COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1738

SCOTT W. MYERS

vs.

DAVID MORIN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff brought this action pro se "to [p]ursue [r]estitution from [the] [d]efendant," claiming that he incurred damages from a psychiatric evaluation report that the defendant prepared in connection with the plaintiff's divorce proceedings. Before us now is the defendant's interlocutory appeal from an order of a Superior Court judge (1) denying the defendant's cross motion to dismiss the complaint based on the plaintiff's failure to post a $6,000 bond pursuant to the medical malpractice tribunal statute, G. L. c. 231, § 60B, and (2) reducing the bond to $1,000 and giving the plaintiff thirty additional days to post it.[1] We vacate the order and remand for entry of judgment dismissing the complaint.

[1] A single justice of this court allowed the defendant's request for leave to take an interlocutory appeal.

Background. According to the complaint, the plaintiff paid the defendant $6,000 to prepare the psychiatric evaluation report (report) at issue. The report allegedly contained errors and "libelous" statements and was "partly responsible for the [Probate and Family Court's] restricting [the] [p]laintiff's parental rights." Through this lawsuit the plaintiff seeks the return of the $6,000 he paid to the defendant, along with legal costs and other uncalculated damages he says he incurred as a result of the report.

When the plaintiff failed to file an offer of proof within fifteen days of the defendant's answer, the defendant moved for entry of a tribunal finding in his favor.[2] The plaintiff opposed the defendant's motion on the ground that G. L. c. 231, § 60B, did not apply to his claims. In an order dated April 26, 2018, a Superior Court judge (first judge) allowed the defendant's motion, and ordered the plaintiff to post a bond of $6,000

[2] See G. L. c. 231, § 60B, first par. ("Every action for malpractice, error or mistake against a provider of health care shall be heard by a tribunal . . ., at which hearing the plaintiff shall present an offer of proof and said tribunal shall determine if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result"). See also Superior Court Rule 73 ("Within 15 days after each defendant's answer has been filed in a case subject to G. L. c. 231, § 60B, the plaintiff[] shall file the offer of proof with the clerk . . .").

within thirty days.[3] Instead of posting the bond, however, the plaintiff filed, on May 31, 2018, a "notice of intension [sic] to file an appeal" and a motion to stay the first judge's order pending appeal. The defendant filed a cross motion to dismiss the complaint based on the plaintiff's failure to post the $6,000 bond within thirty days. The first judge denied the plaintiff's motion to stay, but deferred ruling on the cross motion to dismiss to give the plaintiff the opportunity to file an opposition.

The plaintiff never filed an opposition, and the cross motion to dismiss was eventually heard by a different Superior Court judge (second judge). At the start of the hearing, the plaintiff confirmed that he had not opposed the cross motion to dismiss and made clear that he was "looking to appeal" the first judge's "original decision" requiring posting of the bond. After asking the plaintiff to submit an affidavit of indigency, the second judge took the cross motion under advisement.

In a decision dated September 25, 2018, the second judge denied the cross motion to dismiss on the ground that the plaintiff's "appellate issue, whether this is a breach of

[3] See G. L. c. 231, § 60B, sixth par. ("If a finding is made for the defendant . . . the plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of six thousand dollars . . . . If said bond is not posted within thirty days of the tribunal's finding the action shall be dismissed").

contract or simple negligence case, but not a medical malpractice case, is not a frivolous issue, but an issue worthy of appeal." At the same time, the second judge reduced the bond to $1,000 and ordered the plaintiff to post it within thirty days. The plaintiff posted a $1,000 bond on October 22, 2018.

Discussion. When a plaintiff declines to make an offer of proof to the medical tribunal, "the judge may assume that the plaintiff's claims are entirely frivolous." Denton v. Beth Israel Hosp., 392 Mass. 277, 280 (1984). Accord Faircloth v. DiLillo, 466 Mass. 120, 124-125 (2013). In such a case, "the plaintiff can only be said to have assumed voluntarily the financial burden of the bond." Denton, supra at 281. Thus, even if the plaintiff is indigent, "the judge should not reduce the bond . . . unless the plaintiff has made a good faith effort to present an offer of proof sufficient to meet the directed verdict standard." Id. See Faircloth, supra at 125-126 (explaining circumstances where judge may reduce bond despite adverse finding by medical tribunal).

Here, not only did the plaintiff fail to make an offer of proof, he made clear that he did not intend to do so. Instead, from the outset, he stated his intent to pursue an appeal on the question whether G. L. c. 231, § 60B, applies to his claims. Even if this is a nonfrivolous appellate issue, as the second judge found, it is not relevant to whether the plaintiff is

entitled to a reduction of the bond. The relevant inquiry, rather, is whether the plaintiff could survive a motion for a directed verdict on the underlying claims. See Faircloth, 466 Mass. at 124-126; Denton, 392 Mass. at 280-281. Otherwise, under the standard applied by the second judge, the plaintiff could proceed to litigate his claims in Superior Court without any threshold determination of their merit. This would in turn undermine the purpose of the bond requirement, which is to "deter frivolous suits" and "weed[] out groundless claims." Faircloth, supra at 124, quoting Denton, supra.

The second judge thus erred as a matter of law by reducing the bond and giving the plaintiff thirty extra days to post it. The judge should have instead allowed judgment of dismissal to enter so that the plaintiff could pursue his legal arguments on appeal. Accordingly, the order dated September 25, 2018, is vacated, and the matter is remanded for entry of judgment dismissing the complaint under G. L. c. 231, § 60B. The $1,000 bond posted on October 22, 2018, shall be returned to the

plaintiff.[4]

So ordered.

By the Court (Neyman, Shin & McDonough, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: November 12, 2019.

[4] Given the current procedural posture, the plaintiff's constitutional arguments and the parties' arguments concerning the applicability of G. L. c. 231, § 60B, are not properly before us. Our disposition here is without prejudice to the plaintiff's raising those arguments in any appeal from the judgment of dismissal entered on remand.

[5] The panelists are listed in order of seniority.