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

PRESENT: Eileen Bransten Justice PART 6

Index Number : 109773/2006
BRIZEL, RITA
VS
MALINOU, MARTIN
Sequence Number : 001
DISMISS ACTION

INDEX NO. 109773/06
MOTION DATE 2-2-07
MOTION SEQ. NO. 01
MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to/for dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3,4,5

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 4-2-07

J.S.C.
HON. EILEEN BRANSTEN

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

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

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RITA BRIZEL,

Plaintiff,

against

MARTIN MALINOU, Executor of the Estate of SHELDON MALINOU D.D.S.,

Defendant.

----------X

Index No.: 109773/06
Motion Date: 2/2/07
Motion Seq. No.: 01

EILEEN BRANSTEN, J.:

Pursuant to CPLR 3211, defendant Martin Malinou, Executor of the Estate of Sheldon Malinou D.D.S. ("the Executor") moves to dismiss this dental malpractice action commenced by plaintiff Rita Brizel ("Ms. Brizel"), arguing that plaintiff failed to comply with Rhode Island's nonclaim statute and failed to properly serve him.

Ms. Brizel opposes the motion and, as a precautionary matter, cross-moves for an extension of time to properly serve the Summons and Verified Complaint.

Background

Ms. Brizel was a patient of Sheldon Malinou ("Dr. Malinou"), a general dentist. Affirmation in Support of Motion ("Supp."), at ¶ 3.

Dr. Malinou died on September 12, 2005. Supp., Ex. C, at ¶ 4. Although he lived in New York at the time of his death, a probate estate was commenced in Rhode Island where Dr. Malinou possessed property and where, over a decade earlier, he had executed his will. *Id.*, at ¶¶ 2-3.

On December 8, 2005, Martin Malinou, Dr. Malinou's brother (who happens to be an attorney), was appointed as Executor of the Estate of Dr. Malinou ("the Executor") . In late December 2005, he sent Ms. Brizel, care of her attorney, a "Notice of Commencement of Probate," which set forth information regarding Dr. Malinou's Rhode Island probate estate. Supp., Ex. E.

Ms. Brizel commenced this dental-malpractice action against the Executor in June 2006. In her Verified Complaint, she alleges that Dr. Malinou committed malpractice while rendering dental treatment between September 11, 2004, and February 15, 2005.

The Executor's Verified Answer (dated August 24, 2006), includes the affirmative defenses of failure to "timely file a claim against decedent's estate" pursuant to Rhode Island General Laws §§ 33-11-4, 5, 9 and "insufficient service of process." Supp., Ex. B.

Discussion

Rhode Island Nonclaim Statute

In October 2006, the Executor made this motion to dismiss. He urges, among other things, that New York courts must apply Rhode Island's "statute of nonclaim," which provides:

> "Claims [against a Rhode Island estate] shall be filed within six (6) months from the first publication [of notice of the appointment of either an executor or administrator]. Claims not filed within six (6) months from the publication

> shall be barred; provided, that a creditor who, by reason of accident, mistake or any other cause, has failed to file his or her claim, may, at any time, before the distribution of the estate, petition the probate court for leave to file his or her claim, and the probate court, after notice to the executor or administrator of the estate and a hearing on the petition, may in its discretion, grant leave to file the claim upon the terms, if any, as the court shall prescribe, which claim, if allowed, shall be paid out of the assets remaining in the hands of the executor or administrator at the time of the receipt by him or her of notice of the pendency of a petition."

General Laws of Rhode Island § 33-11-5.

Shortly after being served with this motion, Ms. Brizel petitioned the Probate Court of the City of Providence to allow for the late filing of a claim. In December 2006, the Probate Court found that insurance coverage was sufficient to satisfy any judgment and ordered that Ms. Brizel "could file her claim by December 22, 2006, in accordance with Section 33-11-5 of the Rhode Island General Laws authorizing the Court to allow the late filing of a claim whenever there is reason by accident, mistake, or other cause; however, no assets of the estate other than the aforesaid insurance shall be available to satisfy any judgment which may be rendered in favor of Rita Brizel." Plaintiff's Supplemental Affirmation ("Plaintiff Supplemental"), Ex. 1, Order of Probate Court, City of Providence, at 1-2. The Order further set forth that the "Executor may disallow the claim as may be filed by Rita Brizel on or before January 13, 2007. *Id.*, at 2.

Subsequently, Ms. Brizel filed a claim against Dr. Malinou's estate in Probate Court in Rhode Island.

On December 26, 2006, the Executor disallowed the claim, (Plaintiff Supplemental, Ex. 1), and after that point, Ms. Brizel did not take any further action to pursue her dental-malpractice case in Rhode Island's courts.

The Executor now argues that Ms. Brizel's action must be dismissed because plaintiff cannot "ignore the Rhode Island Probate Court's Order and pursue her claim in this Court, rather than proceed in conformity with those remedies made available to her pursuant to the Probate Court's Order and Rhode Island's nonclaim statute." Defendant's Supplemental Affirmation ("Defendant's Supplemental"), at ¶ 11. The Executor argues that Rhode Island law required Ms. Brizel to either timely sue in Rhode Island Superior Court (citing Rhode Island Gen. Laws § 33-11-48), or to proceed with a proof-of-claim hearing before the Probate Court (pursuant to Rhode Island Gen. Laws § 33-11-6). Defendant's Supplemental, at ¶ 9.

Ms. Brizel counters that, pursuant to Rhode Island law, once the Executor disallowed her claim her only recourse was to proceed with her action before the Probate Court, City of Providence. Plaintiff's Supplemental, at ¶ 9. "Such a requirement," she argues, "is not only illogical, unfair and unjust, but impossible to effectuate" because "the Probate Court lacks subpoena power and cannot conduct a jury trial." *Id.*, at ¶ 10. Relying on *Babcock v. Jackson*, 12 N.Y.2d 473 (1963), Ms. Brizel maintains that conflict of laws analysis requires application of New York--not Rhode Island--law because "the plaintiff, defendant and course of treatment are all New York based." *Id.*, at ¶ 7.

Although Ms. Brizel is wrong, her action will nonetheless survive.

It is well-settled that a plaintiff suing the personal representative of an out-of-state estate must comply with the jurisdiction's statutory requirements for commencement of an action regardless of the strong New York contacts associated with the case. *Gaslow v. Phillips Nizer Benjamin Krim & Ballon, LLP*, 286 A.D.2d 703, 705 (2d Dept. 2001) (legal malpractice claim by New York plaintiff against the Florida estate of a New York lawyer, which was based on malpractice allegedly committed in New York, dismissed for noncompliance with Florida Probate Code), *lv. dismissed* 97 N.Y.2d 700 (2002); *see also*, *Boone Assocs. v. Oaster*, 257 A.D.2d 370, 371 (1st Dept. 1999) (breach of contract and fraud claims properly dismissed based on noncompliance with Florida Probate Code).

The objective of Rhode Island's nonclaim statute is to "produce a speedy settlement of estates, and the repose of titles derived under persons who are dead." *Thompson v. Hoxsie*, 55 A. 930, 931 (R.I. 1903). Accordingly, Rhode Island's nonclaim provision requires that any claim against an estate be filed with the Probate Court within six months of publication of the identity of the estate's personal representative. A claim against a Rhode Island estate can only be filed later if the estate has not been distributed and the claimant receives the Probate Court's permission to file a late claim. *See*, General Laws of Rhode Island § 33-11-5 (quoted earlier on pages two and three).

After a claim is properly filed, the executor of the estate can timely disallow it in whole or in part. Rhode Island General Laws § 33-11-14. If there has been no disallowance and the estate is solvent then the executor "shall pay" the claim . Rhode Island General Laws § 33-11-19. As to disallowed claims against a solvent estate, Rhode Island General Laws § 33-11-48 authorizes:

> "suit on claims disallowed * * * may be brought within thirty (30) days after notice is given to the claimant that the claim is disallowed."

Unlike the plaintiffs in *Gaslow* and *Boone* who wanted to proceed in New York with their suits against Florida estates without complying with Florida's equivalent of a nonclaim statute, Ms. Brizel, with the Rhode Island Probate Court's express permission, belatedly filed a claim against Dr. Malinou's estate. The Executor therefore had timely notice of the claim under Rhode Island law.

Although the Executor disallowed the claim, Ms. Brizel's suit was brought well within 30 days of the disallowance. In fact, her suit--which the Executor undoubtedly knew about all along-- was commenced in New York even before the claim was disallowed in Rhode Island. Because the Executor was well aware of the pendency of the action, there was no need for Ms. Brizel to commence yet another action after the disallowance.

The Executor, moreover, has not demonstrated that Rhode Island General Laws § 33-11-48 mandates that a claimant's post-disallowance suit be commenced exclusively in a

Rhode Island court. Though Rhode Island cases construing the provision state that after disallowance a suit can be commenced in Rhode Island's Superior Court, *see, e.g., Heflin v. Koszela*, 774 A.2d 25, 32 (R.I. 2001); *Bentsen v. Finn*, 2006 WL 1360940, at *5 (R.I. Super. Ct. May 17, 2006), there is absolutely no indication either in the cases or in the statute that suits in other courts are prohibited. In *Heflin v. Koszela*, for example, the plaintiff "rented and lived in a house" in Rhode Island. *See*, *Heflin v. Koszela*, 774 A.2d, at 28. It makes perfect sense that he wanted the matter litigated in Rhode Island's Superior Court as opposed to a court in another jurisdiction (and that he was not compelled to bring his suit there). Here, by contrast, neither Ms. Brizel nor her dispute have any connection whatsoever to Rhode Island and the Executor has not established that her "suit on [a claim] disallowed" cannot be brought in New York in accordance with General Laws of Rhode Island § 33-11-48.

There has been full compliance with the letter and spirit of Rhode Island's nonclaim law. Ms. Brizel properly filed a claim against Dr. Malinou's probate estate. The Executor had notice of the claim, which will not deplete the value of the estate because pursuant to the Rhode Island Probate Court's Order--to be given full faith and credit in New York--recovery will be limited to Dr. Malinou's liability insurance proceeds. Finally, immediately after the Executor's disallowance he unquestionably knew of the pendency of this dental-malpractice suit to resolve the merits of Ms. Brizel's claim against the estate. Under these circumstances,

it would be wholly inequitable to dismiss Ms. Brizel's suit. Thus, the Executor's motion to dismiss for failure to comply with Rhode Island's nonclaim statute is denied.

Improper Service of Process

The Executor also moves for dismissal of the action based on improper service of process. He swears under oath that on "July 27, 2006, [he] found a copy of the Summons and Verified Complaint in this matter in an envelope taped to the door of [his residence located at 334 Smith Street, and that he] did not receive a copy of the Summons and Verified Complaint by first class mail at [his] residence, which is also [his] actual place of business." Supp., Ex. C, at ¶ 8. For that reason (among others), he correctly argues, that there has not been compliance with CPLR 308(4)'s "nail and mail" provision.

Relying on an affidavit of service filed in August 10, 2006, Ms. Brizel responds that the Summons and Verified Complaint were personally delivered to the Executor. The affidavit of service sets forth:

> "That on 7/22/06 at 8:45 A.M. at 334 Smith Street * * * deponent served the within Summons and Verified Complaint with Certificate of Merit on Martin Malinou defendant therein named, by personally delivering to and leaving with said Martin Malinou a true copy thereof."

Affirmation in Opposition and in Support of Cross-Motion ("Cross"), Ex. 1. Ms. Brizel submits that if there is any question about the affidavit's accuracy a traverse hearing must be

held. Cross, at ¶ 14. If for some reason service is deemed improper, she cross-moves for an extension of time to serve pursuant to CPLR 306-b.

The Executor replies that he "was not personally served with a copy of [the] Summons and Verified Complaint on July 22, 2006 at 8:45 a.m. at [his] residence and actual place of business." Reply Affirmation in Support of Defendant's Motion to Dismiss and in Opposition to Plaintiff's Cross-Motion, Ex. A. The Executor, once again, insists that he found a copy of the papers taped to his door five days later, on July 27th.

The parties disagree over whether service of process was proper, Ms. Brizel insisting that it was (based on the affidavit of service that she filed) and the Executor maintaining that it was not (arguing that the Summons and Verified Complaint were not personally delivered to him and that the affidavit of service is therefore inaccurate). Ordinarily, this conflict would be resolved by a traverse hearing. *See, e.g., Ananda Capital Partners, Inc. v. Stav Electrical Systems, Ltd.*, 301 A.D.2d 430 (1st Dept. 2003) (dispute as to service requires traverse hearing).

However, where, as here, Ms. Brizel has sought an interest-of-justice extension of time to serve the Executor, and an extension is warranted, there is no reason for the parties to go through the effort and expense of a traverse hearing (at the end of which, plaintiff, if unsuccessful, could always seek an extension of time to serve as well).

CPLR 306-b authorizes this Court to grant an extension of time to serve the summons and complaint in the interest of justice. The "interest of justice standard" contemplates accommodation of late service due to a mistake, confusion or oversight, so long as there is no prejudice to the defendant. *Leader v. Maroney*, 97 N.Y.2d 95, 104-105 (2001).

> "[It] 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 causes of action, the length of the delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant."

Id., at 105-106.

Ms. Brizel diligently attempted (if not effected) service within the time frame allotted by the CPLR. Until this motion was made, she had no concrete reason to believe that service may have been improper and that her process server's affidavit may have been faulty.

Additionally, without an extension of time to serve, some of Ms. Brizel's allegations may be barred by the statute of limitations (those alleging malpractice in connection with treatment dates more than two and a half years ago--unless there was continuous treatment).

The Executor, moreover, had actual knowledge of the lawsuit within the statute of limitations and would not be prejudiced by an extension of time to serve (it is unlikely that the Executor has any relevant substantive information anyway--there is no real fear that

between the time service was supposed to have been effected and now his memory may have faded).

In the end, Ms. Brizel's reliance on the affidavit of her process server warrants an "interest-of-justice" extension of her time to serve. *See*, *Lippett v. Education Alliance*, 14 A.D.3d 430, 431 (1st Dept. 2005) ("action was timely commenced, plaintiff made a good faith attempt to serve defendant and defendant received actual notice of the claim within the prescribed 120-day period and before the expiration of the statute of limitation on the negligence claims. Plaintiff's failure to attempt to re-serve defendant upon receiving its answer alerting counsel to the problem with service should not preclude an extension in the interest of justice, particularly where defendant received actual notice of the action and shows no prejudice from the delay, and the statute of limitations expired in the interim"); *see also*, *Estey-Dorsa v. Chavez*, 27 A.D.3d 277, 278 (1st Dept. 2006) (extension appropriate based on, among other things, "the expiration of the statute of limitations" and "defendant's failure to demonstrate prejudice"); *de Vries v. Metropolitan Transit Auth.*, 11 A.D.3d 312, 313 (1st Dept. 2004) (extension of time warranted based on, among other things, timely attempted service and lack of prejudice); *Goldstein v. Columbia Presbyterian Med. Ctr.*, 1 A.D.3d 188, 188 (1st Dept. 2003) (extension proper as defendant failed to show any prejudice).

Thus, in the interest of justice, plaintiff's cross-motion for an extension of time to serve the Executor is granted and Ms. Brizel must properly serve the Executor within 30 days of the date of this Decision and Order.

Accordingly, it is

ORDERED that defendant's motion to dismiss is DENIED; and it is further

ORDERED that plaintiff's cross-motion is GRANTED to the limited extent that pursuant to CPLR 306-b she is granted 30 days from the date of this Decision and Order to properly serve the Executor; and it is further

ORDERED that the parties are to appear for a preliminary conference on May 1, 2007 at 10:30 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
April 2, 2007

ENTER:

Eileen Branston, JSC