

COPY

IN THE STATE COURT OF CLAYTON COUNTY  
STATE OF GEORGIA

OMAR EL SAWI )  
Plaintiff, )  
vs. )  
CASE NO. 2005CV03712C )

DR. JOHN B. BLACK, SOUTHERN )  
REGIONAL HEALTH SYSTE, INC., )  
and SOUTH ATLANTA RADIOLODY )  
ASSOCIATES, P.C., )  
Defendants. )

**ORDER**

The within and foregoing matter appeared before this Court pursuant to Defendant Southern Regional Health System's (hereinafter Defendant) Motion to Dismiss pursuant to O.C.G.A. §9-11-12(b)(6), §9-11-9.1 and §9-11-9.2. Plaintiff did not file a response to Defendant's Motion. After review of all matters and pleadings presented, the Court finds as follows:

Defendant's Motion raises two grounds on its Motion to Dismiss. First, Defendant argues Plaintiff's claims against Southern Regional should be dismissed because Plaintiff failed to allege and cannot show as a matter of law that Defendant is liable for the alleged negligent acts of Defendant Black through agency or vicarious liability. Second, Defendant argues the Complaint should be dismissed due to Plaintiff's failure to file a medical authorization in compliance with the requirements of O.C.G.A. §9-11-9.2. Lastly, Defendant states it "reserves its right to object to the contents of the Affidavit of Manuel Fajardo, M.D."

The Georgia Legislature recently enacted O.C.G.A. §9-11-9.2 as part of the newly enacted Georgia Tort Reform Law, Senate Bill 3. In relevant part, O.C.G.A. §9-11-9.2 states in

any medical malpractice action filed in Georgia "contemporaneously with the filing of the complaint, the plaintiff shall be required to file a medical authorization form. Failure to provide this authorization shall subject the complaint to dismissal." O.C.G.A. §9-11-9.2(a). In the case *sub judice*, the Complaint was filed June 28, 2005. Plaintiff did not file the required medical authorization until July 27, 2005, twenty-two (22) days after the Complaint was filed.

Based on this Court's review of O.C.G.A. §9-11-9.2, Defendant's Motion to Dismiss is hereby **GRANTED** for the untimely filing of the medical authorization. O.C.G.A. §9-11-9.2 requires the contemporaneous filing of the authorization with the complaint. That was not done in the case *sub judice*. O.C.G.A. §9-11-9.2 does not provide for any extension of time. Therefore, the remaining issue is whether dismissal pursuant to O.C.G.A. §9-11-9.2 is with or without prejudice.

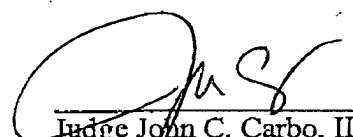
Defendant has requested Plaintiff's Complaint be dismissed with prejudice. After review of the statute, the Court does not find specific statutory language on this matter as other statutes have. *See*, O.C.G.A. §9-11-9.1, *and also*, ABE Engineering, Inc. v. Griffin, Cochran, & Marshall, 212 Ga. App. 586, 443 S.E.2d 1 (1994)(the failure to file a timely professional malpractice affidavit is a dismissal for failure to state a claim which has been held to be a dismissal on the merits).

The provisions of O.C.G.A. §9-11-9.2 are in derogation of common law and must be strictly construed against the party seeking to invoke it. Nat. Indemnity Co. v. Tatum, 193 Ga. App. 698, 388 S.E.2d 896 (1989). Furthermore, the Court finds that a dismissal pursuant to O.C.G.A. §9-11-9.2 is not an adjudication on the merits. O.C.G.A. §9-11-41(b). Therefore, Plaintiff's Complaint is hereby **DISMISSED** without prejudice.

Based on the above ruling, the Court will not address the remaining grounds, as they are moot.

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SO ORDERED this 22 day of Sept, 2005.

  
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Judge John C. Carbo, III  
State Court of Clayton County

Prepared by Jennifer L. Caldwell, Esq.  
Staff Attorney for Judge Carbo

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served all counsel and interested parties in the foregoing matter with a copy of this pleading by depositing in the United State Mail a copy of same in the properly-addressed envelope with the adequate postage thereon to ensure delivery or by hand-delivery as follows:

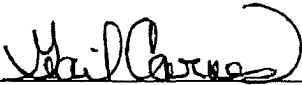
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This 22 day of Sept., 2005.

  
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Gail Carnes, Administrative Assistant and  
Calendar Clerk to  
Judge John C. Carbo, III  
State Court of Clayton County