

**Mason v Haimovich**

2007 NY Slip Op 30917(U)

April 20, 2007

Supreme Court, New York County

Docket Number: 0114053/2005

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

GENA MASON,  
Plaintiff,

Index No.: 114053/05

Motion Date: 12/05/06

- v -

Motion Seq. No.: 03

MENACHEM HAIMOVICH, OSCAR RODRIGUEZ,  
LYNDA ZWEBEN-HOWLAND, DANIEL SCHECHTER,  
RORY O'CONNOR, KEN JORDAN, and DOES 1-25,  
inclusive,  
Defendants.

Motion Cal. No.: 70

The following papers, numbered 1 to 3 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3	_____

**FILED**

APR 25 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers,

Defendants Oscar Rodriguez and Lynda Zweben-Howland move for to dismiss plaintiff's complaint against them. Plaintiff pro se opposes the motion.

Movants argue that the claims asserted against them sound in medical malpractice and must be dismissed as time-barred under CPLR 214-a. The court agrees. The last medical treatment of movants rendered to plaintiff was in 1999 and this action was not commenced until 2005. Plaintiff raises no allegations of

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

continuous treatment that would have tolled the limitations period. Therefore plaintiff's claims against the movants are untimely under the two year, six-month limitations period of CPLR 214-a.

As this court has stated previously, the plaintiff fails to state a claim for civil conspiracy as that cause of action is not recognized in this state. Alexander & Alexander of New York, Inc., v Fritzen, 68 NY2d 968, 969 (1986) ("as we long ago held, a mere conspiracy to commit a tort is never of itself a cause of action. Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort"). To the extent plaintiff's claims against the movants sound in tort, they too are barred by the statute of limitations. See CPLR 214 (5).

Plaintiff's cross-motion for a default judgment shall be denied. The movants served a notice of appearance and demand on October 31, 2005. The movants further concede that they were served with the complaint following due demand therefore on November 21, 2005. The movants and plaintiff agree that the movants filed an affidavit of service setting forth that an answer was served upon plaintiff January 6, 2006. Although plaintiff does not rebut the proof of service, plaintiff states that she received the answer on February 8, 2006, and rejected and returned it that same day. However, the parties

subsequently entered into discovery orders on January 24 and February 28, 2006. The court further observes that the plaintiff did not apply for a default against the movants at the time such motion was brought against other defendants on March 31, 2006.

However, the court shall deny the cross-motion for a default judgment based upon the standard set forth in CPLR 3012 (d) and 5015 (a). Movants' submissions in support of their motion to dismiss set forth a meritorious defense to the current action and the record sets forth that the movants appeared before this court and engaged in discovery during the 11 months since they were served with the complaint. On these facts, the movants have established that they have a reasonable excuse for any delay insofar as they have actually and actively participated in the litigation.

The sole remaining defendant in this action is KEN JORDAN and the court shall direct that the plaintiff and that defendant appear for a further status conference.

Accordingly, it is

ORDERED that the motion for summary judgment dismissing the complaint against defendants OSCAR RODRIGUEZ and LYNDIA ZWEBEN-HOWLAND is GRANTED and the Clerk is directed to enter judgment DISMISSING this action in its entirety against defendants OSCAR RODRIGUEZ and LYNDIA ZWEBEN-HOWLAND ; and it is further

ORDERED that plaintiff's cross-motion for a default judgment is DENIED; and it is further

ORDERED that the remaining parties including the plaintiff, GENA MASON and defendant, KEN JORDAN, are directed to attend a status conference on May 8, 2006, in TAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013 at 11:00 A.M .

This is the decision and order of the court.

Dated: April 20, 2007

ENTER:

~~Debra A. James~~  
J.S.C.  
**DEBRA A. JAMES**  
J.S.C.

**FILED**  
APR 25 2007  
NEW YORK  
COUNTY CLERK'S OFFICE