UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1506

ANDREA RENE'E TOOTLE,

Plaintiff - Appellant,

v.

BEAUX ART INSTITUTE OF PLASTIC SURGERY; DR. NIA BANKS,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. James K. Bredar, Chief District Judge. (1:17-cv-01684-JFM)

Submitted: September 20, 2018 Decided: October 4, 2018

Before NIEMEYER, KING, and FLOYD, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Andrea Renée Tootle, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Andrea Renée Tootle seeks to appeal the district court's order denying her Fed. R. Civ. P. 60(b) motion to reconsider the dismissal without prejudice of her civil action. We dismiss the appeal for lack of jurisdiction because the notice of appeal was not timely filed.

Parties are accorded thirty days after the entry of the district court's final judgment or order to note an appeal, Fed. R. App. P. 4(a)(1)(A), unless the district court extends the appeal period under Fed. R. App. P. 4(a)(5), or reopens the appeal period under Fed. R. App. P. 4(a)(6). "[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

The district court's order was entered on the docket on April 2, 2018. The notice of appeal was filed on May 3, 2018, one day late. Because Tootle failed to file a timely notice of appeal or obtain an extension or reopening of the appeal period, we dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

FILED: October 4, 2018

UNITED STATES COURT OF APPEALS
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Defendants - Appellees

J U D G M E N T

In accordance with the decision of this court, this appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANDREA RENE'E TOOTLE,	*	
Plaintiff	*	
v.	*	Civil Action No. JFM-17-1684
BEAUX ART INSTITUTE OF PLASTIC SURGERY,	*	
DR. NIA BANKS,	*	
Defendants	*	
	***	

ORDER

On June 20, 2017, self-represented Plaintiff Andrea Rene'e Tootle, a Maryland resident, filed an action seeking money damages and alleging that Dr. Nia Banks, a plastic surgeon at the Beaux Art Institute of Plastic Surgery in Lanham, Maryland, committed medical malpractice during surgery performed on June 28 and August 13, 2012. The action, construed as a medical malpractice claim, was dismissed without prejudice on July 6, 2017, for lack of federal or diversity jurisdiction. ECF Nos. 3 and 4.

Tootle seeks reconsideration of that decision, stating that mediation before the Health Care Alternative Dispute Resolution office is now completed. ECF No. 5. Tootle implies mediation was not successful because she was unable to obtain an expert witness to testify on her behalf. *Id.*

As the Fourth Circuit has pointed out, the Federal Rules of Civil Procedure do not provide for a post-judgment "motion for reconsideration." Rather, "they provide for a Rule 59(e) motion to alter or amend the judgment or a Rule 60(b) motion for relief from judgment." *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 470 n.4 (4th Cir. 2011). This Circuit has squarely

held that such motion should be analyzed under Rule 59(e) only if it was filed no later than 28 days after entry of the adverse judgment and seeks to correct that judgment. *See Robinson v. Wix Filtration Corp. LLC*, 599 F.3d 403, 412 (4th Cir. 2010) (citing *Small v. Hunt*, 98 F.3d 789, 797 (4th Cir. 1996)); *see also Vaughan v. Murray*, No. 95-6081, 1995 WL 649864, at *3 n.3 (4th Cir. Nov. 6, 1995). If filed after the 28-day period has elapsed, the motion is considered under Rule 60(b). Tootle's Motion was filed nearly nine months after dismissal; thus, reconsideration is analyzed pursuant to Federal Rule of Civil Procedure 60(b).

Rule 60 permits relief from a judgment or order of this Court in order to correct clerical mistakes, oversights, and omissions. Fed. R. Civ. Proc. 60(a). A party may also be granted relief from judgment on motion for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; (6) any other reason that justifies relief. Fed. R. Civ. Proc. 60(b). It is within this Court's discretion to grant or deny a motion filed pursuant to Rule 60(b). *See Nat'l Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 265 (4th Cir. 1993).

Tootle asks that her action be reopened because she has completed administrative review of her malpractice claim, in compliance with Maryland law. The Maryland Health Care Malpractice Claims Act ("the Act"), Md. Code Ann., Cts. & Jud. Proc. § 3-2A-01, *et seq.*, requires that all claims against a health care provider for medical injury where certain monetary damages are sought must be submitted to the Health Care Alternative Dispute Resolution Office as a condition precedent to any judicial action. *See id.* at § 3-2A-02; *see also Roberts v. Suburban Hospital Assoc., Inc.*, 73 Md. App. 1, 3 (1987); *Davison v. Sinai Hospital of Balt. Inc.*,

462 F. Supp. 778, 779-81 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980). This requirement applies to claims of medical negligence filed in federal court. *See Davison*, 462 F. Supp. at 779-81. This Court is required to dismiss an action for noncompliance with the Act where a party has failed to exhaust his or her administrative remedies under the Act. *See Roberts*, 73 Md. App. at 6; *see also Davison*, 462 F. Supp. at 781.

Tootle misconstrues the reason for dismissal of her action, which was not dismissed for failure to exhaust her claim under the Act, although such dismissal would have been permitted. Rather, her lawsuit was dismissed because medical malpractice is a state – not federal – claim, and the parties were Maryland residents. In other words, she could not establish federal question jurisdiction pursuant to 28 U.S.C. § 1331, nor diversity jurisdiction pursuant to 28 U.S.C. § 1332. Tootle's reconsideration motion is therefore denied.

Accordingly, it is hereby ordered:

1. The Motion for Reconsideration (ECF No. 5) IS DENIED; and

2. The Clerk SHALL MAIL a copy of this Order to Plaintiff.

DATED this 30 day of March, 2018.

BY THE COURT:

James K. Bredar
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANDREA RENE'E TOOTLE,	*	
Plaintiff	*	
v	*	Civil Action No. JFM-17-1684
BEAUX ART INSTITUTE OF PLASTIC SURGERY,	*	
DR. NIA BANKS,	*	
Defendants	*	
	***	

In accordance with the foregoing memorandum, it is this 5th day of June, 2017, by the United States District Court for the District of Maryland, hereby ordered that:

1. The Clerk shall AMEND the docket to reflect Dr. Banks' full name and to list her as a defendant;
2. Plaintiff's motion for leave to proceed in forma pauperis (ECF 2) is GRANTED;
3. The complaint is DISMISSED without prejudice;
4. The Clerk shall CLOSE this case; and
5. The Clerk shall PROVIDE a copy of this order to plaintiff.

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANDREA RENE'E TOOTLE,	*	
Plaintiff	*	
v	*	Civil Action No. JFM-17-1684
BEAUX ART INSTITUTE OF PLASTIC SURGERY,	*	
DR. NIA BANKS,[1]	*	
Defendants	*	

***

MEMORANDUM

Andrea Tootle, a resident of Hanover, Maryland, seeks money damages and alleges that Dr. Nia Banks, a plastic surgeon at the Beaux Art Institute of Plastic Surgery in Lanham, Maryland, committed medical malpractice during surgery performed on June 28 and August 13, 2012.[2] Tootle's motion seeking in forma pauperis status (ECF 2) shall be granted. For reasons noted herein, the complaint shall be dismissed without prejudice for lack of federal or diversity jurisdiction.

Pursuant to 28 U.S.C. § 1915, courts are required to screen a plaintiff's complaint when in forma pauperis status has been granted. *See Michau v. Charleston Cnty., S.C.*, 434 F.3d 725, 727 (4th Cir. 2006) (applying 28 U.S.C. § 1915(e)(2)(B) to preliminary screen a non-prisoner complaint); *Troville v. Venz*, 303 F.3d 1256, 1260 (11th Cir. 2002) (applying § 1915(e) to non-

[1] The Clerk shall amend the docket to reflect Dr. Banks' full name and to list her as a defendant.

[2] It is unclear whether Tootle's claim is timely. Maryland law provides a tiered limitations period for medical malpractice claims. The limitations period runs three years from the discovery of the injury or five years from injury, whichever is earlier. *See* Md. Code Ann. Cts. & Jud. Proc. § 5-109(a).

prisoner actions); *Evans v. Albaugh*, 2013 WL 5375781 (N. D. W.Va. 2013) (28 U.S.C. § 1915(e) authorizes dismissal of complaints filed in forma pauperis).[3]

The jurisdiction of the federal courts is limited, and the burden of establishing subject matter jurisdiction rests on the party invoking the jurisdiction of the court. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). There is no presumption that jurisdiction is vested in the court. *See Pinkley, Inc. v. City of Frederick*, 191 F.3d 394, 399 (4th Cir. 1999).

A court may consider subject matter jurisdiction as part of its initial review of the Complaint. *See Lovern v. Edwards*, 190 F.3d 648, 654 (4th Cir. 1999) (holding that "[d]etermining the question of subject matter jurisdiction at the outset of the litigation is often the most efficient procedure"). In general, if subject matter jurisdiction is lacking, the action must be dismissed. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Consequently a federal court must determine with certainty whether it has subject matter jurisdiction over a case pending before it. If necessary, the court has an obligation to consider its subject matter jurisdiction *sua sponte*. *See Joseph v. Leavitt*, 465 F.3d 87, 89 (2d Cir. 2006). "[Q]uestions of subject-matter jurisdiction may be raised at any point during the proceedings and may (or, more precisely, must) be raised *sua sponte* by the court." *Brickwood Contractors, Inc. v. Datanet Engineering, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004). Tootle's complaint is based on medical malpractice by a

[3] Title 28 U.S.C. Section 1915(e)(2)(B) provides:

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(B) the action or appeal—
(i) is frivolous or malicious;
(ii) fails to state a claim on which relief may be granted; or
(iii) seeks monetary relief against a defendant who is immune from such relief.

private Maryland physician, a state tort claim. There is no jurisdictional basis to consider the complaint under this court's 28 U.S.C. § 1331 jurisdiction.

The federal court does not sit to review every claim related to alleged tortious conduct involving non-federal parties. It may, however, have authority to review such state-law claims based on the court's diversity of citizenship jurisdiction. Pursuant to 28 U.S.C. § 1332, diversity jurisdiction exists when the parties are of diverse citizenship and the amount in controversy exceeds $75,000. It is a firmly established general rule of the federal courts that a plaintiff's diversity claim is the measure of the amount in controversy and determines the question of jurisdiction. *See McDonald v. Patton*, 240 F.2d 424, 425-26 (4th Cir. 1957). Tootle seeks sufficient damages and satisfies the amount-in-controversy requirement. The named defendants, however, are located in Maryland, where Tootle also resides. Thus, the parties are not diverse.

Even if this court were to assume that diversity jurisdiction existed, Tootle's medical malpractice claim would be subject to dismissal unless Tootle demonstrated that she had first presented her medical malpractice claim to the Maryland Health Claims Arbitration Board. *See* Md. Code Ann., Cts & Jud. Proc. §3-2A-04 *et seq.* Maryland law requires a medical malpractice claim to be filed with the Health Claims Arbitration Board as a condition precedent to filing a malpractice or negligence suit. *See Attorney General v. Johnson,* 385 A.2d 57 (Md. 1978). The complaint does not indicate that the condition has been met.

For the reasons set out herein, the complaint shall be summarily dismissed by separate order. Tootle remains free to bring her claim in the appropriate state court.

July 5 2017
Date

J. Frederick Motz
United States District Judge

Additional material from this filing is available in the Clerk's Office.