

Rodriguez v Saal

2005 NY Slip Op 30439(U)

December 15, 2005

Supreme Court, New York County

Docket Number: 113392/04

Judge: Joan B. Carey

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

PRESENT: Honorable Joan B. Carey
Justice

PART 40 D

ELENA ALICEA RODRIGUEZ, as Administratrix
of the Goods, Chattels and Credits which
were of JUAN RODRIGUEZ, Deceased, and
ELENA ALICEA RODRIGUEZ, Individually,

Plaintiffs,

-v-

Index No.: 113392/04
MOTION DATE _____
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

STUART SAAL, M.D., JOHN WIGNESWARAN, M.D.,
KAPUR SANDIP, M.D., TIGIST HAILY, M.D.,
MICHAEL T. WAYANT, M.D., DESMOND BURKE,
M.D., LEE RICHARDSON, M.D., ROXANA BOLOGA,
M.D., NIESHA MHASKAR, M.D., MANIKKAM
SUTHANTHIRAN, M.D., DARSHANA DADHANANIA,
M.D., CHOLI HARTONO, M.D., SUSAN KIM, M.D.,
"JOHN" BERLIN, M.D., (first name being
fictitious and unknown), YONG-HO AUG, M.D.,
RAGUPATHY BALLACHANDER, M.D., SIMMONS
KHALMANI, M.D., NEW YORK ORGAN DONOR NETWORK,
"JOHN DOE" (first and last name being
fictitious and unknown but intended to
represent the Transplant Coordinator at the
New York Organ Donor Network), "SCREENING
HOSPITAL" (name being fictitious and unknown
but intended to represent the screening
Hospital of the organ transplanted to
plaintiff's decedent on 2/24/02), THE ROGOSIN
INSTITUTE and NEW YORK PRESBYTERIAN HOSPITAL
WEILL CORNELL CAMPUS,

Defendants.

The following papers, 1-22, were read on this motion by the plaintiffs for an extension of time to effect service of process upon each of the defendants pursuant to CPLR 306-b; cross motion by defendants Stuart D. Saal, M.D., s/h/a Stuart Saal, M.D., Sandip Kapur, M.D., s/h/a Kapur Sandip, M.D., M. Desmond Burke, M.D., s/h/a Desmond Burke, M.D., Lee Richstone, M.D., Roxana M. Bologna, s/h/a Roxana Bologna, M.D., Darshana M. Dadhinia, M.D., s/h/a Darshana Dadhanania, M.D., Choli Hartono, M.D., Yong H. Au, M.D.,

s/h/a Yong-Ho Aug, M.D., The Rogosin Institute and New York-Presbyterian Hospital, s/h/a New York Presbyterian Hospital Weill Cornell Campus, and Manikkam Suthanthiran, M.D., to dismiss the complaint insofar as asserted against them pursuant to CPLR 306-b; and cross motion by defendant New York Organ Donor Network, Inc., to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211(a)(5).

Notice of Motion /Order to Show Cause - Affidavits - Exhibits
Notice of Cross Motion - Affidavits - Exhibits
Notice of Cross Motion - Affidavits - Exhibits
Answering/Reply Affidavits - Exhibits
Replying Affidavits - Exhibits
Replying Affidavits - Exhibits
Replying Affidavits - Exhibits
Replying Affidavits - Exhibits

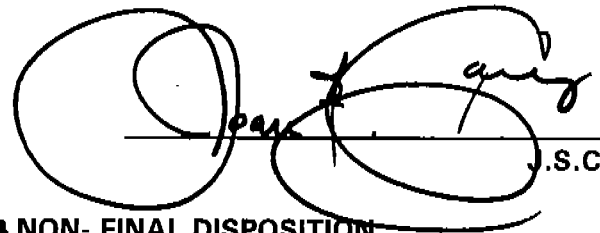
Papers Numbered

1-5
6-8
9-10
11-13
14-15
16
17-19
20-22

Cross-Motion: Yes No

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

Dated: 12/15/2005



J.S.C.

Check one: FINAL DISPOSITION

NON- FINAL DISPOSITION

FILED

DEC 19 2005

NEW YORK
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK Part 40D

ELENA ALICEA RODRIGUEZ, as Administratrix
of the Goods, Chattels and Credits which
were of JUAN RODRIGUEZ, Deceased, and
ELENA ALICEA RODRIGUEZ, Individually,

Plaintiffs, Index No.: 113392/04

-against-

DECISION & ORDER

STUART SAAL, M.D., JOHN WIGNESWARAN, M.D.,
KAPUR SANDIP, M.D., TIGIST HAILY, M.D.,
MICHAEL T. WAYANT, M.D., DESMOND BURKE,
M.D., LEE RICHARDSON, M.D., ROXANA BOLOGA,
M.D., NIESHA MHASKAR, M.D., MANIKKAM
SUTHANTHIRAN, M.D., DARSHANA DADHANANIA,
M.D., CHOLI HARTONO, M.D., SUSAN KIM, M.D.,
"JOHN" BERLIN, M.D., (first name being
fictitious and unknown), YONG-HO AUG, M.D.,
RAGUPATHY BALLACHANDER, M.D., SIMMONS
KHALMANI, M.D., NEW YORK ORGAN DONOR NETWORK,
"JOHN DOE" (first and last name being
fictitious and unknown but intended to
represent the Transplant Coordinator at the
New York Organ Donor Network), "SCREENING
HOSPITAL" (name being fictitious and unknown
but intended to represent the screening
Hospital of the organ transplanted to
plaintiff's decedent on 2/24/02), THE ROGOSIN
INSTITUTE and NEW YORK PRESBYTERIAN HOSPITAL
WEILL CORNELL CAMPUS,

Defendants.

Dinkes & Schwitzer, New York (Leigh Bernstein of counsel), for
the plaintiffs.

Martin, Clearwater & Bell, LLP, New York (Ruth A. O'Neil of
counsel), for defendants Stuart Saal, M.D., Kapur Sandip, M.D.,
Desmond Burke, M.D., Lee Richstone, M.D., Roxana Bologa, M.D.,
Manikkam Suthanthiran, M.D., Darshana Dadhanania, M.D., Choli
Hartono, M.D., Yong-Ho Aug, M.D., New York Presbyterian Hospital
Weill Cornell Campus.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York
(Richard E. Lerner of counsel), for defendant New York Organ
Donor Network.

JOAN B. CAREY, J.:

Introduction

Motion by the plaintiffs for an extension of time to effect service of process upon each of the defendants pursuant to CPLR 306-b, cross motion by defendants Stuart D. Saal, M.D., s/h/a Stuart Saal, M.D., Sandip Kapur, M.D., s/h/a Kapur Sandip. M.D., M. Desmond Burke, M.D., s/h/a Desmond Burke, M.D., Lee Richstone, M.D., Roxana M. Bologna, s/h/a Roxana Bologna, M.D., Darshana M. Dadhinia, M.D., s/h/a Darshana Dadhanania, M.D., Choli Hartono, M.D., Yong H. Au, M.D., s/h/a Yong-Ho Aug, M.D., The Rogosin Institute and New York-Presbyterian Hospital, s/h/a New York Presbyterian Hospital Weill Cornell Campus, and Manikkam Suthanthiran, M.D., to dismiss the complaint insofar as asserted against them pursuant to CPLR 306-b, and cross motion by defendant New York Organ Donor Network, Inc., to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211(a)(5).

Facts & Procedural Posture

On February 25, 2002, the plaintiffs' decedent underwent a kidney transplant ("the procedure") at defendant Rogosin Institute ("the Institute"). The procedure involved removing the decedent's right kidney and implanting a cadaveric kidney that was supplied by defendant New York Organ Donor Network ("the Network").

Approximately one month after the procedure, a biopsy was

performed on the implanted kidney at defendant New York Presbyterian Hospital ("Presbyterian"), which apparently revealed, among other things, minimal interstitial fibrosis (i.e. lesions). Another biopsy was performed on the implanted kidney at Presbyterian on May 28, 2002. In addition to mild interstitial fibrosis, this biopsy revealed, among other things, sparse lymphocytic infiltrate in the interstitium.

On September 3, 2002, after a summer marked by several visits to Presbyterian for treatment related to the implanted kidney, including a percutaneous nephrostomy (i.e. the insertion of a tube into the urinary tract to allow visualization), the decedent underwent a nephrectomy of the implanted kidney at Presbyterian. The decedent was informed that his body had rejected the implanted kidney. Pathology studies conducted on the donor kidney removed from the decedent indicated that there was extensive tumor infiltration of the organ. A consulting hematologist/oncologist subsequently detected evidence of lymphoma in the donor kidney removed from the decedent. This consulting physician noted that donor's other kidney, which was transplanted into another patient, also exhibited evidence of lymphoma, and that this other patient had died of lymphoma.

On September 19, 2002, approximately two weeks following the removal of the donor kidney, the decedent died after experiencing cardiac and respiratory arrest. An autopsy report received by the

plaintiffs on or about October 24, 2002 noted that the decedent had metastatic undifferentiated malignant neoplasm (i.e. cancerous tumors) involving most of his major organs.

The decedent's wife, Elena Alicea Rodriguez, was granted letters of administration of the decedent's estate, and commenced the instant action on behalf of the estate to recover damages for medical malpractice.¹ The action, which was commenced on September 20, 2004 by the filing of a summons and complaint, was brought against the Institute, Presbyterian, the Network, an unknown medical facility factitiously designated as the "Screening Hospital" and eighteen individual physicians, each one of whom, the plaintiffs alleged, had some affiliation with an institutional defendant. The crux of the plaintiffs' complaint is that the defendants negligently transplanted the cancerous cadaveric kidney into the decedent, causing the decedent to acquire the malignant cancer that metastasized to most of his major organs and ultimately resulted in his death.

Notwithstanding the fact that plaintiffs' commenced the instant action by filing the summons and complaint with the clerk of the court on September 20, 2004, defendants were not served within 120 days of the filing (to wit, January 18, 2005) as required under CPR 306-b. Plaintiffs' counsel maintains that they

¹Mrs. Rodriguez also asserted a derivative claim for loss of services and consortium.

forwarded copies of the summons and complaint to their process server on September 21, 2004 and requested that service be effected upon the defendants. Despite same, the process server advised that the summons and complaints were not received, and, as result, were not timely served.

Upon learning that service had not been effected within the statutory 120 days, plaintiffs had service executed upon defendants the Institute, Roxana Bologa, M.D., Darshana Dadhanania, M.D., Choli Hartono, M.D., Stuart Saal, M.D., Lee Richstone, M.D., and Presbyterian on February 1, 2005. Defendants the Network and "JOHN DOE" (first and last name being fictitious and unknown but intended to represent the Transplant Coordinator at the Network), were served on February 2, 2005. Defendants Yong-Ho Aug, M.D., Desmond Burke, M.D., Kapur Sandip., M.D. and Manikkam Suthanthiran, M.D. were served on February 3, 2005.

According to plaintiffs, service upon the remaining defendants, consisting of John Wigneswaran, M.D., Tigist Haily, M.D., Michael T. Wayant, M.D., Niesha Mhaskar, M.D., Susan Kim, M.D., "John" Berlin, M.D. (first name being fictitious and unknown), Ragupathy Ballachander, M.D., Simmons Khalmani, M.D. and the "Screening Hospital" was attempted on February 1, 2005 at the facilities of the institutional defendants. However, since these individuals were no longer employed by the institutional defendants, service was not accepted. Further, the "Screening

Hospital" could not be served as it had not yet been identified.

On February 4, 2004, plaintiffs made the instant motion, which seeks an extension of time to effect service of process upon each of the defendants pursuant to CPLR 306-b². Defendants Stuart D. Saal, M.D., s/h/a Stuart Saal, M.D., Sandip Kapur, M.D., s/h/a Kapur Sandip. M.D., M. Desmond Burke, M.D., s/h/a Desmond Burke, M.D., Lee Richstone, M.D., Roxana M. Bologna, s/h/a Roxana Bologa, M.D., Darshana M. Dadhinia, M.D., s/h/a Darshana Dadhanania, M.D., Choli Hartono, M.D., Yong H. Auh, M.D., s/h/a Yong-Ho Aug, M.D., The Rogosin Institute and New York-Presbyterian Hospital, s/h/a New York Presbyterian Hospital Weill Cornell Campus, and Manikkam Suthanthiran, M.D., seek, by cross-motion, an order dismissing the complaint insofar as asserted against them pursuant to CPLR 306-b. Defendant New York Organ Donor Network, Inc., has separately moved for an order dismissing the complaint insofar as asserted against it pursuant to CPLR 3211(a)(5), on the grounds that plaintiffs' action was time barred as it was commenced more than two and one-half years after its alleged malpractice.

² It appears that plaintiffs additionally seek leave to amend their summons and complaint pursuant to CPLR 3025(b). However, such relief was not demanded in their notice of motion and was only raised for the first time in their reply/opposition papers. Since plaintiffs failed to properly demand this relief in their notice of motion, as required by CPLR 2214, this court will not entertain any arguments relating to the amendment of plaintiffs' pleadings (see, Chun v. North American Mortgage Co., 285 AD2d 42 [1st Dept. 2001]; Escava v. Escava, 2005 WL 2077221 [Sup Ct, Kings County 2005]).

Analysis

I. Motion and Cross Motion Related to Service of Process

CPLR 306-b provides that service of a summons and complaint shall be made within 120 days of filing the complaint with the clerk of the court. Where service is not made upon a defendant within the 120 day period, a plaintiff's time to serve may be extended "upon good cause shown or in the interest of justice" (see CPLR 306-b; see also Leader v. Maroney, Ponzini, 97 NY2d 95 [2001]; Lippett v. Education Alliance, 14 AD3d 430 [1st Dept. 2005]; De Vries v. Metropolitan Transit Authority, 11 AD3d 312 [1st Dept. 2004]; Goldstein v. Columbia Presbyterian Medical Center, 1 AD3d 188 [1st Dept. 2003]; Wideman v. Barbel Trucking, Inc., 300 AD2d 184 [1st Dept. 2002]).

The "good cause" and "interest of justice" standards are two distinct standards under which a plaintiff may seek an extension of time to effectuate service of process (see Leader v. Maroney, Ponzini, supra; De Vries v. Metropolitan Transit Authority, supra). "The legislative history indicates that the interest of justice standard is a broader standard designed 'to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant" (De Vries v. Metropolitan Transit Authority, supra, citing Bill Jacket, L. 1997 ch. 476, at 14). Unlike an extension request brought under the good cause standard, a plaintiff may be granted an extension of

time to effectuate service in the interest of justice even where a plaintiff was not diligent in its initial attempts to serve the defendant within the time frame set forth in CPLR 306-b. Although it is clear that plaintiffs in the instant action cannot establish good cause to extend the time to effect service on defendants, an extension may be granted in the interest of justice.

As explained by the Court of Appeals, in Leader v. Maroney, Ponzini (supra):

[t]he interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter, however, the court may consider diligence or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length in delay of service, the promptness of the plaintiff's request for the extension of time.

Where the court is faced with the dismissal of an action based upon CPLR 306-b it is empowered to consider any factor relevant to the exercise of its discretion. "No one factor is determinative-the calculus of the court's decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served" (Id.)

In the case at bar, it is clear that the plaintiffs exhibited little to no diligence in effecting service upon the defendants

within the 120 day period following the filing of their complaint with the clerk of the court. However, with respect to those defendants that were served with the summons and complaint soon after the plaintiffs discovered their error³, numerous factors are present which warrant an extension of time to effect service upon them. Not only was the length in delay of service minimal, as these defendants were served no later than sixteen days after the 120 statutory period, but plaintiffs promptly moved for an extension of time to serve. It appears that once plaintiffs discovered that an error had occurred, they immediately sought to rectify the situation. Moreover, as a result of plaintiffs expeditious efforts following the discovery of their mistake, those defendants who were served cannot claim that they have been significantly prejudiced by plaintiffs failure to timely serve them, even though the statute of limitations expired prior to the time at which they were served (see Resk v. City of New York 293 AD2d 661 [2d Dept 2002][Prejudice is established by showing an injury, change of position, loss of evidence, or some other disadvantage resulting from the delay]; cf. Slate v. Schiavone

³These defendants include the Institute, Roxana Bologna, M.D., Darshana Dadhanania, M.D., Choli Hartono, M.D., Stuart Saal, M.D., Lee Richstone, M.D., Presbyterian, "JOHN DOE" (first and last name being fictitious and unknown but intended to represent the Transplant Coordinator at the Network), Yong-Ho Aug, M.D., Desmond Burke, M.D., Kapur Sandip., M.D. and Manikkam Suthanthiran, M.D. It is noted that that portion of plaintiffs' motion seeking an extension of time to effect service of process upon the Network is addressed in Part II infra.

Construction Company, 4 NY3d 816 [2005][Plaintiff denied an extension to serve defendants where, among other things, defendant first received notice of the action more than a year and a half after the running of the statute of limitations]).

Furthermore, the plaintiffs made a sufficient, though hardly overwhelming, demonstration of the merits of their claims through submission of the affirmation of a licensed physician (cf. Posada v Pelaez, 7/29/05 NYLJ p 18, col 1 [Sup Ct, New York County 2005]). Accordingly, based on the totality of the circumstances and in the interest of justice, plaintiffs' time to effectuate service as to those defendants who have been served shall be extended.

With respect to the remaining defendants⁴, it would not be in the interest of justice to extend plaintiffs' time to serve them. As these defendants have not yet been served and there is no evidence to suggest that they have been put on notice with respect to plaintiffs' claims, an "inference of substantial prejudice" is created (see Leader v. Maroney, Ponzini, supra; Yardeni v. Manhattan Eye, Ear and Throat Hospital, 9 AD3d 296 [1st Dept. 2004]).

Despite plaintiffs' contention to the contrary, it does not appear that these defendants had actual notice of plaintiffs'

⁴ These defendants include John Wigneswaran, M.D., Tigist Haily, M.D., Michael T. Wayant, M.D., Niesha Mhaskar, M.D., Susan Kim, M.D., "John" Berlin, M.D. (first name being fictitious and unknown), Ragupathy Ballachander, M.D., Simmons Khalmani, M.D. and the "Screening Hospital."

claims when served with the instant motion. Plaintiff initially attempted to serve the defendant physicians with the summons and complaint at the facilities of the institutional defendants on February 1, 2005. However, since these individuals were no longer employed by the institutional defendants, service was not accepted. Notwithstanding, the instant motion was served upon these defendants at the very same facilities of the institutional defendants that had advised plaintiffs that they no longer employed those defendants. Further, as the "Screening Hospital" has not been identified by plaintiffs, they were never served with the instant motion and do not have notice of plaintiffs' claims⁵. Based on the foregoing, it does not appear that these defendants have been put on notice with respect to plaintiffs' claims, and, as a result of the "inference of substantial prejudice" created, plaintiffs' motion is denied with respect to these defendants.

II. The Network's Cross Motion Related to Statute Of Limitations

Defendant New York Organ Donor Network, Inc., cross moves for an order dismissing the complaint insofar as asserted against it, pursuant to CPLR 3211(a)(5), on the grounds that plaintiffs' action was time barred as it was commenced more than two and one-half

⁵ It is noted that the use of a fictitious designation does not exempt a plaintiff from serving process on the intended defendant by an authorized method under the CPLR, nor does it toll the statute of limitations (see Luckern v. Lyonsdale Energy Limited Partnership, 229 AD2d 249 [4th Dept. 1997]).

years after its alleged malpractice. The Network contends that since any departure from accepted medical practice on its part occurred no later than February 24, 2002, at the time the donor's organs were removed for transplantation, the plaintiffs were required to commence their medical malpractice action no later than August 24, 2004. However, as the complaint in this action was not filed with the clerk of the court until September 20, 2004, such action should be time barred.

Generally, an action to recover damages for medical malpractice must be commenced within two years and six months of the accrual of the claim (i.e. act, omission or failure complained of) (CPLR 214-a). As such, plaintiffs' claim for personal injuries allegedly sustained by the decedent as a result of the negligence on the part of the Network in providing organ screening to plaintiffs' decedent, any claim alleging lack of informed consent, as well as the derivative claim for loss of services and consortium should be dismissed.

Despite plaintiffs' contention to the contrary, the claim alleging a failure on the part of the Network in providing adequate organ screening to plaintiffs' decedent sounds in medical malpractice, not negligence, and, thus, it is governed by the two years and six months limitation period set forth by CPLR 214-a as opposed to the three year limitation period of CPLR 214. "[T]he distinction between medical malpractice and negligence is a subtle

one, for medical malpractice is but a species of negligence and 'no rigid analytical line separates the two'" (Weiner v. Lenox Hill Hospital, 88 NY2d 784 [1996], quoting Scott v. Ulianov, 74 NY2d 673 [1989]). As set forth by the Court of Appeals in Weiner v. Lenox Hill Hospital (supra):

a claim sounds in medical malpractice when the challenged conduct 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician.' By contrast, when 'the gravamen of the complaint is not negligence in furnishing medical treatment to a patient, but the hospital's failure in fulfilling a different duty,' the claim sounds in negligence.

(quoting Bleiler v. Bodnar, 65 NY2d 65 [1985]; see also Boothe v. Lawrence Hospital, 188 AD2d 435 [1st Dept. 1992]).

As plaintiffs' claim that the Network was negligent in providing organ screening to plaintiffs' decedent implicates questions of medical competence and judgment linked to the treatment of plaintiffs' decedent, it sounds in medical malpractice and is subject to two years and six month statute of limitations as set forth by CPLR 214-a. This court acknowledges that the courts of this State have repeatedly found that claims relating to the failure of a hospital to adopt and prescribe proper procedures and regulations in connection with blood testing and screening sound in negligence (see Weiner v. Lenox Hill Hospital, supra; Bleiler v. Bodnar, supra). However, unlike blood collection, the examinations performed on prospective organ recipients, the removal of donor organs as well as any examinations and screening of those donor

organs conducted prior to transplantation into a recipient clearly bear a substantial relationship to the rendition of medical treatment by a licensed physician.

Further, plaintiffs incorrectly argue that the statute of limitations relating to the medical malpractice claims contained in the complaint were tolled as a result of the continuous treatment received by plaintiffs' decedent. Plaintiffs contend that the decedent's treatment in connection with the cadaveric right kidney transplantation concluded on the date of his death, September 19, 2002, and, thus, the statute of limitations with respect to all medical malpractice claims expired in or about March 2005. Notwithstanding, the plaintiffs have not provided any evidence that demonstrates that the treatment rendered by any physician or facility subsequent to the treatment rendered by the Network, which was prior to the decedent's February 25, 2002 kidney transplant, was ascribable to the Network. Therefore, such treatment cannot be considered continuous for purposes of tolling the statute of limitations (see, DeParalta v. Presbyterian Hospital, 121 AD2d 346 [1st Dept. 1986]; De Sainz v. City of New York, 101 AD2d 746 [1st Dept. 1984]).

Lastly, plaintiffs' inartfully pleaded wrongful death claim is governed by the two year limitations period pursuant to EPTL 5-4.1, which begins to run on the date of death (see EPTL 5-4.1; see also Dunefsky v. Montefiore Hospital Medical Center, 162 AD2d 300 [1st

Dept. 1990]; Krowicki v. St. Elizabeth Hospital, 113 AD2d 1023 [4th Dept. 1985]). The plaintiffs' wrongful death claim accrued on September 19, 2002, and, thus, the applicable statute of limitations expired two years later on the anniversary date of the death of the plaintiffs' decedent, September 19, 2004 (see Evans v. Hawker-Siddeley Aviation, Ltd., 482 F.Supp. 547 [U.S.D.C., S.D.N.Y. 1979]; Marino v. Proch, 258 AD2d 628 [2d Dept. 1999]; Ekas v. City Cab Company of Jamestown, New York, Inc., 203 Misc. 730 [Sup Ct Cattaraugus County 1953]; Siegel, N.Y. Practice §34 [4th Ed. 2005]). Since plaintiffs did not file their summons and complaint until September 20, 2005, their wrongful death claim is time-barred.

Accordingly, defendant Network's cross motion to dismiss the complaint insofar as asserted against it is granted, and, as a result, that portion of plaintiffs' motion seeking an extension of time to effect service of process upon the Network is denied.

Conclusion

Based upon the foregoing, it is hereby

ORDERED that that portion of plaintiffs' motion seeking an extension of time to effect service of process upon defendants Stuart D. Saal, M.D., s/h/a Stuart Saal, M.D., Sandip Kapur, M.D., s/h/a Kapur Sandip. M.D., M. Desmond Burke, M.D., s/h/a Desmond

Burke, M.D., Lee Richstone, M.D., Roxana M. Bologna, s/h/a Roxana Bologna, M.D., Darshana M. Dadhinia, M.D., s/h/a Darshana Dadhanania, M.D., Choli Hartono, M.D., Yong H. Auh, M.D., s/h/a Yong-Ho Aug, M.D., The Rogosin Institute and New York-Presbyterian Hospital, s/h/a New York Presbyterian Hospital Weill Cornell Campus, Manikkam Suthanthiran, M.D. and "JOHN DOE" (first and last name being fictitious and unknown but intended to represent the Transplant Coordinator at the Network) is granted and service is deemed effected and the aforementioned defendants shall serve their Answers upon plaintiffs within 30 days of service of a copy of this order with notice of entry; and it is further,

ORDERED that the remainder of the plaintiffs' motion is denied; and it is further,

ORDERED that the cross motion by defendants Stuart D. Saal, M.D., s/h/a Stuart Saal, M.D., Sandip Kapur, M.D., s/h/a Kapur Sandip. M.D., M. Desmond Burke, M.D., s/h/a Desmond Burke, M.D., Lee Richstone, M.D., Roxana M. Bologna, s/h/a Roxana Bologna, M.D., Darshana M. Dadhinia, M.D., s/h/a Darshana Dadhanania, M.D., Choli Hartono, M.D., Yong H. Auh, M.D., s/h/a Yong-Ho Aug, M.D., The Rogosin Institute and New York-Presbyterian Hospital, s/h/a New York Presbyterian Hospital Weill Cornell Campus, and Manikkam Suthanthiran, M.D. to dismiss the complaint insofar as asserted against them is pursuant to CPLR 306-b denied; and it is further,

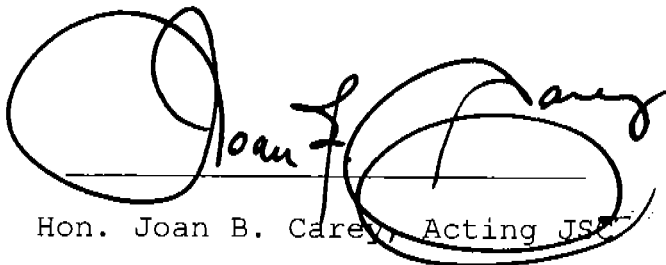
ORDERED that the cross motion of defendant New York Organ

Donor Network, Inc., to dismiss the complaint pursuant to CPLR 3211(a)(5) insofar as asserted against it is granted and the complaint is dismissed insofar as asserted against it, and the action against the remaining defendants is severed; and it is further,

ORDERED that the clerk of the court is directed to enter judgment in favor of defendant New York Organ Donor Network, Inc., dismissing the complaint insofar as asserted against it; and it is further,

ORDERED that counsel for the remaining parties are to appear before the court at 9:30 am on January 16, 2005, at 111 Centre Street, room 572, Part 40D, for a preliminary conference.

Date: December 15, 2005


Hon. Joan B. Carey, Acting JSC

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