No. 18-2193

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

VICTOR MONDELLI,

Plaintiff-Appellant,

v.

BERKELEY HEIGHTS NURSING & REHABILITATION CENTER; ET AL.,

Defendant-Appellee.

On Appeal from the United States District Court
For the District of New Jersey,
Civil Action No. 2:16-cv-01569-ES-SCM
Judge Esther Salas, Presiding

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* ON BEHALF OF APPELLANT
AND
VOLUME 1 OF THE JOINT APPENDIX

Michael L. Foreman
PENN STATE LAW, CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
University Park, PA 16802
Phone: (814) 865-3832
Fax: (814) 865-3851
mlf25@psu.edu
PA Bar 30231

Court-Appointed *Amicus Curiae* Counsel

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rules of Appellate Procedure 26.1 and 29(c), and Third Circuit L.A.R. 26.1.1, *amicus curiae* counsel on behalf of Victor Mondelli states that the Civil Rights Appellate Clinic is an educational component of The Pennsylvania State University, Penn State Law which is not a publicly-held corporation and has no parent corporation and no publicly-traded stock.

In accordance with Federal Rules of Appellate Procedure 26.1(c) and Third Circuit L.A.R. 26.1.1, *amicus* counsel states that Victor Mondelli is an individual and therefore is not a publicly held corporation, has no parent corporation, and no publicly traded stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae Penn State Law Civil Rights Appellate Clinic is a component of Penn State Law's experiential learning curriculum. The Clinic's work is aimed at aiding those who have brought civil rights claims and do not have the means to pursue an appeal on their own. Since its inception, the Clinic has assisted victims of alleged civil rights violations navigate the appellate process to ensure they are afforded the same opportunities as all citizens. By Order dated September 9, 2020, the United States Court of Appeals for the Third Circuit appointed Michael L. Foreman, Director of the Clinic, as *amicus* counsel on behalf of Appellant, Mr. Mondelli. The *amicus* appointment is for the purpose of addressing "whether the District Court erred in dismissing Mondelli's action for failure to prosecute without first inquiring into Mondelli's competency," and "whether the District Court properly considered and balanced the factors provided in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984), before dismissing Mondelli's complaint." This Honorable Court has appointed Professor Foreman as counsel in several matters including most recently *Doe v. Law School Admission Council*, 791 F. App'x 316 (3d Cir. 2018), *Baptiste v. Att'y Gen.*, 841 F.3d 601 (3d Cir. 2016), *cert. denied*, 138 S. Ct. 2018 (2018), and *Ellis v. Ethicon, Inc.*, 529 F. App'x 310 (3d Cir. 2013).

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because this is a civil action arising under a federal statute, the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12165.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1), as the district court ordered that this suit be dismissed for lack of prosecution pursuant to Federal Rule of Civil Procedure 41(b).

STATEMENT OF THE ISSUES

1. Whether, given Mr. Mondelli's lifelong struggle with mental illness, the district court erred in dismissing Mondelli's action for failure to prosecute his claims without first inquiring into his competency pursuant to Fed. R. Civ. P. 17(c) and this Court's decision in *Powell v. Symons*, in light of the verifiable evidence Mr. Mondelli presented.

2. Whether the district court, in light of its failure to consider Mr. Mondelli's mental illness in making its decision, improperly balanced the factors provided in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3d. Cir. 1984) before dismissing Mondelli's complaint.

STANDARD OF REVIEW FOR THE ISSUES ON APPEAL

When a district court dismisses a case pursuant to Federal Rule of Civil Procedure Rule 41(b), the reviewing court reviews that dismissal for an abuse of

discretion. *See Briscoe v. Klaus*, 538 F.3d 252, 258 (3d Cir. 2008) (citing *Emerson v. Thiel Coll.*, 296 F.3d 184, 190 (3d Cir. 2002)).

STATEMENT OF RELATED CASES

Neither this case or any case related to this case has been before this Court or any tribunal.

CONCISE STATEMENT OF THE CASE

a. Factual History

Plaintiff, Victor Mondelli, is a diagnosed paranoid schizophrenic who also suffers from major depression. J.A. at 098 (Certification, Exhibit B). His disabilities are well-documented and date back to as early as 1967 when, at just nine years old, Mr. Mondelli was removed from school due to insurmountable behavioral problems. Mr. Mondelli's school stated that he refused to go to school, would run away and hide in the woods, and would often need to be physically restrained. J.A. at 102 (Certification, Exhibit C). Mr. Mondelli's disabilities have caused him significant limitations throughout his life. He receives SSI benefits, J.A. at 026 (Compl. ¶ 15), and has also furnished a wealth of documentation from his treating physicians describing his mental and physical disabilities. For example, one of Mr. Mondelli's treating psychiatrists states in a letter that Mr. Mondelli has "schizophrenia of the paranoid type," and notes that while Mr. Mondelli is on medication, he has also "been under a tremendous amount of stress for a long time," and contributes the exacerbation of his stress to "the fact that he is not being allowed to have adequate

time to spend with his mother." J.A. at 097 (Certification, Exhibit B, letter dated August 14). In other letters, Mr. Mondelli's doctors continually explain that Mr. Mondelli's schizophrenia limits his capacity to attend court proceedings and that the stress of doing so would be too much for him to handle. J.A. at 089, 092, 096, 100 (Certification, Exhibits A–B).

Mr. Mondelli also alleges that a judge in Fanwood, New Jersey Municipal Court determined that he did not have the mental capacity to move forward with a separate case involving a municipal zoning dispute.[1] J.A. at 085 (Certification ¶ 3). Mr. Mondelli also suffers from a host of other physical ailments—including asthma, digestive problems, and high blood pressure—for which he receives medication and has been recently treated. J.A. at 086: lns 108–109 (Certification ¶ 9; Certification, Exhibit E). Mr. Mondelli alleges that this myriad of mental and physical disabilities has prevented him from prosecuting his case. J.A. at 086 (Certification ¶ 11).

Mr. Mondelli commenced his action against Berkeley Heights Nursing & Rehabilitation Center, Marina Ferrer, and Diane Wilverding (hereinafter "Defendants") on March 22, 2016 over alleged maltreatment of his mother. Mr. Mondelli's mother was a resident at Berkeley Heights until March of 2015, and she

[1] Because this matter has not yet proceeded from its preliminary stages, Mr. Mondelli is only required to set forth "a claim for relief upon which relief may be granted," and to allege facts which may plausibly give rise to the relief he seeks. *See* Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

died in May of 2015. J.A. at 026 (Compl. ¶¶ 13-14). In his Complaint, Mr. Mondelli alleges that he visited his mother for twelve hours every day at Berkeley Heights from January 2012 until March 2015. J.A. at 026 (Compl. ¶ 17). In July 2013, Mr. Mondelli began to complain to Berkeley Heights staff and New Jersey public health officials about the care and treatment his mother was receiving. J.A. at 026, 028 (Compl. ¶¶ 19, 46). Mr. Mondelli alleges witnessing temporary Foley catheters being used to feed his mother and that staff had completely stopped assisting his mother with getting out of bed so that she could exercise. J.A. at 026–027 (Compl. ¶¶ 21-26, 33). Mr. Mondelli also alleges that his mother had a bad rash on the inside of her legs as a result of Defendants' neglect, and that he once arrived at her room in the morning "to find her air mattress was unplugged and flat—and she had no oxygen on her." J.A. at 028 (Compl. ¶¶ 37–39).

Mr. Mondelli alleges several other instances of neglect, including finding his mother on at least two occasions "shivering because [Defendants] had not properly dried her after washing her" and one occasion when Ms. Mondelli's oxygen was choking her because it was not properly adjusted. J.A. at 028 (Compl. ¶¶ 40-43). A supervisor at Berkeley Heights confirmed in an email that Mr. Mondelli complained about his mother's treatment "on a daily basis." J.A. at 028 (Compl. ¶ 46). These complaints, however, often had merit; Mr. Mondelli alleges multiple occasions when the New Jersey Ombudsman took action to stop Defendants from feeding his mother "canned protein," "leaving her in parts of her room where the sun was too hot," and

from "transferring [Ms.] Mondelli to a facility . . . where it would have been impossible for [Mr. Mondelli] to visit her." J.A. at 029 (Compl. ¶¶ 48-52).

Defendants, allegedly in retaliation for Mr. Mondelli's continuing complaints, restricted his visitation with his mother to one or two hours per day in the cafeteria for the rest of her life. J.A. at 031 (Compl. ¶¶ 67–68). In March 2014, Defendants again restricted Mr. Mondelli's visitation, and he was no longer able to visit with his mother in the cafeteria. J.A. at 031 (Compl. ¶¶ 69–70). On one occasion, Defendants called the police as soon as Mr. Mondelli arrived at Berkeley Heights to visit his mother. J.A. at 031–032 (Compl. ¶ 75). Eventually, Mr. Mondelli was forced to visit with his mother solely in the lobby of the building. J.A. at 032 (Compl. ¶ 76).

b. Proceedings at the District Court

Mr. Mondelli filed his Complaint in the United States District Court for the District of New Jersey on March 21, 2016, bringing claims for both intentional infliction of emotional distress and for violations of the Americans With Disabilities Act (ADA). J.A. at 32-33. On August 15, 2016, Berkeley Heights filed an Answer to Mr. Mondelli's Complaint and denied the allegations in Mr. Mondelli's complaint. J.A. at 37.

The parties then filed their Joint Discovery Plan and, on November 17, 2016, the plan was approved by the court. J.A. at 058-61. Pursuant to the plan, Rule 26 disclosures were to be completed by December 10, 2016 and interrogatories, requests for documents, and requests to admit were to be completed by July 31, 2017.

J.A. at 058. Mr. Mondelli, however, did not provide any Rule 26 disclosures or discovery responses by those dates. J.A. at 009:lns 2-4 (Telephone Conference Tr.). The Honorable Steven C. Mannion held a second case management conference on January 20, 2017 and allowed Mr. Mondelli additional time to respond to discovery. J.A. at 009:lns 4-11 (Telephone Conference Tr.). Despite this extension of time, Mr. Mondelli did not provide discovery. J.A. at 009:lns 12-13 (Telephone Conference Tr.). During a third case management conference on March 29, 2017, Mr. Mondelli's counsel at the time, Kenneth Rosellini, explained that he had been unable to contact Mr. Mondelli and requested more time. J.A. at 009:lns 14-17 (Telephone Conference Tr.). Judge Mannion allowed Mr. Mondelli an additional 14 days to produce all outstanding discovery. J.A. at 009:lns 17-19 (Telephone Conference Tr.).

On April 25, 2017, Berkeley Heights sought leave to file both a motion to dismiss for failure to provide discovery and a motion for summary judgment. J.A. at 052. As a result, the district court issued a Rule to Show Cause as to why Mr. Mondelli should not be sanctioned for his failure to comply with Berkeley Heights' discovery requests. J.A. at 083. Mr. Mondelli, through his counsel at the time, responded with a notarized "Certification" stating that he was unable to prosecute the case. J.A. at 85. Mr. Mondelli also attached notes, letters, and other documents to this Certification that support his claim that he was not in a position, either physically or mentally, to pursue his case against Berkeley Heights without assistance. J.A. at 88-110. In the Certification, Mr. Mondelli, through his counsel,

also alleged that the magistrate judge for the district court discriminated against him because the judge failed to inquire into his health before issuing the Rule to Show Cause. J.A. at 86. He requested that the case be put on administrative hold and transferred to another court to avoid prejudice against him. J.A. at 114-16. On May 22, 2017, however, the case was administratively terminated. J.A. at 111.

On November 20, 2017, Mr. Mondelli, through his counsel, filed a Motion to Extend Time to Reopen, and with that Motion filed an affidavit accusing Judge Mannion of prejudice and requesting that the case be reassigned to another judge. J.A. at 113-16. On December 18, 2017, Defendants opposed Mr. Mondelli's motion to reopen the case in their Opposition Brief to Plaintiff's Motion to Extend Time to Reopen Case. J.A. at 117-129. Mr. Rosellini did not reply to Defendants' Opposition and made no effort to counter Defendants' application of the factors laid out in *Poulis v. State Farm Fire and Casualty Company*, 747 F.2d 863, 868-70 (3d Cir. 1984).

On April 27, 2018, the district court denied Mr. Mondelli's motion to extend time to reopen the case and dismissed his Complaint with prejudice. *See Mondelli v. Berkeley Heights Nursing & Rehabilitation Center*, No. 16-1569-ES-SCM (D.N.J. Apr. 27, 2018). During a telephone hearing, Mr. Rosellini argued that Mr. Mondelli had provided enough documentation to show there is evidence of his incompetence, and cited Mr. Mondelli's May 19th Certification, which "include[d] documentation of his medical history, including . . . relatively recent letters from Robert Wood

Johnson Medical School and some of his treatment." J.A. at 017:lns 7-10. Mr. Rosellini also noted the prior determination of the Fanwood Municipal Court as evidence of Mr. Mondelli's incompetency, but the district court largely ignored the value of this evidence. J.A. at 013:lns 14-23. The district court first claimed that it would need additional documentation of the Fanwood Municipal Court's determination, and then implied that even if such documentation were provided, that such a determination should not be binding on the district court. J.A. at 015: ln 16. Defense counsel similarly minimized the value of the documentation provided by Mr. Mondelli in the Certification and argued that "there is no letter about his mental competency to stand trial from all of the doctor notes that they provided." [2] J.A. at 017:ln 20-018:ln 3.

In determining whether to dismiss Mr. Mondelli's claims, the district court cited to the six factors laid out in *Poulis*. Despite the wealth of evidence that Mr. Mondelli had already submitted that demonstrated the extent of his mental illness, the district court determined that "[Mr. Mondelli's] submissions do not adequately explain why he has failed to respond to discovery requests or otherwise prosecute the case." J.A. at 019:lns 16-19. The district court then concluded that the factors in *Poulis* "weigh in favor of dismissal." J.A. at 012:ln 13.

[2] Contrary to defense counsel's assertion, in his Certification, Mr. Mondelli provided the Court with a letter from Robert Wood Johnson Medical School stating that Mr. Mondelli was "unable to attend court due to his mental condition." J.A. at 85.

c. Proceedings at the Court of Appeals

Mr. Mondelli filed a Notice of Appeal on May 25, 2018. J.A. at 002-03. On May 9, 2019, a panel of the Third Circuit Court of Appeals held that it would be inappropriate to dismiss Mr. Mondelli's appeal under 28 U.S.C. § 1915(e) or to take summary action under the Third Circuit's Local Rule 27.4 and I.O.P 10.6. Order, June 14, 2019. The Court also sought to appoint counsel for Mr. Mondelli, and laid out the relevant issues on appeal: first, "whether the district court erred in dismissing Mondelli's action for failure to prosecute without first inquiring into Mondelli's competency," and second, "whether the district court properly considered and balanced the factors provided in [*Poulis*] before dismissing Mondelli's complaint." *Id*. Since that decision, the Court has attempted to appoint counsel for Mr. Mondelli on multiple occasions, but could not find counsel for Mr. Mondelli that could work with him. On one occasion, Mr. Mondelli's appointed counsel asked the Court to withdraw, citing a breakdown in communication and trust that was irreconcilable. Mot. to Withdraw From Representation, Nov. 4, 2019. Mr. Rosellini also filed an Entry of Appearance with the Court of Appeals on February 21, 2020, but has been absent since then. Entry of Appearance, Feb. 21, 2020. He clarified in a March 19, 2020 letter to the Court of Appeals that he was only assisting Mr. Mondelli in a limited matter and is "not currently representing Mr. Mondelli in this case" and asked that the Court "not consider that [he is] or will be representing Mr. Mondelli in the future in this matter." Letter, March 19, 2020. Mr. Mondelli was also briefly

represented by pro bono counsel, but this representation ceased after Mr. Mondelli refused to sign a contract with his counsel because he could not understand it. Penn State Law's Civil Rights Appellate Clinic was then appointed as *amicus curiae* counsel with briefing privileges. Mr. Mondelli opposed this appointment in a letter to the Court and maintains that he is entitled to pro bono counsel rather than appointed *amicus* counsel.

SUMMARY OF THE ARGUMENT

1. Under Rule 17(c), the district court has a duty to appoint a guardian or take other appropriate action to ensure that incompetent litigants are being adequately represented. This Court provided guidance in applying Rule 17(c) in *Powell v. Symons*, and imposed a duty on district courts to inquire into a litigant's competency when presented with verifiable evidence suggesting incompetency.

Contrary to this mandate, the district court dismissed Mr. Mondelli's claims before first inquiring into his competency and despite being provided with an abundance of documentation that explicitly details the severity of his mental illnesses. Further, notwithstanding Mr. Rosellini's role as counsel, this Court has previously explained in *Gardner by Gardner v. Parson* that representation of counsel in the proceedings before the district court is irrelevant, because it is the duty of the district court to inquire into competency.

The district court abused its discretion in not conducting a hearing to determine whether Mr. Mondelli was incompetent. As such, the district court's order

declining to reopen this case should be reversed and remanded with instructions to hold a competency hearing to determine whether the court must take action to protect Mr. Mondelli's interests in this matter.

2. The district court further abused its discretion when it improperly weighed the six factors articulated in *Poulis v. State Farm Fire & Casualty Co.* prior to dismissing Mr. Mondelli's claims, particularly in light of his mental health conditions and the incompetency issues before the court. Considerable evidence was provided to show Mr. Mondelli's mental incompetency, which the district court ignored when it found him personally responsible for his failure to prosecute. The district court failed to properly consider that any prejudice arising from these proceedings falls on Mr. Mondelli rather than the defendant, particularly because of his conditions. It improperly characterized Mr. Mondelli's struggles concerning his mental illnesses as well as Mr. Rosellini's resulting failures during the proceedings as "dilatoriness."

The district court improperly based its decision on the grounds that Mr. Mondelli's inaction demonstrated a lack of interest in pursuing litigation rather than considering that Mr. Mondelli's inaction was due to his mental incapability and not indicative of his intentions to participate in future litigation. Due to the disregard of all the evidence provided to the court by Mr. Mondelli that showcased the severity of Mr. Mondelli's mental illnesses, the district court improperly balanced the six *Poulis* factors when dismissing Mr. Mondelli's case.

ARGUMENT

I. The District Court abused its discretion by failing to carry out its duty imposed by Federal Rule of Civil Procedure 17(c) and this Court to inquire into Mr. Mondelli's competency and ability to prosecute his case.

The mandate of Federal Rule of Civil Procedure Rule 17(c) is not subject to debate. The rule requires a court to appoint a guardian or take some other protective action for an incompetent litigant in a case. Fed. R. Civ. P. 17(c)(2) ("The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action."). By failing to inquire into Mr. Mondelli's competency before dismissing his claims, the district court abused its discretion by ignoring both Third Circuit precedent and Rule 17(c)'s purpose of protecting incompetent litigants. Therefore, the district court's order must be reversed and remanded for a proper hearing to be conducted.

a. To provide guidance for applying Rule 17(c), the Third Circuit in *Powell v. Symons* imposed a duty on the district court to inquire into Mr. Mondelli's competency prior to dismissing his suit when presented with verifiable evidence that he was unable to prosecute his claims.

In *Powell v. Symons*, this Court held that "it is the federal district court's obligation to issue an appropriate order 'to protect a minor or incompetent person who is unrepresented in an action.'" *Powell v. Symons*, 680 F.3d 301, 307 (3d Cir. 2012) (quoting Fed. R. Civ. P. 17(c)(2)). While a district court is not required to inquire into a litigant's competency *sua sponte* "based on [the] litigant's bizarre behavior alone," the *Powell* court imposed a duty of inquiry when the district court

is presented with verifiable evidence of the litigant's incompetence. *Id.* at 307.[3] Expanding on this standard, the court stated "that a district court would likely abuse its discretion if it failed to consider whether Rule 17(c) applied '. . . if the court received verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent.'" *Id.* (quoting *Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 201 (2d Cir. 2003)).

Here, the district court was presented with much more than merely bizarre behavior, which, under the rule in *Powell*, should have triggered the court's duty of inquiry to determine whether Mr. Mondelli was competent and able to prosecute his claims. The district court was in receipt of no less than four letters from Mr. Mondelli's current psychiatric provider, and at least seven letters from his past mental health provider, attesting to his inability to participate in everyday activities such as school and work because of his mental illness. J.A. at 089-102. (Certification, Exhibits A-C). One of these letters, dated March 13, 2017—mere months before this case was administratively terminated—stated that Mr. Mondelli was unable to attend a court proceeding because of his mental health. J.A. at 092

[3] The Third Circuit has not further defined "verifiable evidence" other than providing examples of what may suffice as verifiable evidence. Oxford Learner's Dictionaries defines "verifiable" as a fact "that can be checked to show whether it is accurate or true." *Verifiable*, Oxford Learner's Dictionaries, https://bit.ly/3eBcMkg (last visited Nov. 6, 2020).

(Certification, Exhibit A, letter dated March 13, 2017). Additional letters attached to Mr. Mondelli's Certification detail his lifelong struggle with mental illness and the impacts it has had on him; specifically, a letter dated June 6, 2016 from Mr. Mondelli's psychiatrist explicitly states his diagnosis of schizophrenia and depression, conditions which have affected him since the age of nine. J.A. at 098 (Certification, Exhibit B, letter dated June 6, 2016).

In *Powell*, this Court found that a letter from a litigant's psychiatrist stating the psychiatrist's belief that the litigant was incompetent sufficed to trigger the district court's obligation to inquire into the litigant's competency under Rule 17(c). *Powell*, 680 F.3d at 310. Here, the evidence provided to the district court far surpasses the single letter submitted in *Powell*. Mr. Mondelli's actions, combined with the abundance of evidence presented to the district court regarding his mental deficiencies, were more than sufficient to trigger the court's duty to inquire into his competency. At the hearing on whether to reopen the case, the district court itself acknowledged that "it is clear there is some reason the plaintiff is unable to prosecute this matter." J.A. at 013:lns 8-9.

However, rather than schedule a Rule 17(c) competency hearing where the letters regarding Mr. Mondelli's mental deficiencies and Mr. Mondelli's finding of incompetency by the Fanwood Municipal Court could be supported by testimony and other documentary evidence, the district court instead seemed to demand such evidence be produced at the hearing on whether to reopen the case without any prior

notice that such evidence would be required.[4] The district court improperly reached the merits of Mr. Mondelli's claims without first fulfilling its duty of inquiry into his competence and determining whether he required a guardian ad litem. *See Gardner by Gardner v. Parson*, 874 F.2d 131, 141 (3d Cir. 1989) (holding that the district court was "without authority" to reach the merits of claims brought by a minor plaintiff who was "without a representative when the court dismissed her claims, and was otherwise unprotected"). In so doing, the district court abused its discretion. *See Powell*, 680 F.3d at 310 (holding that "the district court abused its discretion in failing to at least consider the possible application of Rule 17(c)" when presented with a letter from a litigant's psychiatrist stating the psychiatrist's belief that the litigant was incompetent). Therefore, the proper recourse is to remand this case to the district court so that a necessary inquiry into Mr. Mondelli's competence may be conducted. *See id*.

[4] As previously noted, this case has not yet proceeded from its preliminary stages. Mr. Mondelli has set forth an abundance of evidence explaining to the district court the mental deficiencies that have prevented him from being able to assist in providing discovery responses which were required to be accepted by the court as true. At the time of the Rule 17 hearing Mr. Mondelli would have borne the production of proof and would have been required to submit documentary and testimonial evidence supporting the information contained in his Certification. At that time, the issue of Mr. Mondelli's capacity could have been properly weighed and examined by the Court and all parties with the benefit of mental health providers' testimony and the presentation of the finding of incompetency by the Fanwood Municipal Court.

b. As the Third Circuit has explained, it is irrelevant that Mr. Mondelli was represented by counsel in the proceedings before the district court.

The Third Circuit has recognized that a lawyer fulfilling the role of both guardian and counsel is generally inadvisable. *See Gardner,* 874 F.2d at 140 n.14 (citing R. Mackay, *The Law of Guardianships* 12 (3d ed. 1980) (observing that "[o]ne commentator has noted that this is generally inadvisable, because a lawyer who acts in both capacities may sometimes fail to distinguish between the two roles"). Accordingly, the fact that Mr. Mondelli at times was represented by counsel does not relieve the district court from following Rule 17 and the direction of this Court's precedent. *See Gardner,* 874 F.2d at 140 n.14 (recognizing that competent counsel briefed and argued minors claims, yet finding that the district court should have appointed a next friend to represent the minor's interest). The roles of counsel and guardian are distinct from one another.[5]

In this case, Mr. Mondelli's interests suffered when the district court failed to inquire into his competency and consider whether appointing a guardian or taking

[5] *See* Vicki Gottlich, *The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective*, 7 Md. J. Contemp. Legal Issues 191, 212 (1996) ("The representative attorney is a zealous advocate for the wishes of the client. The guardian ad litem evaluates for himself or herself what is in the best interests of his or her client-ward and then represent[s] the client-ward in accordance with that judgment."); *see also McCaslin by McCaslin v. Radcliff*, 168 F.R.D. 249 (D. Neb. 1996) (under Rule 17(c), duties of lawyer for the party and duties of guardian ad litem for that party are entirely different, since it is not a function of the guardian ad litem to serve as lawyer, and vice-versa), *aff'd without op. sub nom*, *McCaslin v County of York*, 141 F.3d 1169 (8th Cir. 1998).

other appropriate action was necessary to ensure his interests were protected. As the district court observed, Mr. Rosellini was placed in the "untenable" position of having to balance both his duties as an attorney and officer of the court with his duty towards his client. J.A. at 013-015, 014:lns 16-17 (Telephone Conference Tr.). Mr. Rosellini admitted that he likely could not fulfill all the roles which his client required. J.A. at 013-015 (Telephone Conference Tr.) (requesting that a power of attorney be appointed for Mr. Mondelli due to his competency issues and recognizing that his role of counsel could create a conflict). As a result, Mr. Rosellini, for a time, was forced to wear "two hats" and act as both Mr. Mondelli's counsel and guardian, attempting to ensure his interests were protected in the litigation, a position which eventually would become difficult to maintain. *See Bacon v. Mandell*, No. CIV.A. 10-5506 JAP, 2012 WL 4105088, at *14 (D.N.J. Sept. 14, 2012) (observing that a single representative "could yield a scenario where such representative, being obligated to effectively wear "two hats" by acting as both a guardian ad litem and pro bono counsel, might find himself/herself caught in a limbo, being [] unable to continue wearing both these hats"); *see also Wright v. Wenerowicz*, No. 2:14-cv-00245, 2018 WL 1081982, at *3 (E.D. Pa. Feb. 28, 2018) (finding that appointing "objective third party" as guardian ad litem for incompetent plaintiff who was represented by counsel but refused to communicate with counsel was appropriate course of action so the guardian could pursue plaintiff's claims in conjunction with attorney). Mr. Rosellini's untenable position is highlighted by the

instances where he reappears in this Court purporting to attempt to advance Mr. Mondelli's interests in a limited capacity.[6]

Here, Mr. Rosellini often tried to walk a tightrope between counselor and guardian. Mr. Rosellini may bear some responsibility, but as discussed *supra* Part I.a., it was the district court's duty to inquire into Mr. Mondelli's competency in light of the evidence before it. By failing to do so, the district court contravened both this Court's precedent in *Powell v. Symons* and Rule 17(c)'s direction. Therefore, because Mr. Mondelli's attorney was not able to fulfill the role of both guardian and counsel, the dismissal should be reversed so that the district court can determine whether Mr. Mondelli should be appointed a proper guardian to protect his interests.

c. The district court's dismissal of Mr. Mondelli's case before inquiring into his competency contravened the purpose of Rule 17(c) and this Court's precedent by allowing his interests to go unprotected.

The district court abused its discretion by failing to inquire into Mr. Mondelli's competency to determine whether protective action needed to be taken on his behalf. As a result, the court allowed Mr. Mondelli's interests to go unprotected in direct conflict with Rule 17(c)'s purpose. The purpose of Rule 17(c) is to protect the interests of litigants before the court and ensure that any person,

[6] These actions have continued before this Court as exhibited in Mr. Rosellini's letters dated March 19, 2020 stating "I am not currently representing Mr. Mondelli in this case and the court should not consider that I am or will be representing Mr. Mondelli in the future in this matter." Letter, March 19, 2020. Despite this, Mr. Rosellini again submits a letter to this Court on Mr. Mondelli's behalf. Letter, June 19, 2020.

despite any impairments they may suffer, has access to the federal courts. *See Richards v. Duke Univ.*, 166 F. App'x 595, 599 (3d Cir. 2006) ("The purpose behind appointing a guardian is to protect the interests of the incompetent person."); *see also* 6A Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure* §1571 (3d ed. 2010) (stating that Rule 17(c) "manifests a desire to protect the interest of infants and incompetent persons by assuring them proper representation in and access to a federal forum").

In *Gardner by Gardner v. Parson*, this Court recognized that a court may not "decline to appoint a guardian with the result of allowing the [incompetent person's] interests to go *un*protected." 874 F.2d at 140 (emphasis in original). Indeed, "Rule 17(c) was not intended to be a vehicle for dismissing claims." *Id.* When a district court declines to appoint a guardian ad litem to prosecute an incompetent person's claims and instead dismisses those claims entirely, the result is that the incompetent person's interests go unprotected. "This result cannot be what the drafters of Rule 17(c) had in mind when they provided that a court which declines to appoint a representative 'shall make such other order as it deems proper for the protection of the infant or incompetent person.'" *Id.*

While "the decision as to whether to appoint a . . . guardian ad litem rests with the sound discretion of the district court," the court "must act in some other way to protect the [incompetent person's] interests in the litigation" if it declines to appoint a guardian for the incompetent person. *Id*. As discussed above, the district court in

this case was presented with more than enough evidence to "at least [hold] a hearing to determine whether a [guardian ad litem] should be appointed" for Mr. Mondelli. *Id*. Instead, the district court dismissed Mr. Mondelli's claims, leaving his interests in the litigation entirely unprotected. This decision is an abuse of discretion and, therefore, should be reversed and remanded for a proper inquiry into whether Mr. Mondelli is competent to prosecute his claims. *See Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir. 2005) (finding abuse of discretion in failure to make a competency determination when a litigant indicated he could not understand court instructions and submitted a letter from a psychiatrist stating that the litigant was schizophrenic); *see also Hoffenburg v. Bumb*, 446 F. App'x 394, 400 n.4 (3d Cir. 2011) (observing that sanctions are inappropriate if the record before the court as to the litigant's mental health offers explanation for actions in proceeding).

II. The district court failed to properly consider and balance the factors provided by the Third Circuit in *Poulis v. State Farm Fire & Casualty Co.* prior to dismissing Mr. Mondelli's claims.

"[D]ismissal with prejudice is only appropriate in *limited* circumstances and doubts should be resolved in favor of reaching a decision on the merits." *Emerson v. Thiel Coll.*, 296 F.3d 184, 190 (3d Cir. 2002) (emphasis added). Although courts defer to the district court's discretion when considering whether to dismiss a plaintiff's claim, the Third Circuit has instructed district courts to balance the following six factors to decide whether dismissal—a notedly extreme sanction—is appropriate: (1) the extent of the party's personal responsibility, (2) the prejudice to

the adversary caused by the failure to meet scheduling orders and respond to discovery, (3) a history of dilatoriness, (4) whether the conduct of the party or the party's counsel was willful or in bad faith, (5) the effectiveness of sanctions other than dismissal, and (6) the meritoriousness of the claim. *Poulis*, 747 F.2d at 868-70 (3d Cir. 1984). No single *Poulis* factor is dispositive. *See Mindek v. Rigatti*, 964 F.2d 1369, 1373 (3d Cir. 1992) (reasoning that "*Poulis* did not provide a magic formula whereby the decision to dismiss or not to dismiss a plaintiff's complaint becomes a mechanical calculation easily reviewed" by a court). Because the district court improperly weighed the *Poulis* factors when it dismissed Mr. Mondelli's claim below, the decision of the district court should be reversed.

First, when conducting a *Poulis* factor balancing test, a court must weigh the extent of the party's personal responsibility for delaying the proceedings. *Poulis*, 747 F.2d at 868. In the instant case, the district court did not properly consider the difficulties of Mr. Mondelli's mental illness when it found that he was personally responsible for his failure to prosecute. As discussed *supra* Part I.a., there was extensive evidence of Mr. Mondelli's mental incompetency, which the district court ignored when it found him personally responsible. While the *Poulis* court reasoned that "a client cannot always avoid the consequences of the acts or omissions of its counsel," it is clear that if the client is incompetent to pursue the litigation without a guardian, the client cannot be held personally responsible for not prosecuting their case. *Id.* (citing *Link v. Wabash Railroad*, 370 U.S. 626, 633 (1962)). Despite the

evidence presented to the district court detailing Mr. Mondelli's struggle with his mental health, the court did not consider these submissions as sufficient proof of mental incompetence, discounted the various submissions before it as inadequate to explain the delay in complying with discovery requests, and improperly found him personally responsible for that delay. Because the district court failed to properly account for Mr. Mondelli's inability of handling this matter on his own, thus failing to properly measure his degree of personal responsibility, and excused the shortcomings of Mr. Rosellini, the district court improperly weighed the first *Poulis* factor.

The second *Poulis* factor requires a court to contemplate the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery. *Poulis*, 747 F.2d at 868. In Mr. Mondelli's case, the district court overstated the prejudice to Defendants caused by Mr. Mondelli's inability to assist in discovery. Although the district court notes that five years have passed, this does not prejudice the nursing home. Mr. Mondelli commenced his suit in 2016 and Defendants were put on notice that all documents relating to this matter could be demanded in discovery. Thus, these documents should have been placed on a litigation hold. *See Fujitsu Ltd. v. Fed. Express Corp*., 247 F.3d 423, 436 (2d Cir. 2001) (stating that when a party "has notice that the evidence is relevant to litigation or ... should have known that the evidence may be relevant to future litigation," that party has a duty to institute a litigation hold); *see also Mosaid Techs. Inc. v. Samsung Elecs. Co*., 348

F. Supp. 2d 332, 339 (D.N.J. 2004) (noting that "[t]he duty to preserve potentially relevant evidence is an affirmative obligation that a party may not shirk"). Additionally, Defendants could have taken employee statements and gathered other evidence at this time. *Mosaid Techs. Inc.,* 348 F. Supp. 2d at 339.

Moreover, this matter was dismissed at the preliminary pleading stage. Reopening the underlying matter would not cause Defendants to incur any sort of duplicative expense, such as producing previous discovery responses, because none were ever initially produced due to Mr. Mondelli's inability to assist his attorney in the discovery process. In the same vein, because this matter was dismissed in its preliminary stage, no duplicative filings would occur that would impose any additional expense. Put simply, if Mr. Mondelli's case is reopened, the only expenses Defendants would incur are those which they would have incurred had the district court fulfilled its duty of inquiry, recognized Mr. Mondelli's incompetence, and would have taken the action necessary to protect his rights and interests in the litigation. For these reasons, the district court failed to properly weigh the second *Poulis* factor.

Next, a court must examine whether there is a history of dilatoriness. *Poulis*, 747 F.2d at 868. Had the district court properly appointed a guardian based on the overwhelming evidence of Mr. Mondelli's mental incapacity, the proceedings below may have moved along much more expeditiously. Instead, the district court improperly characterized Mr. Mondelli's illness-related difficulties and Mr.

Rosellini's resulting failures to provide the required discovery in prosecuting this case as "dilatoriness." In examining dilatoriness, the *Poulis* court stated "if compliance is not feasible, a timely request for an extension should be made to the court." *Id.* In the instant case, Mr. Rosellini made several timely requests for extensions. The district court acknowledged that Mr. Rosellini made these requests, but it did not weigh this properly when it accused Mr. Mondelli of dilatoriness. Furthermore, the district court acknowledged Mr. Rosellini's difficulties in trying to reach Mr. Mondelli, but dismissed this obstacle and simply alleged that "plaintiff has not engaged in discovery." J.A. at 020:lns 5-6 (Telephone Conference Tr.). Because the district court failed to appoint Mr. Mondelli a guardian and improperly characterized Mr. Mondelli's illness-related difficulties and Mr. Rosellini's resulting failures during the proceedings below as "dilatoriness," the district court improperly weighed the third *Poulis* factor.

The *Poulis* factors also required the district court to analyze whether the conduct of the party or of the attorney was willful or in bad faith. *Poulis*, 747 F.2d at 868. The *Poulis* court stressed the existence of "contumacious" behavior, which created a clearly separate factor from the dilatoriness standard laid out above. *Id*. In the instant case, the district court found that Mr. Rosellini had not acted in bad faith and went so far as to describe Mr. Rosellini as a zealous advocate for his client. J.A. at 020:lns 9-16 (Telephone Conference Tr.). Moreover, there is nothing in the record to suggest that Mr. Mondelli acted in bad faith. Instead, the record shows that he was

unable to assist in the prosecution because of his incompetence. Because the court found no evidence that Mr. Rosellini acted in bad faith and because Mr. Mondelli's mental incompetence eliminates his capacity to act in bad faith, the district court did not properly weigh the fourth *Poulis* factor.

The district court also failed to properly consider the fifth *Poulis* factor, which requires an analysis of the effectiveness of sanctions other than dismissal. *Poulis*, 747 F.2d at 868. Under the *Poulis* court's reasoning that "dismissal must be a sanction of last, not first, resort," *id.* at 869, the court must examine alternative sanctions before resorting to the ultimate sanction of dismissal. *Id*. at 868. Here, the district court believed that Mr. Mondelli's failure to comply with court orders suggested that he abandoned his claim and that, therefore, dismissal was the only appropriate sanction. J.A. at 020:lns 17-23 (Telephone Conference Tr.). However, at no point did the court address Mr. Mondelli's mental illness, nor did the court consider whether his mental illness warranted a competency hearing. Not only was this appropriate alternative available, it was mandated by Rule 17 and Third Circuit precedent, as explained *supra* Part I. Because the district court subjected Mr. Mondelli to the notedly harsh sanction of dismissal without first considering alternative sanctions, the district court improperly weighed the fifth *Poulis* factor.

Finally, pursuant to the sixth *Poulis* factor, a district court should evaluate the meritoriousness of the claim. *Poulis*, 747 F.2d at 868. A court must find a "claim . . . meritorious when the allegations of the pleadings, if established at trial, would

support recovery by plaintiff." *Id*. at 870. In the instant case, the district court determined that Mr. Mondelli's ADA claim was not meritorious by reasoning that Title II of the ADA only allows for injunctive relief and that no such relief is available to the plaintiff at this time.[7] 42 U.S.C. § 12188 (2018); J.A. at 020:ln 24-021:ln 4 (Telephone Conference Tr.). As it appears that the claim is actually under Title III of the ADA, monetary damages would be available upon the intervention and request of the Attorney General.[8] Because Mr. Rosellini did not reply to Defendants' Brief in Opposition to Plaintiff's Motion to Extend Time to Reopen Case and Mr. Mondelli is incapable of replying without assistance, there was never a full analysis of the basis for Mr. Mondelli's ADA claim or the availability of

[7] Title II of the ADA applies to state and local government actors. 42 U.S.C. § 12132 (2018). Some courts have found that monetary damages are available under Title II. *See, e.g.*, *Hamer v. City of Trinidad,* 924 F.3d 1093, 1108-09 (10th Cir. 2019) (noting that monetary damages resulting from intentional discrimination under Title II of the ADA are the exception to the general rule that no monetary damages are available); *Johnson v. City of Saline*, 151 F.3d 564, 573 (6th Cir. 1998) (holding that "compensatory damages are available under Title II of the ADA, by extension from their availability under the Rehabilitation Act and Title VI"); *Scharffenberger v. Kirkland* (In re Allegheny Health, Educ. & Research Found.), 321 B.R. 776 (Bankr. W.D. Pa. 2005) (acknowledging that actions brought under Title II are eligible for monetary damages).

[8] Title III of the ADA applies to all places of public accommodation, including Defendant Berkeley Heights. 42 U.S.C. § 12182(a) (2018). Under Title III, private individuals aggrieved by places of public accommodation can obtain monetary damages, but only if the Attorney General, after bringing a civil suit against a place of public accommodation, requests such damages on behalf of the aggrieved persons. *See* 42 U.S.C. § 12188(b)(2)(B) (2018); *see also* 28 C.F.R. § 36.504 (LexisNexis 2020).

monetary relief. Further, the district court declined to find that Mr. Mondelli's claim for intentional infliction of emotional distress was without merit. Accordingly, the district court failed to properly weigh the final *Poulis* factor.

This Court has recognized that "dismissal is a drastic sanction and should be reserved for those cases where there is a clear record of delay or contumacious conduct by the plaintiff." *Donnelly v. Johns-Manville Sales Corp.*, 677 F.2d 339, 342 (3d Cir. 1982). There is no evidence that Mr. Mondelli purposefully attempted to delay litigation. Instead, there is verifiable evidence indicating that he was simply incapable of timely complying as a result of his mental illness. *Cf. Everett v. Fieldworks, LLC*, 822 F. App'x 145, 147 (3d Cir. 2020) (reasoning that dismissal was supported by the fact that the plaintiff had a "strategic interest in delaying the trial while he sought to relitigate the District Court's pretrial orders"). The district court failed to give any weight to Mr. Mondelli's mental deficiencies when it conducted the *Poulis* balancing test. As a result, the district court's dismissal of Mr. Mondelli's case was based on an improper and truncated analysis of the *Poulis* factors and should, therefore, be reversed.

CONCLUSION

Because the district court was presented with abundant verifiable evidence of Mr. Mondelli's incompetence but failed to take proper action, we respectfully ask that this Court remand the district court's ruling with an instruction to hold a competency hearing pursuant to Fed. R. Civ. P. 17(c).

Respectfully submitted,

/s/ Michael L. Foreman
Michael L. Foreman
Court-Appointed *Amicus Curiae* Counsel
PENN STATE LAW, CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
University Park, PA 16802
(814) 865-3832
mlf25@psu.edu
PA Bar 30231
Dated: December 16, 2020

CERTIFICATION OF BAR MEMBERSHIP

I certify that I, Michael L. Foreman, am admitted to practice before the United States Court of Appeals for the Third Circuit.

/s/ Michael L. Foreman
Michael L. Foreman
Court-Appointed *Amicus Curiae* Counsel
Penn State Law, Civil Rights Appellate Clinic
329 Innovation Blvd., Suite 118
University Park, PA 16802
(814) 865-3832
mlf25@psu.edu
PA Bar 30231
Dated: December 16, 2020

CERTIFICATION OF COMPLIANCE WITH FEDERAL RULE 32(a)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,521 words, including the Statement of Interest of *Amicus Curiae* and excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface and type style requirements of Rules 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 12-point Times New Roman Font.

/s/ Michael L. Foreman
Michael L. Foreman
Court-Appointed *Amicus Curiae* Counsel
PENN STATE LAW, CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
University Park, PA 16802
(814) 865-3832
mlf25@psu.edu
PA Bar 30231
Dated: December 16, 2020

CERTIFICATION OF COMPLIANCE WITH 3d CIR. L.A.R. 31.1(c)

In accordance with the Third Circuit Rule 31.1(c), I certify that (1) the electronic brief being filed is identical to the paper copies being submitted, and (2) that a virus protection program Symantec has been run on the file and no virus was detected.

/s/ Michael L. Foreman
Michael L. Foreman
Court-Appointed *Amicus Curiae* Counsel
PENN STATE LAW, CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
University Park, PA 16802
(814) 865-3832
mlf25@psu.edu
PA Bar 30231
Dated: December 16, 2020

CERTIFICATION OF SERVICE

I certify that the original and seven copies of this brief, with Volume 1 of the Joint Appendix attached, are being sent to the Clerk of the Court today, December 16, 2020, along with four copies of Volume 2 of the Joint Appendix, by United Parcel Service (UPS) Next Day Delivery. I further certify in addition to being served via the court's electronic system one copy of the Brief and Volume 2 of the Joint Appendix are being served today, December 16, 2020, on both the respondent, Berkeley Heights Nursing & Rehabilitation Center via Counsel Mr. Walter F. Kawalec, III, Esq., Marshall, Dennehey, Warner, Coleman and Goggin, 15000 Midlantic Drive, Suite 200, P.O. Box 5429, Mt. Laurel, NJ 08054, and upon Appellant, Victor Mondelli, by United Parcel Service (UPS) Next Day Delivery.

I certify under penalty of perjury that the foregoing statements by me are true.

/s/ Michael L. Foreman
Michael L. Foreman
Court-Appointed *Amicus Curiae* Counsel
PENN STATE LAW, CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
University Park, PA 16802
(814) 865-3832
mlf25@psu.edu
PA Bar 30231
Dated: December 16, 2020

No. 18-2193

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

VICTOR MONDELLI,

Plaintiff-Appellant,

v.

BERKELEY HEIGHTS NURSING & REHABILITATION CENTER; ET AL.,

Defendant-Appellee.

On Appeal from the United States District Court
For the District of New Jersey,
Civil Action No. 2:16-cv-01569-ES-SCM
Judge Esther Salas, Presiding

VOLUME 1 OF THE JOINT APPENDIX (JA001 to JA021)

Michael L. Foreman
PENN STATE LAW, CIVIL RIGHTS APPELLATE CLINIC
329 Innovation Blvd., Suite 118
University Park, PA 16802
Phone: (814) 865-3832
Fax: (814) 865-3851
mlf25@psu.edu
PA Bar 30231

Court-Appointed *Amicus Curiae* Counsel

JOINT APPENDIX TABLE OF CONTENTS

VICTOR MONDELLI (PRO SE)
P.O. Box 236
Green Village, N.J. 07935

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VICTOR MONDELLI, Plaintiff, v. BERKELEY HEIGHTS NURSING & REHABILITATION CENTER, MARINA FERRER, DIANE WILVERDING AND JOHN/JANE DOES 1 through 5, Defendants.	CIVIL ACTION Case No. : 2:16-cv-01569-ES-SCM

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Plaintiff Victor Mondelli, appeals to the United States Court of Appeals for the Third Circuit from the Order of the District Court for the District Court of New Jersey, issued and entered on April 27, 2018 (Docket Entry 26).

The aforementioned Order denied Plaintiff's Motion to Reopen Case and Dismissed the Case With Prejudice.

The issues in this appeal include, *inter alia*, the Plaintiff's rights to pursue an Americans with Disabilities Act claim against a nursing home that restricted his access to visit his ailing mother due to his disabilities, and claims for intentional infliction of emotional distress. This appeal also involves the failure of the District Court to consider and accommodate Plaintiff's disability which caused delays for his prosecution of this case, as wells as the Court's delegating decision-making to the Magistrate Judge without consent of Plaintiff pursuant to Federal Rule of Procedure 73.

The parties to the Order and/or Opinions appealed from and the names and addresses of their respective attorneys are as follows:

Defendants BERKELEY HEIGHTS NURSING & REHABILITATION CENTER, MARINA FERRER, and DIANE WILVERDING

Represented by
ROSALIND B. HERSCHTHAL
Marshall Dennehey Warner Coleman & Goggin
425 Eagle Rock Avenue
Suite 302
Roseland, NJ 07068
973-618-4100
Fax: 973-618-0685
Email: rbherschthal@mdwcg.com

May 25, 2018

VICTOR MONDELLI

Not for Publication

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

VICTOR MONDELLI, **Plaintiff,** **v.** **BERKELEY HEIGHTS NURSING & REHABILITATION CENTER, et al.,** **Defendants.**	**Civil Action No. 16-1569 (ES) (SCM)** **ORDER**

SALAS, DISTRICT JUDGE

Pending before the Court are Plaintiff Victor Mondelli's motions to extend time to reopen this case, or alternatively, to reopen this case (D.E. No. 20) and to recuse the Hon. Steven C. Mannion, U.S.M.J. (D.E. No. 21); and the Court having considered the parties' submissions and having conducted a telephonic oral argument on April 27, 2018; and for the reasons set forth on the record on April 27, 2018; and for other good cause shown,

IT IS on this 27th day of April 2018,

ORDERED that Plaintiff's motion to extend time to reopen the case, or alternatively, to reopen the case (D.E. No. 20) is DENIED; and it is further

ORDERED that Plaintiff's motion to recuse Magistrate Judge Mannion (D.E. No. 21) is DENIED; and it is further

ORDERED that Plaintiff's Complaint is DISMISSED *with prejudice*; and it is further

ORDERED that the Clerk of Court shall CLOSE this case.

s/Esther Salas
Esther Salas, U.S.D.J.

Not for Publication

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

VICTOR MONDELLI, **Plaintiff,** **v.** **BERKELEY HEIGHTS NURSING & REHABILITATION CENTER, et al.,** **Defendants.**	**Civil Action No. 16-1569 (ES) (SCM)** **ORDER**

SALAS, DISTRICT JUDGE

Pending before the Court are Plaintiff Victor Mondelli's motions to extend time to reopen this case, or alternatively, to reopen this case (D.E. No. 20) and to recuse the Hon. Steven C. Mannion, U.S.M.J. (D.E. No. 21); and the Court having considered the parties' submissions and having conducted a telephonic oral argument on April 27, 2018; and for the reasons set forth on the record on April 27, 2018; and for other good cause shown,

IT IS on this 27th day of April 2018,

ORDERED that Plaintiff's motion to extend time to reopen the case, or alternatively, to reopen the case (D.E. No. 20) is DENIED; and it is further

ORDERED that Plaintiff's motion to recuse Magistrate Judge Mannion (D.E. No. 21) is DENIED; and it is further

ORDERED that Plaintiff's Complaint is DISMISSED *with prejudice*; and it is further

ORDERED that the Clerk of Court shall CLOSE this case.

s/Esther Salas
Esther Salas, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VICTOR MONDELLI,

Plaintiff,

v.

BERKELEY HEIGHTS NURSING & REHABILITATION CENTER, MARINA FERRER, DIANE WILVERDING and JOHN/JANE DOES 1 THROUGH 5,

Defendants.

CIVIL ACTION NUMBER:

2:16-cv-01569-ES-SCM

TELEPHONE CONFERENCE

Pages 1 - 16

Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07101
Friday, April 27, 2018
Commencing at 2:18 p.m.

B E F O R E: **THE HONORABLE ESTHER SALAS,**
UNITED STATES DISTRICT JUDGE

Mary Jo Monteleone, Official Court Reporter
maryjomonteleone@gmail.com
(973) 580-5262

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

A P P E A R A N C E S:

KENNETH ROSSELLINI, ATTORNEY AT LAW
BY: KENNETH J. ROSELLINI, ESQUIRE
636 Van Houten Avenue
Clifton, NJ 07013
(973) 998-8375
kennethrosellini@gmail.com
For the Plaintiff

MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN
BY: ROSALIND B. HERSCHTHAL, ESQUIRE
425 Eagle Rock Avenue, Suite 302
Roseland, NJ 07068
(973) 618-4100
rbherschthal@mdwcg.com
For the Defendant

(PROCEEDINGS held in open court before The Honorable ESTHER SALAS, United States District Judge, at 2:18 p.m.)

THE COURT: We're on the record in the matter of *Mondelli v. Berkeley Heights Nursing and Rehabilitation Center*, et al., Civil Action No. 16-1569.

Let me have appearances by counsel, please.

MR. ROSELLINI: Good afternoon, your Honor. Kenneth Rosellini, Attorney at Law, on behalf of the Plaintiff Victor Mondelli.

MS. HERSCHTHAL: Good afternoon, your Honor. Rosalind Herschthal, Marshall Dennehey, et al., on behalf of the Defendant Berkeley Heights, et al.

THE COURT: All right, counsel. Let me just go over the procedural history here because I think, quite frankly, the record needs to be very clear what has transpired.

So this complaint first comes in on March 21st of 2016. The defendants file an answer. That's filed on August 18, 2017.

On November 17, 2016, Judge Mannion held a Rule 16 conference and entered a scheduling order requiring Rule 26 disclosures, initial disclosures to be, obviously, done or served by December 10th of 2016.

Interrogatories, request for documents and request to admit needed to be done by December 30th of 2016.

January 3rd, 2017, defendants sent a follow-up letter

requesting plaintiff's Rule 26 disclosures.

Plaintiff failed to provide any Rule 26 disclosures or discovery responses, which necessitated counsel to follow up.

On January 20th of 2017, Judge Mannion held a second case management conference. That was done, I believe, telephonically. And plaintiff requested more time to respond to discovery.

Judge Mannion granted plaintiff more time and plaintiff agreed to provide all outstanding discovery by February 3rd, 2017, over a year ago.

On February 3rd, 2017, guess what, plaintiff again failed to provide discovery.

On March 29th, 2017 (Docket Entry Number 15) Judge Mannion held a third case management conference. Plaintiff's counsel stated he was not able to get in touch with his client and again requested more time. Judge Mannion gave plaintiff 14 days to produce all outstanding discovery or consider administrative termination of the proceed proceeding.

On April 12, 2017, the 14-day deadline expired. Plaintiff again failed to provide any outstanding discovery due and owing to defense counsel.

On April 25th, 2017, Docket Entry 16, defendant sought leave to file both a motion to dismiss for failure to provide discovery and a motion for summary judgment.

On May 3rd, 2017, Docket Entry 17, the Court was forced to enter an order to show cause requiring plaintiff to show, in writing, why sanctions should not be imposed against him, pursuant to Federal Rules of Civil Procedure 16(f) and 37.

The Court stated -- at the time, Judge Mannion stated that possible sanctions, including attorney's fees and costs, as well as a dismissal, could obviously -- well, let me state it a different way.

The Court, clearly, was, in his effort, trying to warn plaintiff's counsel that sanctions as well as a dismissal of the complaint could follow if there was continued refusal to provide the necessary discovery.

Plaintiff was directed to respond, in writing, by May 18, 2017.

May 19, 2017: Plaintiff responded to the order to show cause and requested an administrative termination of the case for 180 days.

At the time, plaintiff claimed in his certification, that he had physical and mental problems that prevented him from being able to prosecute the case. Plaintiff also claimed a municipal judge found him incompetent to stand trial, but provided not documentary support for these assertions.

On May 22nd, 2017 (that's Docket Entry Number 19) Judge Mannion entered an order administratively terminating

the case and giving plaintiff 180 days to file dismissal papers or to move to reopen.

Well, sadly, on November 20, 2017, the 180-day period expired.

On November 20th, 2017 (Docket Entries 20 and 21) plaintiff filed motions to extend the time to reopen the case or, in the alternative, to reopen the case; and, in addition, to recuse Judge Mannion. For what reason I'm not quite sure.

On December 18, 2017, (Docket Entry 23) defendant opposes plaintiff's motion to reopen.

So let's start with -- which is not even clear to me, what Judge Mannion did that would require plaintiff to file a recusal motion when His Honor, by review of the docket sheet, clearly was working with plaintiff to give plaintiff the time that plaintiff needed, to give plaintiff additional time, to work with plaintiff.

I don't even know what the basis for the motion to recuse Judge Mannion could possibly be.

Let me hear from plaintiff's counsel, not that I need it. But what did Judge Mannion do that would require this Court to remove him from the action?

MR. ROSELLINI: Your Honor, as set forth in Mr. Mondelli's certification, affidavit that was filed on November 20, 2017, when I was able to discuss with him the order to show cause that was issued on May 3rd, 2017, in which

the Court indicated that it was considering sanctions against Mr. Mondelli for failure to provide the discovery or to proceed with the matter, Mr. Mondelli took that as something that was being levied against him without taking into consideration his health condition and the fact that he has mental health disorders; and he's been unable, because of his health, to physically proceed with the case.

THE COURT: I think that I take issue. The docket speaks volumes that that is not the case. The docket shows that the judge continued to extend deadlines, continued to work with Mr. Mondelli. And there is no evidence in this record at all that Mr. Mondelli he was somehow being treated differently.

We have rules of discovery. We have thousands of actions that are filed in our district. Our docket is -- obviously speaks for itself, if one wanted to care to look at the current docket, the number of filings in our district on a yearly basis.

We don't have the luxury of continuing to, in a lot of ways, extend these deadlines just because some people are having trouble. And the trouble they're having, by the way, they're not even providing the Court with the documentary support to establish that these, indeed, are the troubles that they are having.

So there is nothing in this record that would ever,

at this point, support this Court ruling to remove Magistrate Judge Mannion from the case. And therefore, I am denying the motion to recuse Judge Mannion, for all the reasons I just stated a moment ago. So let's just dispense with that. Motion denied.

Now, we move forward with what is going on in this case because I am trying to understand why I should, at this point in time, reopen a case where it is clear there is some reason the plaintiff is unable to prosecute this matter.

And I'd like to start out by asking you, Mr. Rosellini, what's the reason for your client's inability to provide responses to discovery and why does he need a power of attorney if you represent him? Two questions there.

MR. ROSELLINI: Well, it says that he needs a power of attorney -- he needs a power of attorney to proceed in this case just because right now, in particular, there was a municipal court proceeding that was transferred to Fanwood, I believe it was Fanwood Municipal Court, because Mr. Mondelli was selling firewood out of his home, which he asserted that he had the authority to do for many years.

In connection with that proceeding, that the court actually determined that he didn't have the mental capacity to move forward with that case. He's also been very difficult, unfortunately, to communicate with him.

He's a long-standing client of mine going back to

2007. I'm trying to advocate for him. He wants to pursue the case. It's just been various mental health issues in connection with that particular proceeding. There was an issue with the psychologist that he had had for many years. And he lost -- that relationship was affected by that proceeding and he's been very hard to deal with.

So in order to -- I can't sign documents for him. I don't feel I could file Rule 26 disclosures or certainly answer interrogatories or document requests without the authority of the client. And I believe he is competent enough to choose, sort of, a power of attorney to make those kinds of decisions, but I don't believe, as his attorney, I could do that. I think it's something that he'd have to get through a power of attorney, but he'd still have to sign things under oath, ultimately.

THE COURT: Counsel, I get you're in an untenable position. I get it. Because it's a long-standing client, you've known him for a while, you're trying to work with him.

But you're also an officer of the court, right? You're a lawyer. You appear before us often, both in district court and bankruptcy court.

MR. ROSELLINI: That's correct.

THE COURT: You know what your responsibilities are. And if a client is not providing you information that you need and is not communicating with you as you need him to

communicate with you in order to prosecute this matter, don't you have an obligation, sir, to at some point file a motion to withdraw as counsel? Isn't that -- I mean at some point in time isn't that what you need to do?

MR. ROSELLINI: If my client is unable to proceed, I'm doing the best I can to advocate for him to keep his options open. If the Court determines that he has exhausted them, then that's the determination by this court.

If I withdraw as counsel, he'll have no representation and no capacity to even attempt to proceed with this case, which is why --

THE COURT: But Mr. -- is it Rosellini?

MR. ROSELLINI: Rosellini, yes.

THE COURT: Mr. Rosellini, what am I supposed to do? What am I supposed to do? I can't leave this open indefinitely. I can't.

MR. ROSELLINI: Well, I would ask for one more extension.

THE COURT: No, no.

MR. ROSELLINI: One more deadline.

THE COURT: No, you've had enough. You've got to decide. You have to decide.

If your client is not mentally fit, I mean -- and again, I have no proof. That's what you're saying as an officer of the court. I mean you're telling me some other

municipal judge ruled. I mean this isn't, obviously, something that at this point -- I have absolutely no record from the Fanwood Municipal Court finding that your client is incompetent to stand trial.

If there was a competency determination -- I'm not even sure, quite frankly, that a competency determination can be made by a municipal court judge as it relates to some firewood that he may or may not have been selling out of this home.

Competency determinations are made in superior court. If there's an issue of competency, I need to see something more than an attorney's argument, after there have been several attempts to get you and your client to comply with basic standard discovery obligations.

MR. ROSELLINI: I understand that, your Honor. But I don't see how a municipal court judge doesn't have authority in the State of New Jersey to make a competency determination in connection with --

THE COURT: Great -- then, you know what, then provide me with the basic evidence that says the Fanwood Municipal Court judge even did that. Where is that? Where is that in the form of an affidavit or an exhibit?

MR. ROSELLINI: Mr. Mondelli has represented that. I appeared at that case, once he made -- when the court --

THE COURT: Counsel, counsel, counsel, you and I both

know attorney argument is not sufficient when it comes to matters such as the one I am confronted with right now.

You had an obligation to provide me the necessary evidence in order for me to be able to rule on the issue before me. You didn't do that.

MR. ROSELLINI: Your Honor, the certification that was filed on May 19th includes documentation of his medical history, including matters, at that time, relatively recent letters from Robert Wood Johnson Medical School and some of his treatment. This is not without any documentation.

THE COURT: No. Yeah, you gave me Morristown Medical Center discharge instructions. But now you're trying to tell me that the municipal judge's -- the Fanwood municipal judge's determination as to competency is binding on me.

MR. ROSELLINI: Well, that's the one issue. Then I could certainly get the --

THE COURT: No -- time -- counsel, enough is enough.

Does the defense counsel want to put anything on the record?

MS. HERSCHTHAL: My only comment in reply, your Honor, to the issue with the municipal court, there is no letter about his mental competency to stand trial from all of the doctor notes that they provided.

There were letters that said he was ill, he had asthma, et cetera. I went through every letter, as I'm sure

the Court did, and there was nothing about his competency to stand trial, either as a defendant or to represent himself. Period.

So I'm befuddled, which was the only thing that I was going to raise today, but both the Court and Counsel Rosellini explained it. But there's nothing there.

And as the Court well knows, I have a client, too, who is prejudiced by this entire delay.

And no disrespect intended, counsel could have provided discovery without a power of attorney for his client. At least that's my understanding of how we produce discovery.

That being said, I have nothing to add to the Court's comments.

THE COURT: All right. I'm prepared to rule.

Pending before the Court is plaintiff's request to extend time to reopen the case or, in the alternative, to reopen the case. I have considered his submissions as well as defendant's opposition and I am now prepared to rule.

For the following reasons, plaintiff's request is denied and plaintiff's complaint is dismissed with prejudice.

Under Third Circuit law, courts consider six factors when deciding whether to dismiss an action for failure to prosecute. Those factors are: (1) the extent of the party's personal responsibility; (2) prejudice to the adversary; (3) history of dilatoriness; (4) willful or bad faith conduct of

an attorney; (5) alternative sanctions; (6) meritoriousness of the claim or defense. *Poulis v. State Farm Fire and Casualty Company*, 747 F.2nd 863-868 (Third Circuit 1984).

No single factor is dispositive and dismissal may be appropriate, even if some of the factors are not met. *See Mindek v. Rigatti*, 964 F.2d 1369, 1373 (Third Circuit 1992).

Defendants addressed each factor in their opposition, but plaintiff did not submit a reply or otherwise respond to defendant's arguments.

First, plaintiff is personally responsible for his failure to prosecute. Plaintiff's counsel has repeatedly advised the Court that he has been unable to answer discovery requests because he has not been able to contact his client.

To date, plaintiff has failed to respond to defendant's discovery request despite multiple court orders requiring him to do so. And plaintiff's submissions do not adequately explain why he has failed to respond to discovery requests or otherwise prosecute the case.

Second, defendants have been prejudiced by plaintiff's failure to prosecute. As defendants argue in opposition, plaintiff's claims stem from incidents that occurred nearly five years ago. In addition, the Berkeley Heights Nursing and Rehabilitation Center was sold in 2016. With each passing day, defendants are losing the ability to gather documents and witnesses in its defense of plaintiff's

claims.

Third, plaintiff has shown a history of dilatoriness. The parties were ordered to exchange Rule 26 disclosures on December 10, 2016, and other discovery requests on December 30th, 2016. To date, plaintiff has not engaged in discovery. Indeed, at each status conference before Magistrate Judge Mannion, plaintiff requested more time to respond to the request but each time failed to do so.

Fourth, the Court declines to find at this time that plaintiff's counsel has engaged in willful or bad faith conduct, and, in fact, counsel is participating in today's call, and despite the procedural history and despite the facts that are clearly known and evident from the record, counsel continues to advocate for his client. So I, obviously, would not enter or even rationalize that the fault lies on plaintiff's counsel.

Fifth, the Court is not convinced that any sanction other than dismissal is appropriate. Plaintiff's failure to comply with Court orders or adequately explain his ability to do so suggest he has abandoned his claim. Further, the Court does not think monetary sanctions, such as fines, costs or attorneys fees would spur plaintiff to resume actively litigating the case.

Sixth, the Court does not view plaintiff's ADA claim as meritorious. As defendants correctly point out, Title 2 of

the ADA allows for injunctive relief only. Because plaintiff's mother passed away in May of 2015, no such relief is available to him. *Anderson v. Macys, Inc.*, 943 F. Supp. 2d 531, 538 (Western District PA 2013).

But the Court declines to say at this time that plaintiff's claim for intentional infliction of emotional distress is not meritorious, even though such claims in New Jersey must meet an elevated threshold that is only satisfied in extreme cases. *See Fahnbulleh v. Steneck*, 218 West Law 1610692 at 11 (District of New Jersey April 23, 2018).

The Court therefore finds that the *Poulis* factors weigh in favor of dismissal. Accordingly, based on the foregoing and the reasons already stated on the record, the Court will dismiss plaintiff's complaint with prejudice.

That is my ruling. I appreciate counsel calling in today and we'll issue an order memorializing said ruling.

Thank you very much, everyone. Have a good day.

(Proceedings concluded at 2:40 p.m.)

- - - - - - - - - - - - - - -

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/ Mary Jo Monteleone, CCR, CRCR, RPR
Court Reporter

April 24, 2019
Date