

Williams v St. Luke's-Roosevelt Hosp. Ctr.

2007 NY Slip Op 31473(U)

May 29, 2007

Supreme Court, New York County

Docket Number: 0102452/1998

Judge: Eileen Bransten

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

PRESENT: Eileen Bransten
Justice

PART 6

Index Number : 102452/1998

WILLIAMS, THELMA

vs

ST. LUKE'S ROOSEVELT HOSPITAL

Sequence Number : 001

DISMISS ACTION

INDEX NO. 102452/98

MOTION DATE 3-27-07

MOTION SEQ. NO. 01

MOTION CAL. NO. 11

The following papers, 3

motion to/for dismiss for failure to prosecute

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED
JUN 06 2007
NEW YORK COUNTY CLERK'S OFFICE

Dated: 5-29-07

Eileen Bransten
J.S.C.

HON. EILEEN BRANSTEN

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):

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

-----X
THELMA WILLIAMS, as Administratrix and Personal
Representative of the Estate of NORMA CAMPBELL,
deceased,

Plaintiff,

-against-

Index No.: 102452/98
Motion Date: 03/27/07
Motion Seq. No.: 01
Motion Cal. No.: 11

ST. LUKE'S - ROOSEVELT HOSPITAL CENTER, a/k/a
GREATER METROPOLITAN HOSPITAL SYSTEM,
INC., DR. CONSTA ANAGNOSTAOPOULOS,
DR. CLIFF CONNERY, DR. DONNA MENDES,
DR. GEOFFREY POLLACK, DR. JEAN-CLAUDE,
DR. KYUNG PARK, DR. S. PODDA, DR. SHEILA
APICELLA, AND DR. A. PEPE and "John Doe",
"Jane Doe", "John Roe" and "Jane Roe" (said named
being fictitious and unknown by intended to represent
physicians and nurses who rendered care to deceased
NORMA CAMPBELL),

FILED
JUN 06 2007
NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

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

In motion sequence number 01, pursuant to CPLR 3216, defendant St. Luke's-
Roosevelt Hospital Center ("St. Luke's") moves to dismiss the complaint of Thelma
Williams, as Administratrix and Personal Representative of the Estate of Norma Campbell,
deceased ("Plaintiff"), with prejudice, for failure to prosecute the action.

Background

On November 6, 1995, 71-year-old Norma Campbell ("Ms. Campbell") underwent cardiac bypass surgery at St. Luke's. Affirmation in Support ("Supp."), at ¶ 2. Six days later, while still in the hospital, she fell out of her bed. *Id.* As a result, she allegedly suffered "severe cardiac arrest," her right leg was injured and an above-the-knee amputation was performed on December 5, 1995. *Id.* On February 19, 1996, Ms. Campbell died at the hospital. *Id.*

Plaintiff commenced this wrongful death and medical malpractice action more than nine years ago in February 1998. Supp., at ¶ 3. On the summons, "Plaintiff's Attorneys" are designated as Emengo & Harlowe, P.C. Supp., Ex. A. At the commencement of the case, Anthony C. Emengo, Esq. certified that he consulted with a physician and believed that there was a reasonable basis for pursuing recovery. *Id.*

St. Luke's answered--thus issue was joined--on March 12, 1998. *Id.* In response to the hospital's demand, Plaintiff provided St. Luke's with a bill of particulars (more than 10 months later) on January 18, 1999.

Defendants Dr. C.E. Anagnostopoulos (sued as Dr. Consta Anagnostopoulos), Dr. Cliff Connery, Dr. Donna Mendes, and Dr. Anthony Pepe (sued as Dr. A. Pepe) served answers as well. Supp., at ¶ 4. On June 22, 2000, however, Plaintiff's counsel "Emengo and

Harlowe” stipulated that the action as against these individual defendants was “discontinued with prejudice” and that the case would proceed as to St. Luke’s. Supp., Ex. C.

There is no indication that the remaining named defendants Dr. Geoffrey Pollack, Dr. Jean-Claude, Dr. Kyung Park, Dr. S. Podda, and Dr. Sheila Apicella were ever served. Supp., at ¶ 4. They have not entered any appearances.

On approximately March 7, 2002, Plaintiff, via her attorneys Emengo & Harlowe, served an Amended Bill of Particulars, alleging that St. Luke’s failed to properly train and supervise its employees and medical staff. Supp., at ¶ 5.

Since that time--in the last five years--Plaintiff has done nothing to pursue this case. There has been no preliminary conference and absolutely no discovery. Supp., at ¶ 6.

On August 9, 2006, St. Luke’s served a CPLR 3216 90-Day Notice (“Notice”) on Plaintiff, sending it by certified mail to counsel of record--Emengo & Harlowe. Supp., Ex. F. The Notice explained that failure to resume prosecution and file a Note of Issue within 90 days “will serve as a basis for a motion for dismissal.” *Id.*

Plaintiff has not resumed prosecution of this case or filed a note of issue. Nothing has been done to press the nine-year-old matter any further.

In January 2007, well over 90 days from sending the Notice, St. Luke’s made this motion to dismiss the case with prejudice based on Plaintiff’s failure to prosecute.

In response, Anthony C. Emengo, Esq. submits an Affirmation Entering a Limited Appearance and in Opposition to Motion ("Emengo Aff."), which is dated February 14, 2007, and sets forth that:

- in 2003, he was discharged from Emengo & Harlow;
- his representation of Plaintiff allegedly "ceased upon [his] discharge from employment;"
- Mr. Harlowe, purportedly Plaintiff's counsel, is deceased
- he received St. Luke's motion papers and "unsuccessfully sought a stipulation to keep this motion in abeyance until [he] could make contact with the plaintiff to determine whether [he] would be retained to appear and prosecute the case on behalf of plaintiff;"
- he has not succeeded in contacting Plaintiff, and has no idea of her whereabouts; and
- he is not authorized to appear in this matter but nonetheless seeks an indefinite adjournment "pending when and if [he] can make contact with plaintiff to determine which way forward."

Emengo Aff., at ¶¶ 3-8. No documentation or other proof (other than the affirmation) is offered to support Mr. Emengo's assertions.

Because St. Luke's has fully complied with CPLR 3216, its motion to dismiss must be granted; however, the action is dismissed without prejudice.



Analysis

Pursuant to CPLR 3216, a court may dismiss an action based on unreasonable neglect to prosecute provided that issue was joined, more than one year elapsed since the joinder of issue and a written demand was served by registered or certified mail that calls for resumption of prosecution within 90 days and sets forth that a failure to comply will serve as a basis for a motion to dismiss the case. CPLR 3216(b); *Baczkowski v. D.A. Collins Const. Company, Inc.*, 89 N.Y.2d 499, 504-505 (1997); *Grullon v. Henry*, 7 A.D.3d 342, 343 (1st Dept. 2004) (because defendant served a proper 90-day notice and there was no compliance “it was an abuse of discretion for the court to refuse to dismiss the action where plaintiffs did not oppose the motion and therefore failed to demonstrate either the existence of a meritorious cause of action or a justifiable excuse for their failure to timely file a note of issue.”).

A CPLR 3216 dismissal is “not on the merits” unless the order specifies to the contrary. CPLR 3216(a) (emphasis added).

St. Luke’s served its answer and issue was joined more than nine years ago. A proper 90-day demand for resumption of prosecution was mailed to Plaintiff’s counsel of record and, despite the passage of more than 90 days, absolutely no action was taken to resume prosecution of the case. This Court cannot hold the action in abeyance forever based on the

unsubstantiated, undetailed affirmation submitted by Mr. Emengo who has had months to locate Plaintiff but failed to do so. The dismissal is without prejudice in order to afford Plaintiff the opportunity to attempt to vacate the default upon a proper motion.

Accordingly, it is

ORDERED that St. Luke's motion to dismiss the complaint pursuant to CPLR 3216 is granted except that the dismissal is without prejudice.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
May 29, 2007

ENTER



Hon. Eileen Bransten

FILED
JUN 06 2007
NEW YORK
COUNTY CLERK'S OFFICE