868 A.2d 400 (2005). He maintains that the request for *in forma pauperis* may be denied if the underlying cause of action is frivolous, citing *Thomas v. Holtz*, 707 A.2d 569 (Pa. Cmwlth. 1998), and that his complaint has an arguable basis in law and fact and therefore, even if the case is ultimately correctly resolved against him, it is not frivolous under *Neitzke*.

Donnelly quotes from Judge Bertin's analysis of the circumstances, concluding that allowing the claimed expense of $315 per month for litigation expenses would be to piggy-back expenses from other cases, which the court cannot monitor, on to this case, and that the face of the application shows that Schneller should have paid the filing fee. Donnelly also quotes from a Federal District Court decision denying Schneller's claim for *in forma pauperis* status.

The Court agrees with Judge Bertin's analysis of the circumstances as represented in the petition that Schneller filed. It is true that *in forma pauperis* status exists to assure in general that persons are not deprived of access to the courts solely because they cannot afford to pay the costs, *see Grant*, but this does not mean that all reasons for not being able to pay are acceptable. Schneller has a right to access to the courts, but he does not have a constitutional or other right to be subsidized by the taxpayers to pursue a "chosen profession" of litigating full-time on his own behalf. The Court sees no abuse of discretion or errors of law in

the trial court's conclusion on this point. *Thomas*. The issue of frivolousness is related to Schneller's third argument and will be considered in conjunction with it.

Schneller questions whether Judge Bertin abused his discretion in effectively dismissing the complaint in mandamus on a jurisdictional basis of lack of clear right to the writ and law of the case. He notes that mandamus requires a clear legal right in the plaintiff, a corresponding duty in the defendant and a lack of any other appropriate remedy at law. *Luzerne County Board of Commissioners v. Flood*, 874 A.2d 687 (Pa. Cmwlth. 2005). The crux of Schneller's argument concerns the nature and the effect of the judgments of non pros entered in the medical malpractice action pursuant to Pa. R.C.P. No. 1042.6, relating to entry of judgment of non pros for failure to file certification.[3] Schneller asserts that he made reinstatements and re-served the medical malpractice complaint pursuant to *Helfrick v. UPMC Shadyside Hosp.*, 64 Pa. D. & C.4th 129 (2003), *Moore v. John A. Luchsinger, P.C.*, 862 A.2d 631 (Pa. Super. 2004), and 42 Pa. C.S. §5535, claiming that such was a permissible re-filing subsequent to entry of non pros.

In *Helfrick* the plaintiff failed to file a certificate of merit within sixty days of filing a professional liability complaint. Several days after the sixtieth day

[3]Rule 1042.6(a) provides: "The prothonotary, on praecipe of the defendant, shall enter a judgment of non pros against the plaintiff for failure to file a certificate of merit within the required time provided that there is no pending timely filed motion seeking to extend the time to file the certificate." Also, Pa. R.C.P. No. 1042.3(a) provides that in any action based upon an allegation that a licensed professional has deviated from an accepted professional standard, the attorney or the plaintiff if unrepresented shall file within sixty days of filing the complaint a certificate of merit signed by the party or attorney stating that (1) an appropriate licensed professional has supplied a written statement that there is a reasonable probability that the actions of the defendant fell outside professional standards and caused harm or (2) the claim against the defendant is based solely on allegations that other professionals for whom he or she is responsible deviated from an acceptable standard or (3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

the plaintiff filed a certificate of merit; later that day the defendant filed a praecipe for the entry of non pros, and the prothonotary entered judgment. The trial court concluded that where judgment of non pros was not automatic but had to be preaciped for by the defendant, the judgment was not proper if the plaintiff filed a certificate before the filing of the praecipe for non pros. In *Moore* a plaintiff filed a legal malpractice action against an attorney and a law firm. Although the certificate was filed late, the court held that a praecipe for entry of non pros could not be granted if filed after the certificate was filed, but the court perceived conflict in the record over whether the certificate was filed first and remanded.[4]

This Court concludes that Judge Bertin was correct in his ruling in this case. Mandamus will lie to compel performance of a ministerial act or mandatory duty where there is a well-defined legal right in the plaintiff, a corresponding well-defined legal duty in the defendant and no other adequate remedy. *Thompson v. Cortese*, 398 A.2d 1079 (Pa. Cmwlth. 1979). When Judge Barrett denied the petition for reinstatement in the medical malpractice case, Schneller had an entirely adequate and appropriate remedy available, namely an appeal. As noted, Schneller admits that he chose not to appeal Judge Barrett's order based on Schneller's view that his mandamus action would have a high likelihood of success. A writ of mandamus may not be used to compel the undoing of an action taken by a judicial

[4]In a footnote the court stated that if the statute of limitations has not expired, the plaintiff is able to refile his claim, citing a statement from *Helfrick v. UPMC Shadyside Hosp.*, 65 Pa. D. & C.4th 420 (2003), that a judgment of non pros is not res judicata and does not bar a plaintiff from commencing another action based upon the same cause of action within the period of limitations. *See also* 42 Pa. C.S. §5535.

official in the exercise of legitimate jurisdiction even if the decision was wrong. *Pennsylvania Dental Ass'n*. The underlying mandamus action was frivolous.[5]

Donnelly requests the Court to sanction Schneller under Pa. R.A.P. 2744, which provides that a court may award as further costs a reasonable counsel fee if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the charged participant is dilatory, obdurate or vexatious. The Court concludes that Schneller's conduct does not rise to this level, and it declines at this time to impose sanctions. Also, the Court has jurisdiction over this appeal from a final order of a trial court in a matter relating to local government civil matters under 42 Pa. C.S. §762(a)(4). The order of the trial court therefore is affirmed.

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[5]Should the merits of Schneller's complaint in mandamus be considered, he would not prevail. His assertion that his attempted reinstatements in the medical malpractice action after the judgments of non pros were entered were not reinstatements but rather represented a refiling of the complaint pursuant to *Moore* is at odds with the complaint in mandamus, which seeks relief of entering on the civil docket "the praecipes for reinstatement of the complaint in civil action at No. 04-06045…." It also is contrary to Schneller's assertions that he did not seek to refile the cause of action at a new docket number after the non pros judgments because he anticipated that the defendants would have opposed the necessary *in forma pauperis* petition accompanying the complaint. The footnote in *Moore* upon which Schneller appears to rely indicates that after a judgment of non pros, if the statute of limitations has not run, a plaintiff may commence another action upon the same cause of action. Schneller did not attempt to commence another cause of action. In his reply brief, Schneller cites *Scaramuzza v. Sciolla*, 345 F. Supp. 2d 508 (E.D. Pa. 2004), as stating that it is appropriate for a court to include the possibility of *Helfrick* reinstating when adjudicating petitions for relief from Rule 1042.3 non pros. In that case the court noted that the Pennsylvania Supreme Court in *Moore* stated that the plaintiff could refile after dismissal for failure to file a certificate of merit, if the statute of limitations had not yet expired. There is no question, however, that reinstating pursuant to *Helfrick* is not what occurred here and is different from commencing a new cause of action under *Moore* after a judgment of non pros. Schneller had no clear legal right to relief that would support the grant of mandamus. *Luzerne County Board of Commissioners*; *Thompson*.

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O R D E R

PER CURIAM

AND NOW, this 19th day of March, 2008, the order of the Court of Common Pleas of Montgomery County is affirmed.