

Walker v New York City Health & Hospital Corp.

2006 NY Slip Op 30281(U)

May 24, 2006

Supreme Court, New York County

Docket Number:

Judge: Eileen Bransten

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

PRESENT: EILEEN BRANSTEN
Justice

PART 6

WALKER,
Plaintiff,

INDEX NO. 109165/04

MOTION DATE 3/14/06

- v -

MOTION SEQ. NO. 02

HEALTH & HOSPITAL CORP.,
Defendants

MOTION CAL. NO. 05

The following papers, numbered 1 to 3 were read on this motion for reargument and stay.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

JUN 02 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5-24-06



EILEEN BRANSTEN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 SIX

-----X
MARSULETTE WALKER, as Administrator of the
Estate of MARTHA DODDS, Deceased,

Plaintiff,

-against-

Index No. 109165/04
Motion Date: 03/14/06
Motion Seq. No.: 002

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION and "JOHN DOE, M.D. #3192,"

Defendants.

-----X
PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 2221, defendant New York City Health and Hospitals Corporation ("HHC") moves for reargument of its motion to dismiss this medical malpractice and wrongful death action commenced by plaintiff Marsulette Walker, as Administrator of the Estate of Martha Dodds ("Ms. Dodds"). HHC's motion to dismiss was denied in a Decision and Order dated November 28, 2005. HHC also seeks a stay of the proceedings pending an appeal of this Court's determination. Plaintiff opposes reargument but does not oppose a stay of the trial pending appeal. *See*, CPLR 5519(a)(1).

FILED
JUN 02 2006
COUNTY CLERK'S OFFICE
NEW YORK

Background

In this medical malpractice action, plaintiff, among other things, claims that HHC, through its employees at Bellevue Hospital ("Bellevue"), negligently treated Ms. Dodds by failing to give her adequate follow-up instructions after amputation of her leg and by discharging her from Bellevue on May 19, 2003 without performing vascular testing.

Plaintiff asserts that as a result of defendant's negligent treatment, Ms. Dodds suffered conscious pain and suffering from August 2002 until her death on July 6, 2003.

In June 2005, after the completion of disclosure, HHC moved to dismiss "the cause of action for pain and suffering due to plaintiff's failure to comply with General Municipal Law § 50-e and § 50-i; and to dismiss the cause of action for wrongful death pursuant to CPLR § 3211(a)(7), § 3212 for failure to state a cause of action or, in the alternative, for summary judgment and pursuant to the EPTL § 5-4." Affirmation in Support ("Supp."), Ex. B1, Affirmation in Support (of Underlying Motion) ("Underlying Supp."), at ¶ 2.

In a Decision and Order dated November 28, 2005, this Court denied HHC's motion to dismiss. Affirmation in Support ("Supp."), at ¶ 2; Ex. A1.

Analysis

Underlying Motion

In the underlying motion to dismiss, HHC argued that plaintiff's notice of claim, which was served on September 19, 2003--120 days after her May 19, 2003 discharge from Bellevue--was untimely. Supp., Ex. B1, Underlying Supp., at ¶ 12. HHC asserted that even if the 90-day period to serve the notice of claim ran from Ms. Dodds' last scheduled follow-up appointment--May 30, 2003--it would still have been untimely, and therefore, dismissal of this action was warranted.

Plaintiff countered that HHC should be equitably estopped from asserting that the notice of claim was untimely. Plaintiff's counsel pointed out that Ms. Dodds' daughter, Marsulette Walker, forwarded a signed retainer agreement authorizing counsel to proceed with the case on September 2, 2003. Supp., Ex. B1, Affirmation in Opposition ("Underlying Opp."), at ¶ 2.

Ms. Walker did not know the last date of treatment that her mother underwent at Bellevue. *Id.*, at ¶ 8.

On September 19, 2003, plaintiff's counsel served a Notice of Claim on HHC, alleging wrongful death and conscious pain and suffering. *Id.*, at ¶ 2.

On November 12, 2003, less than six months after Ms. Dodds was discharged from the hospital, plaintiff's counsel requested that Bellevue release Ms. Dodds' medical records, which would have revealed her last day of treatment. *Id.*, at ¶ 8. A month later, Bellevue informed plaintiff's counsel that before processing the request, Bellevue "must receive the Court document making the daughter [Ms. Walker] the executor of the estate. Upon receipt of this and the [\$1290.89 duplication costs], the chart will be released to you." *Id.*, at ¶ 8.

Letters of Administration were issued on April 22, 2004. *Id.* Less than a week later, on April 27, 2004, plaintiff's counsel paid Bellevue's bill for the medical records. *Id.*

It is uncontested that on April 29, 2004, Bellevue provided plaintiff's counsel with an incomplete set of medical records. Bellevue's transmittal letter stated that enclosed was

a “certified copy of all records located * * * for the period from 10/02 to 7/03.” Supp., Ex. B1, Underlying Opp., at Ex. J. Importantly, the records from Ms. Dodds’ final surgery, which took place on May 7, 2003, were missing; thus, plaintiff’s counsel remained unaware of the last date of treatment at Bellevue.

On June 21, 2004, plaintiff filed a summons and complaint.

Just days later, on June 24, 2004, plaintiff’s counsel renewed the request that Bellevue produce Ms. Dodds’ complete medical record.

About two months later, by letter dated August 30, 2004--roughly one year and ninety days after Ms. Dodds’ last scheduled follow-up visit--Bellevue informed plaintiff’s counsel that upon payment of the copying fees, the records would be made available. Supp., Ex. B1, Underlying Opp., at Ex. K.

By the time plaintiff’s counsel had access to the records, the statute of limitations expired and with it the time to make a motion to serve a late notice of claim expired as well.

Plaintiff’s counsel picked up the Bellevue records in October 2004. On review of the records, plaintiff’s counsel discovered that Ms. Dodds’ treatment at Bellevue may have ended as early as May 2003. Thus, after it was too late to make a motion to serve a late notice of claim, plaintiff’s counsel for the very first time was able to learn that the notice of claim already served may have been late. Significantly, because of HHC’s delinquency in turning over the complete medical records, plaintiff’s counsel never had an opportunity

within the statute of limitations to realize that the notice of claim already served was defective or that a motion to serve a late notice of claim was required.

On that record, this Court concluded that HHC should be estopped from invoking untimeliness. *See*, Supp., Ex. A1. This Court addressed the statute of limitations only in connection with authorizing late service of a notice of claim. Additionally, although there was never any cross-motion to serve a late notice of claim--such an application would clearly have been untimely--this Court allowed late service by Ordering that the notice of claim already served be deemed served on HHC *nunc pro tunc*. *Id.*, at 15.

Now, HHC seeks reargument pursuant to CPLR 2221, arguing that this Court erred in its application of equitable estoppel and in *sua sponte* deeming the notice of claim timely served. Supp., at ¶ 4. HHC further contends that the Court also “failed to address the break in continuous treatment during the relevant period and therefore failed to find that the allegations of negligence relating to the early dates of care at Bellevue Hospital were time barred.” *Id.* Finally, HHC asserts that the EPTL was not properly applied in this case and that the wrongful death claim should have been dismissed.

Plaintiff counters that this Court should adhere to its earlier determination.

Reargument

Because nothing was overlooked or misapprehended, the motion for reargument is denied. *See, Foley v. Roche*, 68 A.D.2d 558, 568 (1st Dep't 1979).

At the outset, in its moving papers, HHC never argued that certain allegations relating to the early dates of Ms. Dodds' care at Bellevue were time barred and should be dismissed. *See, Supp., Ex. B1, Underlying Supp.* HHC focused on the untimeliness of the notice of claim. Its argument in the underlying moving papers with regard to the statute of limitations was limited to explaining that the "plaintiff could have moved for leave to serve a late notice of claim within the statutory period under GML §§ 50-e(1)(a),(5). She did not, and since the statute of limitations for conscious pain and suffering has since run, it is now too late to do so. The court is without discretion and must dismiss the cause of action for conscious pain and suffering as a matter of law." *Supp., B1, Underlying Supp., at ¶ 12.* Because HHC did not seek dismissal of plaintiff's malpractice claims based on Ms. Dodds' early treatment dates at Bellevue, that relief certainly will not be awarded now.*

Similarly, reargument is not warranted as to the wrongful death claim. HHC did not establish that plaintiff did not suffer any pecuniary loss. For example, plaintiff may be

* HHC's assertion in its reply papers that "all dates of treatment before [Ms. Dodds' January 13, 2003] admission to Bellevue are time barred" is to no avail. *See, Supp. Ex. B-1, Reply Affirmation, at ¶ 10.* It is beyond cavil that new grounds for a motion cannot be introduced on reply. *See, Zurich Ins. Co. v. R. Electric, Inc.*, 5 A.D.3d 338, 339 (1st Dept. 2004); *Dannasch v. Bifulco*, 184 A.D.2d 415, 417 (1st Dept. 1992).

entitled to reimbursement for funeral expenses. Supp., Ex. B1, Underlying Opp., at ¶ 18; *see, Ruiz v. New York City Health and Hospitals Corp.*, 165 A.D.2d 75, 79 (1st Dept. 1991); *Erbstein v. Savasatit*, 274 A.D.2d 445, 446 (2d Dept. 2000) (“EPTL 5.43[a] provides that a plaintiff may recover for ‘pecuniary injuries’ resulting from a decedent’s death, including any funeral expenses paid by the distributees”).

Finally, this Court remains convinced that allowing the notice of claim to be deemed timely served under these unique circumstances is appropriate. Significantly, plaintiff’s counsel made diligent efforts to secure the hospital records within the one-year-ninety-day statute of limitations. HHC mistakenly failed to timely provide plaintiff’s counsel with the records reflecting Ms. Dodds’ last date of treatment, leaving plaintiff without any basis for knowing (or even suspecting) that the notice of claim served months earlier was untimely. All the while, HHC had full access to the treatment dates.

By the time the records were provided to plaintiff’s counsel, the statute of limitations had run and counsel was no longer able to move for permission to serve a late notice of claim. Thus, in failing to timely provide plaintiff’s counsel with the most recent (and in certain respects the most important) medical records, HHC altogether deprived plaintiff of the ability to remedy the notice-of-claim defect.

Under these extraordinary circumstances, it was appropriate to deem the notice of claim served *nunc pro tunc*. *See, Cassidy v. County of Nassau*, 84 A.D.2d 742, 743 (2d Dept.

1981); *cf. Wade v. New York City Health and Hospitals Corp.*, 16 A.D.3d 677, 677 (2d Dept. 2005) (equitable estoppel is appropriate when a municipal defendant's conduct negligently discourages a party from serving a timely notice of claim and the conduct has been justifiably relied upon); *Kamruddin v. Desmond*, 293 A.D.2d 714, 715 (2d Dept. 2002) ("equitable estoppel may arise where there is an unreasonable delay in delivering records to an attorney consulted in a suspected case of medical malpractice"); *Arbutina v. Bahuleyan*, 75 A.D.2d 84, 87 (4th Dept. 1980) ("an unreasonable delay in delivering hospital records to an attorney consulted in a suspected case of malpractice may result in defendants being estopped from later asserting the Statute of Limitations if the delay prevented the timely commencement of an action").

Accordingly, it is

ORDERED that HHC's motion for reargument is denied; it is further

ORDERED that in accordance with CPLR 5519(a)(1) a stay pending appeal is in effect and the parties are to inform the court of an appellate determination within 10 days of its issuance.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
May 24, 2006

FILED
JUN 02 2006
COUNTY CLERKS OFFICE
NEW YORK

ENTER



Hon. Eileen Bransten