

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

MIRIAM BAILEY and ALFRED BAILEY,

Plaintiffs,

vs.

ST. CROIX HOSPITAL, an instrumentality
of the GOVERNMENT OF THE VIRGIN
ISLANDS, and DR. MANUEL CAMOES,

Defendants.

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CIVIL NO. 287/1993

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

NOT FOR PUBLICATION

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CABRET, Judge

MEMORANDUM OPINION AND ORDER

(November 6, 1996)

Defendants in this medical malpractice action, claim they are entitled to summary judgment because the Court lacks subject matter jurisdiction due to plaintiffs' failure to comply with the procedural prerequisites of the Virgin Islands Health Care Provider Malpractice Act ("Malpractice

Act”) and the Virgin Islands Tort Claims Act (“Tort Claims Act”). For the reasons that follow, this Court will grant defendants' motion for summary judgment.

FACTS

Plaintiffs' claims are based upon alleged negligence of the St. Croix Hospital (“Hospital”) and Dr. Manuel Camoes (“Dr. Camoes”), in providing Miriam Bailey (“Mrs. Bailey”), with medical care from April through May of 1991. In their complaint, plaintiffs allege that on April 7, 1991, Mrs. Bailey went to the St. Croix Hospital and was diagnosed with an inevitable abortion. On April 8, 1991, surgery was performed to remove the fetus, and Mrs. Bailey was discharged from the hospital on April 10, 1991. Mrs. Bailey was readmitted to the St. Croix Hospital on April 28, 1991, because of recurrent vaginal bleeding, and she was discharged shortly thereafter. The bleeding continued, and Mrs. Bailey was readmitted to the hospital on May 6, 1991. She was then diagnosed with an irregular uterus, and on May 14, 1991 she underwent a total abdominal hysterectomy. The hysterectomy involved removal of Mrs. Bailey's uterus, thereby ending her fertility. Several days later, on May 26, 1991, Mrs. Bailey went to the Emergency Room of the St. Croix Hospital complaining of abdominal pain. She was given medication and instructed to see Dr. De Chabert for follow-up treatment.

In compliance with the claim requirements of the Health Care Provider Malpractice Act (“Malpractice Act”), 27 V.I.C. §166i(b), plaintiffs filed a proposed complaint with the

Committee on April 16, 1993. Four days later, on April 20, 1993, plaintiffs filed an identical complaint with this court.

STANDARD FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Therefore, the threshold inquiry is whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The non-moving party cannot create an issue of material fact through conjecture or speculation as to what evidence might be turned up by further discovery. Lappe v. Parker Brothers Division of General Mills Fun Group, Inc., 575 F.Supp. 44, 46 (N.D. Ill. 1983). The court must view the evidence and all factual inferences therefrom in the light most favorable to the non-moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

The Supreme Court has decided that "a motion for summary judgment must be granted unless the party opposing the motion can produce evidence which, when considered in light of that party's burden of proof at trial, could be the basis for a jury finding in that party's favor." J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 618 (3d Cir. 1987) (Becker, J., concurring) (citing Anderson, 477 U.S. 242, and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Moreover,

once the moving party has carried its burden of establishing the absence of a genuine issue of material fact, "its opponent must do more than simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Thus, if the non-movant's evidence is merely "colorable" or "not significantly probative," the court may grant summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986).

DISCUSSION

A. 27 V.I.C. §166i -- Medical Malpractice Action Review Committee

Defendants' motion for summary judgment is based upon plaintiffs' alleged failure to comply with the requirements of 27 V.I.C. §166i, in that plaintiffs did not wait ninety (90) days before filing their complaint with this Court. As such, defendants contend that dismissal of plaintiffs' complaint is required since this Court lacks subject matter jurisdiction. Plaintiffs' oppose defendants' motion by arguing that §166i(b) is silent as to a specific time period within which an action may be filed with the court. Plaintiffs reason that they filed their proposed complaint with the Medical Malpractice Action Review Committee ("Committee" or "MMARC") within the statute of limitations, and having commenced this court action four days later, the jurisdiction of this Court attached when the ninety-day period passed without the issuance of an expert opinion.

The law in this jurisdiction unambiguously states that for the Court to have subject matter jurisdiction, a medical malpractice complaint must first be filed with the MMARC. V.I. Code

Ann. 27 § 166i(b).¹ Failure to file a complaint with the Committee deprives the Court of subject matter jurisdiction. Freeman v. Government of the Virgin Islands, 25 V.I. 360, 362 (D.C.V.I. 1990); see also Philip v. Government of the Virgin Islands, 21 V.I. 3 (D.V.I. 1984); Espinosa v. Government of the Virgin Islands, 20 V.I. 78 (Terr. Ct. St. C. 1983). However, 27 V.I.C. §166i(b) does not simply require a filing with the MMARC. Section 166i(b) also provides that a claimant may not bring an action in court until a proposed complaint is filed with the Committee and the Committee has received the required expert opinion. Furthermore, the Committee has up to ninety (90) days to obtain an expert opinion once the complaint is filed. If the Committee fails to obtain an expert opinion within that 90-day period, a claimant may then commence an action in court. 27 V.I.C. §166i(b).

Contrary to plaintiffs' assertions that the statute "is silent as to a specific time period within which th[e] action may be filed" in court,² the statute is clear as to the time frame within which a medical malpractice action may be filed in Court. Section 166i(b) explicitly states that:

[n]o action against a health care provider may be commenced in court before the claimant's proposed complaint has been filed with the Committee and the Committee has received the expert opinion as required by this section, provided, that if said opinion is not received by the Committee within ninety days from the date the complaint was filed with the Committee, the claimant may commence his action against the health care provider in court (emphasis added).

¹ See Supra note 1.

² Plaintiffs' Opposition to Motion for Summary Judgment at 2.

Plaintiffs filed their complaint with the MMARC on April 16, 1993. Section 166i(b) provides that the Committee has ninety days to receive the expert opinion, and in the case sub judice, this 90-day period elapsed on July 16, 1993 without the issuance of an expert opinion. Therefore, plaintiffs were only permitted by statute to file their action in this Court on or after July 16, 1993. Rather than waiting for the 90-day period to elapse, plaintiffs filed their complaint with the Court on April 20, 1993, just four (4) days after they had filed with the MMARC. By failing to wait the prescribed ninety days before filing their complaint with the Court, plaintiffs ignored the indisputably plain language of §166i.

As this Court has noted, the only purpose of the Committee is "to obtain an expert opinion before [a malpractice] suit is commenced." Quinones v. Charles Harwood Memorial Hospital, 20 V.I. 356, 360 (D.C.V.I. 1983). By providing for an expert medical opinion, the Malpractice Act, "is designed to eliminate claims lacking merit and encourage prompt settlement of meritorious claims." Abdallah v. Callender, 28 V.I. 416, 424 (3d Cir. 1993). Further, "where a plaintiff does not comply with the procedural requirements of 27 V.I.C. § 166i before instituting an action in court, the complaint must be dismissed." Francis v. Government, et al., Civ. No. 114/1994 (Terr. Ct. 1994); see also Phillip v. Government, 21 V.I. 3, 6 (D.V.I. 1984); and Espinosa v. Government of the V.I., et al., 20 V.I. 79, 83. In this case, the MMARC was not afforded a full opportunity to obtain an expert opinion as required by statute prior to the commencement of this court action. As such, this Court is divested of subjected matter jurisdiction and this action must be dismissed.

B. 90 Day Tolling Provision of 27 V.I.C. §166i(c)

Plaintiffs argue that defendants' interpretation of 27 V.I.C. §166i(b) would make it impossible for a plaintiff claiming under the Malpractice Act to file a claim with the MMARC on the last day of the limitation period for medical and then benefit from the tolling provision of 27 V.I.C. §166i(c).³ In making this argument, plaintiffs fail to understand the basic precepts of §166i(c), which must be construed in conjunction with §166d(a).

The statute of limitations in medical malpractice actions is set for in § 166d(a) of Title 27 of the Virgin Islands Code. Section 166d(a) provides in pertinent part: "[n]o claim, whether in contract or tort may be brought against a health care provider based upon professional services or health care rendered or which should have been rendered unless filed within two (2) years from the date of the alleged act, omission or neglect." The running of the limitations period contained in §166d(a) is tolled when a party files a proposed complaint with the Committee. V.I.CODE ANN. tit. 27, § 166i(c) (1993); see also *Petersen v. Glad*, 780 F.2d 359 (1985).⁴

³ The Court need not consider what would happen if plaintiffs filed their claim with the MMARC on the last day of the statutory period, as the facts of this case clearly indicate that plaintiffs filed their claim with the MMARC several weeks before their two-year statute of limitations was due to expire.

⁴ The tolling provision contained in 27 V.I.C. §166i(c), states that "[t]he filing of the proposed complaint with the Committee shall toll the applicable statute of limitations for a period of ninety (90) days." 27 V.I.C. §166i(c). However, it should be noted that a June 17, 1993 amendment to §166i(c) deleted the 90 day tolling provision. The amendment effectively shortens the two year statute of limitations insofar as it no longer affords plaintiffs the benefit of a tolling of the statute of limitations while the MMARC obtains its expert opinion. This amendment has no bearing on the instant matter, inasmuch as plaintiffs filed their action in April 1993, prior to the passing of said amendment.

The Third Circuit Court of Appeals addressed the §166i(c) tolling provision in Petersen v. Glad, 780 F.2d 359 (1985), where a former patient brought a malpractice action against her dentist. In Petersen, plaintiff filed her proposed complaint with the MMARC on July 22, 1980, after undergoing a tooth extraction in November of 1978 as a result of an incomplete root canal performed by defendant. Plaintiff received the expert opinion from the MMARC on October 22, 1980, but waited until February 2, 1981 to file her complaint in the District Court. The trial court dismissed plaintiff's complaint on the ground that she was barred by the Virgin Islands statute of limitations for medical malpractice actions. On appeal, the Third Circuit stated: "[f]or the purposes of a statute of limitations, the word 'toll' is defined as 'suspend or stop temporarily.'" Peterson, 780 F.2d at 360. (citing Black's Law Dictionary 1334 (5th ed. 1979)). Under the clear language of section 166i(c), the ninety days is a tolling period that stops the running of the two-year period in section 166d(a) and the remaining portion of the two-year period begins to run again only after the ninety days have passed. Petersen at 360. Following standards set forth in Petersen, Mrs. Bailey would have had until August 13, 1993, to commence her medical malpractice action with this Court if she had waited until after the ninety day tolling period had passed.⁵

In this case, Mrs. Bailey underwent a total abdominal hysterectomy on May 14, 1991. Therefore, the two-year statute of limitations would have expired on May 14, 1993. Pursuant to §166i(c), upon filing the proposed complaint with the MMARC on April 16, 1993, the several weeks

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remaining on plaintiffs' two-year period were tolled for 90 days. Since the statute of limitations was tolled for 90 days from when the complaint was filed with the MMARC, the remaining 28 days of the two-year statute of limitations would not have began to run again until after July 16, 1993, and would have then expired on August 13, 1993.⁶ Therefore, the Baileys' ability to file their action with the Court within the two-year statutory period was not jeopardized by the 90 day tolling period. However, plaintiffs' haste to file a complaint with the Court prior to the expiration of the 90- day tolling period divested this Court of subject matter jurisdiction. See also Francis v. Government et al., Civ. No. 114/1994 (Terr. Ct. 1994).

C. 33 V.I.C. §3409(c) -- Tort Claims Act

Defendants' motion also alleges that plaintiffs have failed to comply with the filing requirements of §3409(c) in that they failed to either file a complaint, or notice of intention to file a complaint with the Committee within 90 days of accrual of the claim. Plaintiffs' opposition to defendants' motion for summary judgment fails to set forth any indication that they have complied with the filing requirements of the Tort Claims Act. Instead, plaintiffs remain silent as to their failure to comply with the mandates of 33 V.I.C. §3409(c).

⁶ This conclusion is based upon the assumption that Mrs. Bailey's cause of action accrued on May 14, 1991, the date on which she underwent the hysterectomy. Using this assumption, the Court calculates that the two-year statutory period of §166d(a) would have run out on May 14, 1993. Since plaintiffs filed their proposed complaint with the Committee on April 16, 1993, under 1166i(c), the two-year statutory period, of which there were four weeks remaining, was tolled until July 16, 1993. Thus, plaintiffs' two-year statutory period would not have expired until August 13, 1993, as after July 16, 1993, she would have had the remaining four weeks of her limitations period in which to file her action with this Court.

Title 33, section 3409(c) of the Virgin Islands Code, governs the time frame for filing claims and notices of intention to file claims. Section 3409(c) substantively states that a tort claim against the Government, or notice of an intention to file a claim, must be filed within ninety (90) days of the accrual of the claim. This section also gives the Court discretion to allow a claimant to file a tort claim within two (2) years of accrual of the action if the claimant failed to give notice within the aforementioned 90 day period.

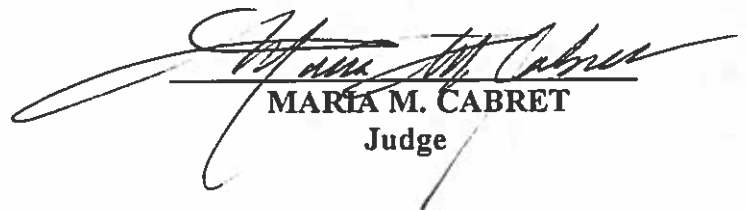
In Richardson v. Knud Hansen Memorial Hospital, 744 F.2d 1007, 1009 (3d Cir. 1984), the Third Circuit Court of Appeals overruled Saludes v. Ramos, 744 F.2d 992 (3d Cir. 1984), which held that a malpractice claimant need not comply with the requirements of the Tort Claims Act in addition to the provisions of the Medical Malpractice Act. The Richardson Court held that "a malpractice claimant against the Government must comply with the provisions of the Virgin Islands Tort Claims Act as well as the provisions of the Virgin Islands Health Care Provider Malpractice Act, 27 V.I.C. §166 et seq." Richardson, 744 F.2d at 1009. Since plaintiffs' failure to comply with both 27 V.I.C. §166 et seq. and 33 V.I.C. §3409(c) has deprived this Court of jurisdiction, it is not necessary for this Court to address any issues related to the statute of limitations for filing claims and notices of intention to file claims.

CONCLUSION

The language of 27 V.I.C. § 166i mandates strict compliance by claimants, and plaintiffs' failure to comply with the procedural requirements for filing a malpractice suit deprives this

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Court of jurisdiction over this action. Consequently, defendants' motion for summary judgment seeking dismissal of plaintiffs' complaint, must be granted.



MARIA M. CABRET
Judge