

Sullivan v Nimmagadda
2008 NY Slip Op 31322(U)
April 22, 2008
Supreme Court, Nassau County
Docket Number: 1820-07/
Judge: Michele M. Woodard
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----x
TIMOTHY SULLIVAN as administrator of the Goods
Chattels and Estate of GRACE SULLIVAN, deceased

Plaintiff,

-against-

PHANI NIMMAGADDA M.D.,

Defendant.
-----x

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.: 1820/07
Motion Seq. No.: 01+02**

DECISION AND ORDER

Papers Read on this Motion:

- 1. Defendant's Notice of Motion 01
- 2. Plaintiff's Cross Motion and Affirmation in Opposition 02
- 3. Defendant's Reply Affirmation xx

Defendant moves by Notice of Motion for an order pursuant to CPLR § 3211 and 3212, granting summary judgment in his favor and dismissing the complaint as time-barred by the applicable statutes of limitations. Defendant further requests an order granting a Protective Order staying the Preliminary Conference and discovery in this matter pending the resolution of this motion and a change of venue.

Plaintiff cross-moves by Notice of Cross-Motion for an order allowing and declaring that the service of process on the defendant has been made *nunc pro tunc*, pursuant to the discretion granted to the Court or in the alternative, dismiss the case without prejudice to the service of a new complaint within six months of the decision rendered by the Appellate Division.

This action for medical malpractice and wrongful death was commenced by Summons and Complaint, dated January 31, 2007, served on the defendant on April 20, 2007. Issue was joined on August 2, 2007 and plaintiff served defendant with a Verified Bill of Particulars, dated August 22, 2007. The plaintiff had previously brought a similar action against numerous defendants, including the present defendant, which was dismissed by order of this court, Nassau County, (J. Jonas), dated September 18, 2006. A judgment dismissing the complaint against the defendant, with prejudice, was entered on October 24, 2006. The plaintiffs appealed and the decision was

affirmed by the Appellate Division on November 27, 2007, in *Sullivan v St. Francis Hosp.*, 45 AD3d 833 (2d Dept 2007).

Defendant argues that the plaintiffs action is time barred because it was not brought within the two years and six month statute of limitations to commence a medical malpractice suit pursuant to CPLR § 214(a), or the two year statute of limitations for wrongful death claims. Further, the plaintiff argues that the plaintiff cannot avail himself of the six-month extension to these statute of limitations pursuant to CPLR § 205(a), because the action was dismissed on the merits and thus does not qualify for the extension. The defendant also argues that even if the six-month extension were to apply, the plaintiff did not satisfy the conditions precedent to invoking the extension when the plaintiff failed to commence the suit within six-months from the dismissal of the original action.

Plaintiff argues that because the original complaint was dismissed for failure to state a cause of action, and not on the merits, the new action based on the same transaction or occurrence, falls within the purview of the six-month tolling provision and further, the time-period did not begin to run until the Appellate Division rendered its decision on November 27, 2007.:

The applicable statute of limitations for a medical malpractice claim, pursuant to CPLR § 214(a) is “two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure” unless the action is “based upon the discovery of a foreign object in the body of the patient,” in which case “the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery.” Further, the applicable statute of limitations to bring a wrongful death action pursuant to the EPTL § 5-4.1 is two years after the decedent’s death by a duly appointed personal representative.

In the instant case, defendant did not the right to raise the statute of limitations as an affirmative defense because the defense was originally raised in the answer. See *Fade v Pugliani/Fade*, 8 AD3d 612, 614 (2d Dept 2004). Next, the alleged medical malpractice against the defendant occurred from May 6, 2003 to May 29, 2003 when the plaintiff’s decedent, Grace Sullivan, died. Hence, applying the longer of the two applicable statute of limitation, medical

malpractice, absent the applicability of an extension due to continuous treatment or one based on the discovery of a foreign object, the original action should have been commenced on or about November 29, 2005. However, it is undisputed that the plaintiff commenced this action on or about January 31, 2007, when the statute of limitations had run.

Thus, the plaintiff's argument that the tolling provision of CPLR § 205(a) applies to this case is misguided because the provision only allows for the commencement of a new action when the prior action that was dismissed was timely commenced. In this case, the prior action was not timely commenced. Further, the tolling provision does not apply to actions that were previously dismissed on the merits.

In relevant part, CPLR § 205(a) states that:

“If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination, provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.”

Generally, “when service of the new complaint is not effectuated within six months of dismissal of the original complaint, then dismissal of the new complaint is warranted as a matter of law.” *Silber v Stein*, 287 AD2d 494 (2d Dept 2001). However, “an appeal of the dismissal may serve to delay the running of the six-month period if the appeal lies as a matter of right . . . [and] termination of the prior action occurs when appeals as of right are exhausted.” *Andrea v Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C.*, 5 NY3d 514, 519 (2005); see also *Lehman Bros., Inc. v Hughes Hubbard & Reed, L.L.P.*, 92 NY2d 1014, 1016 (1998) (where dismissal of an action is appealable as a matter of right, the action is not terminated, and the six-month period does not begin to run, until that appeal is exhausted).

Here, the plaintiff did not have an appeal as of right because in affirming the Supreme Court's dismissal of the original action, the Appellate Division stated that “the right of direct appeal therefrom terminated with the entry of the judgment in the action.” *Sullivan v St. Francis*

Hosp., 45 AD3d 833, 834 (2d Dept 2007). Thus, because this was a discretionary appeal, the original judgment of this court marked the termination of the original action. As such, had the prior action been timely commenced, the plaintiff could have availed himself of the tolling provision of CPLR § 205(a) from the date of judgment, and failed to do so.

Further, courts have found that an appeal based on a plaintiff's failure to state a cause of action, or whether the plaintiff has a cause of action, is a dismissal based on the merits, and thus there is no appeal as of right. *Hausch v Clarke*, 8 AD3d 436, 437 (2d Dept 2004). In addition, a dismissal "with prejudice" generally "signifies that the court intended to dismiss the action on the merits. *Yonkers Contracting Co., Inc. v Port Authority Trans-Hudson Corp*, 93 NY2d 375, 380 (1999).

Guided by these principles, the court finds that the matter was dismissed on the merits when the Supreme Court originally dismissed the complaint after finding that it did not "allege facts upon which personal liability of the defendant to the plaintiffs can be predicated." See generally *Hausch*, 8 AD3d at 437. In addition, because judgment was entered that the complaint be dismissed with prejudice, the court presumes that it was dismissed on the merits.

Therefore, the plaintiff's action must be dismissed as untimely because it was not timely commenced in the original action under the applicable statute of limitations for medical malpractice or wrongful death and because the tolling provision of CPLR § 205(a) does not apply extend the statute of limitations in this action.

As such, it is hereby

ORDERED, that summary judgment is granted in favor of defendant and dismissing the complaint in its entirety as time-barred by the applicable statute of limitations.

The parties' remaining applications are denied as moot.

This constitutes the **DECISION** and **ORDER** of this Court.

DATED: April 22, 2008
Mineola, N.Y.

ENTER: 
HON. MICHELE M. WOODARD

J.S.C. **ENTERED**

APR 30 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE