

Rudin v Hospital for Joint Diseases

2007 NY Slip Op 32096(U)

June 29, 2007

Supreme Court, New York County

Docket Number: 0117767/2006

Judge: Stanley L. Sklar

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

PRESENT: Hon. Stanley L. Sklar

PART 29

Index Number : 117767/2006

RUDIN, STEVEN

vs

HOSPITAL FOR JOINT DISEASES

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

Dated: 6/29/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

-----x
STEVEN RUDIN and MICHELE RUDIN,

Plaintiffs,

Index No.: 117767/06

-against-

HOSPITAL FOR JOINT DISEASES, LYNN LETKO,
M.D., S. LEVIN, M.D., and "JOHN DOE" (first and
last names fictitious), RAFII MAHVASH, BEVERLY
M. THORNHILL, LUZVISA PREMNE-MANAS,

Defendants.

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SKLAR, J.:

Defendant NYU Hospital for Joint Diseases ("the hospital"), s/h/a Hospital for Joint Diseases, moves for an order dismissing this action on the grounds that plaintiffs lack the capacity to sue, the action is time-barred and that the action is barred by res judicata and collateral estoppel.

In 2001 plaintiff commenced a medical malpractice action against the hospital and Drs. Lynn Letko and S. Levin arising out of treatment rendered to Steven Rudin ("Rudin") in July 1999. The complaint in contravention to CPLR 3017(c) valued the damages as \$15,000,000 for Rudin's claims and \$1,000,000 for his wife's derivative claim. See also plaintiffs' special damages set forth in the bill of particulars. That case was dismissed by another justice of this court by an order dated July 28, 2005 and filed on August 1, 2005 because plaintiffs lacked the capacity to sue since fewer than two months after the malpractice action was commenced plaintiffs filed a Chapter 7 bankruptcy petition and failed to list the malpractice action as an asset. That justice noted that the bankruptcy case was closed on August 29, 2002 and that,

although the record showed that the trustee had been aware of the malpractice action, the trustee could not have been deemed to have abandoned the claim because the debtors never listed the malpractice claim as an asset. A copy of the order dismissing that malpractice case was served on plaintiffs' counsel on August 22, 2005. The order was appealed from and affirmed on November 30, 2006 (See *Rudin v Hospital for Joint Diseases*, 34 AD3d 376). A copy of the order of affirmance with notice of entry was served on plaintiffs' counsel on December 13, 2006.

Meanwhile by motion filed on April 28, 2006, i.e. about 8 months after plaintiffs were served with a copy of the order dismissing the malpractice case and about nine months after the dismissal, plaintiffs sought to amend schedules B and C of their bankruptcy petition to add on schedule B a "personal injury claim" of "unknown amount" and to claim on schedule C \$18,450.00 arising from a personal injury claim as exempt property pursuant to 11 USC 522(d)(11)(D). The plaintiffs' certification in support of that application recognized (at ¶ 7) that their time to go back to the New York State Courts was limited. Motion, exh G In response, the trustee in bankruptcy submitted a letter dated May 11, 2006 to the Bankruptcy Court indicating that the malpractice action had not been pursued by him because the information provided to him by the debtor allegedly revealed that the case would not result in a net benefit to the creditors. The trustee further stated that if the debtors now valued their case in excess of applicable exemptions and counsel fees then he (the trustee) objected to the case being closed immediately after it was reopened. By order dated May 30, 2006 the Bankruptcy Court judge reopened the Chapter 7 case, permitted plaintiff to file amended schedules B and C within 10 days of entry of that order and ordered that the case be reclosed upon such filing. According to plaintiffs'

malpractice attorney, on June 11, 2006 the amended schedules were filed and on May 31, 2006 the bankruptcy case was closed.

Almost six months later, on November 29, 2006 plaintiffs commenced the instant malpractice action, naming the original defendants and general others and asserting claims arising out of the July 1999 treatment. The complaint alleges that Rudin's damages exceeded the jurisdictional limits and that the wife's derivative claim amounted to \$1,000,000.

The application to dismiss is granted because plaintiffs have not established that the trustee abandoned this action, particularly here were the trustee's May 11, 2006 letter to the Bankruptcy Court did not reflect an unequivocal abandonment and where plaintiffs indicated before the Bankruptcy Court that their personal injury claims were of an unknown amount yet sought millions of dollars in the first malpractice action and sums presumably well in excess of a million dollars in the second action which was virtually identical to the first cause of action, [See *Donaldson, Lutkin & Jennette Securities Corp. v Mathiasen*, 207 AD2d 280 (1st Dept, 1994); *Bromley v Fleet Bank*, 240 AD2d 611 (2nd Dept, 1999); *Dynamics v Marine Midland*, 69 NY2d 191, 195-196 (1987); *Shepmoes v Hilles*, 122 AD2d 35 (2nd Dept, 1986); See also *Marcinak v General Motors Corp.*, 285 AD2d 387 (1st Dept, 2001)] and that therefore they have standing to pursue this case. Moreover, even assuming arguendo that the plaintiffs did have standing, the claims asserted against the movant are time-barred. See CPLR § 205(a); *PiJuTang v Hosp.*, 37 AD3d 690 (2nd Dept, 2007); *Pinto v Ancona*, 262 AD2d 472 (2nd Dept, 1999); *Carrick v Central Gen Hosp.*, 51 NY2d 242 (1980); *Genova v Madani*, 283 AD2d 860 (3rd Dept, 2001); *Tulis v Nyack Hosp.*, 271 AD2d 684 (2nd Dept, 2000); *Miller v Waldbaum's Inc.*, 7 Misc. 3d 1003 (A)(Sup. Ct., Queens City, 2005)

Plaintiffs' counsel's claims (Fedrizzi aff. ¶¶ 21, 14, 27) that the six month extension of time set forth in CPLR §205(a) to recommence the dismissed malpractice action runs from the date the bankruptcy proceeding was reclosed on May 31, 2006, from June 1, 2006 when the amended schedules were filed or from the date of service of a copy of the Appellate Division's order upholding the dismissal of the first action are without merit. Plaintiffs, once the first case was dismissed, should have promptly applied to the Bankruptcy Court for appropriate relief so that the action could have been timely recommenced. The two cases relied on by plaintiffs' counsel at oral argument do not avail plaintiffs since in both of those cases the action was recommenced within six months of the dismissal. See *George v Mt. Sinai Hospital* 47NY2d 170 (1979); *In re Morris Investors, Inc. v Commissioner of Finance*, 121AD2d 221 (1st Dept., 1986); app. gtd, rearg. den. 123AD2d 26 (1st Dept., 1986); affd 69NY2d 993 (1987) In light of all of the foregoing I do not reach the issues of res judicata and collateral estoppel raised by the movant.

Accordingly the action is dismissed as to the hospital.

Settle order.

Dated: June 29, 2007
60 Centre Street
New York, NY



J.S.C.