

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>WILLIAM J. LONG</b>	:	
	:	<b>CIVIL ACTION</b>
<b>v.</b>	:	
	:	
<b>ADMINISTRATION OF MONTGOMERY</b>	:	
<b>HOSPITAL OF NORRISTOWN, PA,</b>	:	<b>NO. 2000-cv-1056</b>
<b>ET AL.</b>	:	

**MEMORANDUM**

Schiller, J.

October 25, 2000

On September 12, 2000, this court dismissed plaintiff's sole count alleging violation of Section 1983. Plaintiff filed a motion to "reinstate specified substantive merit review," which I treated as a motion for reconsideration. The court denied that motion as well. Plaintiff served this court with a notice of appeal on October 10. I now write pursuant to Third Circuit Local Appellate Rule 3.1 to amplify upon my decision.<sup>1</sup>

The complaint fails to give a full or clear narrative of the events giving rise to plaintiff's claims. Nonetheless, I have examined it to see if the facts alleged therein would give rise to a claim over which I have jurisdiction. Mr. Long alleges that defendant Montgomery Hospital violated his due process rights. In his memorandum in opposition to the Motion to

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1. The Third Circuit Local Appellate Rule 3.1 provides:

At the time of the filing of the notice of appeal, the appellant shall mail a copy thereof by ordinary mail to the trial judge. Within 15 days thereafter, the trial judge may file and mail to the parties a written opinion or a written amplification of a prior written or oral recorded ruling or opinion.

3d CIR. R. 3.1.

Dismiss, plaintiff seems to draw out from his complaint fraudulent and negligent misrepresentations as well.

The operative facts are as follows. Plaintiff, a Pennsylvania resident, sought treatment at defendant Montgomery Hospital on April 16th or 17th, 1997 for the removal of a parotid tumor. The procedure required that he be admitted to the hospital as an in-patient. Before undergoing the procedure, Mr. Long filled out the obligatory insurance forms in which he named Medicare as his insurance provider.<sup>2</sup> Plaintiff concedes in his complaint that while he had some Medicare coverage, he had no coverage for in-patient expenses.<sup>3</sup> The defendants admitted him to the hospital and removed the tumor. Plaintiff has made no allegations that the Montgomery Hospital surgeons improperly performed the procedure.

Mr. Long now avers that the defendants deprived him of his “rightful Medicare benefits.” He claims the defendants had the responsibility to verify his Medicare benefits before admitting him into the hospital to ensure Medicare would cover his expenses. The defendants never informed him that his Medicare benefits would not cover all of his treatment. Had they so informed him, plaintiff says, he would have made alternate arrangements to have the procedure performed at the Veteran’s Hospital where he had full medical benefits.

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2. Plaintiff also submitted his Medicare Card, which states that he had both medical and hospital coverage. A copy of that card is appended to Defendant’s Motion to Dismiss as Exhibit B.

3. Medicare Part A provides hospital insurance for the elderly and disabled at the expense of the Federal Government. See generally 42 U.S.C. §§ 1395 to 1395i-4 (West 1992 & Supp.2000). Medicare Part B is a voluntary program that provides supplemental benefits to Medicare participants to cover the costs of physician services, laboratory and diagnostic tests, ambulance services, and prescription drugs, but not in-patient procedures. See generally §§ 1395j to 1395w-4 (West 1992 & Supp. 2000).

Mr. Long maintains that defendants' actions resulted in the denial of his "federal-Medicare-patients-rights." He alleges that the hospital has a contract with Medicare. By virtue of that contract, Mr. Long maintains, the defendants are state actors subject to Section 1983 and the Fourteenth Amendment.

#### SECTION 1983 CLAIM

When considering a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court may look only to the allegations in the complaint, exhibits attached thereto, any reasonable inferences therefrom and matters of public record. See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir.1993); Markowitz v. Northeast Land Co., 906 F.2d 100, 401 (3d. Cir. 1988). The court must view the complaint in the light most favorable to the plaintiff, see Tunnell v. Wiley, 514 F.2d 971, 975 n.6 (3d Cir.1975); Rothman v. Specialty Care Network, Inc., No. Civ.A. 00-2445, 2000 WL1470221 at \*3 (E.D. Pa. Oct. 3, 2000), and take well pleaded allegations as true. See Colburn v. Upper Darby Township, 838 F.2d 663, 664-65 (3d Cir.1988). However, "a court need not credit a complaint's 'bald assertions' or 'legal conclusions.'" Pennsylvania v. Rand Finan. Corp., No. Civ.A.99-4209, 2000 WL 1521589 \*2 (E.D. Pa. Oct. 3, 2000) quoting Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir.1997). When no set of facts could be proven which would guarantee a right to relief, the case must be dismissed. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1391 (3d Cir.1994); Rothman at \*3.

Here, plaintiff has not pled a set of facts which, if proven, would entitle him to relief under the Fourteenth Amendment. The Fourteenth Amendment provides that “[n]o state” shall make or enforce any law which shall abridge the privileges or immunities of U.S. Citizens. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment proscribes only state action; “it provides no shield against private conduct.” Klavan v. Crozer-Chester Med. Ctr., 60 F. Supp. 2d 440 (E.D. Pa. 1999), citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 359 (1974). While plaintiff does argue in his complaint and in his briefs that the defendants are state actors because they have a contract with the federal government, this court is not bound by his bald allegations and legal assertions. See Morse, 132 F.3d at 906.

A private entity may qualify as a ‘state actor’ under three discrete tests: the “traditional exclusive government function test,” the “symbiotic relationship test,” and the “close nexus test.” Klavan, 60 F. Supp. 2d at 441. The heart of the inquiry is to “discern if the defendant exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” Id., quoting Groman v. Township of Manalapan, 47 F.3d 628, 639 n. 17 (3d Cir. 1995) (internal quotations omitted).

I first reject the notion that the hospital was exercising a traditional government function. Within the ambit of traditional government functions are such activities as holding elections and eminent domain. See Klavan, 60 F. Supp. 2d at 441 n. 5. The provision of hospital services is not a function reserved exclusively to the state. Id.

I next reject plaintiff’s contention that the alleged Medicare contract between the defendant and the government, without more, renders the hospital a state actor under the remaining two tests. Extensive financial assistance does not constitute state action. See Hodge v.

Paoli Memorial Hosp., 576 F.2d 563 (3d Cir. 1978) (per curiam). In Hodge, the Third Circuit joined the majority of Circuit Courts and specifically rejected the argument that Hill-Burton construction funding or the receipt of Medicare or Medicaid funds could serve as the basis for state action under section 1983. See id.; Klavan, 60 F. Supp. 2d at 442. Thus, the mere fact that Montgomery Hospital has a contract with the United States to provide medical services in exchange for payments from Medicare does not transform the hospital into a state actor. Absent state action, plaintiff's section 1983 claim fails.

#### FRAUD AND MISREPRESENTATION CLAIMS

Plaintiff also uses language in his complaint evocative of fraud and misrepresentation. Even assuming, arguendo, that plaintiff has met the demanding particularity requirements for an allegation of fraud under Federal Rule of Civil Procedure 9(b), this claim must be dismissed because this court lacks jurisdiction.

Federal question jurisdiction is absent because misrepresentation and fraud do not arise under federal law. Generally, state law governs the elements of fraud that must be identified in the complaint and proven at trial. See Burland v. Manorcare Health Servs., CIV A. 98-4802, 1999 U.S. Dist. LEXIS 725 at \*8 (E.D. Pa. Jan. 26, 1999). State law governs negligent misrepresentation claims as well. See, e.g. Gibbs v. Ernst, 647 A.2d 882, 890 (Pa. 1994) (setting forth elements of negligent representation claim under Pennsylvania law).

This court also lacks diversity jurisdiction. Both the plaintiff and the defendants reside in the Commonwealth of Pennsylvania, rendering the parties non-diverse. See 28 U.S.C. § 1332 (a)(1) (West 1993) (requiring citizens of different states for district court jurisdiction).

Finally, as I dismissed plaintiff's civil rights action, there is no claim upon which to base supplemental jurisdiction. See 28 U.S.C. § 1367 (West 1993).

Therefore, this court has no jurisdiction over plaintiff's misrepresentation and fraud claims.

#### CONCLUSION

For the reasons above, I dismissed plaintiff's complaint by order dated September 12, 2000, docket no. 15, for failure to state a claim upon which relief can be granted, FED. R. CIV. P. 12(b)(6) and for lack of subject matter jurisdiction, FED. R. CIV. P 12(b)(1).

BY THE COURT:

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Judge Berle M. Schiller

October 25th, 2000