



suffers from a condition called Dystonia (spasmodic torticollis), a condition that causes sustained muscle spasms/contractions. Plaintiff further alleges that his treating physician, Dr. Gollomp, prescribed continuous quarterly Botulinum Toxin Type A ("Botox") injections for the treatment of Plaintiff's condition and, as a result of Defendant's failure and/or refusal to compensate Dr. Gollomp for Botox injections, Plaintiff has filed the instant lawsuit to recover detrimental reliance damages, having allegedly been deprived of his prescribed June, 1997 Botox injection for a period of approximately three (3) months. See First Amended Complaint, ¶ 14.

On July 22, 1999, this Court granted Defendant Keystone's Motion for Summary with respect to extracontractual damages. See Reilly v. Keystone Health Plan East, No. Civ. A. 98-1648, 1999 WL 528713 (E.D. Pa. 1999).<sup>1</sup> In addition, this Court determined that "Plaintiff must show some evidence of damages recoverable pursuant to his ERISA claim or risk the dismissal of the remaining aspects of his First Amended Complaint." Id. at \*4. As a result, this Court directed Plaintiff to produce evidence of damages recoverable pursuant to

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<sup>1</sup> In accordance with the Supreme Court's ruling in Varity Corp. v. Howe, 516 U.S. 489 (1996), this Court held that the equitable relief sought by Plaintiff under ERISA § 502(a)(3), as amended, § 1132(a)(3)(B)(i), was not appropriate since it appeared that Plaintiff could obtain adequate relief under ERISA's first subsection, § 502(a)(1)(b), as amended, § 1132(a)(1)(b).

the ERISA claim sustained by the Plaintiff in this matter.

On August 10, 1999, Plaintiffs submitted a response that merely pointed to the allegations in his complaint. Subsequently, on August 25, 1999, this Court entered an Order dismissing plaintiff's action for failure to produce such evidence.<sup>2</sup> Thereafter, Plaintiff filed the instant motion pursuant to Rule 60(b) for relief from this Court's judgment because of alleged "excusable neglect," and, further, a motion, pursuant to Rule 4 of the Rules of Appellate Procedure, to extend the time for appeal.

#### **DISCUSSION**

Federal Rule of Civil Procedure 60(b) provides six grounds for relief from a judgment. The subsection that applies to this case is (b)(1), which cites "mistake, inadvertence, surprise, or excusable neglect" as reasons which may justify relief from a final judgment. Lorenzo v. Griffith, 12 F.3d 23,

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<sup>2</sup> While Plaintiff complains that this Court's August 25, 1999 Order was entered without further application to this Court by Defendant, as stated in this Court's July 22, 1999 Order, Plaintiff overlooks the fact that he was given (1) notice that this Court was considering granting summary judgment with respect to the remaining aspects of Plaintiff's First Amended Complaint and (2) a second opportunity to present evidence to oppose the granting of summary judgment. Cf. Otis Elevator Co. v. George Washington Hotel Corp., 27 F.3d 903, 910 (3d Cir. 1994) ("Under our cases, a district court may not grant summary judgment sua sponte unless the court gives notice and an opportunity to oppose summary judgment.").

26 (3d Cir. 1993). In his Rule 60(b) motion, Plaintiff asserts that his August 10, 1999 submission was intended to satisfy this Court's July 22, 1999 Order by allowing the Court to rule, as a matter of law, whether reliance damages represent recoverable damages under Section 1132(a)(3)(B)(i) of ERISA and that "Plaintiff possessed a reasonable and good faith belief, in the absence of any notice or instruction to the contrary, that Plaintiff's August 10, 1999 response satisfied the intent and purpose of the Court's July 22, 1999 Order." Pl.'s Rule 60(b) Motion at ¶¶ 4 and 4.1. Plaintiff further argues that "[t]he Court's August 25, 1999 Order represents the first time that Plaintiff received any guidance or notice whatsoever as to the nature and degree of specificity of "evidence of recoverable damages" required by the Court's July 22, 1999 Order." Id. at ¶ 7.

In response, Defendant correctly points out that when this Court entered its original Order on July 22, 1999, it did so in response to Defendant's Motion for Summary Judgment. It is well-settled that when a motion for summary judgment is made and supported as provided by FED. R. CIV. P. 56(e), Plaintiff Reilly, as the non-moving party, cannot rest on the pleadings, but rather must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). Yet, when this Court directed Plaintiff to produce evidence of recoverable damages pursuant to

ERISA, Plaintiff simply cited the allegations made in the First Amended Complaint, which is insufficient.<sup>3</sup> FED. R. CIV. P. 56(e).

Defendant also is correct in its contention that the affidavit which Plaintiff now requests this Court to consider as a basis for relief from summary judgment does nothing to provide evidence of "damages recoverable under ERISA" as directed by this Court's July 22, 1999 Order. The extracontractual damages attested to in Plaintiff's proffered affidavit -- pain, embarrassment and humiliation -- are not damages recoverable pursuant to ERISA as "reliance damages" or otherwise. See DeMaio v. Cigna Corp., CIV. A. No. 89-0724, 1989 WL 153961, \*2 (E.D. Pa. Dec. 15, 1989).

Finally, Plaintiff has filed a motion for extension of time to file a notice of appeal, contending that it will afford this Court additional time to resolve Plaintiff's pending Rule 60(b) Motion. Because this Court is issuing a decision on Plaintiff's Rule 60(b) motion before September 24, 1999, the deadline for filing a Notice of Appeal of this Court's August 25, 1999 Order, and will timely notify the parties of this decision, Plaintiff's Motion for Extension of Time will be denied as moot.

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<sup>3</sup> Counsel for Plaintiff cannot credibly claim that he was unaware of his responsibility to go beyond the pleadings as required by Rule 56 of the Federal Rules of Civil Procedure. Indeed, Plaintiff's Opposition Brief to Defendant's Motion for Summary Judgment sets forth the standard of review for summary judgment motions, including the non-moving party's duty to respond to such a motion with specific evidence demonstrating that there are genuine issues for trial. See Pl.'s Opp'n Brief at pp. 7-8.

Based on the above, Plaintiff's Rule 60(b) Motion for Relief from this Court's Order dismissing Plaintiff's First Amended Complaint is denied. In addition, Plaintiff's Motion for Extension of Time to File Notice of Appeal is denied as moot. An appropriate Order follows.

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

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CHARLES J. REILLY,	:	
	:	
	:	
Plaintiff,	:	
v.	:	Civil Action No. 98-1648
	:	
KEYSTONE HEALTH PLAN EAST, INC.,	:	
	:	
Defendant.	:	

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**ORDER**

AND NOW, this 23rd day of September, 1999, upon consideration of Plaintiff's Rule 60(b) Motion for Relief from this Court's Order, dated August 25, 1999, dismissing Plaintiff's First Amended Complaint, and all responses thereto, it is hereby ORDERED that Plaintiff's Motion is DENIED. It is further ORDERED that Plaintiff's Motion for Extension of Time to File Notice of Appeal is DENIED as moot.

BY THE COURT:

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ROBERT F. KELLY, J.