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

UNITED STATES ex rel. KUSNER,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
OSTEOPATHIC MEDICAL CENTER of PHILADELPHIA, et al.,	:	**NO. 88-9753**
	:	
Defendants.	:	

M E M O R A N D U M

Reed, J. **October 21, 1997**

This case, for various reasons to be analyzed below, has had anything but a smooth, speedy, and efficient sojourn through the legal process in the Eastern District of Pennsylvania. The complaint, filed in December 1988, contains underlying factual allegations occurring in the early 1980s. Not surprisingly, almost nine years after the filing of the complaint, defendants move to dismiss the complaint for lack of prosecution pursuant to Federal Rule of Civil Procedure 41(b) (Document No. 32). This pending motion, along with all responses of parties thereto, and after a hearing before the Court on this issue, and post-hearing briefs submitted by the parties, is to be resolved by the Court today. For the following reasons, it will be granted.

Relator David Kusner ("Kusner") has brought this *qui tam* action pursuant to the False Claims Act, 31 U.S.C. §§ 3729-3733 against defendants Osteopathic Medical Center of Philadelphia, the Philadelphia College of Osteopathic Medicine, Hospital of the Philadelphia College of Osteopathic Medicine, PCOM Radiology Associates, OMCP Radiology Associates,

and Robert Meals, M.D. ("Dr. Meals") and (collectively "defendants). This Court has jurisdiction pursuant to 28 U.S.C. § 3732(a).

I. PROCEDURAL BACKGROUND

The procedural background of this case has been previously recited in a Memorandum by this Court dated May 28, 1996 (Document No. 27), which I will briefly repeat here. Kusner commenced this action by simultaneously filing a complaint and a motion to seal the record and docket on December 23, 1988. The motion to seal the record and docket was promptly granted. The government declined to enter appearance and Kusner was permitted to proceed with the action under 31 U.S.C. § 3730(b)(4)(B). Kusner filed a motion to unseal the record and docket of this case on May 24, 1989. For unknown reasons, this motion was never ruled on. Approximately two years later, having apparently assumed that the record and docket were no longer under seal, Kusner served the complaint on all defendants. None of the defendants responded to the complaint, so Kusner requested and received entries of default against them. Kusner never moved for entry of default judgment and there was no activity on the docket until over three and one-half years later.

In May 1995, new counsel entered his appearance on behalf of Kusner and, through an *ex parte* letter to the Court, sought guidance as to how he should handle subpoenaing documents in light of the sealed record and docket. In response to this letter, the Court unsuccessfully conducted a search for the record in this case. A second search was conducted in 1996, at which time approximately one-half of the original documents filed in this case were found. Pursuant to Local Rule of Civil Procedure 39.3(c), the other documents of record were reconstructed from copies supplied by Kusner.

Kusner then filed a second motion to unseal the record. On March 11, 1996, the Court granted the motion to unseal the record, ordered that the complaint be served on all defendants, and vacated the entry of default.

Defendants subsequently moved to dismiss the complaint, *inter alia,* for lack of prosecution. In my Memorandum dated May 28, 1996, this Court concluded that, at that time, only one of six Poulis factors,[1] *i.e.*, history of dilatoriness, weighed in favor of dismissal. This Court found that the two-year delay in this case between the filing of the first motion to unseal the record and docket in March 1989 and the filing of a praecipe to issue alias summons in May 1991, and then another three and a-half year delay between the final entry of default in September 1991 and the appearance of a new attorney on behalf of Kusner in May 1995, constituted a history of dilatoriness. Because only one factor weighed in favor of dismissal for lack of prosecution, and because the factual record was incomplete, this Court declined to dismiss the complaint at that time. In conjunction with that ruling, this Court ordered that all discovery related to the issue of lack of prosecution[2] should proceed to the right of defendants to file an appropriate motion addressing this issue if the record should so support. See Order of May 28, 1996 (Document No. 26).

Pursuant to the Court's Order and after the completion of discovery, defendants filed another motion to dismiss for lack of prosecution. Kusner filed an appropriate response. After studying the filings of the parties at length, the Court was concerned that certain issues were not adequately addressed. Consequently, a hearing and oral argument were scheduled and

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[1] The Poulis factors will be discussed in more detail infra Part II.

[2] The Order additionally permitted discovery related to the issue of subject matter jurisdiction.

took place before the Court on July 24, 1997 and August 26, 1997, in which Kusner himself, and others, testified. Now, in light of the hearing and oral argument, the evidentiary record, and the post-hearing briefs and exhibits filed by the parties, the Court is confident that this arsenal of information is sufficient for resolving the motion for dismissal for lack of prosecution.

II. DISCUSSION

A district court may in its discretion dismiss a suit that a plaintiff has failed to prosecute. See Link v. Wabash R.R., 370 U.S. 626, 629-30 (1962). While a court should be reluctant to apply this drastic sanction, see Titus v. Mercedes Benz of N. Am., 695 F.2d 746, 749 (3d Cir. 1982), "[t]he power to invoke [the] sanction [of dismissal] is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts." Link, 370 U.S. at 629-30. Because of the severity of the sanction of dismissal, it is "reserved for those cases where there is a clear record of delay or contumacious conduct by the plaintiff." Titus, 695 F.2d at 749 (internal quotations omitted). Before me is such a case.

The Court of Appeals for the Third Circuit has set forth six factors to be weighed in determining whether to dismiss a claim for lack of prosecution: (1) the extent of the party's personal responsibility, (2) prejudice to the adversary, (3) history of dilatoriness, (4) willful or bad faith conduct on the part of the litigant or the attorney, (5) efficacy of alternative sanctions, and (6) meritoriousness of the claim or defense. Poulis v. State Farm Fire Cas. Co., 747 F.2d 863, 867-68 (3d Cir. 1984); see also United States v. USX Corp., 68 F.3d 811, 819-20 (3d Cir. 1995); Dunbar v. Triangle Lumber and Supply Co., 816 F.2d 126, 128 (3d Cir. 1987).

A. Personal Responsibility

The evidence shows that Kusner made efforts to monitor his case and made persistent attempts to find an attorney to represent him in this matter. While the Court sympathizes with any frustration Kusner undoubtedly encountered through these efforts, he cannot escape responsibility for protracting this litigation spanning almost a decade.

Kusner was initially represented by the law firm of Hepburn, Wilcox, Hamilton & Putnam ("Hepburn"). Jeffrey Pettit ("Pettit"), formerly an attorney at Hepburn, testified that, shortly after the motion to unseal the record and serve the complaint was filed in 1989, he called the Deputy Clerk of this Court several times to inquire as to the status of the motion. (8/26/97 Tr. at 8). Pettit testified that the Deputy Clerk never responded to his inquiries. (8/26/97 Tr. at 8). During this time, Pettit testified that Kusner called him to inquire about the status of the case. (8/26/97 Tr. at 8). On one occasion, Kusner suggested to Pettit that Kusner himself would call the Deputy Clerk. (8/26/97 Tr. at 9). Kusner testified that he called and spoke with the Deputy Clerk on two occasions. (8/26/97 Tr. at 80); (Dep. of Kusner at 42- 43). Kusner also testified that he visited the Clerk's Office of the courthouse and viewed the microfiche records of the case, only to discover the case was no longer listed. (8/26/97 Tr. at 81). Neither Pettit nor Kusner took any further action at that time and offered no explanation of their inactivity therein.

When Pettit left the Hepburn firm in May 1990, a debate ensued as to whether Kusner's case would remain with Hepburn or be transferred to Pettit's new firm, as each firm wanted the other to handle the matter. Pettit testified that his new law firm lacked the resources to take Kusner's case. Pettit further testified that he advised Kusner, in light of Hepburn's reluctance to further pursue the case, to find a new attorney. (8/26/97 Tr. at 10-11).

During this time period, Kusner testified that he spoke with Hepburn attorneys either via the telephone or in face-to-face meetings regarding the status of his case and that he continually tried to push the firm to move forward with it. (Dep. of Kusner at 61, 64-65, 77-78). On November 25, 1991, the Hepburn firm sent a letter to the Deputy Clerk, noting that it could not locate in its records a motion to unseal the record and docket nor did it have any indication that such motion was actually filed, and requesting that the Deputy Clerk send a copy of the motion to unseal the record and docket if one had been filed. (Pl. Exh. 6).

Kusner wrote two letters to Hepburn in August and September 1992 inquiring as to the status of his case and pushing Hepburn to move forward with it. (Pl. Ex. 2). Soon thereafter, the Hepburn firm formally withdrew its representation of Kusner in this matter. (Pl. Ex. 4).

From September 1992 through May 1995, Kusner sought representation from numerous attorneys. He spoke with approximately sixteen attorneys about representing him in this matter, of which he visited the offices of approximately a dozen. (8/26/97 Tr. at 75); (Dep. of Kusner at 82, 88).[3] Many of these attorneys took considerable time, up to one month or more, to review the case file. (8/26/97 Tr. at 76-77, 79).

Since the time Pettit left the Hepburn firm until 1995, Kusner maintained frequent contact with Pettit on an informal basis and updated him as to the status of this case and his efforts to find a new attorney. Pettit suggested names of potential attorneys for Kusner to contact. (8/26/97 Tr. at 17).

[3] Kusner specifically names several of these attorneys in his deposition and at the hearing, yet it is not necessary to repeat them here.

Despite any confusion that surrounded the case once Pettit left the Hepburn firm, and despite the endeavors of Kusner to prod the Hepburn firm to further pursue the case, and despite the efforts of Kusner to find a new attorney to represent him in this matter, I find that Kusner remains ultimately responsible for the delay in prosecuting his case. This is not a case where the attorney failed to file a timely motion or otherwise betrayed an unwitting client. Nor is this a case where a client failed to appear at his scheduled deposition or refused to answer interrogatories. In those scenarios, the blame may be clearly attributed to the appropriate individual. Our case, however, is more nebulous. Here, the case languished due to various circumstances, including the unwillingness of the Hepburn firm to pursue the case and the subsequent search for a new attorney, rather than a specific individual's blameworthy acts or omissions.[4]

It is unfortunate for Kusner that his case was entangled in an ostensible web of internal strife at the Hepburn firm with respect to which law firm, the Hepburn firm or Pettit's new law firm, should represent him in this matter. Yet, the fact remains that Kusner freely and willingly chose the Hepburn firm to represent him. At any point, Kusner could have terminated

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[4] These circumstances also include the fact that, for reasons still not known, the record could not be found and had to be reconstructed and this Court never ruled upon the motion to unseal the record filed by Kusner in 1989. It is conceivable that, had this Court ruled on that motion, the ensuing delay may never have occurred. However, any suggestion that the Court caused the delay by not ruling on this motion is belied by the fact that there is no evidence in the record that this motion had been properly filed or came to this Court's attention in the first place. In fact, an attorney from the Hepburn firm stated that, based on his investigation, no motion to unseal the record was ever filed. See Pl. Exh. 4; Pl. Exh. 6.

While there is evidence that Kusner and Pettit telephoned the Deputy Clerk to inquire as to the case's status with respect to the motion to unseal the record, there is no evidence that they followed up the phone calls with any formal written correspondences or filings to the Court. In November 25, 1991, after Pettit left Hepburn, an attorney from Hepburn wrote the Deputy Clerk. Pl. Exh. 6. That letter requested a copy of the motion if one had actually been filed. Although this Court regrets, on an administrative level, any lack of response to their inquiries, mere phone calls court personnel, without more, will not alleviate the responsibility of Kusner to safeguard the diligent prosecution of his case.

his relationship with the firm, yet he did not. In fact, it was Hepburn, and not Kusner, who eventually withdrew formally from their attorney-client relationship. See Pl. Ex. 4 (9/23/92 Letter of Hepburn); Pl. Ex. 2 (chronology). "[Kusner] voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." Link, 370 U.S. at 633-34; see Poulis, 747 F.2d at 868.

It is also unfortunate for Kusner that his tenacity in finding an attorney to represent him in this matter was fruitless until 1995. However, all of Kusner's inquiries to and contact with attorneys, no matter how persistent and how frequent, does not change the fact that his case remained stagnant.

During the intervening years between 1989 and 1995, Kusner not once protected the record for his case or informed defendants as to the status of the case. There is no evidence of any formal correspondence or filing with the Court explaining the delay, or requesting that the case be stayed until a new attorney had been found, or asking for extensions. Nor is there any evidence that Kusner contacted defendants at any point to make defendants aware of the status of the case. Defendants thus had no knowledge of the progress, or lack thereof, of the case. And, as mentioned above, this is not the case of an unwitting client betrayed by his attorney. To the contrary, Kusner has demonstrated a legal acumen far beyond an average layperson.[5] He was aware of the lack of progress of his case as demonstrated by his periodic inquiries to the Hepburn firm as well as his inquiries at the Clerk's Office and to the Deputy Clerk. Moreover, he was

[5] See Dep. of Kusner at 27-30 (demonstrating Kusner's knowledge of *qui tam* actions); Dep. of Kusner at 32-34 (acknowledging that Kusner had been hired as an "amateur paralegal" by the Hepburn firm).

also aware that inefficient prosecution of his claim could be cause for dismissal. See Def. Ex. 5.[6]

For these reasons, I conclude that Kusner must accept significant personal responsibility for the dilatory manner in which his case has been prosecuted. Therefore, this factor weighs in favor of dismissal.

B. Prejudice to the Adversary

A lengthy delay may cause prejudice because of the "irretrievable loss of evidence, the inevitable dimming of witnesses' memories, or the excessive and possibly irremediable burdens or costs imposed on an opposing party." Adams v. Trustees of N.J. Brewery Employees' Pension Trust Fund, 29 F.3d 863, 874 (3d Cir. 1994) (quotations and citations omitted). All of these prejudices are present here.

Kusner claims that defendants engaged in a practice of overstating the number of patients and the type of procedures used in the treatment of patients, thereby creating excessive billing. Kusner has in his possession billing forms that were submitted by defendants to a billing agency to generate a bill and records of names of new patients from the period prior to his discharge in 1981. (7/24/97 Tr. at 91-92). He also has tapes of conversations with individuals

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[6] In a letter dated March 12, 1993 to Kusner from Pettit, Pettit states, in pertinent part:

> . . . I have also included a squib on the Pennridge Electric case in Montgomery County which was dismissed because of lack of activity for 4 1/2 years. The part that concerns me the most is the statement that one of the important factors is prejudice to the defendant which may be presumed from the delay. You might wish to share this with [attorneys at Hepburn] in your efforts to persuade them to move on your cases.

Def. Exh. 5

purportedly evidencing the billing practices. (8/26/97 Tr. at 92).[7] However, this evidence pre-dates this cause of action and thus is not helpful to proving Kusner's claim.[8]

Defendants assert a defense based on a "front-end" billing process, also called "front-loading," and a reconciliation process. Dr. Meals, one of the defendants in this case, instituted this practice after attending a seminar given by Dr. Luther W. Brady explaining this billing method. (7/24/97 Tr. at 19).[9] This process consisted of billing for services not yet performed, ostensibly for purposes of efficiency. In this process, once a patient's course of treatment was established, including number of visits and type of treatment to be administered, the patient was billed in advance. These bills were then submitted to the appropriate government agency under the Medicare and Medicaid programs for reimbursement. If it subsequently turned out that the actual visits or number of treatments given were less than the amount billed for, Dr. Meals directed his office assistant, Beatrice Iannitto ("Iannitto"), to periodically correct and "reconcile" this over billing. (7/24/97 Tr. at 19).

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[7] It is possible that the passage of time during this litigation may affect the overall quality of the tapes, further prejudicing defendants. Kusner recognizes such a possibility when he states "I hope the tapes are still in playable condition, it's obviously 17 years." (8/26/97 Tr. at 92).

[8] In my earlier Memorandum, I noted that Kusner had conceded that the six year statute of limitations under the False Claims Act bars his claim to the extent that it is based on violations that were allegedly committed before December 23, 1982. (Document No. 27 at 17).

[9] Kusner submits a letter of Dr. Brady in which Dr. Brady denies advocating billing for services not rendered. See Pl. Exh. 8. However, that letter further states that Dr. Robert Bogardus of the University of Oklahoma was actively presenting seminars explaining front end loading billing procedures and Dr. Meals may have learned about this procedure from Dr. Bogardus. Pl. Exh. 8. As such, this letter does not refute the statements of defense counsel at the hearing that Dr. Meals learned about this billing procedure at a seminar, albeit not from Dr. Brady.

Kusner also submits another letter written by his attorney, Michael S. Bomstein, to Dr. Bogardus. See Pl. Exh. 9. This letter apparently relates to an earlier conversation that occurred between Mr. Bomstein and Dr. Bogardus regarding billing practices. This letter, written by counsel for Kusner, is neither a deposition nor an affidavit, nor does it constitute in any way any reliable testimony of Dr. Bogardus. Thus, it serves little, if any, evidentiary value regarding proper billing procedures advocated by Dr. Bogardus.

Defendants argue that in order to defend the claim against excessive and false billing, they need three types of evidence: (1) billing records, (2) patient/clinical records, and (3) reconciliation records or testimony. Defendants maintain that they have suffered significant prejudice due to the difficulty, if not impossibility, in obtaining these records as the alleged false billing practices arose as far back as fourteen years ago. I find that these original records are essential to make a proper evaluation and defense of the claim and that they are now unavailable, lost or destroyed.

Outside billing companies used by defendants have not retained the records from this period. For instance, Springfield Associates, a billing agency, disposed of records every two years, and as of 1990, had no records prior to 1988. (7/24/97 Tr. at 72). Also, Professional Medical Services, the billing agency in 1982 and 1983, was subsequently acquired by a company called Mediface. (7/24/97 Tr. at 74-75). Mediface currently has a seven-year retention policy. Therefore, there is a strong likelihood that the records from the period in question no longer exist. Counsel for both parties have been unable to obtain any relevant billing records from Blue Cross/Blue Shield. (7/24/97 Tr. at 75-76). Finally, Kusner was unable to obtain any records from the federal government. (7/24/97 Tr. at 113).

Defendants themselves no longer retain billing records from 1983. Allegheny Hospital, which had ultimately acquired the assets of the Hospital of the Philadelphia College of Osteopathic Medicine, also has a retention policy of seven years. (7/24/97 Tr. at 76).

I find that the evidentiary record demonstrates an absence of actual billing or patient records dating from the early 1980s. Defendants are prejudiced because they are not able to utilize the actual records to defend Kusner's claim.

With respect to the reconciliation process, the only staff person in charge of reconciling the overstated bills was Iannitto. At the hearing, defense counsel represented to the Court that Iannitto is currently seriously ill and no longer has any recollection of the "front-end loading" and the "reconciliation" process. (7/24/97 Tr. at 77-78, 80).[10] Thus, the dimming of Iannitto's memory over such a period of time, as well as her potential unavailability due to her illness, prejudices defendants.[11] See Heinzeroth v. Golen, No. 84-2407, 1990 WL 238354, at *3 (E.D. Pa. Dec. 28, 1990).

In an effort to offset the absent billing records, Kusner offers his handwritten columnar document of information compiled by him personally. This document is based on statistics of the number of treatments reported by defendants to the Delaware Valley Hospital Council ("Council") and on a document by Iannitto listing new patients treated during that period. According to Kusner, this compilation supports an inference that billing was excessive in January, February, and March of 1980 due to a discrepancy between the number of actual patients treated and the number of treatments being reported. (7/24/97 Tr. at 97). Kusner admits that constructing a similar document for the years 1982 forward is only possible if similar records of patients actually treated, like that of Iannitto's, exist, and that Kusner has no knowledge of

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[10] Iannitto had been deposed and was questioned directly about billing practices, including front loading and reconciliations thereto, in relation to separate litigation in state court.

In a letter to this Court dated August 25, 1997, counsel for both parties stated their "reluctance to intrude upon Mrs. Iannitto's privacy, particularly in light of her failing health." (8/25/97 Letter). Defendants' counsel had spoken to a physician, Dr. Pickins of Holy Redeemer Hospital, treating Iannitto for her cancer, regarding her availability for further interrogation. Dr. Pickins stated that she "while sometimes lucid, uses narcotics to control her pain," "is unlikely to survive the year," and is "probably not strong enough to be deposed, if at all, for more than 30-45 minutes." (8/25/97 Letter).

[11] The dimming of memories is not limited to Iannitto, but other potential witnesses, including Kusner himself. (See 8/26/97 Tr. at 96) (Kusner stated, when responding to questions about Iannitto's deposition regarding billing practices, "Over an 18-year time period, times tend to meld together a little bit").

whether such documents exist. (7/24/97 Tr. at 98). However, Kusner argues that an expert statistician could compare the information from patient records with reports from the Council to show over billing and make a reasonable projection of damages of over billing in other pertinent periods.[12] Defendants counter this argument by presenting the affidavit of Joel L. Telles, vice president of the Council, who attests that the Council "does not have data and does not produce reports with billing information or summaries for specific patents [sic]." (Aff. of Telles at ¶ 2). Telles further states that he did not believe the records could be used to determine whether or not the bills were accurately prepared because they contain "inconsistencies" and other "data integrity issues." (Aff. of Telles at ¶¶ 2).

Allowing Kusner to prove his claim using this kind of evidence, where records are essentially recreated through expert testimony, instead of actual billing records, forces defendants to defend the claim in a way they would not have had to if the case been prosecuted in a timely fashion. Had the case been prosecuted in a more timely fashion, the greater the likelihood that actual billing records would exist. This alone prejudices defendants, especially in light of the additional costs incurred when countering expert testimony. Even if Kusner fully discloses his expert testimony or he somehow locates adequate documentation of patient records from the year

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[12] Kusner cites several cases where courts have allowed a statistical extrapolation to demonstrate overpayments. Those cases are distinguishable, however, because they all involve, in some form or another, *actual* billing records from which extrapolations of overpayment were made. See, e.g., Ratanasen v. California Dep't of Health Servs., 11 F.3d 1467, 1468 (9th Cir. 1993) (calculation of overpayment based on patient files and audited claims for payments); Yorktown Med. Lab., Inc. v. Perales, 948 F.2d 84, 86-87 (2d Cir. 1991) (extrapolating from sample of total number of overcharged claims for audited period); Illinois Physicians Union v. Miller, 675 F.2d 151, 152 (7th Cir. 1982) (auditing a sample of 353 records randomly selected from a total of 1,302 records for the audit period, and extrapolating overpayment for the 353 cases to the total number of cases); Mile High Therapy Ctrs., Inc. v. Bowen, 735 F. Supp. 984, 985 (D. Colo. 1988) (extrapolating overpayments from audit to the total claims submitted).

In our case, there was never any audit conducted of billing or patients records during the time period the alleged violations occurred. In short, there are no actual billing or patient records from which Kusner could even use to extrapolate from and to estimate overpayments.

1982 forward,[13] defendants cannot now properly and fully develop a defense.

In the absence of actual billing records and patient records dating from the early 1980s,[14] and given the uncertainty of constructing such records using the Council's information, and given the scanty, if any, recollection of Iannitto, I conclude that this factor weighs heavily in favor of dismissal.[15]

C. History of Dilatoriness

The conclusion in my earlier Memorandum that this factor weighs in favor of dismissal remains unchanged. (Document No. 27 at 15). I will not revisit it here.

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[13] Subsequent to the hearing, counsel for Kusner sent a flurry of correspondences to this Court requesting that this Court postpone its decision on the outstanding motion to dismiss for lack of prosecution due to the possibility that Kusner had located actual billing records. (Document No. 42). This Court denied the request in recognition that the Court was presently in the decisionmaking process and the reliability of the evidence remains uncertain. (Document No. 41). Moreover, the Court rejected the request because there was no good cause shown why this evidence was not discovered previously. Kusner and his counsel were on notice that the lack of billing records could prejudice defendants since September 9, 1996, when defendants filed their supplemental motion to dismiss for lack of prosecution. Yet, they waited until after hearing on this motion in July and August 1997, to further attempt to locate the billing records.

[14] Although Kusner argues that defendants became aware earlier, it was clear that by 1991 defendants became aware of the lawsuit when they were served with the complaint. Thus, by 1991, defendants were on notice of the claim and theoretically could have begun collecting the appropriate billing and patient records or at least attempted to prevent their destruction. In light of the seven-year retention policies described earlier, defendants could have begun in 1991 attempting to protect records from 1984 onward, but not earlier.

The complaint of Kusner alleges that the conduct complained of, particularly the billing practices of Dr. Meals, took place "until at least 1983, and, it is averred, beyond that date." Complaint ¶ 17. In my earlier Memorandum, I concluded that Kusner sufficiently pled that the alleged fraudulent scheme at issue continued past 1983. (Document No. 27 at 18).

Kusner argues that defendants could not be prejudiced by nonexistent billing records after 1984 because defendants were aware in 1991 that the billing records were at issue. While there is some merit to this argument, I am persuaded that defendants are prejudiced by the delay. Kusner's argument does not account for the nonexisting billing records in 1983 or the dimming of memories of potential witnesses. Also, the relevant billing records at issue here would presumably have been for the time period during which Dr. Meals was associated with PCOM Radiology Associates ("PCOM"). The Court does not know the length of Dr. Meals' tenure at PCOM. Billing records outside the period of Dr. Meals' association with PCOM are not likely to be pertinent to the claim alleged.

[15] There is no evidence whatsoever that defendants deliberately destroyed billing and patient records at any time with an eye toward litigation.

D. Wilfulness or Bad Faith

The evidentiary record contains no facts or allegations demonstrating "'contumacious behavior'" on the part of Kusner or the Hepburn firm. See Adams v. Trustees, N.J. Brewery Employees' Pension Trust Fund, 29 F.3d 863, 875 (3d Cir. 1994) (quoting National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976)). In National Hockey, the Supreme Court of the United States affirmed the dismissal of a case for lack of prosecution by the district court after plaintiffs failed to answer interrogatories despite extensions and broke promises and committments to the court. Id. Unlike in National Hockey, there is no instance here of flagrant noncompliance with Court orders on the part of Kusner or his attorneys. Thus, I will not impute any bad faith on either for the delay in prosecution of this suit.

Willfulness involves intentional, self-serving or strategic behavior. Id. at 875-76. The Court remains perplexed as to the failure of the Hepburn firm to proceed diligently with Kusner's case, especially in light of Kusner's repeated attempts to prod the firm forward. Even more disconcerting is the withdrawal of the Hepburn firm from its representation of Kusner after failing to prosecute the case diligently. The conduct of the Hepburn firm appears to be professionally irresponsible,[16] and thus the Court's willingness to weigh this factor in favor of dismissal is strong. However, there was no testimony given by representatives of the Hepburn firm at the hearing nor is there adequate evidence showing that Hepburn's conduct was intentional or self-serving. Therefore, I find that this Poulis factor in relation to the Hepburn firm is, at best, neutral.

[16] Rule 1.3 of the Rules of Professional Conduct requires a lawyer to "act with reasonable diligence and promptness in representing a client."

In terms of Kusner, I find that his efforts to contact the Deputy Clerk, to prod the Hepburn firm forward, and to seek new counsel would ordinarily be antithetical to any conclusion that Kusner acted with willful delay in the prosecution of his case. However, where, as here, Kusner is conciously aware for several years that no one is attending to his litigation in the Court or interacting with the defendants, it is tempting to infer that Kusner has crossed the line from careless dilatoriness to willful behavior. While I do not cross this line, I conclude that this Poulis factor is neutral or weighs, albeit slightly, against dismissal.

E. Effectiveness of Other Sanctions

I have considered alternative sanctions. I could charge Kusner for the costs incurred by defendants related to the delay, require Kusner to comply with an expedited or limited discovery schedule, or impose evidentiary restrictions on Kusner. However, none of these alternatives would cure the prejudice to defendants for having to defend the claim without the existence of actual billing and patient records, nor would these alternatives serve to alert the dimming memories of potential witnesses. Thus, this factor weighs in favor of dismissal.

F. Meritoriousness of the Claim

A claim "will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff . . . ." Poulis, 747 F.2d at 870. This standard is moderate. Adams, 29 F.3d at 876. Although there is a more full record before the Court due to the discovery taken thus far in this case, the meritoriousness of a the claim must be evaluated on the basis of the facial validity of the pleadings and not on summary judgment standards. Id.; Scarborough v. Eubanks, 747 F.2d 871, 874 (3d Cir. 1984).

In my Memorandum of May 28, 1996, I concluded that, accepting the well-

pleaded allegations of the complaint as true as required in a motion to dismiss stage, the merits of Kusner's claim were sufficient to weigh against dismissing the instant action. (Document No. 27 at 16). Having previously reached this conclusion and in light of the moderate standard afforded to this factor, I cannot now say that the claim of Kusner is not "meritorious."[17]

I will say, however, that the inability of counsel to locate any of the actual billing and patient records on which the alleged fraudulent acts are premised makes it more unlikely that Kusner will ultimately prevail. This sentiment is further echoed by the inescapable fact that numerous attorneys declined to represent Kusner in this matter. See, e.g., Pl. Exh. 4 (9/23/92 Letter of Hepburn to Kusner ("In short, we are not willing to go forward with the Quit Tam matter because we do not believe the case has merit."); Pl. Exh. 5 (Letter of Thompson) (declining to take case given that "many of the essential documents have apparently been lost or destroyed").

I conclude that, while the merits of the claim are facially valid forcing me to weigh this factor in favor of Kusner, at this stage of the case, which is well beyond the pleadings stage, the claim has doubtful merit.

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[17] When a prima facie defense appears stronger than the claim, the "meritorious" factor should be weighed in favor of the defendant. Poulis, 747 F.2d at 863. In their answer to the complaint, defendants assert five affirmative defenses: (1) Plaintiff fails to state a claim upon which relief may be granted; (2) Plaintiff's claims is barred by laches; (3) Plaintiff's claim is barred by the statute of limitations; (4) Plaintiff's claim is barred by failure to comply with procedural requirements; (5) Plaintiff's claim is barred by lack of prosecution; and (6) the Court lacks subject matter jurisdiction to adjudicate this matter. Answer ¶¶ 18-23. In my Memorandum of May 28, 1996, I denied part of the motion to dismiss concluding that this Court did have jurisdiction, that dismissal was inappropriate for violations of procedural requirements, that the equitable defense of laches was not available, and that the statute of limitations did not bar the claim in whole, though certain time periods were barred. Therefore, the only two affirmative defenses remaining are failure to state a claim upon which relief may be granted and lack of prosecution. The failure to state a claim defense, as stated, is conclusory and not pleaded with specificity to constitute a stronger prima facie case than the claim of Kusner. While the lack of prosecution defense is afforded considerable weight for purposes of deciding this motion to dismiss, for the limited purpose of this Poulis factor, it remains a conclusory statement which can be given no force.

III. CONCLUSION

For the foregoing reasons, I will grant the motion to dismiss for lack of prosecution in favor of defendants and against Kusner. Four of the six Poulis factors weigh in favor of dismissal. While the claim of Kusner may have been facially meritorious though no longer so and while the conduct of Kusner or his attorneys was not willful or in bad faith, I note that the scales of the blind justice, though shifting in favor of Kusner ever so slightly for these two Poulis factors, in the end come to rest commandingly in favor of dismissal.

An appropriate Order follows.

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

UNITED STATES ex rel. KUSNER,	**:**	**CIVIL ACTION**
	:	
Plaintiff,	**:**	
	:	
v.	**:**	
	:	
OSTEOPATHIC MEDICAL CENTER of PHILADELPHIA, et al.,	**:**	**NO. 88-9753**
	:	
Defendants.	**:**	

O R D E R

AND NOW, 21st day of October, 1997, upon consideration of the motion of defendants to dismiss the complaint for lack of prosecution pursuant to Federal Rule of Civil Procedure 41(b) (Document No. 32), and all responses of parties thereto, and after a hearing before the Court on this issue, and for the reasons stated in the foregoing memorandum, it is hereby **ORDERED** that the motions to dismiss for lack of prosecution is **GRANTED** and the **COMPLAINT** of plaintiff United States ex rel. Kusner is **DISMISSED WITH PREJUDICE**.

This is a final Order.

LOWELL A. REED, JR., J.