

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-24

SHARON IVY

vs.

BOSTON MEDICAL CENTER & others.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A Superior Court judge dismissed the plaintiff's medical malpractice lawsuit based upon her failure to comply with court orders, and her failure to prosecute the case. We perceive no abuse of discretion and, accordingly, we affirm.

Background. The plaintiff filed this medical malpractice action in September of 2016.² The Boston Medical Center (defendant) answered, and requested that a medical malpractice tribunal be convened pursuant to G. L. c. 231, § 60B. On April 3, 2018, a Superior Court judge entered an order scheduling a

¹ The other defendants have been identified as "employees or agents of the defendant Boston Medical Center."

² The extremely bare bones complaint merely states that the plaintiff received unspecified "health care services" from the defendant hospital on September 13, 2013, and that the hospital and "unknown defendants" were "negligent in their respective care." There is no further identification of the plaintiff's condition, what care she received, or who provided the care.

tribunal hearing for May 16, 2018. The order stated that the plaintiff's offer of proof was "due by" April 30, 2018.

The plaintiff did not file an offer of proof on April 30, 2018. Instead, on May 11, 2018, five days before the scheduled hearing, the plaintiff filed an "emergency motion to continue" the tribunal. The basis for the motion was that plaintiff's counsel had been undergoing serious medical treatments and would be "unable to appear on May 16."

The motion judge initially denied the motion on May 14. He noted that although he was "fully prepared to accommodate plaintiff's counsel by, for instance, allowing a phone argument," there was no just cause for a continuance where the plaintiff had failed to file the offer of proof, "as ordered." On May 15 plaintiff's counsel filed a supplemental affidavit, stating that he had been admitted to the hospital on May 14. The same motion judge then issued an order on May 15:

"Tribunal continued on the condition that plaintiff shall serve and file an offer of proof by June 15, 2018 or post a bond by July 13, 2018 for failure to show a legitimate issue for judicial inquiry. [G. L. c.] 231, § 60B" (emphasis added).³

³ Apparently, all of these filings in May were done without giving adequate notice to defendant's counsel. The defendant states without contradiction that the papers were not provided to the defendant prior to May 16, and no one from the plaintiff's side made a phone call to defendant's counsel. Defendant's counsel accordingly appeared for the tribunal on May 16, only to learn it had been continued.

Having secured a conditional continuance, the plaintiff did not file an offer of proof by June 15. On June 19, however, a different Superior Court judge issued an order scheduling another tribunal, this time for August 8, 2018. The order stated that the plaintiff's offer of proof was now due July 20, 2018.

Once again, the plaintiff did not file an offer of proof by the ordered date. Nor did the plaintiff post a bond, as directed by the May 15 order. Nor did the plaintiff notify the court that she did not wish to go forward with the August 8 hearing. Instead, on August 7, the plaintiff filed a "Motion to reduce bond," from \$6,000 to \$1,000, on the ground that the plaintiff was indigent. The plaintiff's affidavit addressing indigency was not signed. Once again, the plaintiff did not serve the defendant in advance of the August 8 hearing.

Plaintiff's counsel failed to appear at the August 8 tribunal. Defense counsel did appear. So did the tribunal. Thereafter, the defendant filed a motion to dismiss the plaintiff's suit, citing the above facts. The plaintiff opposed, arguing that she should be allowed to post a bond. The plaintiff's opposition argued that "[c]learly, by not filing the offer of proof by July 20, 2018, and filing the above-referenced motion before the date of the tribunal, the plaintiff had chosen not to proceed with the tribunal but rather to post a bond."

The motion judge granted the defendant's motion to dismiss.

He concluded:

"If plaintiff 'had chosen not to proceed with the tribunal,' it was [the] responsibility of plaintiff to inform the court . . . by requesting a continuance. . . . Failing to appear for the rescheduled tribunal constitutes failure to prosecute this case. That failure to prosecute, coupled with plaintiff's earlier failure to comply with [the] order of May 15, 2018, justifies dismissal of this case."

Discussion. The plaintiff argues that the court erred, because she should have been afforded the opportunity to post a bond pursuant to G. L. c. 231, § 60B. She claims that the reason she did not post a bond was that her August 7 motion to reduce the bond had not been acted upon, and thus she did not know the amount to post.

We perceive no error. Under Mass. R. Civ. P. 41 (b) (2), 365 Mass. 803 (1974), on motion of the defendant the judge may dismiss a case, "in its discretion," "for failure of the plaintiff to prosecute or to comply with . . . any order of court." The allowance of a motion to dismiss under this rule can be "harsh," Bucchiere v. New England Tel. & Tel. Co., 396 Mass. 639, 642 (1986), but it is "committed to the judge's sound discretion," and "is critical to the orderly and expeditious disposition of cases and the calendar as a whole." Id. at 641. Accordingly, as the Supreme Judicial Court has explained, "[a]s with most rulings by a judge regarding the management of a case,

[o]nly in rare instances can it be ruled that there has been an abuse of discretion amounting to [an] error of law" (quotations omitted). Id.

Here the plaintiff was afforded multiple opportunities to prosecute her case, and she did not do so. She missed three separate deadlines to file an offer of proof. She failed, alternatively, to comply with the judge's order to post a bond by July 13.⁴ Perhaps most egregiously, the plaintiff did not appear for the scheduled tribunal hearing on August 8, and she did not notify anyone that she would not appear. In her brief, the plaintiff does not address these failures in a meaningful way, and does not appear to recognize their significance. The suggestion that her August 7 filing made it "clear" that she was not going forward with the tribunal the next day is simply not credible. Among other things, that filing (1) did not in fact state that the plaintiff was not going forward with the

⁴ The plaintiff suggests that she believed the May 15 order was superseded by the June 19 order setting another tribunal. While the June 19 order did set a different date for filing the offer of proof, the June 19 order did not reference the May 15 order. Under the circumstances the May 15 order was still extant, and the plaintiff could not simply assume otherwise.

tribunal, (2) was deficient on its face, where the affidavit of indigency was not signed, and (3) came far too late in any event to accomplish the purpose of notifying the tribunal.⁵

Judgment affirmed.

By the Court (Meade,
Ditkoff & Englander, JJ.⁶),



Clerk

Entered: May 13, 2020.

⁵ In addition to the failure to appear or to notify the tribunal, and the failure to comply with the court orders, we note that counsel's actions consistently failed to give due consideration to the other participants in the litigation process. Emergency motions should not be served by regular mail; counsel needs to make particular efforts to notify opposing counsel in such circumstances. Similarly, counsel should notify the court, as early as possible, when it cannot make a court appearance or does not intend to appear.

⁶ The panelists are listed in order of seniority.