

<b>Capogrosso v Kansas</b>
2007 NY Slip Op 32042(U)
July 5, 2007
Supreme Court, New York County
Docket Number: 0112291/2006
Judge: Debra A. James
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

ELEANOR CAPOGROSSO,

Plaintiff,

- v -

TINA KANSAS,

Defendant.

Index No.: 112291/06

Motion Date: 03/27/07

Motion Seq. No.: 01

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 10 were read on this motion to dismiss.

- Notice of Motion -Affirmation -Exhibits
- Answering Affidavits - Exhibits
- Replying Affirmation - Exhibits

PAPERS NUMBERED

1 - 4

5, 6

7 - 10

**UNFILED JUDGMENT**  
Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the County Clerk's Desk (Room 4123)

Cross-Motion:  Yes  No

Upon the foregoing papers,

the court shall deny defendant's motion to extend her time to move to dismiss as unnecessary. The court shall grant defendant's motion to dismiss the Complaint, deny her motion for sanctions and grant her motion for an order enjoining plaintiff from bringing any further motions or initiating any future actions without prior approval of the Administrative Judge of the court in which she seeks relief.

Plaintiff and defendant are both attorneys who represent themselves in this legal malpractice action. In this action, plaintiff alleges that defendant represented her on her medical malpractice lawsuit against the Hospital for Special Surgery in

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):

connection with treatment she received as an admitted patient from January 6 to January 9, 2000. Both parties agree that on August 27, 2003, the Civil Court (Kenney, J.) granted defendant hospital's application to dismiss that medical malpractice action with prejudice, reasoning

"Plaintiff is in violation of three prior orders of this Court directing her to provide expert witness response before proceeding further. Plaintiff has not provided any expert affidavit or response establishing the merit of her claim. There is no evidence of any medical malpractice and there is no evidence of any injury or damage."

Such Order was filed with the clerk of the court on August 28, 2003.

In her supporting affirmation, defendant asserts that her characterization of the Complaint at bar as "perjurious" and plaintiff's precipitous service of such on defendant "just before the Thanksgiving holiday, more than two months after the complaint was filed" is borne out by the court file. Accordingly, the court takes judicial notice of the court file (Magid v Gabel, 25 AD2d 649 [1<sup>st</sup> Dept 1966]) and determines that the Summons and Complaint dated August 31, 2006 was filed with the court clerk on September 1, 2006. According to the affidavit of service filed with the same clerk, plaintiff allegedly caused such pleadings to be served on defendant's co-worker at defendant's actual place of business on November 7, 2006; on November 8, 2006, she caused a copy of such pleadings in an envelope addressed to defendant's last known address to be placed

in an official depository of the United States Postal Service. Pursuant to CPLR § 308(2), such service was complete when proof of service thereof was filed with the court clerk, which according to the court file took place on November 13, 2006.

As the summons and complaint were served on defendant by "suitable age and discretion" service [CPLR § 308(2)], service of defendant's answer was due thirty days after completion of service of the Complaint, i.e., her answer was due on December 13, 2006 pursuant to CPLR § 3012 (c). According to her affidavit of service, defendant served the motion to dismiss at bar on plaintiff on December 8, 2006, having on that day in a envelope on which was affixed regular first class postage, mailed such papers. Her motion to dismiss, therefore, was not late, as it was served when mailed [(CPLR Rule 2103(b)(2))], rendering unnecessary her motion to the extent that it seeks to extend her time to move to dismiss.

Defendant's ground for her motion to dismiss is that the statute of limitations expired prior to plaintiff's commencement of her action for legal malpractice. Under CPLR § 214, plaintiff had three years after her claim for legal malpractice accrued to commence her action. There is no evidence in the record before the court that defendant provided any legal services to defendant.

after August 28, 2003, the date of filing of the Order dismissing her medical malpractice complaint.<sup>1</sup>

"A legal malpractice claim accrues 'when all the facts necessary to the cause of action have occurred and an injured party can obtain relief in court' (Ackerman v. Price Waterhouse, 84 NY2d 535, 541 [1994]). ...[T]his accrual time is measured from the day an actionable injury occurs, 'even if the aggrieved party is then ignorant of the wrong or injury' (id.)".

McCoy v. Feinman, 99 NY2d 295 (2002).

Plaintiff therefore had three years after her injury, i.e. the dismissal of the complaint, or until August 29, 2006, to commence her legal malpractice action against defendant. Instead, she filed such process with the court clerk on September 1, 2006. As the statute of limitations expired two days before such date, plaintiff's Complaint for legal malpractice is untimely and barred by the applicable statute of limitations.

With respect to defendant's application for sanctions, the court denies such relief as unwarranted as the court does not find plaintiff's legal malpractice action completely without merit in law pursuant to 22 NYCRR § 130-1.1. However, the court

---

<sup>1</sup> Defendant contends that based on her letter dated November 24, 2002 to plaintiff, she no longer represented plaintiff as of that date. However, the court finds that letter a nullity as defendant failed to comply with CPLR 321(b), which governs applications or notices that relieve or substitute counsel. Such omission on the part of the defendant and a general review of the papers submitted by each party on the motion at bar demonstrates that both parties engage in a ponderous approach to litigation and that neither has any sense of the simplicity and elegance that abiding by court rules and sometimes merely observing the plain logic of trial practice provide.

grants defendant's motion for an injunction against plaintiff. Court records show that plaintiff caused at least fifteen actions to be commenced on her own behalf in state courts in New York City during the five year period from 2002 through 2006. At least three of these actions (one commenced in New York City Civil Court, i.e., the underlying medical malpractice action related to the case at bar, and two commenced in New York State Supreme Court) involve her four day stay at the Hospital for Special Surgery. The court records set forth the names and index numbers for each such action. The only lawsuit which appears to have been meritorious is the landlord tenant proceeding she brought in the New York City Civil Court in December 2002 against defendant Kansas, who apparently was her tenant at one time. Several others were dismissed for lack of merit.

Further, according to correspondence dated December 30, 2003, sent to the defendant, the Departmental Committee of the First Judicial Department, undertook a "careful investigation" of a complaint plaintiff filed against her, and "after review" "determined to take no further action and closed the file on this matter."

Moreover, plaintiff has challenged the integrity of at least three judges (including the undersigned), who have presided over actions in which she was a party. Two such jurists have recused

themselves from hearing any matters in which she is a party, the most recent by Order entered on February 5, 2007.

Finally, by Order dated January 10, 2003 (Bransten, J.) in Capogrosso v. Hospital for Special Surgery (NY Co Supreme Court Index No. 112075/02), the court dismissed plaintiff's complaint therein based upon the pendency of the same cause of action in another court. In her decision, the court stated further that "Capogrosso narrowly escapes sanctions this time but hopefully will nonetheless learn that she must follow court orders and that measures (sic) to avoid judicial decrees will not be countenanced."

Though a review of the record shows that plaintiff has flirted with placing her own license to practice law in jeopardy, of more moment is her pattern of commencing frivolous and repetitious actions. Based on a pattern of vexatious conduct and repetitive litigation and proceedings brought by plaintiff (see Sutherland v City of New York, 245 AD2d 210 [1<sup>st</sup> Dept 1997] and In re Winters v Gould, 143 Misc2d 44 [NY Co Supreme Court 1989]), this court grants a protective order prohibiting plaintiff from initiating any further litigation as party plaintiff without prior approval of the Administrative Judge of the court in which she seeks to bring a further motion or future action or of the designee of such judge, with the sole exception of appealing the herein Order.

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint in its entirety is GRANTED, and it is further

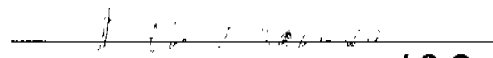
ORDERED that plaintiff is hereby enjoined from initiating any further litigation as party plaintiff without prior approval of the Administrative Judge of the court in which she seeks to bring a further motion or future action or of the designee of such judge, with the sole exception of appealing the instant Order, and it is further

ORDERED and ADJUDGED that the Clerk shall enter a judgment accordingly.

This is the decision and order of the court.

Dated: July 5, 2007

ENTER:

  
**DEBRA A. JAMES** S.C.  
**J.S.C.**

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or interested representative must appear in person at the Judgment Clerk's Desk (Room 11B)