

<b>Jones v St. Luke-Roosevelt Hosp. Ctr.</b>
2008 NY Slip Op 31931(U)
June 27, 2008
Supreme Court, New York County
Docket Number: 0110202/2004
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN B. LOUIS

PART 6

Justice

Index Number : 110202/2004

**JONES, BRENDA**

VS.

**ST. LUKE'S-ROOSEVELT HOSPITAL**

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 110202-04

MOTION DATE 5/20/08

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

be read on this motion to ~~for~~ dismiss complaint

PAPERS NUMBERED

1-8

9-17

26; 27-30

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits X MOT: 18, 19-25

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

**FILED**

JUL 07 2008

NEW YORK

COUNTY CLERK'S OFFICE

Dated: 6/27/08

JBL  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
BRENDA JONES, as Administratrix of the Estate of  
INEZ GATEWOOD,

Plaintiff,

Index No. 110202/04

-against-

**Decision and Order**

ST. LUKE-ROOSEVELT HOSPITAL CENTER,  
RIVINGTON HOUSE THE NICHOLAS A. RANGO  
HEALTH CARE FACILITY,

Defendants.

-----X  
**JOAN B. LOBIS, J.S.C.:**

Defendant St. Luke's-Roosevelt Hospital Center ("St. Luke's") moves for an order pursuant to C.P.L.R. Rule 3216, dismissing plaintiff's complaint against St. Luke's, on the grounds that plaintiff has unreasonably neglected to prosecute the action. Defendant Rivington House - The Nicholas A. Rango Health Care Facility ("Rivington") cross-moves for the same relief.

Plaintiff's medical malpractice claim arose from defendants' treatment of, and failure to treat, plaintiff's decedent's decubitus ulcers while she was under their care. Plaintiff's decedent was treated for AIDS-related complications at St. Luke's from January 26, 2002 until March 5, 2002, when she was transferred to Rivington, where she stayed until March 20, 2002. Plaintiff's decedent died on September 24, 2002. Plaintiff brought her medical malpractice action by the filing of a summons and verified complaint on or about July 13, 2004. Issue was joined in August 2004, and plaintiff served bills of particulars on or about August 31, 2005. For the next two years, it appears that this case did not move forward; no further discovery was exchanged, and no one requested a preliminary conference. By letters dated September 12, 2005 and November 18, 2005, Rivington

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and St. Luke's, respectively, sought supplemental bills of particulars and responses to discovery demands. These letters appear to have gone unanswered.

Pursuant to C.P.L.R. Rule 3216(b)(3), on October 5 and October 12, 2007, St. Luke's and Rivington, respectively, served 90-day notices by certified and regular mail on plaintiff's attorney. Both notices were returned as undeliverable. Defendants learned that plaintiff's counsel had moved to a new office. St. Luke's and Rivington proceeded to re-serve the 90-day notices on November 6 and 12, 2007, respectively. Plaintiff's counsel does not argue that he failed to receive the second set of notices. Moreover, plaintiff neither served and filed note of issue within the specified time period nor moved for an extension of time within which to do so.

C.P.L.R. Rule 3216(a) sets forth, in pertinent part,

[w]here a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, upon its own initiative or upon motion, may dismiss the party's pleadings on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

Rule 3216(b) requires three conditions to be met before the court may dismiss a complaint for failure to prosecute: (1) issue must have been joined, (2) one year must have elapsed since issue has been joined in the action, and (3) the court or the party seeking the relief shall have served a written demand (the "90-day Notice") by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of the demand. The 90-day Notice must also state that default in complying with

the demand within the ninety-day period will serve as a basis for a motion for dismissal. All of these prerequisites have been met. Rule 3216(e) sets forth that if a party fails to serve and file a note of issue within ninety days of receiving the 90-day Notice, the court may grant a motion to dismiss based on such failure unless the party "shows justifiable excuse for the delay and a good and meritorious cause of action."

Plaintiff's attorney, Benjamin Katz, Esq., sets forth that after this litigation commenced, he suffered from medical issues which required him to close his own practice and join the firm of Kelly & Grossman, LLP, in or around August 2005. In August 2005, Mr. Katz attempted to reach plaintiff by letter to obtain her signature on a consent to change attorney and retainer agreement with Kelly & Grossman. He did not hear back from the client and could not locate her to secure a change of counsel. In January 2006, plaintiff states that he applied to the Appellate Division to temporarily surrender his license due to his inability to effectively represent his clients as a result of his aforementioned health problems; he also left Kelly & Grossman in or about January 2006. By October 2006, he felt able to return to practice and he withdrew his application to surrender his license. The Appellate Division permitted the withdrawal but ordered the temporary suspension of Mr. Katz's license pending a determination of his capacity to resume practicing law. Mr. Katz states that he served a copy of the Appellate Division's order on plaintiff and defendants, indicating that he would need to withdraw as counsel from the case. Again, he did not receive a response from plaintiff. Prior to Mr. Katz moving to withdraw as counsel, his suspension was lifted by the Appellate Division in July 2007.

Mr. Katz states that after receiving defendants' 90-day Notices in November 2007, he was still unable to locate his client and was attempting to transfer the action to another firm, but because of the circumstances, no firm would agree to take over the representation. Additionally, he states that the 90-day period was not properly calendared due to a ministerial error on his part. Mr. Katz asserts that he has since located plaintiff, who wishes to proceed with the action, and that counsel served a supplemental bill of particulars in April 2008.

To demonstrate merit, plaintiff submits the affidavit of a physician (name redacted) board certified in geriatric and family medicine. Plaintiff's expert states that he reviewed the records and pleadings. The physician asserts that Rivington's records indicate that the decedent was admitted to Rivington from St. Luke's with two Stage II pressure sores, but that St. Luke's records have no mention of pressure sores or wound care. The physician also notes that the chart from Rivington indicates that decedent was admitted with pressure sores on her sacrum and left buttock; that on March 11, the assessment indicates no sores at all; but, that upon discharge, the assessment indicates that decedent had three Stage I and two Stage II sores. The expert states that pressure sores develop when bony and cartilaginous areas of the body rub against hard portions of a bed to which the patient is confined. Based on the foregoing, the physician opines, to a reasonable degree of medical certainty, that deviations occurred on the part of both defendants in the treatment and care of plaintiff's decedent, and that since she was conscious and generally alert, she would have been suffering pain and discomfort from the sores.

While plaintiff's papers are "far from satisfactory" (Neyra y Alba v. Pelham Foods, Inc., 46 A.D.2d 760, 761 [1st Dep't 1974]), plaintiff's counsel has sufficiently demonstrated that the timely prosecution of this case was hindered by a confluence of events over the past three years—the inability to reach plaintiff for a long stretch of time in order to arrange for substitute counsel, counsel's personal health problems and subsequent temporary suspension (see DiSimone v. Good Samaritan Hosp., 100 N.Y.2d 632, 634 [2003]), and counsel's change of office. Although the failure to move this case forward and cooperate with discovery demands is troubling, it does not appear that plaintiff intentionally abandoned the action, nor have defendants demonstrated that they have been unduly prejudiced by the delay. Neyra y Alba, supra. In circumstances such as these, plaintiff "should not be required to suffer the consequences of [her] attorney[']s misconduct." Id.


Accordingly, it is

ORDERED that the motion and cross-motion are denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on August 12, 2008, at 9:30 a.m., in courtroom 345 at 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

Dated: June 27, 2008

  
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 JOAN B. LOBIS, J.S.C.

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