

Lopresti v Bamundo, Zwal & Schermerhorn, LLP

2010 NY Slip Op 33436(U)

December 14, 2010

Sup Ct, NY County

Docket Number: 100206/09

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

MARTIN SHULMAN

PRESENT: _____

J.S.C.

PART 1

Index Number : 100206/2009

LOPRESTI, LINA

vs

BAMUNDO, ZWAL & SCHERMERHORN

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO.

100206/09

MOTION DATE

MOTION SEQ. NO.

004

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits 1-15

Answering Affidavits — Exhibits A-D, 1-3

Replying Affidavits Exhs 16-21

PAPERS NUMBERED

1
2, 3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

DEC 15 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: DEC 14 2010

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X

LINA LOPRESTI, Individually and as Administratrix of
the Estate of VITO LOPRESTI, deceased,

Plaintiff,

-against-

Index No. 100206/09

BAMUNDO, ZWAL & SCHERMERHORN, LLP,

Defendant.

-----X

BAMUNDO, ZWAL & SCHERMERHORN, LLP,

Third-Party Plaintiff,

Index No. 590510/10

-against-

LAW FIRM OF JONATHAN C. REITER,

Third-Party Defendant.

-----X

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

MARTIN SHULMAN, J.:

The third-party defendant the Law Firm of Jonathan C. Reiter ("Reiter") moves pursuant to CPLR 3212 for an order granting summary judgment dismissing the third-party complaint and for sanctions pursuant to 22 NYCRR 130-1.1.

This is a legal malpractice action arising from the defendant Bamundo, Zwal & Schermerhorn, LLP's ("Bamundo Zwal") representation of the plaintiff Lina Lopresti ("Lopresti" or "plaintiff") in an underlying medical malpractice action against Dr. Lawrence Marino. The underlying action arose from Dr. Marino's treatment of Lopresti's husband Vito Lopresti prior to his death on July 25, 2003.

In May 2004 Lopresti retained Bamundo Zwal. On May 24, 2004, Bamundo Zwal first corresponded with Dr. Marino seeking his records relating to his treatment of

Vito Lopresti. Michael C. Zwal, Esq. ("Zwal") of Bamundo Zwal alleges that the correspondence included a duly and properly executed HIPPA-compliant authorization. Dr. Marino did not respond. The correspondence was followed up with several telephone calls and a decision to seek Letters of Administration.

Zwal alleges that Lopresti misinformed him that Dr. Marino treated Vito Lopresti until two or three months before his death on July 25, 2003. It is also alleged that Lopresti was in the state of Florida without telephone service until 2007 and was not providing the information and documents needed to obtain the Letters of Administration. Bamundo Zwal sent follow-up correspondence to Lopresti on October 31, 2004, November 24, 2004 and November 29, 2004 and finally received a copy of the death certificate from Lopresti on November 30, 2004. On March 15, 2005, Lopresti was appointed the administratrix of the estate. On April 19, 2005, Bamundo Zwal sent a follow-up letter to Dr. Marino seeking his treatment records. Again Dr. Marino did not respond.

On July 11, 2005, Bamundo Zwal commenced the underlying action against Dr. Marino setting forth causes of action for medical malpractice (first) and wrongful death (second). Bamundo Zwal's October and November 2005 follow-up letters to Dr. Marino seeking medical records went unanswered. Finally, on December 1, 2005, Dr. Marino provided a portion of his records. The records showed that treatment ended in November 2002 and thus, the medical malpractice action was commenced beyond the applicable two and one half year statute of limitations.

On May 2, 2007, Lopresti fired Bamundo Zwal and engaged Reiter. Dr. Marino's motion for summary judgment dismissing Lopresti's first cause of action as barred by

the statute of limitations was granted without any opposition from Reiter. Reiter took the position that the first cause of action for medical malpractice was, as a matter of law, barred by the applicable statute of limitations. Subsequently, the remaining cause of action for wrongful death settled for the sum of \$840,000.

The complaint in this action for legal malpractice alleges that in the underlying medical malpractice case, Bamundo Zwal failed to timely commence the first cause of action seeking to recover damages for Vito Lopresti's conscious pain and suffering. Lopresti alleges she was forced to settle the underlying wrongful death second cause of action for an amount below what she would have recovered had it not been for Bamundo Zwal's actions.

Bamundo Zwal has impleaded the Reiter law firm alleging that Reiter failed to properly oppose Dr. Marino's motion for summary judgment. The third-party complaint pleads causes of action for contribution and common-law indemnification.

Reiter served this motion for summary judgment simultaneously with its third-party answer and without any discovery being conducted. In this legal malpractice action, Reiter represents both plaintiff Lopresti and itself as third-party defendant.

In support of the motion for summary judgment, Reiter alleges that the third-party complaint is predicated upon the mistaken contention that Reiter could have made a valid equitable estoppel argument in opposition to Dr. Marino's summary judgment motion in the underlying action that would have prevented dismissal of the medical malpractice cause of action. Reiter argues that the record fails to support the applicability of equitable estoppel and accordingly Reiter had no duty to make a

frivolous, meritless argument that would not have avoided the consequences of Bamundo Zwal's negligence in permitting the statute of limitations to expire.

In opposition to the motion, Bamundo Zwal argues that Reiter fails to establish entitlement to summary judgment as a matter of law and that the motion is premature. In addition, Bamundo Zwal speculatively suggests the possibility of Reiter and the medical malpractice carrier having struck a deal whereby the insurer paid an excessive settlement of the wrongful death claim in exchange for Reiter's not opposing Dr. Marino's motion.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is uncommon to grant summary judgment in a negligence action even where the facts are uncontradicted (*Ugarriza v Schmiøder*, 46 NY2d 471, 475 [1979]).

To establish a cause of action for legal malpractice, Bamundo Zwal must prove that Reiter failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal community and that Reiter's breach of this duty proximately caused damages to the plaintiff (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438 [2007]). A defendant moving for summary judgment in a legal malpractice action must establish prima facie that the plaintiff cannot prove at least one essential element of the claim (*Levy v Greenberg*, 19 AD3d 462 [2d Dept 2005]).

The doctrine of equitable estoppel may bar a defendant from asserting the statute of limitations when the plaintiff "was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007], quoting *Simcuski v Sacli*, 44 NY2d 442, 448-449 [1978]; *General Stencils, Inc. v Chiappa*, 18 NY2d 125, 128 [1966]). Equitable estoppel will "bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding" (*Zumpano v Quinn*, 6 NY3d 666, 673 [2006], quoting *General Stencils, Inc. v Chiappa*, 18 NY2d at 128). A defendant may be precluded from invoking a statute of limitations defense under such circumstances (*Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552 [2006], quoting *Zumpano v Quinn*, 6 NY3d at 673).

Where a medical malpractice claim is asserted, the patient's medical records are material to reaching a responsible decision on whether there are grounds for a lawsuit and equitable estoppel may arise where there is an unreasonable delay in delivering

records to an attorney consulted in a suspected case of malpractice (*Kamruddin v Desmond*, 293 AD2d 714 [2d Dept 2002]). Concealment by a physician or failure to disclose his own malpractice may, in a proper case in conjunction with other factors, provide a foundation for seeking to invoke the doctrine of equitable estoppel to extend the applicable period of limitations (*Simcuski v Saeli*, 44 NY2d at 452).

Of critical importance, due diligence on the plaintiff's part in ascertaining the facts and commencing the action is an essential element when plaintiff seeks to invoke this doctrine. Although there are exceptions, "the question of whether a defendant should be equitably estopped is generally a question of fact" (*Putter v North Shore Univ. Hosp.*, 7 NY3d at 553). On the other hand, where plaintiff is timely aware of the facts requiring him to make further inquiry before the statute of limitations expires, an equitable estoppel defense to the statute of limitations is inappropriate as a matter of law (*Pahlad v Brustman*, 8 NY3d 901 [2007]).

Under the circumstances presented here, this court concludes that there was no basis for Reiter to pursue an equitable estoppel defense in opposition to Dr. Marino's motion in the underlying action for summary judgment dismissing the medical malpractice cause of action as time barred. As Zwal himself testified at his June 3, 2010 deposition, Dr. Marino refused to respond to Bamundo Zwal's first request for records in May 2004 because Vito Lopresti was deceased and no personal representative had been appointed (see Motion at Exh. 10, p. 32). After Lopresti was appointed administratrix of her husband's estate, Bamundo Zwal made a second

written request to Dr. Marino dated April 19, 2005, less than 30 days before the statute of limitations expired.

This record contains no evidence of any affirmative wrongdoing or purposeful concealment on Dr. Marino's part caused Lopresti's delay in commencing the underlying action (see *Zumpano v Quinn*, 6 NY3d at 673; *Kamruddin v Desmond*, 293 AD2d at 715). Lopresti's allegedly incorrect statements to Bamundo Zwal as to the last date Dr. Marino treated Vito Lopresti and the delay in having a personal representative appointed cannot be held against Dr. Marino. Rather, Lopresti's and/or Bamundo Zwal's own inaction caused the untimely commencement of the underlying case. See, e.g., *Public Adm'r of State of New York v Beth Israel Med. Ctr.*, 2007 WL 176380 (Sup Ct, NY County, Carey, J)(granting summary judgment dismissing action as time barred and finding that hospital should not be equitably estopped from asserting statute of limitations as a defense where plaintiff's inaction and failure to avail itself of various procedural safeguards¹ prevented timely commencement of action).

As no triable issues of fact exist for the foregoing reasons, it is

ORDERED that the portion of the motion for summary judgment seeking dismissal of the third-party complaint is granted, and the motion is otherwise denied.

¹ The plaintiff in *Public Adm'r of State of New York v Beth Israel Med. Ctr.*, *supra*, failed to timely seek pre-action discovery or to move for an extension of time to serve the complaint. Further, although the plaintiff argued that no certificate of merit could have been submitted without decedent's medical records, where a request has been made and records have not been provided, CPLR 3012-a (d) provides for a 90 day extension of time from receipt of the records to serve a certificate of merit. In addition to the foregoing options, in the case at bar there was no need for Bamundo Zwal to await appointment of a personal representative for Vito Lopresti, since Public Health Law §18 was amended effective October 26, 2004 to permit distributees to obtain a decedent's medical records.

The Clerk is directed to enter judgment accordingly.

Counsel for the parties are directed to appear for a status conference on January 25, 2011 at 9:30 a.m. at Part 1, Room 325, 60 Centre Street, New York, New York.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: New York, New York
December 14, 2010



Martin Shulman, J.S.C.

FILED

DEC 15 2010

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