STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

KENNETH J. MARTIN and JANIE M. MARTIN,

Plaintiffs,

-against-

Index No.: 213523
RJI No.: 41-0189-2005

INTERNATIONAL TROTTING & PACING ASSOCIATION, INC., EMPIRE STATE TROTTINGBRED BREEDERS & CIRCUIT ASSOCIATION, INC., HORSEMEN'S UNITED ASSOCIATION, INC., and THE ASHTABULA COUNTY AGRICULTURAL SOCIETY,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

BOND, SCHOENECK & KING, PLLC
Attorneys for Plaintiffs
(Arthur J. Siegel, Esq., of Counsel)
111 Washington Avenue, 5th Floor
Albany, New York 12210

DONOHUE, SABO, VARLEY & HUTTNER, LLP
Attorneys for Defendants, International Trotting & Pacing Association, Inc., Empire State Trottingbred Breeders & Circuit Association, Inc., and Horsemen's United Association, Inc.
(Bruce S. Huttner, Esq., of Counsel)
24 Aviation Road
P.O. Box 15056
Albany, New York 12212-5056

DECISION/ORDER

George B. Ceresia, Jr., Justice

Previously, defendants International Trotting & Pacing Association, Inc., Empire State Trottingbred Breeders & Circuit Association, Inc., and the Horseman's United Association, Inc. renewed their CPLR 3211 dismissal motion based upon the expiration of the statute of limitations following discovery with respect to the medical condition of plaintiff Kenneth J. Martin (hereinafter plaintiff). After a review of the submissions, this Court directed a hearing be held with respect to the extent of plaintiff's disability and his ability to function in society. That hearing was held on May 17, 2007, after which this Court reserved its decision until it reviewed the transcript. This Court received the transcript on August 16, 2007 and, after review, holds, for the reasons discussed below, that the tolling provision of CPLR 208 is not applicable here.

As this Court noted in its prior decision, this action arises out of a harness race accident which occurred on September 21, 2001. Plaintiff was participating as a driver when he was ejected from his surrey, sustaining serious brain injuries. Plaintiff was in a coma for approximately one week and was hospitalized for approximately three and one half months. He was discharged from the rehabilitation hospital on January 5, 2002.

Plaintiffs filed the summons and complaint in this matter on January 6, 2005 – more than three years after the accident. As earlier noted, defendants established, prima facie, that the action was not timely commenced (see Lynch v Carlozzi, 284 AD2d 865, 868 [3d Dept 2001]). In response, plaintiff relied upon CPLR 208 to extend the time by which to commence this action. That provision provides, in relevant part:

> "If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years or more and expires no later than three years after the disability ceases, . . . the time within which the action must be commenced shall be extended to three years after the disability ceases. . . ."

In relation to that provision, the Court of Appeals held that the "toll for insanity [applies to] those individuals who are unable to protect their legal rights because of an over-all inability to function in society." (McCarthy v Volkswagen of Am., 55 NY2d 543, 548 [1982]).

Here, plaintiff submitted, inter alia, an affidavit from a psychologist opining that plaintiff's "mental state was such that he was incapable of comprehending and protecting his legal rights during the initial 6 to 12 months following his brain injury" (Long Affidavit at ¶ 6). In reply, defendants submitted an affidavit from a neuropsychologist opining that, based upon plaintiff's medical records, he was competent to handle his affairs as of the date of his discharge, three years and one day before commencement of this action. The opinion is based upon the results of numerous psychological tests given to plaintiff shortly before his discharge. All of such tests showed functioning within the normal range. Since an issue of fact existed regarding the extent of plaintiff's disability and his ability to function in society, this Court directed a hearing be held pursuant to CPLR 3211 (c) (see Lynch v Carlozzi, 284 AD2d at 868; Smith v Kelley, 228 AD2d 831 [3d Dept 1996]). As noted above, that hearing was held on May 17, 2002.

At the hearing, plaintiff carried the burden of demonstrating his entitlement to the tolling provision (see Smith v Kelley, supra at 832). As his first witness, plaintiff called

Frank Breselor, a lawyer who had been acquainted with plaintiff since the early 1980's. Mr. Breselor testified that, in Spring 2002, he had lunch with plaintiff and his wife. The plaintiff wanted to thank Mr. Breselor for counsel he had given Mrs. Martin regarding the couple's insurance business during plaintiff's recovery. Mr. Breselor testified that plaintiff behaved differently than he had in their many previous encounters. Mr. Breselor described plaintiff, at the lunch, as frequently bursting into tears and having trouble formulating sentences whereas before the accident plaintiff was a "very high energy person" who "created a lot of tension, but did a lot of things" (Hrg Trans at 11).

Next, plaintiff called Dr. Michael Long, a clinical psychologist employed at Sunnyview Hospital in the inpatient and outpatient brain injury programs (see id. at 24). Dr. Long testified that plaintiff was an inpatient at Sunnyview's brain injury program in December 2001, and while there, Dr. Gernert-Dott conducted an inpatient neuropsychological evaluation (see id. at 26). Dr. Long noted that he became involved in plaintiff's treatment at the time of his discharge on January 5, 2002 (see Plaintiffs' Exhibit 1, Discharge Summary), first seeing him on January 22, 2002 and, thereafter, treating him on either a weekly or biweekly basis throughout 2002 (see Hrg Tran at 26).

Dr. Long noted that, at the time of plaintiff's discharge, he was "very much improved" (id. at 30). Further, Dr. Long noted that he had some reduced "processing speed," which meant plaintiff was "[s]lower in tasks that require one to think" (id. at 30). Dr. Long testified that plaintiff showed signs of "lability," which "is a term referring to the . . . emotional . . . control deriving from organic brain damage" (id. at 31). He also testified that, due to

worsening depression, in March, plaintiff was placed on an antidepressant medicine, which "muted the lability and it also seemed to nip what was an increasing episode of depression in the bud" (id. at 34). Dr. Long noted that, by the end of March, the depression seemed to be receding (id.). Dr. Long also noted that plaintiff's memory was "less than reliable" and plaintiff was encouraged to write everything down and review notes to compensate for his memory issues (id. at 35-36).

Dr. Long further testified that plaintiff was able to accomplish routine matters "as long as he did them in a slower, more deliberate fashion. More complicated activities, there were some concerns regarding his ability" (id. at 44-45). Dr. Long also noted: "I think, to the extent, that he had to make decisions based on an understanding of what his long-term difficulties might be, then he wasn't going to be making decisions, because I don't think he had that sort of awareness" (id. at 45). Dr. Long further testified that, without assistance from his wife, plaintiff's "judgment was sufficient in some respects, more often when the tasks were simple. Questionable at other times when the tasks became more complex and different. Almost universally when the emotional disturbance deriving from the brain injury became an issue" (id at 46).

As to the testing plaintiff underwent, Dr. Long explained that the testing environment "falls far short of proximating information, capturing the complexities of the real world, what – there's distractions, time pressures, multiple simultaneous demands. It is quite common that people do much better here than they do even in the real world" (id. at 49).

Upon cross examination, Dr. Long acknowledged that an evaluation of plaintiff by an

occupational therapist at the time of plaintiff's discharge from Sunnyview showed that plaintiff was performing tasks within functional limits (id. at 61-63). Further, Dr. Long acknowledged that the section for judgment used in decision making was within normal limits and the same for problem-solving (id. at 63). Dr. Long also acknowledged that the neuropsychological testing performed by Dr. Gernert-Dott near the time of plaintiff's discharge stated that plaintiff was performing grossly within normal limits on tasks assessing his higher level executive skills, which Dr. Long testified were "as complex tasks as [they] have" (id. at 66). Dr. Long further acknowledged that Dr. Shapiro performed a comprehensive review of the "global state" of plaintiff at the time of his discharge, trying to capture all of the disciplines that were involved in plaintiff's treatment at Sunnyview (id. at 67). Dr. Long agreed that the report stated that plaintiff "had good memory, recall, attention, and processing when normal – with low normal – with no impulsivity" (id.).

Upon redirect, Dr. Long testified that plaintiff "was doing relatively well with regard to the criteria we're looking at . . . the time of a person's discharge. Can they leave a hospital and go home with a probability of being safe in a home environment with supervision? And manage rogue activities, over-learned rudimentary activities relatively well? It means that. Relatively well" (id. at 77). Further, Dr. Long noted that he does not rely entirely on neuropsychological testing because, in an inpatient setting, a patient may do quite well on individual tasks but have difficulty in a setting outside of the hospital on those same tasks where the environment is not controlled (see id. at 78).

Defendants presented the testimony of Robert J. McCaffrey, a licensed psychologist

and professor of psychology at SUNY Albany, who also maintains a part-time private practice (id. at 92-93). Based on his review of plaintiff's records and the neuropsychological evaluation done by Dr. Gernert-Dott, Dr. McCaffrey testified that, in his opinion, when plaintiff was discharged from Sunnyview, "his facilities, while not hundred percent returned, certainly would have been sufficient for him to understand what was going on around him" (id. at 95). Dr. McCaffrey further testified that higher executive functions "refers to things like abstract reasoning. But it also has components of higher mental abilities. The ability to anticipate future events, the ability to put cause and effect together before it happens. It's the cognitive abilities that separate us presumably form all the other species on the planet" (id. at 109). He then opined that plaintiff's higher executive functions were within normal or functional limits at the time of plaintiff's discharge from Sunnyview (see id. at 109-110).

Significantly, Dr. McCaffrey testified that the description of plaintiff's emotional lability in "Dr. Long's treatment summaries is not significantly different from what you would see in a[n] outpatient with an adjustment-related disorder. And these are people who function. They go to work, they go to school. There's . . . nothing in here that would stand up as a red flag with regards to his emotional issues putting him an a position where he would be functionally incapacitated" (id. at 111). Upon cross examination, Dr. McCaffrey acknowledged that he neither had seen plaintiff nor conducted an interview with him (see id. at 116). No further witnesses were called at the hearing.

As cited earlier, in McCarthy v Volkswagen of Am. (55 NY2d 543 [1982], supra), the Court of Appeals held that "the Legislature meant to extend the toll for insanity to only those

individuals who are unable to protect their legal rights because of an overall inability to function in society" (id. at 548; see Barnes v County of Onondaga, 65 NY2d 664, 666 [1985]). In applying the McCarthy rule, the Court of Appeals noted that "the task is a pragmatic one, which necessarily involves consideration of all surrounding facts and circumstances relevant to the [plaintiff's] ability to safeguard his or her legal rights" (Matter of Cerami v City of Rochester School Dist., 82 NY2d 809, 812 [1993]; see Montiel v New York City Health & Hosps. Corps., 209 AD2d 491, 492 [2d Dept 1994]). Further, the insanity tolling provision within CPLR 208 is to be "'narrowly interpreted'" (See v Arias, 209 AD2d 503, 505 [2d Dept 1994], quoting McCarthy v Volkswagen of Am., supra at 598; see Matter of Eberhard v Elmira City School District, 6 AD3d 971, 973 [3d Dept 2004]).

Here, taking into consideration all surrounding facts and circumstances relevant to plaintiff's ability to safeguard his legal rights, this Court determines that the insanity tolling provision pursuant to CPLR 208 is inapplicable here (see Matter of Eberhard v Elmira City School District, supra; Stackrow v New York Prop. Ins. Underwriter's Assoc., 115 AD2d 883 [3d Dept 1985]). Stated another way, the evidence at the hearing failed to establish that plaintiff lacked the ability to safeguard his legal rights (compare Stalker v Luria, 217 AD2d 294, 297 [3d Dept 1995], with Carrasquillo v Hollinswood Hosp., 37 AD3d 509, 510 [2d Dept 2007]; Schulman v Jacobowitz, 19 AD3d 574, 576 [2d Dept 2005]). For instance, at his discharge, testing by an occupational therapist showed plaintiff's ability to function within normal limits. Further, as Dr. Long acknowledged, Dr. Shapiro took an overall approach in evaluating plaintiff, and concluded, at discharge, plaintiff's functioning fell

within normal limits (see Bedaeau v Santi, 221 AD2d 396, 397 [2d Dept 1995]). While testimony from both a lay witness and Dr. Long established that plaintiff showed signs of lability, testimony at the hearing also indicated that this does not equate to the inability to function. In other words, a person may show such signs but still have the overall ability to function. Undoubtedly, evidence demonstrated that plaintiff was not functioning at his pre-accident level but did not establish that, overall, he could not function within society so as to protect his legal rights (see Stalker v Luria, supra at 297; see also Brown v Rochester Gen. Hosp., 292 AD2d 855, 856 [4th Dept 2002]).

Accordingly it is

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR 3211 is granted; and it is further

ORDERED that the complaint is dismissed in its entirety.

This shall constitute the Decision and Order of the Court. All papers being returned to defendants' attorneys, who are directed to enter this Decision/Order without notice and to serve all counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
September 27, 2007

George B. Ceresia, Jr.
Supreme Court Justice