

Eckman v Jeremiah

2007 NY Slip Op 33676(U)

November 5, 2007

Supreme Court, Suffolk County

Docket Number: 0006826/2007

Judge: Paul J. Baisley

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SHORT FORM ORDER

INDEX NO. 06826/2007

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:**Hon. Paul J. Baisley, Jr.**

SUSAN ECKMAN, as Administratrix of the Estate
of JAMES M. MANGANARO, III, deceased, and
SUSAN ECKMAN, individually.

Plaintiff(s),

-against-

KATHLEEN UZZI JEREMIAH and
ANTHONY CIPOLLA PHYSICIAN, P.C.

Defendant(s).

ORIG. RETURN DATE: September 14, 2007

FINAL RETURN DATE: October 18, 2007

MTN. SEQ. #: 001-WDN, #002-MD

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Upon the following papers numbered 1 to 46 read on this motion and cross motion to dismiss: Notice of Motion and supporting papers 1 - 7; Notice of Cross Motion and supporting papers 8 - 13; Affirmation in Opposition and supporting papers 14 - 34; Reply Affirmation and supporting papers 35 - 46; it is,

ORDERED that this motion (001) by the defendant Kathleen Uzzi Jeremiah has been withdrawn pursuant to a Stipulation dated September 26, 2007; and it is further

ORDERED that the stipulation of discontinuance as to the defendant Kathleen Uzzi Jeremiah only, dated September 7, 2007, is without effect as it was not signed by the attorneys of record for all of the parties to this action as required by CPLR 3217(2); and it is further

ORDERED that this cross motion (002) by the defendant Anthony Cipolla Physician, P.C. for dismissal of the complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds is denied; and it is further

ORDERED that this action is respectfully referred to the IAS Part of the Hon. Arthur G. Pitts inasmuch as this action has been assigned to the Hon. Arthur G. Pitts following the issuance of the preliminary conference order; and it is further

Page 2
Index No. 6826/2007
Eckman vs Jeremiah

ORDERED that counsel for the plaintiff is directed to serve copies of this Decision and Order upon all parties pursuant to CPLR 2103(b)(1), (2) or (3) within 30 days of the date hereof and thereafter file proofs of service with the Clerk of the Court.

This action arises out of the medical treatment of the late James M. Manganaro III (hereinafter Manganaro) whose suicide led to this action for medical malpractice and wrongful death. A companion case, against different defendants, is pending in the Supreme Court, Kings County (Index No. 26282/05). According to counsel for the plaintiff, after deposing the individual defendant Dr. Anthony Cipolla in the Kings County case, it was learned that Dr. Cipolla was part of a professional corporation, Anthony Cipolla Physician, P.C. (hereinafter ACP,PC), and the plaintiff then brought this separate action, in Suffolk County, against ACP,PC as well as Dr. Cipolla's nurse, Kathleen Uzzi Jeremiah. The court notes that the plaintiff chose to bring this separate action in a different venue rather than seeking to amend the pleadings in the Kings County action with the addition of these defendants.

The defendant ACP,PC cross-moves to dismiss on statute of limitations grounds. The statute of limitations period on medical malpractice cases is 2 ½ years from the act complained of or from the last treatment if there is a "continuous treatment for the same . . . condition" (CPLR 214-a). The statute of limitations period for a wrongful death action is 2 years from the date of death (EPTL 5-4.1[1]).

In this case, Manganaro, a New York City firefighter, began receiving treatment from Dr. Cipolla on September 11, 2001 for "anxiety and depression." The defendant ACP,PC concedes that Manganaro continued to receive treatment over a course of time until May 30, 2004 which was, according to ACP,PC, the last day Manganaro was prescribed psychiatric medications for his condition.

According to the plaintiff, however, the last day of treatment was October 1, 2004 even though there had been no change in medications since the May 30, 2004 date.

Manganaro died on December 18, 2004.

The Kings County action was commenced on September 9, 2005 which was within the statutes of limitations for both wrongful death and medical malpractice (even using the defendant's earlier last day of treatment date).

The instant action, however, was commenced on March 7, 2007. This was over two years from the date of death and, thus, on its face, outside of the statute of limitations period for bringing a wrongful death action. As for the medical malpractice causes of action, this action was commenced over 2 ½ years from the defendant ACP,PC's suggested last day of treatment ("May 30, 2004")(over three months past the 2 ½ years); the plaintiff contends, however, that this action was commenced within the 2 ½ years from the date they submit was the last day of treatment ("October 1, 2004")(25 days before the 2 ½ year period was to end).

Moreover, and in any event, the plaintiff argues that even if the court finds that the instant action was brought beyond the statute of limitations periods for either or both the medical malpractice and wrongful death claims, this action is permissible, nevertheless, under the “relation-back” doctrine; that it, these causes of action relate back to the timely causes of action brought in the Kings County action against Dr. Cipolla (and others).

In general, in considering a motion to dismiss pursuant to CPLR 3211, the court’s role is limited to “determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]” (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, the pleading “is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]” (*Id.*, at 120-121, 12).

In addition, the court shall consider allegations as true in any affidavits in support of the complaint and in opposition to a motion to dismiss pursuant to CPLR 3211 (*see Grossfield v Grossfield*, 224 AD2d 583, 639 NYS2d 712 [2d Dept 1996]).

In a motion to dismiss based upon statute of limitations grounds (CPLR 3211[a][5]), the initial burden is upon the moving party to make a prima facie showing that the time to bring a cause of action has expired (*see Assad v City of New York*, 238 AD2d 456, 656 NYS2d 669 [2d Dept 1997]). Upon doing so, the burden then shifts to the plaintiff to provide evidentiary facts establishing that the cause of action was not brought beyond the expired time or that it falls within an exception to the statute of limitations (*id.*).

If the plaintiff is relying upon a continuous course of treatment, the plaintiff must show that the treatment was continuous, for the same condition and that the patient and physician reasonably intended an uninterrupted reliance upon the physician’s observations and responsibility for overseeing and monitoring the patient’s progress (*see CPLR 214-a; Shifrina v City of New York*, 5 AD3d 660, 774 NYS2d 85 [2d Dept 2004]; *Sarjoo v New York City Health and Hosp. Corp.*, 309 AD2d 34, 763 NYS2d 306 [1st Dept 2004][uninterrupted reliance]). The need for further treatment must be explicitly anticipated and the appointments must be in conformance with the periodic appointments which characterized the treatment in the immediate past (*see Cox v Kingsboro Medical Group*, 88 NY2d 904, 646 NYS2d 659 [1996]); such as, monitoring a condition (*see Sofia v Jimenez-Rueda*, 35 AD3d 1247, 827 NYS2d 385 [4th Dept 2006]).

In this case, ACP,PC has made a prima facie showing that the medical malpractice and wrongful death causes of action in this case are beyond the applicable statute of limitations periods. With regard to the medical malpractice and wrongful death claims, the burden now shifts to the plaintiff to show otherwise or that some exception is applicable (*see Assad v City of New York*, 238 AD2d 456, 656 NYS2d 669 [2d Dept 1997]).

With regard to the medical malpractice, in considering the complaint and the opposing affidavits on behalf of the plaintiff and, moreover, considering the allegations therein as true (*see Frank v Daimler*

Chrysler Corp., 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002][re complaint]; *Grossfield v Grossfield*, 224 AD2d 583, 639 NYS2d 712 [2d Dept 1996][re affidavits]), the court is satisfied that the course of treatment provided to Manganaro continued up to October 1, 2004 even though his medications had not changed since the prior May. The plaintiff has made a sufficient showing that the treatment and care provided to Manganaro after May 2004 and up to October 2004 still included the continuous monitoring of his anxiety and depressive conditions which required prescribed medications to keep under control. The fact that he may have been stable for a period of time and that his medications had not changed for a period of time did not eliminate the need to monitor this type of condition to ensure it remained under control. Accordingly, the court finds that Manganaro was receiving a continuing course of treatment for his anxiety and depressive condition up to and including the date of his last visit with Dr. Cippola on October 1, 2004.

Using the October 1, 2004 date as the last date of treatment, the plaintiff had until April 1, 2007 to bring an action sounding in medical malpractice (2 ½ years per CPLR 214-a). Since the instant action was commenced before April 1, 2007 (that is, on March 7, 2007), the causes of action sounding in medical malpractice were properly brought within the applicable statute of limitations period. Accordingly, the motion to dismiss the medical malpractice causes of action upon statute of limitations grounds must be denied.

With regard to the wrongful death causes of action, the plaintiff argues that they - along with the medical malpractice claims - relate back to the causes of action which were unquestionably brought within the applicable statute of limitations periods in the related Kings County action. The court agrees.

In applying the relation-back doctrine (codified in CPLR 203[b]), the courts must apply the following three-prong test: (1) Do the claims in both actions arise out of the same conduct; (2) is the defendant in the subsequent action united in interest with the defendant in the prior action; and, (3) did the new defendant know or should have known that, but for a mistake by the plaintiff, the action would have been brought against the new defendant as well (*see Mondello v New York Blood Ctr.*, 80 NY2d 219, 590 NYS2d 19 [1992]). Moreover, a mere mistake, whether excusable or not will satisfy the third prong of the test (*see Buran v Coupal*, 87 NY2d 173, 638 NYS2d 405 [1995]) and the prior and new defendants need not be within the same action but may be in different actions, as here (*see Nani v Gould*, 39 AD3d 508, 833 NYS2d 198 [2d Dept 2007][applying the relation-back doctrine to different actions, both with medical malpractice and wrongful death causes of action; reversed on other grounds]).

In this case, the plaintiff concedes the first two prongs of the relation-back test but argues that the mistake of not naming ACP,PC as a defendant in the earlier action was intentional and, in any event inexcusable since a computer search would easily reveal the existence of ACP,PC.

First of all, there is no evidence - other than mere speculation - that the omission was intentional. Indeed, such an omission would defy logic and, moreover, the omission was corrected expeditiously by the plaintiff upon his learning of the existence of ACP, PC. As to the mistake being inexcusable, as the Court of Appeals held in *Buran v Coupal* (87 NY2d 173, 638 NYS2d 405 [1995]), the mere fact that a mistake was made, whether excusable or not, is enough to satisfy the third prong of the test.

Moreover, Dr. Cipolla and ACP,PC are virtually one and the same - one being the professional corporate manifestation of the individual - and ACP,PC was on notice of the claims in the earlier action and had to have realized, in a corporate sense, that it would have been included but for the plaintiff not being aware of its existence.

Accordingly, the court finds that the relation-back doctrine applies in this case and, thus, both the medical malpractice and wrongful death causes of action survive this cross motion to dismiss on statute of limitations grounds as the time for bringing said causes of action relates back to the timely commenced related action in Kings County.

This decision constitutes the decision of the court.

Dated: *November 5, 2007* **HON. PAUL J. BAISLEY, JR.**

HON. PAUL J. BAISLEY, JR., J.S.C.