

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Phillip Daniels, :  
Appellant :  
v. : No. 2366 C.D. 2007  
: Submitted: June 27, 2008  
James T. Wynder, Jr., Stanley :  
Bohinski, M.D., Jeffrey A. Beard, :  
Edgar Kniess, James McGrady, Fritz :  
Bleich, Dr. Stanish, Cheryl Wisniewski, :  
Donald Jones, Captain Schoonover, :  
CO Prapuolenis :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE FRIEDMAN

FILED: August 12, 2008

Phillip Daniels (Daniels) appeals from the December 19, 2007, order of the Court of Common Pleas of Luzerne County (trial court), which denied Daniels' motion for leave to file *nunc pro tunc* an amended civil action complaint pursuant to Pa. R.C.P. No. 1033 (Rule 1033).<sup>1</sup> We affirm.

Daniels filed a complaint with the trial court alleging that he sustained injuries to his back, neck, shoulder and hand while incarcerated in the restricted

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<sup>1</sup> Rule 1033 permits a party to amend a pleading at any time by leave of court.

housing unit (RHU) of the State Correctional Institution at Dallas (SCI-Dallas) (Complaint). Daniels asserted that he was assigned the top bunk in his cell, and, because there was no ladder, he could access the top bunk only by jumping approximately four feet from the top of his desk to the top bunk. Daniels averred that, on November 14, 2004, his desk seat broke when he stepped on the seat to reach the top of his desk, causing him to fall and become injured. Afterward, SCI-Dallas decided to place bunk ladders in all cells. (Complaint, ¶¶7-8, 10-11, 16.)

Daniels next alleged that he was given Tylenol at the infirmary for his injuries, but his pain did not subside. On November 18, 2004, the medical staff took x-rays but returned Daniels to his cell without disclosing the results. Daniels averred that he was readmitted to the infirmary on two subsequent occasions for pain, but the staff continued to prescribe only ineffective doses of Tylenol because such treatment was cost effective. Daniels alleged that he filed grievances to obtain proper medical care, but he obtained no relief. (Complaint, ¶¶23-26, 31-32, 37-38, 40.)

Daniels averred that, on December 24, 2004, he complained that a corrections officer aggravated his injuries by placing handcuffs on him in an aggressive manner. Daniels asserted that the officer issued a misconduct report and that a hearing examiner gave Daniels thirty days in disciplinary custody in retaliation for his attempts to obtain proper medical treatment for his injuries. (Complaint, ¶¶41-42, 44-45.)

Daniels claimed cruel and unusual punishment with respect to the absence of a bunk ladder in his cell.<sup>2</sup> Daniels also claimed cruel and unusual punishment with respect to the failure of the infirmary staff to provide proper medical care.<sup>3</sup> As indicated, Daniels also set forth a retaliation claim.<sup>4</sup> In his request for relief, Daniels sought, *inter alia*, \$90,000 in compensatory damages and \$40,000 in punitive damages from each defendant.

The defendants charged with failure to provide proper medical care (Medical Defendants) filed preliminary objections, alleging that: (1) the trial court lacked jurisdiction over them because Daniels failed to serve them individually with a copy of the Complaint; (2) the Complaint does not comply with Pa. R.C.P. No. 1020 because it does not set forth each cause of action in a separate count; and (3) the Complaint fails to state a cause of action for cruel and unusual punishment against them because it does not allege that the Medical Defendants knew that their conduct posed a substantial risk of harm to Daniels. By order dated August 16,

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<sup>2</sup> In connection with this claim, Daniels sued Jeffrey A. Beard, Secretary of the Department of Corrections; James T. Wynder, Jr, Superintendent at SCI-Dallas; Edgar Kniess, Deputy Superintendent; James McGrady, Deputy Superintendent; and Fritz Bleich, RHU Lieutenant. (Complaint, ¶48.)

<sup>3</sup> In connection with this claim, Daniels sued Stanley Stanish, M.D. (Dr. Stanish), Eastern Regional Medical Director; Stanley Bohinski, M.D., Medical Director at SCI-Dallas; and Cheryl Wisniewski, Physician's Assistant. (Complaint, ¶49.) Although Daniels also makes allegations against "Defendant Ginnochetti," a Health Care Administrator at SCI-Dallas, Daniels did not include Ginnochetti in his list of defendants, and Ginnochetti is not named in the caption of this case. (*See* Complaint, ¶¶4, 36-38.)

<sup>4</sup> With respect to the retaliation claim, Daniels sued Wynder, Kniess, McGrady, Bleich, Corrections Officer (CO) Prapuolenis, Captain Schoonover and Hearing Examiner Donald Jones. (Complaint, ¶51.)

2007, the trial court granted these preliminary objections, striking and dismissing Daniels' Complaint without prejudice to file an amended complaint within twenty days of the order.

On August 30, 2007, Daniels filed a Motion for Continuance or Stay of the August 16, 2007, order. Daniels averred that he had been residing at 3234 N. Marston Street in Philadelphia and that all of his legal filings were at that address. Daniels then asserted that he was arrested and confined on July 11, 2007, and, as a result, has no access to those documents. Daniels requested that the trial court allow him twenty days from the date of his release, sometime in 2008, to file an amended pleading. By order dated September 4, 2007, the trial court denied the request.

On November 9, 2007, Daniels filed a motion for leave to file *nunc pro tunc* an amended complaint pursuant to Rule 1033, and he attached an amended complaint to the motion. In a supporting brief, Daniels argued that the trial court should grant his motion because Daniels' failure to place each cause of action in a separate count is merely a defect in form and because it is not clear and free from doubt that Daniels will be unable to establish his right to relief. By order dated December 19, 2007, the trial court denied the motion.

Daniels filed an appeal with this court from the December 19, 2007, order. However, in an order dated March 31, 2008, this court stated that, because Daniels "is appealing the trial court's order denying his motion to amend his complaint, the appeal in this matter is dismissed as an appeal from a nonfinal,

interlocutory order.” Daniels filed an application for reconsideration, asserting that his claims before the trial court are irreparably lost because the trial court dismissed his Complaint without prejudice and denied his request to file an amended pleading beyond the twenty-day time period set by the trial court. By order dated April 17, 2008, this court granted the request for reconsideration, vacated the March 31, 2008, order and reinstated Daniels’ appeal because it appeared that “the case before the trial court is concluded.”<sup>5</sup> Thus, Daniels’ appeal is now properly before this court for disposition.

Daniels argues that the trial court’s denial of his request for leave to file *nunc pro tunc* his amended complaint under Rule 1033 was an abuse of discretion. We disagree.

Rule 1033 allows a party to amend a pleading by leave of court. Here, however, there was no pleading to amend because: (1) the trial court dismissed Daniels’ Complaint, albeit without prejudice to file an amended complaint within twenty days; (2) the trial court denied Daniels’ motion to continue or stay the filing of an amended complaint until an unspecified time beyond the twenty-day period; and (3) Daniels filed no other complaint prior to his Rule 1033 request. Because there was no pleading to amend, Rule 1033 did not apply.<sup>6</sup>

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<sup>5</sup> Although the trial court’s August 16, 2007, order indicated that it was addressing only the preliminary objections filed by the Medical Defendants, the order dismissed Daniels’ entire Complaint. In this appeal, Daniels does not argue that the trial court should have dismissed the Complaint only with respect to the Medical Defendants.

<sup>6</sup> The applicable rule in this case was Pa. R.C.P. No. 1028 (Rule 1028), which governs preliminary objections. Rule 1028(e) states that, if the filing of an amendment, an amended **(Footnote continued on next page...)**

Moreover, the trial court did not abuse its discretion by denying Daniels' request to file his amended complaint *nunc pro tunc*. *Nunc pro tunc* relief is equitable relief and may be granted in extraordinary circumstances involving fraud, a breakdown in court operations or non-negligence. *Criss v. Wise*, 566 Pa. 437, 781 A.2d 1156 (2001). Non-negligent circumstances must be unforeseeable and unavoidable. *Id.* According to Daniels' motion for a continuance or stay, Daniels' inability to meet the twenty-day deadline was due to his arrest and confinement for the commission of a crime.<sup>7</sup> It would not have been equitable for the trial court to allow Daniels to file a late amended pleading when his failure to file a timely amended pleading was due to his commission of a crime. Daniels' arrest and confinement were not unavoidable; Daniels simply needed to obey the law.

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Judge

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**(continued...)**

pleading or a new pleading is allowed or required, it shall be filed within twenty days after notice of the order or within such other time as the court shall fix. Here, the trial court granted the preliminary objections of the Medical Defendants, dismissed the Complaint and fixed twenty days for the filing of an amended pleading.

<sup>7</sup> Daniels' subsequent Rule 1033 request did not set forth any other reason for Daniels' failure to file an amended complaint within the twenty-day period.

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Donald Jones, Captain Schoonover,	:	
CO Prapuolenis	:	

ORDER

AND NOW, this 12th day of August, 2008, the order of the Court of Common Pleas of Luzerne County, dated December 19, 2007, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Judge