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NORMAN EISENSTADT, M.D.	:	PHILADELPHIA COUNTY COURT OF COMMON PLEAS
V.	:	
ROXBOROUGH MEMORIAL HOSPITAL et al.	:	JUNE TERM, 1994
	:	NO. 318

O R D E R

IT IS THIS _____ day of _____, 2007, hereby ORDERED, that the motion of Defendant, Roxborough Memorial Hospital, for the entry of a judgment of *non pros*, in its favor, and against the Plaintiff, Norman Eisenstadt, M.D., for failing to prosecute this action, is GRANTED, and the Plaintiff's Complaint is this matter is DISMISSED with prejudice.

BY THE COURT:

_____
J.

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MOTION OF DEFENDANT, ROXBOROUGH MEMORIAL HOSPITAL, FOR JUDGMENT OF *NON PROS* AGAIN PLAINTIFF, NORMAN EISENSTADT, M.D., FOR FAILURE TO PROSECUTE

Moving defendant, Roxborough Memorial Hospital ("Roxborough"), by and through its attorneys, Gold & Robins, P.C., hereby move before this Honorable Court, for an order dismissing the Plaintiff's Complaint for failure to prosecute this action, and in support whereof, states as follows:

1. This matter was initiated with the filing of a Complaint, *Norman Eisenstadt, M.D. v. Roxborough Memorial Hospital*, Phila. C.C.P., June Term, 1994, No. 318, on June 6, 1994, more than thirteen (13) years ago. It is believed, and therefore averred, that this matter is one of the oldest pending matters upon the civil dockets of the Court of Common Pleas of Philadelphia County. (A copy of the Complaint is attached hereto as Ex. "A")

2. In this action, Plaintiff, Eisenstadt, challenged the summary suspension of his medical staff privileges at Roxborough Memorial Hospital on February 18, 1994. Eisenstadt filed this action seeking: (1) a declaratory judgment amending §3.7 of the Hospital's Fair Hearing Plan to require that the Hospital have the burden of proving by clear and convincing evidence the grounds asserted for the summary suspension; (2) reinstatement of Plaintiff's clinical privileges pending a decision from the Hearing Committee; and (3) compensatory and punitive damages.

3. On June 9, 1994, the Court denied Plaintiff's request (in the form of a TRO) for a

declaratory judgment.

4. Thereafter, Dr. Eisenstadt contested his summary suspension via the hospital's Fair Hearing Plan. An extraordinarily lengthy hearing process ensued, in which seventeen (17) hearing sessions took place, and thousands of pages of testimony were amassed, the hospital's Fair Hearing Committee, on August 4, 1995, determined that the summary suspension of Dr. Eisenstadt was justified.

5. On August 22, 1995, the hospital's Special Executive Committee affirmed the decision of the Hearing Committee. And on August 29, 1995, counsel for Dr. Eisenstadt requested appellate review of the decision made under the Fair Hearing Plan.

6. The hospital's appeals process commenced, and some briefings were provided to the hospital's appellate review committee. Prior to completion of the appeals process and a decision as to Dr. Eisenstadt's appeal, however, the parties entered into a settlement agreement in January, 1999, which included a release of all claims with prejudice. This instant matter (the "1994 Action") was then dismissed pursuant to the agreement, with prejudice.

7. Following the settlement of this, the 1994 Action, which included the relinquishment by Dr. Eisenstadt of all claims to hospital privileges, and the filing of a revised adverse action report as to Dr. Eisenstadt's status with the National Data Bank, a second action was filed by Dr. Eisenstadt against the hospital: Eisenstadt v. Roxborough, Philadelphia Court of Common Pleas, August Term, 2001, No. 2506 (the "2001 Action"), in which Plaintiff alleged that the hospital breached the settlement agreement and that the subsequent data bank filings constituted defamation.

8. After several years of litigation, in June, 2004, summary judgment was granted in favor of the hospital in the 2001 Action, and Dr. Eisenstadt's claims were dismissed. The trial Court, however, also determined that the settlement agreement, to the extent that it sought the filing of a revised adverse action report as to Dr. Eisenstadt was illegal, and to that extent could not be enforced. Following a lengthy appeals process, the grant of summary judgment and dismissal of the 2001 action was upheld. The 2001 Action is and remains closed.

9. Following the initial grant of summary judgment in the 2001 Action, the Plaintiff, on July 6, 2004, filed a motion to reinstate the instant matter, the 1994 Action. The motion to reinstate was granted on August 3, 2004 in an order by Judge Moss. A motion for reconsideration on the part of Roxborough was filed, and by order dated October 29, 2004, revoked its order reopening this matter, and permitted Roxborough to file a response. Roxborough did so on November 18, 2004, and following briefing, the Court again, by order dated January 7, 2005, granted the motion to reinstate, and ordered this, the 1994 Action, reopened.

10. Moving defendant, Roxborough, however, had filed a voluntary petition pursuant to Title 11, Chapter 11, of the United States Bankruptcy Code, on June 30, 2004. (A true and correct copy of the dockets from the bankruptcy action, Eastern District of Pennsylvania Bankruptcy Court, No. 04-18933) is attached hereto as Ex. "B".

11. Pursuant to Section 362(a) of the Bankruptcy Code, all civil actions and claims as against defendant, Roxborough Memorial Hospital are automatically stayed, until and unless relief is sought and obtained from the Bankruptcy Court permitting such other claims to proceed. (See Docket entry, 1994 Action, at November 14, 2006, for Suggestion of Bankruptcy, as to Hospital's June 30, 2004, filing of bankruptcy)

12. Following the filing of the Suggestion of Bankruptcy in this matter, on January 16, 2007, the parties in this matter appeared before the Hon. Sandra M. Moss for a status conference, during which the bankruptcy stay, the status of this matter, and the intention of the parties was addressed.

13. During this conference, it was noted that the Bankruptcy Stay precluded the continuance of this, the 2001 Action, until and unless the Plaintiff sought relief from the Bankruptcy Court to proceed.

14. It had been previously noted, and was again noted during the conference, that since the corporate entity which is the object of Plaintiff's claims, Roxborough Memorial Hospital - as it existed at the relevant time in and about 1994 - no longer functioned, and the

present "physical" entity that exists and functions as Roxborough Memorial Hospital, bears no legal relation whatsoever to the defendant in this matter, defendant Roxborough had no ability whatsoever to provide any of the "equitable" relief being sought in this matter. That is, the defendant herein, has no ability to reinstate the Plaintiff, reinstate Plaintiff's medical staff privileges, or to take any further action with respect to the filing, refiling or alteration of reports filed with the National Practitioner Database.

15. The sole relief that the Plaintiff could seek in this matter is limited to the extent of any insurance coverage - and that only to the extent that such coverage exists or is applicable at this point in time. In order for the Plaintiff to continue in this matter, it was noted, the Plaintiff would have to seek relief from the Bankruptcy Stay, as noted above, directly from the Bankruptcy Court.

16. At the January 16, 2007 conferred, Judge Moss directed the Plaintiff, through attorney, Stephen Eisenberg, Esquire[1], to file a petition for relief from the Bankruptcy Stay within ten (10) days of the conference, and if Plaintiff chose not to do so, Judge Moss stated that she would seriously consider a motion by the defendant to dismiss this action with prejudice for failing to prosecute.

17. A review of the dockets from the Bankruptcy Action (Ex. "B"), recently obtained, demonstrate that the Plaintiff has failed to file a petition for relief from the Bankruptcy stay. As of the filing of the present motion, more than eight (8) months have elapsed since the last court appearance in this matter, before Judge Moss in January, 2007. Neither Plaintiff, nor any counsel on Plaintiff's behalf, have made any attempt to move this matter forward, to obtain relief from the bankruptcy stay, or perform any other act to move this now-more than 13-year-old civil action forward. This action has been under the control of the Bankruptcy Stay for the greater than three years which have passed since this matter was reinstated, and at no time has the

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[1] According to both Attorney Eisenberg, and Plaintiff, Eisenstadt, Mr. Eisenberg only appeared at the conference as a courtesy to the Plaintiff, and had not and would not be entering an appearance as counsel in this matter. In fact, Mr. Eisenberg has not entered an appearance in this matter, and the Plaintiff remains – as he has been in the 1994 Action since its dismissal as "settled" in 1999 – *pro se*.

Plaintiff sought relief from the automatic stay which has been in effect since June 30, 2004.

18. As of the filing of this motion, Plaintiff, Eisenberg remains unrepresented by counsel, and has been so for quite some time. Despite the appearance of Attorney Eisenberg at the January, 2007 conference, it is the undersigned's understanding that he did so unofficially, as a courtesy to Dr. Eisenstadt, and that he does not intend to, nor does he in fact represent the Plaintiff in this matter. It was made clear before Judge Moss in January, that the Plaintiff would either secure other counsel, or proceed *pro se* in this matter. To date, there has been no indication from the Plaintiff that he has or intends to secure other counsel, and no such counsel has entered an appearance since the reinstatement of this matter in 2004. It must therefore be concluded that Plaintiff is proceeding in this matter *pro se*.

19. Preliminarily, there can be no question, as the Court noted at the recent conference that there has been significant delays in the prosecution of this matter by the Plaintiff. This case is among the oldest civil actions in the Court of Common Pleas, Philadelphia County, having been filed more than 13 years ago. It was initially discontinued with prejudice in 1999, when the matter was settled among the parties. At the seven-year mark, in 2001, this matter resurrected itself with the filing of a separate action by the Plaintiff contending breach of the settlement agreement. That matter finally concluded in July of 2004, at the ten-year mark, with the decision of the Superior Court upholding the trial court's grant of summary judgment in favor of the Defendant.

20. Prior to the July 6, 2004, filing by the Plaintiff of a motion for reinstatement of this action, on June 30, 2004, the Defendant, Roxborough Memorial Hospital, entered Chapter 11 bankruptcy, and came under the protection of the automatic stay of the Bankruptcy Court of the Eastern District of Pennsylvania. Pursuant to the automatic stay, until and unless relief from the stay is sought and obtained, no civil action may proceed against Roxborough.

21. Now, more then thirteen (13) years out from the commencement of this action, and more than three (3) years since it was reinstated - which in itself followed a more than a three-year breach of contract action which concluded with an unsuccessful appeal by the Plaintiff

of the trial court's grant of summary judgment in favor of the defendant - the parties and this litigation are essentially back to square one.

22. In the more than three (3) years since this matter was reinstated, the Plaintiff has failed to take the slightest effort to move this matter forward. This matter has, essentially, languished upon this Court's docket without any effort on the part of the Plaintiff to prosecute his claims. Further, the Plaintiff has failed to seek relief from the Bankruptcy Stay which governs the prosecution of this matter. Absent an order of the Bankruptcy Court, permitting this matter to continue, and setting the conditions for doing so, the Plaintiff may not do so. 11 U.S.C. §362(a).

23. Compounding the Plaintiff's failure to act in any manner to move this case forward, is the fact, noted earlier, that it *cannot* more forward until and unless the Bankruptcy Court grants the Plaintiff relief from the automatic stay. The Plaintiff has made no such effort to obtain relief from the stay. Even if Plaintiff were to suddenly file such a request with the Bankruptcy Court, its disposition would likely take some time, and there is no guaranty that the relief would be granted.

24. Further, even if relief were to be granted, the parties would then be placed back at the point at which they stood in June of 1994. At that time, the Plaintiff had filed his Complaint, seeking to have his privileges on the staff of Roxborough Memorial Hospital, which were at that time suspended, reinstated, as well as monetary damages.

25. As per the Medical Staff Agreement between the Plaintiff and the Hospital, he was entitled to an administrative hearing process into the suspension of privileges, and as to whether the Plaintiff's privileges would be revoked. Each side, the Hospital, and Dr. Eisenstadt, through counsel, agreed upon the membership of a three-member administrative hearing panel, which panel was presided over by the hearing officer, the Hon. Stanley M. Greenberg. Each side was permitted to put on whatever witnesses desired, and for the ensuing approximate ten (10) month period, a total of seventeen (17) hearing sessions were conducted, and the testimony of fifteen (15) witnesses was taken. Following this, a period of post-hearing briefing was had, and on August 4, 1995, the hospital's Fair Hearing Committee determined that the summary

suspension of Dr. Eisenstadt was justified. On August 22, 1995, the hospital's Special Executive Committee affirmed the decision of the Hearing Committee. Finally, on August 29, 1995, Dr. Eisenstadt requested appellate review of the decision made under the Fair Hearing Plan.

26. Dr. Eisenstadt never completed the administrative appeals process as required pursuant to the Medical Staff Agreement. Pursuant to the agreement, exhaustion of the administrative hearing process is a prerequisite to the pursuit of a civil action. Following the Plaintiff's request for appeal under the hearing plan, the parties commenced a series of settlement negotiations, and Dr. Eisenstadt thereafter make no further efforts to pursue his appeal of the Executive Committee's affirmation of the suspension of his staff privileges.

27. At no time have the parties conducted discovery in this matter. At issue in Plaintiff's action, is his challenge to the propriety and justification of his suspension, and the subsequent revocation of his medical staff privileges at Roxborough Memorial Hospital. Plaintiff also challenges the propriety of the administrative hearings process itself.

28. Defendant, Roxborough's defense in this matter will encompass the issues which faced the Hospital in and about February, 1994, when Hospital officials determined that certain problems concerning the care and treatment provided to patients by Dr. Eisenstadt's required the suspension, and eventual revocation of his medical staff privileges. Defendant, Roxborough's defense in this matter will be, in summary, that the actions taken were appropriate, and that the performance of the Plaintiff in the provision of medical care and treatment to certain patients at Roxborough, warranted the actions taken.

29. In preparing this defense, defendant Roxborough will require discovery from and the testimony of numerous individuals who were involved in the process as a whole, both prior to and during the administrative hearing process. Defendant, Roxborough will likewise require access to and possibly discovery from the individual patients whose treatment by the Plaintiff is at issue with respect to the suspension and revocation of his staff privileges. Copies of the medical records of the patients at issue will likewise be essential in the preparation of defendant, Roxborough's defense in this matter.

30. Due to the lengthy passage of time since the filing of this matter, in June, 1994, and the events at issue (during the February, 1994 through May, 1995 time period), moving defendant respectfully avers that this lengthy delay in bringing this matter, not only to trial, but to *discovery*, has severely and substantially prejudiced it ability to prepare its defense in this matter.

31. Witnesses whose testimony is essential or important to the ability of defendant, Roxborough, to prepare its defense in this matter, include the following individuals whose present whereabouts are unknown:

1. Cyril Abrams, M.D. - Plaintiff's former employer at the medical group Lista-Abrams, P.C. - Located in 1993 at Roxborough Memorial Hospital.

2. John Buonomo, D.O. - Employed in 1993 at Roxborough Memorial Hospital. Member of the administrative hearing panel.

3. Mary Burke, M.D. - Employed in 1993 at Roxborough Memorial Hospital. Member of the administrative hearing panel.

4. J. Norris Childs, III, M.D. - Employed in 1993 at Roxborough Memorial Hospital. Member of the administrative hearing panel.

5. Chris Coyne-McDonald, R.N. - Nurse (ca. 1993-1994) at Roxborough Memorial Hospital.

6. John J. Donnelly, Jr. - Former President (ca. 1993-1994) of Roxborough Memorial Hospital.

7. William Follis - Coordinator, Cardiac Rehabilitation Unit.

8. Lena Fullis - Employee in the Cardiac Rehabilitation Unit.

9. James Harris, M.D. - Former Medical Director at Roxborough Memorial Hospital.

10. Daniel J. Hyman, D.O. - House officer/Medical resident, approx. 11/93.

11. Gregory Lechner, M.D. - Chairman of the Department of Medicine.

12. William Lista, M.D - Plaintiff's former employer at the medical group Lista-Abrams, P.C. - Located in 1993 at Roxborough Memorial Hospital.

13. Salvatore Lofaro, M.D. - Employed in 1993 at Roxborough Memorial Hospital.

14. Debbie A. Rindler, R.N. - Nurse (ca. 1993-1994) at Roxborough Memorial Hospital.

15. Lisa Sataloff - Employee in the Cardiac Rehabilitation Unit.

16. Julia Anna Volz, R.N. - Former Director of Quality Management and Utilization Review, Roxborough Memorial Hospital.

17. Eleanor Wilson, R.N. - Former Vice President of Patient Care, Roxborough Memorial Hospital.

18. George M. Wilson, M.D. - Former Medical Director (ca. 1993-1994) at Roxborough Memorial Hospital.

19. Carol Wons - Nurse (ca. 1993-1994) at Roxborough Memorial Hospital.

32. In the absence of the testimony of the decisionmakers involved in the suspension and hearing process – who were at the time in the employ of defendant, Roxborough – it will not be possible for the Hospital to mount a defense in this matter. Almost fourteen years after the incidents at issue in this matter, thirteen years after the initiation of suit by Plaintiff, seven years after this matter's initial settlement, as well as three years since the entity's entry into bankruptcy, it does not now appear that there exists anyone to speak on behalf of the Hospital. At this time, the whereabouts of those with knowledge concerning the actions taken by the Hospital are not known. The prejudice inherent under these circumstances, wrought by the inordinate passage of time since the commencement of this action, rends severe and inescapable prejudice upon defendant, Roxborough.

33. At issue in the action taken by the Hospital with respect to Dr. Eisenstadt's medical staff privileges, was the medical care and treatment provided to a series of patients under Plaintiff's care. The present whereabouts of these patients is unknown. Due to the age of many at the time, and the length of time which has passed, it is likely that many are now deceased. The ability to have interviewed, and/or examined some or all of these former patients of Dr. Eisenstadt's is/was important to the ability of defendant, Roxborough to the preparation of its defense. The former patients whose whereabouts is presently unknown include[2]:

1. M.M.B. - F, age 62 (in 1993). If still alive, would be approx. 75 years of age.

2. T.B. - M, age 28 (in 1993). If still alive, would be approx. 41 years of

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[2] The names of the former patients of the Plaintiff's are referred to herein only by their initials, gender and age, in order to maintain their confidentiality. Further information can be provided to the Plaintiff or to the Court upon request.

age.

3. C.C - F, age 53 (in 1993). If still alive, would be approx. 66 years of age.

4. A.C. - F, age 77 (in 1993). If still alive, would be approx. 100 years of age.

5. A.D. - F, age 83 (in 1993). If still alive, would be approx. 96 years of age.

6. N.N.D. - F, age 75 (in 1993). If still alive, would be approx. 88 years of age.

7. J.D. - M, age 54 (in 1993). If still alive, would be approx. 67 years of age.

8. H.H.G. - F, age 54 (in 1993). If still alive, would be approx. 67 years of age.

9. S.H. - F, age 50. If still alive, would be approx. 63 years of age.

10. H.K. - F, age 82 (in 1993). If still alive, would be approx. 95 years of age.

11. T.T.M. - M, age 72 (in 1993). If still alive, would be approx. 85 years of age.

12. E.E.M. - F, age 88 (in 1993). If still alive, would be approx. 101 years of age.

13. A.M. - F, age 60 (in 1993). If still alive, would be approx. 73 years of age.

14. T.P. - F, age 75 (in 1993). If still alive, would be approx. 88 years of age.

15. L.S. - F, age 70 (in 1993). If still alive, would be approx. 83 years of age.

16. R.R.W. - F, age 58 (in 1993). If still alive, would be approx. 71 years of age.

34. Further, it is not known at this time whether any of the original medical records of the patients at issue have survived. Certainly, the period of retention for such medical records has long passed and, in view of the original settlement of this matter, in 1999, there existed no reason to have maintained such records. Further complicating the issue, is the entry into bankruptcy of the Hospital in June, 2004. It is not known at this time whether or to what extent the "defunct" entity which formerly operated as Roxborough Memorial Hospital, maintained medical records then more than a decade old.

35. Finally, and yet of further concern to the ability of defendant, Roxborough, to prepare its defense in this matter, it is the effect which the passage of thirteen (13) years since the filing of this matter, and the events complained of by the Plaintiff, upon the memories of any witnesses with knowledge who may at some point be located. The most recent contacts with most of the individuals/witnesses listed above, had by any counsel or hospital official, would have been some time in 1995, at the completion of the hearings process, and the rendering of the hospital executive committee's decision as to the revocation of the Plaintiff's medical staff privileges. The passage of such a long period of time, with respect to issues and questions of a highly technical and fact-intensive nature, as the evaluation of medical care and treatment provided by a physician to a series of cardiac patients, cannot but result in the serious diminution of memories, thus seriously and irreparably prejudicing the ability of defendant, Roxborough, to defend itself in this matter.

36. The Pennsylvania Supreme Court has held that "[i]t is well settled law that the question of granting a non pros, because of the failure of the plaintiff to prosecute his action within a reasonable time rests within the discretion of the lower Court and the exercise of such discretion will not be disturbed on appeal unless there is proof of a manifest abuse thereof." *Gallagher v. Jewish Hospital Ass'n*, 425 Pa. 112, 113, 228 A.2d 732, 733 n.5 (1967), citing *Aldridge v. Great A&P Tea Co.*, 394 Pa. 57, 58, 145 A.2d 695 (1958) ("Where a plaintiff neglects to prosecute his suit diligently and the delay would be harmfully prejudicial to the defendant, if the suit were to be put to trial, the entry of a judgment of non pros is appropriate").

37. In determining whether to grant a judgment of *non pros*, the Pennsylvania Supreme Court, in *Jacobs v. Halloran*, 551 Pa. 350, 710 A.2d 1098 (1998), held that the court must determine the existence of three factors: First, that there has been a "lack of due diligence on the part of the plaintiff in failing to proceed with reasonable promptitude." 710 A.2d at 1103. Second, that the plaintiff has "no compelling reason for the delay." *Id*. Finally, that the delay "must cause *actual* prejudice to the defendant." *Id*. All three factors are amply satisfied in this case.

38. In *McSloy v. Jeanes Hospital*, the Superior Court upheld the dismissal on a motion for *non pros*, of plaintiff's medical malpractice action, where the plaintiffs had failed to secure an expert four-and-a-half (4-1/2) years after the filing of their complaint, some six-and-a-half (6-1/2) years after the events at issue. 376 Pa.Super. 595, 603, 546 A.2d 684, 688 (1988):

> In the present case, we conclude that appellants' [plaintiffs'] actions clearly demonstrate a want of due diligence and a failure to proceed with reasonable promptness. In addition, far from providing a compelling reason for the delay, appellants' do not attempt to provide even the slightest justification for the delay in obtaining an expert. Rather, their failure . . . demonstrates an intentional disregard of the trial court's orders and its efforts to bring this case to a speedy resolve.

39. Further, given the passage of time in *McSloy*, the Court determined that the ability of the defense to present witnesses in their defense was unacceptably impaired:

> Although appellees [defendants] do not allege that material witnesses have died or absented themselves, we believe that appellees ability to properly present its case at trial may have been substantially diminished by appellants' failure to procure an expert.
>
> The incident which is the subject of this dispute occurred on November 2, 1981, approximately **six and a half (6 1/2) years ago**. Appellees have been denied an opportunity to prepare a defense to appellants' claims of malpractice. **The memories of witnesses who may be crucial to preparation of appellees' defense have faded**. . . .
>
> Consequently, the evidentiary difficulties which may face appellees as a result of this delay, in addition to the costs incurred . . . clearly warrant a finding that appellees have been prejudiced by appellants' failure to obtain an expert within a reasonable time.

Id. at 603-604, 546 A.2d at 688 (emphasis added).

40. Courts have also held that the determination of prejudice to the defendant need not be limited only to circumstances involving the death or absence of material witnesses, "[r]ather, if any substantial diminution of a party's ability to properly present its case at trial results, then prejudice can be said to have attached." *Metz Contracting v. Riverwood Builders*, 360 Pa.Super. 445, 451, 520 A.2d 891, 894 (1987).

41. The Commonwealth Court has also observed that "for purposes of entering non pros, [prejudice] is not limited to the death or absence of material witnesses, but may also attach

where, because of delay, there is loss of documentary evidence in a party's ability to properly present its case." *Neshaminy Contractors v. Plymouth Township*, 132 Pa.Commw. 229, 234, 572 A.2d 814, 817 (1990), citing *Carroll v. Kimmel*, 362 Pa.Super. 432, 524 A.2d 594 (1987).

42. In *Metz, supra*, the appellee argued that the advent of a bankruptcy proceeding, and the passage of time, had resulted in prejudice sufficient to require the dismissal of appellant's case:

> Instantly, appellee argues that its ability to present factual information at trial may be substantially diminished because of potential inaccessibility of relevant records due to the bankruptcy status of the contractor, for whom appellant allegedly performed excavation work on real property purportedly owned by appellee. **We hold that these evidentiary difficulties are sufficient to grant dismissal**.

360 Pa.Super. at 451, 520 A.2d at 894 (emphasis added), citing *Moore v. George Heebner, Inc.*, 321 Pa.Super. 226, 467 A.2d 1336 (1983).

43. In *Supplee v. Commonwealth, Dept. of Transp.*, 105 Pa. Commw. 488, 524 A.2d 1002 (1987), the Commonwealth Court upheld the trial court's dismissal for failure to prosecute, where various witnesses had become unavailable during a ten-year delay in proceedings:

> [W]e agree with the trial court that the Commonwealth's ability to present its case has been prejudiced by appellants' lengthy delay in moving this case forward. **A lengthy delay, such as the ten-year delay being addressed in this case, is presumptively prejudicial to all parties even without a specific showing of prejudice on the record**. . . .
>
> In the instance case, the appraiser actively involved, and thus **a key witness, has died. This, in itself, is sufficient to substantiate the trial court's conclusion that prejudice was present**. Additionally, the Commonwealth's witness testified before the trial court that **many other witnesses necessary to the Commonwealth's case were unavailable. For these reasons, it is evident that the Commonwealth's case was prejudiced by the appellants' delay** and the trial court did not abuse its discretion in so finding.

Id. at 493-494, 524 A.2d at 1005 (emphasis added).

44. In *Strickler v. Bell*, the Superior Court of Pennsylvania determined that the prejudice inherent in the passage of a long period of time since the filing of the complaint,

sufficiently prejudicial to the defendant, to support the trial court's dismissal based upon failure to prosecute:

> We do not need the presumption of prejudice based of docket activity here[3], for the record shows the prejudice suffered by appellees. Over a decade has elapsed since the inception of this suit, yet discovery requests remain unanswered. The case is rooted at a standstill like an oak. As nearly twenty years have elapsed since the original tort action was filed, memories have faded and vanished like leaves in the autumn. Trees have grown in less time then has this case.

714 A.2d 437, 439, 1998 Pa.Super LEXIS 1008, **6 (1998).

Lack of Due Diligence

45. With respect to the first of the three factors to be considered in determining which this motion for judgment of *non pros* should be granted, it is clear that there has been a "lack of due diligence on the part of the plaintiff in failing to proceed with reasonable promptitude." As this matter sits in late-2007, more than thirteen (13) years have passed since the initiation of this action; more than eight years since this matter was originally dismissed as "settled" have passed; and more than 3 years have passed since the related breach of contract action was dismissed in favor of the defendant, appealed and the dismissal upheld by the Superior Court.

46. During the past thirteen years, *no discovery whatsoever has taken place*. This matter is no better prepared for trial today, than it was when the matter was filed in 1994. During the past eight years, since entering into a settlement agreement, the Plaintiff has solely acted to dispute the Defendant's performance under the agreement, and commenced a separate litigation in the aforementioned unsuccessful attempt to hold Defendant in breach of contract.

47. Since filing his motion to reinstate this action, more then three (3) years ago, Plaintiff has done nothing to move his case forward, not the least of which should have been seeking relief from the Bankruptcy Court's stay to make the litigation of this matter possible. As the situation currently stands, and as discussed at the recent conference before this Court, the

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[3] The Court had noted the Supreme Court's abandonment in *Jacobs v. Halloran*, 551 Pa. 350, 710 A.2d 1098 (1998), that the presumption of prejudice arose from a two-year period of docket inactivity, previously held in *Penn Piping, Inc. v. Ins. Co. of America*, 529 Pa. 350, 603 A.2d 1006 (1992).

litigation of this matter is precluded by the bankruptcy stay. At the January 16, 2007 hearing, the Court directed the Plaintiff to file - within ten (10) days of the hearing - a motion with the Bankruptcy Court, for relief from the stay, if he intended to proceed with this matter. As of this date, the Plaintiff has chosen *not* to file a motion for relief from the Bankruptcy stay, and therefore chosen not to act to proceed with this litigation.

Compelling Reason for Delay

48. The second factor to be considered is whether the plaintiff has any "compelling reason for the delay." As of this time, there appears to be no such "compelling" reason for Plaintiff's delay in moving his case forward. The only reason which could be discerned at this time is that the Plaintiff *chooses* not to proceed. This conclusion is easily borne out by the fact that, *even when instructed to do so* by the judge previously handling this matter (Judge Moss) to file with the Bankruptcy Court a motion for relief from the very stay which most immediately precludes this matter from moving forward, the Plaintiff does nothing.

49. More than nine (9) months have passed since Judge Moss instructed the Plaintiff to file for relief from the stay *if he chose to proceed* with this matter. More than three (3) years have passed since the Plaintiff specifically requested that the Court reinstate his complaint, dismissed as settled some five (5) years prior to that. Likewise, more than three (3) years since Roxborough entered Chapter 11 bankruptcy. And a total of thirteen (13) years have passed since this matter was filed in this Court. Few cases can possibly remain on the dockets of the Court of Common Pleas, Philadelphia County, which are as old as the instant civil action.

50. These exists no indication of any "compelling" reason for Plaintiff's delay.

Actual Prejudice

51. Finally, there can be no doubt whatsoever that the delay in prosecuting this matter - be that delay calculated from the filing of this matter (13 years), the settlement of this matter (8 years), the filing of the separate "breach of contract" action (6 years), or the reinstatement of this matter (3 years) - has caused *actual prejudice* to the Defendant in this matter. Neither can the depth of that prejudice be disputed. Since the filing of this matter 13 years have passed. Over

the course of this matter, considering the literally dozens of witnesses and potential witnesses required for this litigation, the location of none are presently known, and there can be little doubt that many have disappeared and moved, and some are likely to have died. Many or most of the files, documents, and records, including voluminous medical records pertaining to the treatment of the Plaintiff's patients – including radiographic films, echocardiogram films and tapes, and related materials – well beyond any retention period when the Hospital entered bankruptcy, are likely unavailable or no longer existent.

52. Further, the entity that is the Defendant in this matter, Roxborough Memorial Hospital, *no longer exists*, except in the context of this action, and those matters relating to the pending Bankruptcy action. The Roxborough Hospital that exists in a physical sense in that area of the City of Philadelphia, is not the Roxborough Hospital which is a party to this action. Its ownership is different. Its corporate existence is different. It personnel and leadership are different. It bears no relation to this action whatsoever. The Roxborough Hospital that is the Defendant in this matter, exists solely on paper, for purposes of this actions and the pending Bankruptcy action. No personnel, representatives, employees or officers of Defendant, Roxborough Hospital, remain to represent that entity in this action, to speak for it in this litigation, or to represent it at any trial.

53. That Defendant, Roxborough, will be severely prejudiced in its defense of this matter by virtue of the various delays in litigating this matter, cannot seriously be debated. The entity at issue is no longer operational. It has no employees or representatives, other than attorneys representing it in several contexts. None of the individuals involved in the matters complained about in the Plaintiff's Complaint are presently available, their whereabouts unknown, and after more than 13 years, many or most will likely be unavailable even after investigation. Not to mention the fading of memories over the passage of such a protracted period of time. There can be little doubt that a Defendant, put to the task of defending itself under such circumstances, and after so long a time, has been severely prejudiced.

Conclusion

The "duty to diligently pursue their cause of action," the courts of this Commonwealth have held, "rests with [the plaintiff]," and so too rests "the risk of failing to act within a reasonable time. . ." *Carroll v. Kimmel*, 362 Pa.Super. 432, 437, 524 A.2d 954, 957 (1987).

It is respectfully suggested that this Court would be hard-pressed to conclude that a thirteen (13) year delay in bringing this matter to trial was either reasonable, or that it represented due diligence on the part of the Plaintiff. Likewise, due diligence is not indicated by the eight (8) years which have passed since the matter's original settlement; or by the six (6) years since Plaintiff's filing of the ancillary breach of contract action; or the three (3) years since the dismissal of the other action on summary judgment was upheld on appeal, and this matter was reinstated, and defendant Roxborough entered bankruptcy.

The delays inherent in this matter are indicia not of due diligence, but of delay which has become almost *fatally* prejudicial to defendant, Roxborough, and which require dismissal.

Accordingly, and for the reasons stated herein, it is respectfully requested that this Honorable Court grant the motion of defendant, Roxborough Memorial Hospital, for the entry of a judgment of *non pros*, and dismiss this action, with prejudice.

Respectfully submitted,

GOLD & ROBINS, P.C.

BY: _____

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NORMAN EISENSTADT, M.D.	:	PHILADELPHIA COUNTY COURT OF COMMON PLEAS
V.	:	
ROXBOROUGH MEMORIAL HOSPITAL et al.	:	JUNE TERM, 1994
	:	NO. 318

BRIEF IN SUPPORT OF
MOTION OF DEFENDANT, ROXBOROUGH MEMORIAL HOSPITAL, FOR JUDGEMENT OF *NON PROS* AGAIN PLAINTIFF, NORMAN EISENSTADT, M.D., FOR FAILURE TO PROSECUTE

I. MATTER BEFORE THE COURT

Moving defendant, Roxborough Memorial Hospital ("Roxborough"), by and through its attorneys, Gold & Robins, P.C., hereby move before this Honorable Court, for an order dismissing the Plaintiff's Complaint for failure to prosecute this action, and in support whereof, states as within.

II. STATEMENT OF THE QUESTIONS INVOLVED

Whether this Court should grant moving defendant's motion for the entry of a judgment of *non pros* in its favor and against the Plaintiff, due to the Plaintiff's failure to prosecute this matter, and the resulting severe prejudice to moving defendant, Roxborough, as set forth herein in detail.

III. STATEMENT OF FACTS

This matter was initiated with the filing of a Complaint, *Norman Eisenstadt, M.D. v. Roxborough Memorial Hospital*, Phila. C.C.P., June Term, 1994, No. 318, on June 6, 1994, more than thirteen (13) years ago. It is believed, and therefore averred, that this matter is one of the

oldest pending matters upon the civil dockets of the Court of Common Pleas of Philadelphia County. (A copy of the Complaint is attached hereto as Ex. "A")

In this action, Plaintiff, Eisenstadt, challenged the summary suspension of his medical staff privileges at Roxborough Memorial Hospital on February 18, 1994. Eisenstadt filed this action seeking: (1) a declaratory judgment amending §3.7 of the Hospital's Fair Hearing Plan to require that the Hospital have the burden of proving by clear and convincing evidence the grounds asserted for the summary suspension; (2) reinstatement of Plaintiff's clinical privileges pending a decision from the Hearing Committee; and (3) compensatory and punitive damages.

On June 9, 1994, the Court denied Plaintiff's request (in the form of a TRO) for a declaratory judgment.

Thereafter, Dr. Eisenstadt contested his summary suspension via the hospital's Fair Hearing Plan. An extraordinarily lengthy hearing process ensued, in which seventeen (17) hearing sessions took place, and thousands of pages of testimony were amassed, the hospital's Fair Hearing Committee, on August 4, 1995, determined that the summary suspension of Dr. Eisenstadt was justified.

On August 22, 1995, the hospital's Special Executive Committee affirmed the decision of the Hearing Committee. And on August 29, 1995, counsel for Dr. Eisenstadt requested appellate review of the decision made under the Fair Hearing Plan.

The hospital's appeals process commenced, and some briefings were provided to the hospital's appellate review committee. Prior to completion of the appeals process and a decision as to Dr. Eisenstadt's appeal, however, the parties entered into a settlement agreement in January, 1999, which included a release of all claims with prejudice. This instant matter (the "1994 Action") was then dismissed pursuant to the agreement, with prejudice.

Following the settlement of this, the 1994 Action, which included the relinquishment by Dr. Eisenstadt of all claims to hospital privileges, and the filing of a revised adverse action report as to Dr. Eisenstadt's status with the National Data Bank, a second action was filed by Dr. Eisenstadt against the hospital: Eisenstadt v. Roxborough, Philadelphia Court of Common Pleas,

August Term, 2001, No. 2506 (the "2001 Action"), in which Plaintiff alleged that the hospital breached the settlement agreement and that the subsequent data bank filings constituted defamation.

After several years of litigation, in June, 2004, summary judgment was granted in favor of the hospital in the 2001 Action, and Dr. Eisenstadt's claims were dismissed. The trial Court, however, also determined that the settlement agreement, to the extent that it sought the filing of a revised adverse action report as to Dr. Eisenstadt was illegal, and to that extent could not be enforced. Following a lengthy appeals process, the grant of summary judgment and dismissal of the 2001 action was upheld. The 2001 Action is and remains closed.

Following the initial grant of summary judgment in the 2001 Action, the Plaintiff, on July 6, 2004, filed a motion to reinstate the instant matter, the 1994 Action. The motion to reinstate was granted on August 3, 2004 in an order by Judge Moss. A motion for reconsideration on the part of Roxborough was filed, and by order dated October 29, 2004, revoked its order reopening this matter, and permitted Roxborough to file a response. Roxborough did so on November 18, 2004, and following briefing, the Court again, by order dated January 7, 2005, granted the motion to reinstate, and ordered this, the 1994 Action, reopened.

Moving defendant, Roxborough, however, had filed a voluntary petition pursuant to Title 11, Chapter 11, of the United States Bankruptcy Code, on June 30, 2004. (A true and correct copy of the dockets from the bankruptcy action, Eastern District of Pennsylvania Bankruptcy Court, No. 04-18933) is attached hereto as Ex. "B".

Pursuant to Section 362(a) of the Bankruptcy Code, all civil actions and claims as against defendant, Roxborough Memorial Hospital are automatically stayed, until and unless relief is sought and obtained from the Bankruptcy Court permitting such other claims to proceed. (See Docket entry, 1994 Action, at November 14, 2006, for Suggestion of Bankruptcy, as to Hospital's June 30, 2004, filing of bankruptcy)

Following the filing of the Suggestion of Bankruptcy in this matter, on January 16, 2007, the parties in this matter appeared before the Hon. Sandra M. Moss for a status conference,

during which the bankruptcy stay, the status of this matter, and the intention of the parties was addressed.

During this conference, it was noted that the Bankruptcy Stay precluded the continuance of this, the 2001 Action, until and unless the Plaintiff sought relief from the Bankruptcy Court to proceed.

It had been previously noted, and was again noted during the conference, that since the corporate entity which is the object of Plaintiff's claims, Roxborough Memorial Hospital - as it existed at the relevant time in and about 1994 - no longer functioned, and the present "physical" entity that exists and functions as Roxborough Memorial Hospital, bears no legal relation whatsoever to the defendant in this matter, defendant Roxborough had no ability whatsoever to provide any of the "equitable" relief being sought in this matter. That is, the defendant herein, has no ability to reinstate the Plaintiff, reinstate Plaintiff's medical staff privileges, or to take any further action with respect to the filing, refiling or alteration of reports filed with the National Practitioner Database.

The sole relief that the Plaintiff could seek in this matter is limited to the extent of any insurance coverage - and that only to the extent that such coverage exists or is applicable at this point in time. In order for the Plaintiff to continue in this matter, it was noted, the Plaintiff would have to seek relief from the Bankruptcy Stay, as noted above, directly from the Bankruptcy Court.

At the January 16, 2007 conferred, Judge Moss directed the Plaintiff, through attorney, Stephen Eisenberg, Esquire[4], to file a petition for relief from the Bankruptcy Stay within ten (10) days of the conference, and if Plaintiff chose not to do so, Judge Moss stated that she would seriously consider a motion by the defendant to dismiss this action with prejudice for failing to prosecute.

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[4] According to both Attorney Eisenberg, and Plaintiff, Eisenstadt, Mr. Eisenberg only appeared at the conference as a courtesy to the Plaintiff, and had not and would not be entering an appearance as counsel in this matter. In fact, Mr. Eisenberg has not entered an appearance in this matter, and the Plaintiff remains – as he has been in the 1994 Action since its dismissal as "settled" in 1999 – *pro se*.

A review of the dockets from the Bankruptcy Action (Ex. "B"), recently obtained, demonstrate that the Plaintiff has failed to file a petition for relief from the Bankruptcy stay. As of the filing of the present motion, more than eight (8) months have elapsed since the last court appearance in this matter, before Judge Moss in January, 2007. Neither Plaintiff, nor any counsel on Plaintiff's behalf, have made any attempt to move this matter forward, to obtain relief from the bankruptcy stay, or perform any other act to move this now-more than 13-year-old civil action forward. This action has been under the control of the Bankruptcy Stay for the greater than three years which have passed since this matter was reinstated, and at no time has the Plaintiff sought relief from the automatic stay which has been in effect since June 30, 2004.

As of the filing of this motion, Plaintiff, Eisenberg remains unrepresented by counsel, and has been so for quite some time. Despite the appearance of Attorney Eisenberg at the January, 2007 conference, it is the undersigned's understanding that he did so unofficially, as a courtesy to Dr. Eisenstadt, and that he does not intend to, nor does he in fact represent the Plaintiff in this matter. It was made clear before Judge Moss in January, that the Plaintiff would either secure other counsel, or proceed *pro se* in this matter. To date, there has been no indication from the Plaintiff that he has or intends to secure other counsel, and no such counsel has entered an appearance since the reinstatement of this matter in 2004. It must therefore be concluded that Plaintiff is proceeding in this matter *pro se*.

Preliminarily, there can be no question, as the Court noted at the recent conference that there has been significant delays in the prosecution of this matter by the Plaintiff. This case is among the oldest civil actions in the Court of Common Pleas, Philadelphia County, having been filed more than 13 years ago. It was initially discontinued with prejudice in 1999, when the matter was settled among the parties. At the seven-year mark, in 2001, this matter resurrected itself with the filing of a separate action by the Plaintiff contending breach of the settlement agreement. That matter finally concluded in July of 2004, at the ten-year mark, with the decision of the Superior Court upholding the trial court's grant of summary judgment in favor of the Defendant.

Prior to the July 6, 2004, filing by the Plaintiff of a motion for reinstatement of this action, on June 30, 2004, the Defendant, Roxborough Memorial Hospital, entered Chapter 11 bankruptcy, and came under the protection of the automatic stay of the Bankruptcy Court of the Eastern District of Pennsylvania. Pursuant to the automatic stay, until and unless relief from the stay is sought and obtained, no civil action may proceed against Roxborough.

Now, more then thirteen (13) years out from the commencement of this action, and more than three (3) years since it was reinstated - which in itself followed a more than a three-year breach of contract action which concluded with an unsuccessful appeal by the Plaintiff of the trial court's grant of summary judgment in favor of the defendant - the parties and this litigation are essentially back to square one.

In the more than three (3) years since this matter was reinstated, the Plaintiff has failed to take the slightest effort to move this matter forward. This matter has, essentially, languished upon this Court's docket without any effort on the part of the Plaintiff to prosecute his claims. Further, the Plaintiff has failed to seek relief from the Bankruptcy Stay which governs the prosecution of this matter. Absent an order of the Bankruptcy Court, permitting this matter to continue, and setting the conditions for doing so, the Plaintiff may not do so. 11 U.S.C. §362(a).

Compounding the Plaintiff's failure to act in any manner to move this case forward, is the fact, noted earlier, that it *cannot* more forward until and unless the Bankruptcy Court grants the Plaintiff relief from the automatic stay. The Plaintiff has made no such effort to obtain relief from the stay. Even if Plaintiff were to suddenly file such a request with the Bankruptcy Court, its disposition would likely take some time, and there is no guaranty that the relief would be granted.

Further, even if relief were to be granted, the parties would then be placed back at the point at which they stood in June of 1994. At that time, the Plaintiff had filed his Complaint, seeking to have his privileges on the staff of Roxborough Memorial Hospital, which were at that time suspended, reinstated, as well as monetary damages.

As per the Medical Staff Agreement between the Plaintiff and the Hospital, he was

entitled to an administrative hearing process into the suspension of privileges, and as to whether the Plaintiff's privileges would be revoked. Each side, the Hospital, and Dr. Eisenstadt, through counsel, agreed upon the membership of a three-member administrative hearing panel, which panel was presided over by the hearing officer, the Hon. Stanley M. Greenberg. Each side was permitted to put on whatever witnesses desired, and for the ensuing approximate ten (10) month period, a total of seventeen (17) hearing sessions were conducted, and the testimony of fifteen (15) witnesses was taken. Following this, a period of post-hearing briefing was had, and on August 4, 1995, the hospital's Fair Hearing Committee determined that the summary suspension of Dr. Eisenstadt was justified. On August 22, 1995, the hospital's Special Executive Committee affirmed the decision of the Hearing Committee. Finally, on August 29, 1995, Dr. Eisenstadt requested appellate review of the decision made under the Fair Hearing Plan.

Dr. Eisenstadt never completed the administrative appeals process as required pursuant to the Medical Staff Agreement. Pursuant to the agreement, exhaustion of the administrative hearing process is a prerequisite to the pursuit of a civil action. Following the Plaintiff's request for appeal under the hearing plan, the parties commenced a series of settlement negotiations, and Dr. Eisenstadt thereafter make no further efforts to pursue his appeal of the Executive Committee's affirmation of the suspension of his staff privileges.

At no time have the parties conducted discovery in this matter. At issue in Plaintiff's action, is his challenge to the propriety and justification of his suspension, and the subsequent revocation of his medical staff privileges at Roxborough Memorial Hospital. Plaintiff also challenges the propriety of the administrative hearings process itself.

Defendant, Roxborough's defense in this matter will encompass the issues which faced the Hospital in and about February, 1994, when Hospital officials determined that certain problems concerning the care and treatment provided to patients by Dr. Eisenstadt's required the suspension, and eventual revocation of his medical staff privileges. Defendant, Roxborough's defense in this matter will be, in summary, that the actions taken were appropriate, and that the performance of the Plaintiff in the provision of medical care and treatment to certain patients at

Roxborough, warranted the actions taken.

In preparing this defense, defendant Roxborough will require discovery from and the testimony of numerous individuals who were involved in the process as a whole, both prior to and during the administrative hearing process. Defendant, Roxborough will likewise require access to and possibly discovery from the individual patients whose treatment by the Plaintiff is at issue with respect to the suspension and revocation of his staff privileges. Copies of the medical records of the patients at issue will likewise be essential in the preparation of defendant, Roxborough's defense in this matter.

Due to the lengthy passage of time since the filing of this matter, in June, 1994, and the events at issue (during the February, 1994 through May, 1995 time period), moving defendant respectfully avers that this lengthy delay in bringing this matter, not only to trial, but to *discovery*, has severely and substantially prejudiced it ability to prepare its defense in this matter.

Witnesses whose testimony is essential or important to the ability of defendant, Roxborough, to prepare its defense in this matter, include the following individuals whose present whereabouts are unknown:

1. Cyril Abrams, M.D. - Plaintiff's former employer at the medical group Lista-Abrams, P.C. - Located in 1993 at Roxborough Memorial Hospital.

2. John Buonomo, D.O. - Employed in 1993 at Roxborough Memorial Hospital. Member of the administrative hearing panel.

3. Mary Burke, M.D. - Employed in 1993 at Roxborough Memorial Hospital. Member of the administrative hearing panel.

4. J. Norris Childs, III, M.D. - Employed in 1993 at Roxborough Memorial Hospital. Member of the administrative hearing panel.

5. Chris Coyne-McDonald, R.N. - Nurse (ca. 1993-1994) at Roxborough Memorial Hospital.

6. John J. Donnelly, Jr. - Former President (ca. 1993-1994) of Roxborough Memorial Hospital.

7. William Follis - Coordinator, Cardiac Rehabilitation Unit.

8. Lena Fullis - Employee in the Cardiac Rehabilitation Unit.

9. James Harris, M.D. - Former Medical Director at Roxborough Memorial Hospital.

10. Daniel J. Hyman, D.O. - House officer/Medical resident, approx. 11/93.

11. Gregory Lechner, M.D. - Chairman of the Department of Medicine.

12. William Lista, M.D - Plaintiff's former employer at the medical group Lista-Abrams, P.C. - Located in 1993 at Roxborough Memorial Hospital.

13. Salvatore Lofaro, M.D. - Employed in 1993 at Roxborough Memorial Hospital.

14. Debbie A. Rindler, R.N. - Nurse (ca. 1993-1994) at Roxborough Memorial Hospital.

15. Lisa Sataloff - Employee in the Cardiac Rehabilitation Unit.

16. Julia Anna Volz, R.N. - Former Director of Quality Management and Utilization Review, Roxborough Memorial Hospital.

17. Eleanor Wilson, R.N. - Former Vice President of Patient Care, Roxborough Memorial Hospital.

18. George M. Wilson, M.D. - Former Medical Director (ca. 1993-1994) at Roxborough Memorial Hospital.

19. Carol Wons - Nurse (ca. 1993-1994) at Roxborough Memorial Hospital.

In the absence of the testimony of the decisionmakers involved in the suspension and hearing process – who were at the time in the employ of defendant, Roxborough – it will not be possible for the Hospital to mount a defense in this matter. Almost fourteen years after the incidents at issue in this matter, thirteen years after the initiation of suit by Plaintiff, seven years after this matter's initial settlement, as well as three years since the entity's entry into bankruptcy, it does not now appear that there exists anyone to speak on behalf of the Hospital. At this time, the whereabouts of those with knowledge concerning the actions taken by the Hospital are not known. The prejudice inherent under these circumstances, wrought by the inordinate passage of time since the commencement of this action, rends severe and inescapable prejudice upon defendant, Roxborough.

At issue in the action taken by the Hospital with respect to Dr. Eisenstadt's medical staff privileges, was the medical care and treatment provided to a series of patients under Plaintiff's care. The present whereabouts of these patients is unknown. Due to the age of many at the time, and the length of time which has passed, it is likely that many are now deceased. The ability to

have interviewed, and/or examined some or all of these former patients of Dr. Eisenstadt's is/was important to the ability of defendant, Roxborough to the preparation of its defense. The former patients whose whereabouts is presently unknown include[5]:

1. M.M.B. - F, age 62 (in 1993). If still alive, would be approx. 75 years of age.

2. T.B. - M, age 28 (in 1993). If still alive, would be approx. 41 years of age.

3. C.C - F, age 53 (in 1993). If still alive, would be approx. 66 years of age.

4. A.C. - F, age 77 (in 1993). If still alive, would be approx. 100 years of age.

5. A.D. - F, age 83 (in 1993). If still alive, would be approx. 96 years of age.

6. N.N.D. - F, age 75 (in 1993). If still alive, would be approx. 88 years of age.

7. J.D. - M, age 54 (in 1993). If still alive, would be approx. 67 years of age.

8. H.H.G. - F, age 54 (in 1993). If still alive, would be approx. 67 years of age.

9. S.H. - F, age 50. If still alive, would be approx. 63 years of age.

10. H.K. - F, age 82 (in 1993). If still alive, would be approx. 95 years of age.

11. T.T.M. - M, age 72 (in 1993). If still alive, would be approx. 85 years of age.

12. E.E.M. - F, age 88 (in 1993). If still alive, would be approx. 101 years of age.

13. A.M. - F, age 60 (in 1993). If still alive, would be approx. 73 years of age.

14. T.P. - F, age 75 (in 1993). If still alive, would be approx. 88 years of age.

15. L.S. - F, age 70 (in 1993). If still alive, would be approx. 83 years of age.

16. R.R.W. - F, age 58 (in 1993). If still alive, would be approx. 71 years of age.

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[5] The names of the former patients of the Plaintiff's are referred to herein only by their initials, gender and age, in order to maintain their confidentiality. Further information can be provided to the Plaintiff or to the Court upon request.

Further, it is not known at this time whether any of the original medical records of the patients at issue have survived. Certainly, the period of retention for such medical records has long passed and, in view of the original settlement of this matter, in 1999, there existed no reason to have maintained such records. Further complicating the issue, is the entry into bankruptcy of the Hospital in June, 2004. It is not known at this time whether or to what extent the "defunct" entity which formerly operated as Roxborough Memorial Hospital, maintained medical records then more than a decade old.

Finally, and yet of further concern to the ability of defendant, Roxborough, to prepare its defense in this matter, it is the effect which the passage of thirteen (13) years since the filing of this matter, and the events complained of by the Plaintiff, upon the memories of any witnesses with knowledge who may at some point be located. The most recent contacts with most of the individuals/witnesses listed above, had by any counsel or hospital official, would have been some time in 1995, at the completion of the hearings process, and the rendering of the hospital executive committee's decision as to the revocation of the Plaintiff's medical staff privileges. The passage of such a long period of time, with respect to issues and questions of a highly technical and fact-intensive nature, as the evaluation of medical care and treatment provided by a physician to a series of cardiac patients, cannot but result in the serious diminution of memories, thus seriously and irreparably prejudicing the ability of defendant, Roxborough, to defend itself in this matter.

IV. ARGUMENT

1. Standard on a Motion for Judgement of *Non Pros*

The Pennsylvania Supreme Court has held that "[i]t is well settled law that the question of granting a non pros, because of the failure of the plaintiff to prosecute his action within a reasonable time rests within the discretion of the lower Court and the exercise of such discretion will not be disturbed on appeal unless there is proof of a manifest abuse thereof." *Gallagher v. Jewish Hospital Ass'n*, 425 Pa. 112, 113, 228 A.2d 732, 733 n.5 (1967), citing *Aldridge v. Great*

A&P Tea Co., 394 Pa. 57, 58, 145 A.2d 695 (1958) ("Where a plaintiff neglects to prosecute his suit diligently and the delay would be harmfully prejudicial to the defendant, if the suit were to be put to trial, the entry of a judgment of non pros is appropriate").

In determining whether to grant a judgment of *non pros*, the Pennsylvania Supreme Court, in *Jacobs v. Halloran*, 551 Pa. 350, 710 A.2d 1098 (1998), held that the court must determine the existence of three factors: First, that there has been a "lack of due diligence on the part of the plaintiff in failing to proceed with reasonable promptitude." 710 A.2d at 1103. Second, that the plaintiff has "no compelling reason for the delay." *Id*. Finally, that the delay "must cause *actual* prejudice to the defendant." *Id*. All three factors are amply satisfied in this case.

In *McSloy v. Jeanes Hospital*, the Superior Court upheld the dismissal on a motion for *non pros*, of plaintiff's medical malpractice action, where the plaintiffs had failed to secure an expert four-and-a-half (4-1/2) years after the filing of their complaint, some six-and-a-half (6-1/2) years after the events at issue. 376 Pa.Super. 595, 603, 546 A.2d 684, 688 (1988):

> In the present case, we conclude that appellants' [plaintiffs'] actions clearly demonstrate a want of due diligence and a failure to proceed with reasonable promptness. In addition, far from providing a compelling reason for the delay, appellants' do not attempt to provide even the slightest justification for the delay in obtaining an expert. Rather, their failure . . . demonstrates an intentional disregard of the trial court's orders and its efforts to bring this case to a speedy resolve.

Further, given the passage of time in *McSloy*, the Court determined that the ability of the defense to present witnesses in their defense was unacceptably impaired:

> Although appellees [defendants] do not allege that material witnesses have died or absented themselves, we believe that appellees ability to properly present its case at trial may have been substantially diminished by appellants' failure to procure an expert.
>
> The incident which is the subject of this dispute occurred on November 2, 1981, approximately **six and a half (6 1/2) years ago**. Appellees have been denied an opportunity to prepare a defense to appellants' claims of malpractice. **The memories of witnesses who may be crucial to preparation of appellees' defense have faded**. . . .

> Consequently, the evidentiary difficulties which may face appellees as a result of this delay, in addition to the costs incurred . . . clearly warrant a finding that appellees have been prejudiced by appellants' failure to obtain an expert within a reasonable time.

Id. at 603-604, 546 A.2d at 688 (emphasis added).

Courts have also held that the determination of prejudice to the defendant need not be limited only to circumstances involving the death or absence of material witnesses, "[r]ather, if any substantial diminution of a party's ability to properly present its case at trial results, then prejudice can be said to have attached." *Metz Contracting v. Riverwood Builders*, 360 Pa.Super. 445, 451, 520 A.2d 891, 894 (1987).

The Commonwealth Court has also observed that "for purposes of entering non pros, [prejudice] is not limited to the death or absence of material witnesses, but may also attach where, because of delay, there is loss of documentary evidence in a party's ability to properly present its case." *Neshaminy Contractors v. Plymouth Township*, 132 Pa.Commw. 229, 234, 572 A.2d 814, 817 (1990), citing *Carroll v. Kimmel*, 362 Pa.Super. 432, 524 A.2d 594 (1987).

In *Metz, supra*, the appellee argued that the advent of a bankruptcy proceeding, and the passage of time, had resulted in prejudice sufficient to require the dismissal of appellant's case:

> Instantly, appellee argues that its ability to present factual information at trial may be substantially diminished because of potential inaccessibility of relevant records due to the bankruptcy status of the contractor, for whom appellant allegedly performed excavation work on real property purportedly owned by appellee. **We hold that these evidentiary difficulties are sufficient to grant dismissal**.

360 Pa.Super. at 451, 520 A.2d at 894 (emphasis added), citing *Moore v. George Heebner, Inc.*, 321 Pa.Super. 226, 467 A.2d 1336 (1983).

In *Supplee v. Commonwealth, Dept. of Transp.*, 105 Pa. Commw. 488, 524 A.2d 1002 (1987), the Commonwealth Court upheld the trial court's dismissal for failure to prosecute, where various witnesses had become unavailable during a ten-year delay in proceedings:

> [W]e agree with the trial court that the Commonwealth's ability to present its case has been prejudiced by appellants' lengthy delay in moving this case forward. **A lengthy delay, such as the ten-year delay being addressed in this case, is presumptively prejudicial**

> **to all parties even without a specific showing of prejudice on the record**. . . .
>
> In the instance case, the appraiser actively involved, and thus **a key witness, has died. This, in itself, is sufficient to substantiate the trial court's conclusion that prejudice was present**. Additionally, the Commonwealth's witness testified before the trial court that **many other witnesses necessary to the Commonwealth's case were unavailable. For these reasons, it is evident that the Commonwealth's case was prejudiced by the appellants' delay** and the trial court did not abuse its discretion in so finding.

Id. at 493-494, 524 A.2d at 1005 (emphasis added).

In *Strickler v. Bell*, the Superior Court of Pennsylvania determined that the prejudice inherent in the passage of a long period of time since the filing of the complaint, sufficiently prejudicial to the defendant, to support the trial court's dismissal based upon failure to prosecute:

> We do not need the presumption of prejudice based of docket activity here[6], for the record shows the prejudice suffered by appellees. Over a decade has elapsed since the inception of this suit, yet discovery requests remain unanswered. The case is rooted at a standstill like an oak. As nearly twenty years have elapsed since the original tort action was filed, memories have faded and vanished like leaves in the autumn. Trees have grown in less time then has this case.

714 A.2d 437, 439, 1998 Pa.Super LEXIS 1008, **6 (1998).

2. Plaintiff, Eisenstadt's Lack of Due Diligence in the Pursuit of this Litigation Requires the Grant of a Judgment of *Non Pros*

With respect to the first of the three factors to be considered in determining which this motion for judgment of *non pros* should be granted, it is clear that there has been a "lack of due diligence on the part of the plaintiff in failing to proceed with reasonable promptitude." As this matter sits in late-2007, more than thirteen (13) years have passed since the initiation of this action; more than eight years since this matter was originally dismissed as "settled" have passed; and more than 3 years have passed since the related breach of contract action was dismissed in

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[6] The Court had noted the Supreme Court's abandonment in *Jacobs v. Halloran*, 551 Pa. 350, 710 A.2d 1098 (1998), that the presumption of prejudice arose from a two-year period of docket inactivity, previously held in *Penn Piping, Inc. v. Ins. Co. of America*, 529 Pa. 350, 603 A.2d 1006 (1992).

favor of the defendant, appealed and the dismissal upheld by the Superior Court.

During the past thirteen years, *no discovery whatsoever has taken place*. This matter is no better prepared for trial today, than it was when the matter was filed in 1994. During the past eight years, since entering into a settlement agreement, the Plaintiff has solely acted to dispute the Defendant's performance under the agreement, and commenced a separate litigation in the aforementioned unsuccessful attempt to hold Defendant in breach of contract.

Since filing his motion to reinstate this action, more then three (3) years ago, Plaintiff has done nothing to move his case forward, not the least of which should have been seeking relief from the Bankruptcy Court's stay to make the litigation of this matter possible. As the situation currently stands, and as discussed at the recent conference before this Court, the litigation of this matter is precluded by the bankruptcy stay. At the January 16, 2007 hearing, the Court directed the Plaintiff to file - within ten (10) days of the hearing - a motion with the Bankruptcy Court, for relief from the stay, if he intended to proceed with this matter. As of this date, the Plaintiff has chosen *not* to file a motion for relief from the Bankruptcy stay, and therefore chosen not to act to proceed with this litigation.

3. The Lack of Any "Compelling" Reason for the Extensive Delays in this Matter, Requires the Grant of a Judgment of *Non Pros*

The second factor to be considered is whether the plaintiff has any "compelling reason for the delay." As of this time, there appears to be no such "compelling" reason for Plaintiff's delay in moving his case forward. The only reason which could be discerned at this time is that the Plaintiff *chooses* not to proceed. This conclusion is easily borne out by the fact that, *even when instructed to do so* by the judge previously handling this matter (Judge Moss) to file with the Bankruptcy Court a motion for relief from the very stay which most immediately precludes this matter from moving forward, the Plaintiff does nothing.

More than nine (9) months have passed since Judge Moss instructed the Plaintiff to file for relief from the stay *if he chose to proceed* with this matter. More than three (3) years have passed since the Plaintiff specifically requested that the Court reinstate his complaint, dismissed

as settled some five (5) years prior to that. Likewise, more than three (3) years since Roxborough entered Chapter 11 bankruptcy. And a total of thirteen (13) years have passed since this matter was filed in this Court. Few cases can possibly remain on the dockets of the Court of Common Pleas, Philadelphia County, which are as old as the instant civil action.

These exists no indication of any "compelling" reason for Plaintiff's delay.

4. The Extensive, Ongoing and Unjustified Delays in the Prosecution by Plaintiff of this Matter Have Resulted in Actual, Severe and Undeniable Prejudice Against Defendant, Roxborough, for Which There Exists No Remedy but for the Dismissal with Prejudice of this Action

Finally, there can be no doubt whatsoever that the delay in prosecuting this matter - be that delay calculated from the filing of this matter (13 years), the settlement of this matter (8 years), the filing of the separate "breach of contract" action (6 years), or the reinstatement of this matter (3 years) - has caused *actual prejudice* to the Defendant in this matter. Neither can the depth of that prejudice be disputed. Since the filing of this matter 13 years have passed. Over the course of this matter, considering the literally dozens of witnesses and potential witnesses required for this litigation, the location of none are presently known, and there can be little doubt that many have disappeared and moved, and some are likely to have died. Many or most of the files, documents, and records, including voluminous medical records pertaining to the treatment of the Plaintiff's patients – including radiographic films, echocardiogram films and tapes, and related materials – well beyond any retention period when the Hospital entered bankruptcy, are likely unavailable or no longer existent.

Further, the entity that is the Defendant in this matter, Roxborough Memorial Hospital, *no longer exists*, except in the context of this action, and those matters relating to the pending Bankruptcy action. The Roxborough Hospital that exists in a physical sense in that area of the City of Philadelphia, is not the Roxborough Hospital which is a party to this action. Its ownership is different. Its corporate existence is different. It personnel and leadership are different. It bears no relation to this action whatsoever. The Roxborough Hospital that is the Defendant in this matter, exists solely on paper, for purposes of this actions and the pending

Bankruptcy action. No personnel, representatives, employees or officers of Defendant, Roxborough Hospital, remain to represent that entity in this action, to speak for it in this litigation, or to represent it at any trial.

That Defendant, Roxborough, will be severely prejudiced in its defense of this matter by virtue of the various delays in litigating this matter, cannot seriously be debated. The entity at issue is no longer operational. It has no employees or representatives, other than attorneys representing it in several contexts. None of the individuals involved in the matters complained about in the Plaintiff's Complaint are presently available, their whereabouts unknown, and after more than 13 years, many or most will likely be unavailable even after investigation. Not to mention the fading of memories over the passage of such a protracted period of time. There can be little doubt that a Defendant, put to the task of defending itself under such circumstances, and after so long a time, has been severely prejudiced.

CONCLUSION

The "duty to diligently pursue their cause of action," the courts of this Commonwealth have held, "rests with [the plaintiff]," and so too rests "the risk of failing to act within a reasonable time. . ." *Carroll v. Kimmel*, 362 Pa.Super. 432, 437, 524 A.2d 954, 957 (1987).

It is respectfully suggested that this Court would be hard-pressed to conclude that a thirteen (13) year delay in bringing this matter to trial was either reasonable, or that it represented due diligence on the part of the Plaintiff. Likewise, due diligence is not indicated by the eight (8) years which have passed since the matter's original settlement; or by the six (6) years since Plaintiff's filing of the ancillary breach of contract action; or the three (3) years since the dismissal of the other action on summary judgment was upheld on appeal, and this matter was reinstated at Plaintiff's request, and defendant Roxborough entered bankruptcy.

The delays inherent in this matter are indicia *not* of due diligence, but of delay which has become almost *fatally* prejudicial to defendant, Roxborough, and which require dismissal.

Accordingly, and for the reasons stated herein, it is respectfully requested that this Honorable Court grant the motion of defendant, Roxborough Memorial Hospital, for the entry of a judgment of *non pros*, and dismiss this action, with prejudice.

Respectfully submitted,

GOLD & ROBINS, P.C.

BY: _____

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DATE: September 17, 2007

CERTIFICATE OF SERVICE

The undersigned does hereby certify, that true and correct copies of the within, Motion for Entry of Judgment of *Non Pros*, Brief in Support Thereof, and proposed form of Order, were served on this date, via U.S. Mail, First Class, postage pre-paid, upon the following:

Norman Eisenstadt, M.D. (*pro se*)
512 Sabine Circle
Overbrook, PA 19096

BY: _____
ALAN S. GOLD
SEAN ROBINS

DATE: September 17, 2007