UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

LARRY DUBOSE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 19 cv 8255
	)	
COOK COUNTY, JOHN HALLINAN DR. DAVID KELNER,	)	Honorable Judge Valderrama
	)	
	)	
Defendants.	)	

DEFENDANT COOK COUNTY'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S HEALING ARTS MALPRACTICE CLAIMS

NOW COMES Defendant, Cook County, by its attorney KIMBERLY M. FOXX, State's Attorney of Cook County, through her Assistant State's Attorneys, Rachael D. Wilson and Cory J. Cassis, and replies in support of its motion to dismiss the state law Healing Arts Malpractice Claims in Plaintiff's Third Amended Complaint, pursuant to 12(b)(6) and 735 ILCS 5/2-622. In reply, Cook County states as follows:

INTRODUCTION

Plaintiff filed his response to Cook County's Motion to Dismiss arguing that the Court should deny the motion because: (1) Plaintiff was not required to file the 2-622 affidavit with his complaint under Federal Rule of Civil Procedure 8; (2) Cook County misunderstands its liability under *respondeat superior*; and (3) a 12(b)(6) motion is an inappropriate place to argue affirmative defenses. Plaintiff's arguments, however, fail to overcome the deficiencies of Plaintiff's Third Amended Complaint or respond to Cook County's main arguments under the Tort Immunity Act. Plaintiff's failure to respond forfeits any argument he may have had in opposition of those arguments. *Alioto v. Town of Lisbon*, 651 F.3d 715, 719 (7th Cir. 2011). First, Plaintiff's healing

arts malpractice claim is barred by the Illinois Local Government and Government Employee Tort Immunity Act ("Tort Immunity Act"). Second, Plaintiff fails to plead sufficient facts to establish a cause of action exists. Finally, Plaintiff has provided a non-compliant 2-622 affidavit and report. Because this is Plaintiff's third time asserting that he has a valid state law claim for healing arts malpractice and he has once again failed to do so, this Honorable Court should dismiss those claims with prejudice.

ARGUMENT

I. The Court should dismiss Plaintiff's state law claims with prejudice because Tort Immunity Act bars any state law claims.

Although Plaintiff filed his attorney affidavit and report from the physician his attorney consulted, Plaintiff's Third Amended Complaint still failed to state a claim of healing arts malpractice. Contrary to Plaintiff's assertion, dismissal based on an affirmative defense is appropriate where "the pleadings reveal an unassailable, impenetrable, or airtight affirmative defense." *Jones v. Cribbs*, Case No. 19CV5476, Dkt. 43, pg. 2 (*internal quotations removed*). Where the complaint sets forth everything necessary to satisfy the affirmative defense, a court may decide the affirmative defense on a 12(b)(6) motion to dismiss. *Brooks v. Ross*, 578 F.3d 574, 579 (7th Cir. 2009). Plaintiff attempts to argue that a motion for judgment on the pleadings is more appropriate for dismissal due to an affirmative defense, however, a motion for judgment on the pleadings utilizes the same standard of review as the motion to dismiss for failure to state a claim and "the practical effect is the same." *Id*. As such, Plaintiff must establish that the affirmative defense brought was not "airtight" and has failed to do so.

The Illinois Local Government and Government Employees Tort Immunity Act (the "Tort Immunity Act") was created to "protect local public entities and public employees from liability arising from the operation of government. It grants only immunities and defenses." 745 ILCS 10/1-

101.1(a). Plaintiff argues that Cook County concedes that Cook County would not be immune from willful and wanton conduct of its employees, however, this is no response to the assertion that Plaintiff has failed to even allege facts that could sufficiently be identified as willful and wanton. At best, Plaintiff asserts conclusory allegations which fall short of establishing willful and wanton liability, and a public entity cannot be liable for the acts or omissions of its employee where the employee is not liable. 745 ILCS 10/2-109.

Further, and more importantly, Plaintiff altogether fails to respond or even acknowledge the arguments premised in Sections 10/6-105 and 10/6-106(a) of the Tort Immunity Act, either or both of which are fatal to Plaintiff's claim. Section 10/6-105 has no exception for willful and wanton conduct and provides an absolute immunity to Plaintiff's cause of action, citing that there is no liability "caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others." 745 ILCS 10/6-105. Similarly, 10/6-106(a) also provides immunity for "injury resulting in diagnosing or failing to diagnose that a person is afflicted with mental or physical illness or addition or from failing to prescribe for mental or physical illness or addiction." 745 ILCS 10/6-106(a).

The applicability of these sections of the Tort Immunity Act in this case is without question, as evidenced in other cases involving the failure to conduct examinations or diagnose, such as *Mich. Ave. Nat'l Bank v. Cook County*, 191 Ill. 2d 493 (2000). In that case, the Illinois Supreme Court reviewed and affirmed the granting of summary judgment for defendants where the plaintiff alleged there was a failure to conduct examinations and diagnosis of a breast cancer condition. *Id.* The Illinois Supreme Court rejected that plaintiff's attempts to narrow the interpretation of Section

6-105 to only apply to "preventative" health examinations, finding that "[w]here a statute is clear and unambiguous, a court must give it effect as written, without 'reading into it exceptions, limitations or conditions that the legislature did not express." *Id*. at 508 (*citing Garza v. Navistar International Transportation Corp*., 172 Ill. 2d 373, 378 (1996)). The Court determined that 6-105 was not ambiguous in regard to the scope of the immunity it provides. *Id*. at 506.

In Illinois, it is well established that "when the plain language of an immunity provision in the Tort Immunity Act contains no exception for willful and wanton conduct it means the legislature intended to immunize both negligence and willful and wanton conduct." *Hascall v. Williams*, 2013 IL App (4th) 121131 *31 (4th Dist. 2013) (citing *DeSmet v. County of Rock Island*, 2019 Ill. 2d 497, 514 (2006)). In *Hascall*, that plaintiff alleged that that she had been bullied at school and claimed that the defendants, a school district, a superintendent, and a teacher, failed to appropriately respond. *Id*. at *1. The trial court found that defendants were immune from liability under sections 2-201 and 2-109 of the Tort Immunity Act and granted their motion to dismiss plaintiff's second amended complaint pursuant to 735 ILCS 5/2-619(a)(9) with prejudice. *Id*. at *11-12. That plaintiff appealed, arguing that the court erred in finding immunity under the Tort Immunity Act, and asserting that sections 2-202 of the Act provides a "willful and wanton exception," which should also be attributed to Section 2-201. *Id*. at *18, 30. However, the court of appeals affirmed the dismissal reasoning that had the legislature intended to except willful and wanton misconduct from that provision of the immunity statute, it would have "unambiguously done so." *Id*. at *31.

Just like in *Mich Ave. Nat'l Bank*, Plaintiff's claims are barred by the provisions of the Tort Immunity Act, including but not limited to section 6-105 which applies to the exact conduct at the heart of Plaintiff's claims as pled. Dkt. 42 at ¶29. Further, as elaborated upon in *Mich. Ave. Nat'l*

Bank, as well as in *Hascall*, had the legislature intended to permit an exception to the immunity through a finding of "willful and wanton" conduct, they would have explicitly said so. *See Mich. Ave. Nat'l Bank*, 191 Ill. 2d at 508; *Hascall*, 2013 IL App (4th) 121131 at *31. In lieu of any such provision, it is clear the Section 6-105 of the Tort Immunity Act provides absolute immunity, and therefore, Plaintiff's healing arts malpractice claim must be dismissed with prejudice.

Plaintiff also argues that Cook County is sued under the theory of *respondeat superior*. Dkt. 50 at pg. 5. Cook County, however, cannot be liable, even under *respondeat superior*, because of the absolute immunity discussed above. As stated in Defendant's Motion to Dismiss, Plaintiff alleges merely that Defendants failed to examine or prescribe medication for his alleged mental illness. Thus, the Tort Immunity Act bars Plaintiff's allegations of Healing Arts Malpractice claim against Defendants, and it must be dismissed with prejudice.

II. Alternatively, the Court should Dismiss Plaintiff's State Law Claims Against Defendant Cook County Pursuant to 12(b)(6) and 735 ILCS 5/2-622.

As an initial matter, Plaintiff filed his Section 2-622 report and affidavit with his response to Cook County's Motion to Dismiss.[1] The report and affidavit Plaintiff filed with his response, however, do not cure Plaintiff's failure to plead sufficient facts against Cook County to state a claim. As discussed above, a complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), in order to put the defendant on fair notice of the claim and its basis. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The Court dismissed Plaintiff's previous *respondeat superior* claim along with his healing arts malpractice claim because of insufficient facts. Dkt. 41, pg. 18. Despite the addition of

[1] Although Plaintiff filed his 2-622 affidavit and report with his response, his affidavit and report do not comply with the statutory requirements. 735 I.L.C.S. 5/2-622(a)(1). Defendants reserve the right to object to and challenge the sufficiency of the affidavit and report at a later point in litigation.

paragraph 28, Plaintiff did not remedy the inadequate pleading of his state law claims in the Third Amended Complaint. The standard Plaintiff claims to have stated in paragraph 28 of the Third Amended Complaint is as conclusory as previous complaints. *See* Dkt. 42, ¶28. Conclusory allegations are not well-pled facts. *Bell Atl. Corp.*, 550 U.S. at 555 ("labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."). Without actual facts or facts suggesting a plausible inference, Plaintiff's state law claims against Cook County remains inadequately pled. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (The complaint must contain sufficient factual matter to state a claim of relief that is plausible on its face.")

Plaintiff argues that, because he is suing Cook County under the theory of *respondeat superior*, his federal allegations against individual defendants Hallinan and Dr. Kelner are sufficient to support a state law claim against Cook County. Plaintiff's allegations against Dr. Kelner and Hallinan, as discussed above, are barred under state law by the Tort Immunity Act. Even if they were found not to be barred, the allegations against Dr. Kelner and Hallinan do not support a claim of *respondeat superior* against Cook County because Cook County staff did continue Plaintiff on his medications or similar medications on January 18, 2018. Dkt. 42 at ¶29. Although Plaintiff pleads that the conduct of Dr. Kelner and Hallinan occurred during the scope of their employment with Cook County, the alleged conduct does not rise to a tortious action causing Plaintiff injury. Plaintiff was treated on January 18, 2018 and prescribed medication at that time. Because Plaintiff failed to plead any facts plausibly supporting the vague inference that Defendants breached the standard of care, Plaintiff has essentially pled his *respondeat superior* claim out of court.

Specifically, although Plaintiff added new statements, such as the assertion that Plaintiff suffered from "a serious health need" and that the standard of care owed was a general duty to

replace Plaintiff's medication, Plaintiff fails to identify sufficient facts indicating what the standard of care is. As discussed in Cook County's Motion to Dismiss, a plaintiff alleging a medical malpractice claim must establish three elements: "(1) the proper standard of care, (2) a deviation from that standard, and (3) an injury proximately caused by that deviation." *Prairie v. Univ. of Chicago Hosps.*, 298 Ill. App. 3d 316, (1st Dist. 1998) (citing to *Purtill v. Hess*, 111 Ill. 2d 229 (1986)). Without more, Plaintiff has again failed to state a healing arts malpractice claim against Cook County. Reciting the existence of a standard of care does not inherently allege a breach, a plaintiff must allege facts supporting a breach and the remaining elements of the claim. *Ashcroft*, 556 U.S. at 678 ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.") (*internal citations removed*). By merely asserting that a standard exists and Defendants breached the standard without facts supporting the breach or causation is insufficient to state a claim, even under notice pleading standards. Like Plaintiff's prior complaints, Plaintiff's use of magic words and catch-all phrases are simply insufficient to state how Cook County committed healing arts malpractice.

Because Plaintiff failed to provide facts alleging or supporting an inference of that Cook County is responsible for the actions of Dr. Kelner and Hallinan, Plaintiff's healing arts malpractice state law claim must be dismissed with prejudice.

CONCLUSION

WHEREFORE Defendant Cook County respectfully requests that the Healing Arts Malpractice Claim in Plaintiff's Third Amended Complaint and any other state law claim be dismissed with prejudice for failure to state a claim upon which relief may be granted because: (1) his claim is barred by the Illinois Local Government and Government Employee Tort Immunity

Act and (2) Plaintiff has failed to allege sufficient facts showing Cook County is liable pursuant to the Illinois Healing Arts Malpractice Statute or under a theory of *respondeat superior*. In the alternative, Defendants request that this Court require Plaintiff to file a Fourth Amended Complaint attaching the required Section 2-622 attorney affidavit and physician report. Finally, Defendants request that the Court enter an order staying all deadlines for responsive pleadings in this matter until there is a ruling on this motion, and any other relief this Court deems fair and just.

Respectfully submitted,

KIMBERLY FOXX
State's Attorney of Cook County

By: */s/ Cory J. Cassis*
Cory J. Cassis
Rachael D. Wilson
Assistant State's Attorney
Cook County State's Attorney's Office
500 Richard J. Daley Center
Chicago, Illinois 60601
Rachael.wilson@cookcountyil.gov
Cory.cassis@cookcountyil.gov
(312) 603-3374

CERTIFICATE OF SERVICE

I hereby certify that I have caused true and correct copies of the above and foregoing to be served on Plaintiff pursuant to ECF, in accordance with the rules of electronic filing of documents on this 28th day of April, 2021.

/s/ Cory J. Cassis
Cory J. Cassis