

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D25466  
Y/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - November 12, 2009

WILLIAM F. MASTRO, J.P.  
ANITA R. FLORIO  
RUTH C. BALKIN  
JOHN M. LEVENTHAL, JJ.

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2008-10566

DECISION & ORDER

Arthur Goldenberg, appellant, v Westchester County  
Health Care Corporation, a/k/a Westchester County  
Medical Center, et al., respondents.

(Index No. 3935/08)

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La Sorsa & Beneventano, White Plains, N.Y. (Gregory M. La Sorsa of counsel), for  
appellant.

Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains, N.Y. (Faisal A. Khan  
of counsel), for respondents.

In an action to recover damages for medical malpractice and lack of informed consent,  
the plaintiff appeals from an order of the Supreme Court, Westchester County (Colabella, J.), entered  
September 29, 2008, which granted the defendants' motion to dismiss the complaint as time-barred,  
and denied his cross motion, inter alia, for leave to file the summons and complaint nunc pro tunc.

ORDERED that the order is affirmed, with costs.

The plaintiff served the summons and complaint upon the defendants in this  
malpractice action without ever filing them or obtaining an index number and paying the filing fee for  
the action. Accordingly, the action was never validly commenced (*see* CPLR 304). Following the  
expiration of the applicable statute of limitations, the defendants moved to dismiss the complaint as  
time-barred, and the plaintiff cross-moved, inter alia, for leave to file the summons and complaint

December 22, 2009

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a/k/a WESTCHESTER COUNTY MEDICAL CENTER

nunc pro tunc. The Supreme Court correctly granted the defendants' motion and denied the plaintiffs' cross motion.

Contrary to the plaintiff's contention, the defendants raised timely objections to the plaintiff's failure to file and to the untimeliness of the action, since they asserted affirmative defenses regarding lack of jurisdiction and the expiration of the statute of limitations in their amended verified answer (*see* CPLR 3211[e]; *see generally Harris v Niagara Falls Bd. of Educ.*, 6 NY3d 155, 159; *cf. Sirkis v Cohen*, 23 AD3d 369). Similarly, the defendants were not obligated to move to dismiss the action within 60 days following the service of their answer pursuant to CPLR 3211(e), since their objection was not based on improper service (*see Sangiacomo v County of Albany*, 302 AD2d 769, 772). Indeed, the plaintiff was free to move pursuant to CPLR 3211(b) to dismiss the jurisdictional defense if he desired a more prompt resolution of the merits of that defense.

Furthermore, the plaintiff cannot rely upon the remedial language of CPLR 2001 to cure his error, since that statute does not excuse a complete failure to file within the statute of limitations, as occurred here (*see Matter of Miller v Waters*, 51 AD3d 113, 117-118; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR, C304:3, 2009 Pocket Part, at 162, 165). Likewise, the plaintiff cannot rely on his filing of a proposed complaint in a prior proceeding for leave to file a late notice of claim to act as the functional equivalent of a filing in this action (*see generally Rybka v New York City Health & Hosps. Corp.*, 263 AD2d 403). The papers served in an action must conform in all material respects to the papers that are filed to commence it (*see Matter of Gershel v Porr*, 89 NY2d 327, 332; *Page v Marusich*, 30 AD3d 871, 873; *Louden v Rockefeller Ctr. N.*, 249 AD2d 25, 26). Here, the complaint served in this action dramatically differed, substantively and materially, from the proposed complaint which the plaintiff filed in the prior proceeding. Accordingly, the Supreme Court properly granted the defendant's motion to dismiss the complaint. Moreover, the court properly denied the plaintiff's cross motion for leave to file the summons and complaint nunc pro tunc since, under the circumstances herein, the granting of that relief would impermissibly extend the statute of limitations (*see CPLR 201; Bradley v St. Clare's Hosp.*, 232 AD2d 814, 815).

MASTRO, J.P., FLORIO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court