

Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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YUSUNG SONG,

Plaintiff,

-against-

ELMHURST DENTAL OFFICE, DR. CIVELEK  
KAYHAN, D.D.S., DR. NAZIL QUAYUM, D.D.S.,  
and DR. KIPNIS MARINA, D.D.S.,

Defendants.  
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Index No: 1287/07  
Motion Date: 4/16/08  
Motion Cal. No: 34  
Motion Seq. No: 1

The following papers numbered 1 to 13 read on this motion for an order pursuant to CPLR § 3215, granting plaintiff a default judgment against defendants and setting this matter down for a date certain for an inquest on damages, and on this cross motion for an order dismissing the action against Dr. Nazil Quayum, D.D.S. (a) pursuant to CPLR § 3211(a)(2)(4)(5), as there is another action pending between the same parties for the same cause of action that has been dismissed as to Dr. Nazil Quayum, D.D.S.; (b) pursuant to CPLR §§3211(a)(5) and 214-a, as time barred based upon the expiration of the statute of limitations; (c) pursuant to CPLR §§3211(a)(8) and 308(2), on the ground that the court lacks jurisdiction over that defendant; and (d) amending the caption to delete the name of Dr. Nazil Quayum, D.D.S. on the grounds that this Court lacks jurisdiction over that defendant.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Notice of Cross Motion-Affidavits-Exhibits.....	5 - 9
Affirmation in Opposition and in Support.....	10 - 11
Reply Affirmations-Exhibits.....	12 - 13

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is a dental malpractice action commenced by plaintiff Yusung Song (“plaintiff”) against defendants Elmhurst Dental Office, Civelek Kayhan, D.D.S., Nazil Quayum, D.D.S., and Kipnis Marina, D.D.S. (“defendants”) to recover damages for injuries sustained during their care and treatment of plaintiff for a period up to and including July 22, 2004. Plaintiff moves for a default

judgment against each defendants based upon their respective failures to answer the complaint. Defendant Nazil Quayum, D.D.S. (“Dr. Quayum”) cross moves for an order dismissing the complaint on the grounds that there is another action pending between the same parties for the same cause of action that has been dismissed as to him, the action is barred by the statute of limitations and the court lacks jurisdiction over him. As a determination of the cross motion may be dispositive of the motion, the cross motion will be addressed first.

That branch of the cross motion by Dr. Quayum seeking dismissal of the complaint on the ground that there is another action pending between the same parties for the same cause of action that has been dismissed as to him is denied. Although plaintiff commenced an earlier action based upon the same claims previously pending in this Court under Index No.17144/05, which was administratively disposed of, there is no other action currently pending which would compel this Court to dismiss the instant action on that basis. Moreover, contrary to Dr. Quayum’s contention that the matter was dismissed as to him for plaintiff’s failure to move for a default judgment against him, the record before this Court indicates otherwise. Consequently, this Court finds no impediment to the commencement on this action.

Similarly denied is that branch of the cross motion seeking dismissal based upon res judicata. “It is well settled that under the transactional approach adopted by New York in res judicata jurisprudence, ‘once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy’ (citations omitted). Pursuant to this approach, the doctrine bars not only claims that were actually litigated but also claims that could have been litigated, if they arose from the same transaction or series of transactions.” Marinelli Associates v. Helmsley-Noyes Co., Inc., 265 A.D.2d 1, 5 (1<sup>st</sup> Dept. 2000); see, also, Fogel v. Oelmann, 7 A.D.3d 485 (2<sup>nd</sup> Dept. 2004); MacGregor-Phillips v. MacGregor, 273 A.D.2d 206 (2<sup>nd</sup> Dept. 2000). Moreover, “collateral estoppel, a corollary to the doctrine of res judicata, ‘precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same’ (citation omitted). The two basic requirements of the doctrine are that the party seeking to invoke collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action, and the party to be precluded from re-litigating the issue must have had a full and fair opportunity to contest the prior determination (citations omitted).” CRK Contracting of Suffolk, Inc. v. Jeffrey M. Brown & Associates, Inc. 260 A.D.2d 530 (2<sup>nd</sup> Dept. 1999); see, also, Harley v. Adler, 7 A.D.3d 570 (2<sup>nd</sup> Dept. 2004); Lozada v. GBE Contracting Corp., 295 A.D.2d 482 (2<sup>nd</sup> Dept. 2002).

Here, Dr. Quayam, as the party seeking to preclude plaintiff from allegedly re-litigating the instant action, has not made a sufficient showing of the applicability of collateral estoppel. As stated above, the record does not conclusively show that the previous action was dismissed by the Court based upon plaintiff’s abandonment of the action by failing to take a timely default against Dr. Quayum. Indeed, there were no motions by this defendant or any indication that the action was dismissed as abandoned by the Court upon its own initiative. Thus, there has not been sufficient

proof that the identical issue was necessarily decided in the prior action and is decisive in the present action, and plaintiff, as the party to be precluded from re-litigating the issue, had a full and fair opportunity to contest the prior determination, if any. Thus, it is this Court's determination that issue preclusion based upon *res judicata* or collateral estoppel is inapplicable.

Dr. Quayam also cross moves for an order seeking dismissal of the action on the grounds that the action is barred by the statute of limitations and the court lacks jurisdiction over him. "When a party moves to dismiss a cause of action on the ground that it is barred by the statute of limitations, the movant bears the initial burden of establishing the affirmative defense by *prima facie* proof that the time in which to sue has expired." Assad v. City of New York, 238 A.D.2d 456 (1997); *see, also, see, also, Rosenfeld v. Schlecker*, 5 A.D.3d 461 (2<sup>nd</sup> Dept. 2004); Siegel v. Wank, 183 A.D.2d 158 (3<sup>rd</sup> Dept. 1992). "The burden then shift[s] to the plaintiff to 'aver evidentiary facts establishing that the case falls within an exception to the statute of limitations' (citations omitted)." Rosenfeld v. Schlecker, 5 A.D.3d 461 (2004). Further, where the negligence complained of sounds in medical malpractice, unless tolled by statute, the time period in which plaintiff may properly commence an action of this nature is governed by the two year and six month limitation requirement, pursuant to CPLR § 214-a. *See, Mendelson v. Clarkstown Medical Associates, P.C.*, 271 A.D.2d 584 (2000); Batiste v. Brooklyn Hosp. Center, 255 A.D.2d 474 (1998).

With respect to the action being time-barred, Dr. Quayam alleges in his cross-moving papers that plaintiff claims that Dr. Quayam rendered negligent dental treatment to plaintiff up to and including July 22, 2004. He states that "therefore, at the very latest, the statute of limitations for this claim expired on January 22, 2007. The statute of limitations expired for the second action and plaintiff cannot cure this by re-serving the defendant. Moreover, the plaintiff's affidavit of service is dated January 25, 2007, which is after the expiration of the statute of limitations." In response, plaintiff states "as admitted by defense counsel in his [cross] moving papers, treatment by the defendant upon the plaintiff was through and including July 22, 2004, and therefore the statute of limitations expired on or about January 22, 2007." Plaintiff asserts that contrary to counsel's contention that the applicable date in determining whether an action was timely commenced is the date of service of process, "the law is quite clear that the action is deemed instituted for such purposes as of the date of the filing of the summons and complaint, which in this case occurred on January 16, 2007, prior to the expiration of the statute of limitations. Therefore, service of process was effectuated and filed with the Court in a timely manner pursuant to the CPLR, confirming the timeliness of the institution of this action." In the April 15, 2008 reply to plaintiff's response to Dr. Quayam's cross motion which was filed on March 13, 2008, defense counsel states, in relevant part, the following:

When the cross-motion was filed, your affirmant was not in possession of the treatment records for the plaintiff, as they were maintained exclusively by the co-defendant Elmhurst Dental. Therefore, there was no confirmation regarding the dates of treatment other than the dates in the plaintiff's complaint. However, based upon conversations with [Dr. Quayam], we believed there was a

statute of limitations defense and had to assert it because we were seeking relief under CPLR § 3211 []. As an independent contractor at the facility, Dr. Quayam provided treatment to this plaintiff on two isolated occasions. Both of those dates are excluded under the statute of limitations. Based upon new evidence not known prior to the filing of the cross-motion, Dr. Quayam is entitled to dismissal based upon the expiration of the statute of limitations.

Upon review of the Elmhurst treatment records of the plaintiff, Dr. Quayam's only involvement with the plaintiff was on two occasions, July 23, 2003 and December 4, 2003. [] Thus, the statute of limitations as for Dr. Quayam expired on June 4, 2006. []

Moreover, the plaintiff is bound to have the statute of limitations measured by the filing date of the second attempt to re-commence when the original complaint is dismissed as abandoned for failure to seek a default judgment within one year. This is regardless of when the dismissal was effectuated by the Court. Shepard v. St. Agnes Hospital, 86 A.D.2d 628 (2<sup>nd</sup> Dept. 1982). Moreover, as a matter of law, Dr. Quayam's interest cannot be joined or related back to that of the co-defendants since he was not an employee of the facility and not united in interest with the co-defendants.

With regard to the jurisdictional issue, where the validity of service of the summons and complaint is challenged, the plaintiff has the burden of establishing personal jurisdiction by a preponderance of the evidence at a hearing. Bankers Trust Co. of California, N.A. v. Tsoukas, 303 A.D.2d 343 (2<sup>nd</sup> Dept. 2003); Schwerner v. Sagonas, 28 A.D.3d 468 (2<sup>nd</sup> Dept. 2006); Spangenberg v. Chaloupka, 229 A.D.2d 482 (2<sup>nd</sup> Dept. 1996); Kanner v. Gerber, 197 A.D.2d 673 (2<sup>nd</sup> Dept. 1993). It is beyond dispute that "[s]ervice is only effective . . . when it is made pursuant to the appropriate method authorized by the CPLR." Markoff v. South Nassau Community Hosp., 61 N.Y.2d 283, 288 (1984); Feinstein v. Bergner, 48 N.Y.2d 234, 241 (1979); Foy v. 1120 Ave. of Americas Associates, 223 A.D.2d 232 (2<sup>nd</sup> Dept. 1996).

Here, Dr. Quayam contends that he was never served with the summons and complaint or any other documents in this action, an allegation denied by plaintiff. Accordingly, the branch of the cross motion to dismiss the action for failure to obtain personal jurisdiction is granted to the extent that the matter is hereby set down for a traverse hearing to determine whether this Court has jurisdiction over Dr. Quayam on August 6, 2008 at 10:30 a.m. in Part 19, Courtroom 63, Queens Supreme Court, 88-11 Sutphin Blvd., Jamaica, N.Y. Moreover, in view of the allegations belatedly set forth in Dr. Quayam's reply concerning the statute of limitations, this Court will also address whether this action is time-barred. Lastly, the motion for an order pursuant to CPLR § 3215, granting plaintiff a default judgment against defendants and setting this matter down for a date certain for an inquest on damages is granted without opposition to the extent that plaintiff is granted

a default judgment against defendants Elmhurst Dental office, Civelek Kayhan and Kipnis Marina for the causes of action set forth in the complaint, the amount thereof to be determined at an Inquest to assess damages.

Plaintiff shall place this action on the Inquest calendar of this Court by filing a note of issue and paying the requisite fees by July 11, 2008. A copy of the note of issue with proof of service of this order upon the aforementioned defendants, as well as Dr. Quayam, shall be served upon the clerk of this Part at the time the note of issue is filed. The Inquest hereby is also scheduled for August 6, 2008, at 10:30 a.m., in courtroom 63 of the Supreme Court, located at 88-11 Sutphin Blvd., Jamaica, New York. That branch of the motion for a default judgment against Dr. Quayam hereby is held in abeyance and will be addressed by this Court at this hearing upon a determination as to the whether the action is viable against him under the procedural considerations set forth above.

Accordingly, the motion and cross motion are granted to the extent indicated, and plaintiff shall forthwith serve a copy of this order with notice of entry upon all defendants. Further, plaintiff's failure to proceed with this Inquest within ninety (90) days of the abovementioned scheduled date shall result in this action being marked inactive upon the expiration of the ninety day period.

Dated: June 19, 2008

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J.S.C.