

Snodgrass v Professional Radiology

2007 NY Slip Op 34539(U)

September 17, 2007

Supreme Court, Kings County

Docket Number: 2917/2006

Judge: Randolph Jackson

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
RANDALL SNODGRASS, as Administrator of
the Estate of BEVERLY GAINES-SNODGRASS,
and RANDALL SNODGRASS, Individually,

Plaintiffs,

-against-

PROFESSIONAL RADIOLOGY, JOHN LOUIS
ROMANELLI, M.D. and MENACHEM MANDELL,
M.D.,

Defendants.
-----X

CIVIL TERM, PART 11

DECISION and ORDER

Index No. 2917/2006

PRESENT:
HON. RANDOLPH JACKSON

September 17, 2007

THE FOLLOWING PAPERS NUMBERED 1 TO 15 READ ON

THIS MOTION:

NO. 28 ON CALENDAR OF June 20, 2007 PAPERS NUMBERED

NOTICE OF MOTION - ORDER TO SHOW CAUSE - AFFIDAVIT(S)

AFFIRMATION(S) - PETITION - EXHIBITS ANNEXED 1-5

ANSWERING AFFIDAVIT(S) - AFFIRMATION(S) - EXHIBITS 6, 7-14

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AFFIDAVIT(S) - AFFIRMATION(S) _____

EXHIBITS AND OTHER PAPERS _____

After oral arguments and upon the foregoing papers:

Plaintiffs, RANDALL SNODGRASS, as Administrator of the
Estate of BEVERLY GAINES-SNODGRASS, and RANDALL SNODGRASS,

Individually ("plaintiffs"), move for an order granting leave to reargue a prior motion and cross-motion.

This medical malpractice action was initially commenced on September 27, 2002, Index Number 38921/2002, as against the defendants, PROFESSIONAL RADIOLOGY, JOHN LOUIS ROMANELLI, M.D. and MENACHEM MANDELL, M.D. ("defendants"). Plaintiffs allege that defendants departed from accepted medical standards from June 14, 2000 to May 2001. In January 2003, the action was stayed because Letters of Administration had not been issued. Plaintiff then moved to restore the action and on January 20, 2006, the Hon. Joseph Levine denied plaintiffs' motion and granted the defendants' cross-motion to dismiss the action against all of the defendants.

Plaintiffs then commenced a second action, Index Number 2917/2006, seeking damages against the same parties based upon the same set of facts pursuant to C.P.L.R. §205(A). In a Decision and Order dated February 4, 2007, this Court granted defendants' motion and cross-motion to dismiss. In deciding these motions, the Court held that the order of Justice Levine was a decision on the merits based upon plaintiffs' failure to timely apply for Letters of Administration and statute of limitations grounds, and is thus res judicata as to the second action.

Plaintiffs now challenge the Decision and Order of February 4, 2007, contending that the Court misapprehended the law with regard to the application of C.P.L.R. §205(A). To be more precise,

plaintiffs contend that Justice Levine's dismissal order was not on the merits since the original action was timely commenced despite the fact that no representative had been appointed. In support of this contention, plaintiffs cite numerous authorities. Plaintiffs claim that where an action is timely commenced it cannot be considered a nullity because plaintiff lacked capacity to sue. According to plaintiffs, an error relating to the identification of the named plaintiff will not bar recommencement of another action pursuant to C.P.L.R. §205(A). Based upon the above, plaintiffs argue that C.P.L.R. §205(A) applies to this action while the doctrine of res judicata does not.

In opposition, defendant, DR. JOHN LOUIS ROMANELLI ("DR. ROMANELLI"), asserts that plaintiffs submitted a petition for Letters of Administration on October 29, 2004 and letters were granted on February 24, 2005. DR. ROMANELLI highlights that these letters were not applied for until three (3) years and five (5) months after the decedent's death, and almost two (2) years after the first action was commenced. Based upon this delay, Justice Levine dismissed plaintiffs' prior action. Plaintiff's reliance on C.P.L.R. §205(A) is misplaced because the dismissal was not based solely on his lack of capacity to sue. Dr. ROMANELLI adds that C.P.L.R. §205(A) is inapplicable because it does not permit the re-initiation of a dismissed action where the dismissal was based upon the plaintiffs' neglect to prosecute.

PROFESSIONAL RADIOLOGY argues almost the same points as DR. ROMANELLI and adds that plaintiffs applied for Letters of Administration after the applicable statute of limitations for wrongful death of two (2) years expired.

In reply, plaintiffs maintain that Justice Levine's order of dismissal did not specify any particular grounds for dismissal and there is no way to determine if the dismissal was on the merits for neglect to prosecute.

A motion for reargument, addressed to the sound discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided (Foley v. Roche, 68 AD2d 558, 567 [1st Dept., 1979]; F&G Heating Co., Inc. v. Board of Educ. of City of NY, 103 AD2d 79 [2nd Dept., 1984]).

In the instant matter, the Court determines that plaintiffs' arguments are not persuasive in establishing that the Court overlooked or misapprehended the facts and plaintiffs have failed to establish that there are new facts. The Court notes that plaintiffs failed to apply for Letters of Administration for over three and one-half (3½) years after the decedent's death causing a delay in the prosecution of the action.

