

McDaid v Semegran

2007 NY Slip Op 32964(U)

September 17, 2007

Supreme Court, Nassau County

Docket Number: 0213-05/

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

DONNA PURR McDAID, as Administratrix of the
Estate of DENNIS BOSCO McDAID, and
DONNA PURR McDAID, Individually,

Plaintiff(s),

ORIGINAL RETURN DATE: 07/20/07
SUBMISSION DATE: 07/20/07
INDEX No.: 000213/05

-against-

ADAM BERNARD SEMEGAN, M.D.,
MICHAEL A. SAMA, M.D., PUTNAM HOSPITAL
CENTER, PEGASUS EMERGENCY MEDICINE
GROUP NEW YORK, P.C., JAY ANDREW
YELON, M.D., and NORTH SHORE UNIVERSITY
HOSPITAL,

MOTION SEQUENCE #6, 7

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
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Motion by defendants Jay Andrew Yelon, M.D. and North Shore University Hospital to vacate the note of issue, strike the case from the trial calendar, compel discovery, and extend the time to move for summary judgment is denied. Motion by defendant Adam Bernard Semegran, M.D. for similar relief is also denied.

This is an action for wrongful death based upon medical malpractice. Plaintiff also asserts claims for conscious pain and suffering and loss of consortium.

Plaintiff Donna Purr McDaid is the administratrix of her deceased husband, Dennis Bosco McDaid. Dennis was involved in a motorcycle accident on September 29, 2003 and was initially treated at defendant Putnam Hospital Center. On October 1, 2003, Dennis was airlifted to

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defendant North Shore University Hospital where defendant Dr. Jay Yelon performed certain exploratory procedures on Dennis' spleen and abdomen. Plaintiff alleges that as a result of the malpractice of defendants, Dennis developed an abdominal abscess and respiratory distress which lead to his death. At the time of his death, Dennis ran a family business which consisted of a Tropicana orange juice distributorship. Dennis and plaintiff had two young children, and plaintiff took over the running of the family business after her husband's demise.*

The action was commenced on January 21, 2005 and was designated as "complex" for purposes of the differentiated case management system. A preliminary conference was held on June 23, 2005, and an end date for disclosure of May 21, 2006 was set. The preliminary conference order set up a schedule for the depositions of plaintiff and defendants as well as the production of various documents. The preliminary conference order also called for a compliance conference on November 15, 2005. However, the parties essentially ignored the June 23, 2005 discovery schedule as well as the revised schedule which the court set at the compliance conference.

On May 22, 2006, the court certified the case for trial and directed plaintiff to file a note of issue within 90 days. Plaintiff filed a note of issue as directed by the court. By notice of motion returnable October 10, 2006, defendants Jay Andrew Yelon, M.D. and North Shore University Hospital moved to vacate the note of issue, compel plaintiff to provide outstanding discovery, and extend the time for moving for summary judgment.

By order dated November 28, 2006, the court granted defendant's motion to vacate the note of issue on the ground that the case was not ready for trial (22 NYCRR § 202.21[e]). The order further directed the parties to complete any remaining disclosure by March 1, 2007. The action was deemed certified for trial as of March 1, 2007, and plaintiff was directed to file a note of issue within 90 days of that date. Since the November 28 order provided that motions for summary judgment were to be filed within 60 days of the filing of the new note of issue, the order also had the effect of extending the time for all parties to move for summary judgment. On May 29, 2007, plaintiff filed a new note of issue over objection and stating that "discovery was not complete."

Defendants now move for the same relief granted in their prior motions, namely vacating the note of issue, compelling discovery, and extending the time to move for summary judgment.** The discovery which is sought consists of the production of documents relating to decedent's business which is now run by plaintiff. The documents were demanded in a notice for discovery and inspection which was served on May 11, 2007, after the discovery deadline had expired.

* See deposition of Donna McDaid, defendant Semeghan's Ex. A at 19-21.

** While Dr. Semeghan has not expressly moved to extend his time to file a summary judgment motion, the vacating of the note of issue would have the effect of granting such relief to defendant.

In a letter to defendant's counsel dated June 8, 2007, counsel for plaintiff stated that responses to outstanding discovery requests would be forthcoming. However, in a response dated June 13, 2007, counsel for plaintiff stated that they were objecting to certain records, known as the "white sheets," which defendants had requested. According to plaintiff, production would be unduly burdensome because the white sheets numbered in the thousands of pages. However, counsel for plaintiff promised to produce updated "Tropicana product reports" as soon as they were located. Plaintiff also objected to producing a "Quickbook program" for the years 2002-2006. According to defendants, these documents "potentially" indicate whether the business lost customers after Dennis' death are thus relevant to the issue of damages.

CPLR § 3103(a) provides that the court may at any time on its own initiative, or on motion, make a protective order denying, limiting, conditioning, or regulating discovery. Additionally, § 202.12 of the uniform rules of the trial courts provides for the holding of a preliminary conference to consider, among other matters, a timetable for the completion of discovery. The cutoff date may be within 12 months of the filing of the request for judicial intervention in a standard case, or in a complex case within 15 months of such filing (22 NYCRR § 202.12[b]). At the conclusion of the conference, the court shall make a written order, including its directions to the parties as well as the stipulations of counsel. In view of the CPLR provision and the uniform rule, there is no question that the court has authority to set a discovery cutoff date (*Don Buchwald & Associates v. Marber-Rich*, 305 AD2d 338 [1st Dep't 2003]). While the parties are free to conduct voluntary discovery after the deadline, they may no longer request that their disclosure demands be enforced by the court.

Because of the parties' flaunting of the discovery deadlines in this case, the court was well within its discretion in declaring an end to supervised discovery. Nevertheless, § 202.21(d) of the uniform rules provide that "where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue...which require additional pretrial proceedings to prevent substantial prejudice, the court...may grant permission to conduct such necessary proceedings." Thus, upon the required showing, the court may permit post-note of issue discovery, even where the parties have not previously complied with the directives imposed by the court (*Sklarz v. Crabtree*, 35 AD3d 260 [1st Dep't 2006]).

The damages recoverable by plaintiff in a wrongful death action are "fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought" (EPTL § 5-4.3). The term "pecuniary injuries" means damages which can be measured or recompensed by money (*Gonzalez v. Housing Authority*, 77 NY2d 663, 667 [1991]). Such damages fall into four general categories: 1) decedent's loss of earnings, 2) loss of services each survivor may have received from the decedent, 3) loss of parental guidance from the decedent, and 4) the possibility of inheritance from the decedent (*Huthmacher v. Dunlop Tire Corp.*, 309 AD2d 1175 [4th Dep't 2003]).

The lost services recoverable are frequently household management services which were performed by the deceased (see, e.g. *Mono v. Peter Pan Bus Lines*, 13 F. Supp.2d 471 [SDNY

1998]). However, compensation is available for other types of services provided they can be measured in monetary terms. Where the deceased is the "key player" in a family business, it is not unusual for the surviving spouse to attempt to replace him. While the business may continue without loss of profits, the distributees of the decedent will nonetheless sustain real and measurable damages. These damages may be measured by the increased expenditures to maintain household services formerly performed by the surviving spouse who is now active in the business (Cf. *DeLong v. Erie*, 60 NY2d 296,307 [1983]). These damages may also be measured by the cost, including wages and benefits, of obtaining a replacement for the key employee.

Were this case still in the discovery stage, defendants of course would be entitled to discovery as to the extent and methods of calculation of plaintiff's damages. However, the issue of pecuniary injury in a wrongful death action is neither unanticipated nor unusual. Moreover, since defendants may develop evidence as to loss of services through their own expert witness, they have not made the required showing of substantial prejudice (*DeLong v. Erie*, supra, 60 NY2d at 307). Accordingly, defendants' motions to vacate the note of issue and to compel discovery are denied.

CPLR 3212(a) provides that the court may set a date after which a summary judgment motion may not be made, provided that the date may not be earlier than 30 days after the note of issue is filed. If no cutoff date is set by the court, a summary judgment motion must be made within 120 days of the filing of the note of issue, except with leave of court on good cause shown (CPLR 3212[a]). Such court-ordered time frames are requirements, not options, and must be taken seriously by the parties (*Miceli v. State Farm Mutual Automobile Ins.*, 3 NY3d 725 [2004]). The 60 day time period provided by this court's order of November 28, 2006 was well within the court's discretion under CPLR 3212(a).

Since the court has discretion to grant the parties leave to make summary judgment motions beyond the 120 day period, it is clear the court may also extend shorter summary judgment deadlines which have been imposed by the court. The court notes that defendants' motions to extend the time for making summary judgment motions were filed well within the expiration of the time frame set by the court.

Good cause for leave to file an untimely summary judgment motion requires a showing of good cause for the delay in making the motion, as opposed to merely a showing of merit (*Brill v. New York*, 2 NY3d 648 [2004]). Despite the case's classification as complex for purposes of case management, defendants have made no showing of a need for additional time to make a summary judgment motion. The court also notes that defendants have made no showing of merit as to the question of liability. While a showing of merit is not sufficient to grant leave, the absence such a showing is a factor which may influence the court's discretion. Defendants' motions to extend the time for making motions summary judgment motions are denied.

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This decision constitutes the order of the court.

Dated: 9-17-07

HON THOMAS P. PHELAN
Thomas P. Phelan
J.S.C.

Walter G. Alton, Jr. & Associates, P.C.
Attorneys for Plaintiffs
548 West 28th Street, Suite 670
New York, NY 10001

Keller, O'Reilly & Watson, P.C.
Attorneys for Defendant Adam Bernard Semeghan, M.D.
242 Crossways Park West
Woodbury, NY 11797

Patrick F. Adams, P.C.
Attorneys for Defendants Michael A. Sama, M.D. and
Pegasus Emergency Medicine Group
49 Fifth Avenue
Bay Shore, NY 11706-7306

Kaufman Borgeest & Ryan, LLP
Attorneys for Defendant Putnam Hospital
200 Summit Lake Drive
Valhalla, NY 10595

Heidell, Pittoni, Murphy & Bach, LLP
Attn: Laura S. Murphy, Esq.
Attorneys for Defendants Jay Andrew Yelon, M.D. and
North Shore University Hospital
99 Park Avenue
New York, NY 10016

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