

Beltrez v Chambliss

2008 NY Slip Op 33084(U)

November 13, 2008

Supreme Court, New York County

Docket Number: 105762/07

Judge: Joan B. Carey

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey
Justice

PART 40 D

LETICIA BELTREZ, AS ADMINISTRATRIX
OF THE ESTATE OF MARIANO S. BELTREZ,

Plaintiff,

Index No.: 105762/07
MOTION DATE _____
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

-v-

PAUL CHAMBLISS, M.D., FLORENTINO
REYES, PAC, HOWARD A. GROSSMAN,
M.D., POLARI MEDICAL GROUP, DAVID
INKELES, M.D., and DIAGNOSTIC
RADIOLOGY ASSOCIATES, P.C.

Defendants.

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

The following papers, 1-14, were read on this motion by defendants Paul Chambliss M.D., Florentino Reyes, PAC, and Howard A. Grossman, M.D., to dismiss the complaint for a failure to serve the complaint within 20 days of service of defendants' written demand for the complaint, pursuant to CPLR §3012(b); and a cross-motion by plaintiff, pursuant to CPLR §3012(d), to compel the acceptance of plaintiff's untimely served answer, in the interest of justice and upon reasonable excuse.

Notice of Motion, Affirmation, Accompanying Exhibits
Notice of Cross-Motion, Affirmation, Accompanying Exhibits
Affirmation In Reply

Papers Numbered
1-7
8-13
14

Cross-Motion: Yes No

Plaintiff commenced the instant action for medical malpractice on or about May 4, 2007, by filing a Second Amended Summons With Notice. The Second Amended Summons With Notice was served upon defendant Paul Chambliss, M.D. on or about May 5, 2007, and served upon Florentino Reyes, PAC, and Howard A. Grossman, M.D. on or about May 11, 2007.¹ Thereafter,

¹ The Second Amended Summons With Notice also named Polari Medical Group, David Inkeles, MD and Diagnostic Radiology Associates, PC as defendants in this action. Plaintiff has, however, discontinued the action as against David Inkeles, MD and Diagnostic

on May 18, 2007, Dr. Chambliss and Dr. Grossman served a Demand For Complaint upon plaintiff. Physician's Assistant Reyes served a Demand For Complaint upon plaintiff on or about May 25, 2007. The aforementioned defendants were eventually served with a verified complaint on May 23, 2008, approximately one year after serving plaintiff with their respective Demands For Complaints.

Dr. Chambliss, Dr. Grossman and Physician's Assistant Reyes presently move to dismiss the complaint for a failure to timely serve the complaint within 20 days of service of their respective written demands for the complaint, pursuant to CPLR §3012(b). Plaintiff opposes the instant motion and cross-moves, pursuant to CPLR §3012(d), to compel the acceptance of the untimely served complaint, in the interest of justice and upon reasonable excuse.

CPLR §3012(b), which addresses the service of complaint where a summons is served without a complaint, expressly states that:

"[i]f the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand. Service of the demand shall extend the time to appear until twenty days after service of the complaint. If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision. A demand or motion under this subdivision does not of itself constitute an appearance in the action."

Therefore, under this section, if a plaintiff fails to serve a complaint within twenty days after service of a demand for a complaint, the court upon motion may dismiss the action.

Plaintiff opposes the motion to dismiss and cross-moves, pursuant to CPLR §3012(d), to compel the acceptance of the untimely served complaint, in the interest of justice and upon reasonable excuse. CPLR §3012(d) sets forth that "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." Plaintiff argues that the delay in timely serving the complaint in the instant action was caused by their investigation into the merits of the case. Plaintiff contends that in order to properly investigate the merits of this case plaintiff's attorneys needed to obtain x-rays and other medical records relating to the care and treatment of plaintiff's decedent, as well as locate and interview various witnesses who could support the allegations contained in the complaint. Plaintiff also contends that plaintiff's attorneys needed to consult with a physician in order to file a certificate of merit along with the complaint.

Radiology Associates, PC. With respect to Polari Medical Group, it is not clear from the papers submitted in connection with this motion and cross-motion as to whether they were properly served with a Summons With Notice, whether they timely appeared or served plaintiff with a written notice of demand for a complaint, or whether they were timely served with a complaint. However, the action has not been discontinued as against them, and they do not seek any relief in connection with the instant motion and cross-motion.

Notwithstanding plaintiff's argument to the contrary, this Court, in its discretion, finds it unreasonable to delay the service of a complaint herein for an entire year for the purpose of conducting an investigation into the merits of the complaint. The excuse provided by plaintiff does not adequately explain the inordinate delay in serving the complaint herein, as the affirmation of plaintiff's attorney does not provide any details relating to specific efforts undertaken during this year long investigation or the timing of these efforts. ² See *Benson v. Rana Management*, 131 AD2d 798 [2d Dept. 1987]. Accordingly, plaintiff has not provided a reasonable excuse for approximately a one-year delay in plaintiff's service of the complaint.

In addition to failing to provide a sound excuse for the approximately one-year delay in serving the complaint, the plaintiff failed to adequately establish that her complaint has merit. Where there has been a lengthy delay in serving a complaint, to successfully defeat a motion to dismiss, the plaintiff must not only provide an excuse for its failure to timely serve the complaint, but must also demonstrate that the complaint has merit. See *Manhattan King David Restaurant v. Nathanson*, 269 AD2d 297 [1st Dept. 2000]; see also *Kel Management Corp. v. Rogers and Wells*, 64 NY2d 904 [1985]. In an action to recover damages for medical malpractice, the affirmation of a licensed physician attesting to the merit of the action is required (see, *Henig v. Good Samaritan Med. Ctr.*, 301 AD2d 571 [2d Dept. 2003]; *Posada v. Pelaez*, 7/29/2005 NYLJ 18 (col. 1)[Supreme Court, New York County, Carey J.], *aff'd* 37 AD3d 168 [1st Dept. 2007]). Such an affirmation is not included in the papers supporting the plaintiff's cross-motion.

In the case of *Posada v. Pelaez*, (*supra*), this Court held that a certificate of merit accompanying a plaintiff's complaint in a medical malpractice action, as required by CPLR 3012-a, was not sufficient to demonstrate the merit of the complaint where plaintiff sought an extension of time to effect service of process, pursuant to CPLR 306-b. This Court stated that:

"[t]he certificate of merit accompanying the plaintiff's complaint, declaring that plaintiff's counsel had reviewed the facts of the case and consulted with at least one physician, and that counsel concluded on the basis of such review and consultation that there was a reasonable basis to commence the action (CPLR 3012-a[a][1]), is not an acceptable substitute for the affirmation of a physician. The requirement that a complaint in an action to recover damages for medical, dental or podiatric malpractice be accompanied by a certificate of merit was imposed by the Legislature as part of its malpractice reform package of 1986 (L 1986, ch 266). The purpose of the certificate of merit "is [] to warn lawyers away from bringing [medical, dental or podiatric malpractice] actions at all unless they have consulted appropriate experts in the field to ascertain that the claim has at least arguable merit" (Slegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C3012-a:1, at 713 [main volume]). A CPLR 3012-a certificate does not itself demonstrate the meritoriousness of the plaintiff's

² Plaintiff's counsel does set forth in his affidavit that it took approximately two months to obtain relevant x-rays and have them reviewed by a physician. However, he fails to provide any details with respect to the length of time it took to obtain the remainder of decedent's medical records and to have those records reviewed, or any efforts made to have this done in a timely manner. Moreover, his affirmation provides no information relating to the efforts made to locate and interview witnesses, or the length of time that was needed to complete this portion of the investigation.

claim, but merely ensures that plaintiff's counsel has satisfied herself that a reasonable basis exists for commencing the action (*Horn v. Boyle*, 260 AD2d 76, 77 [3d Dept. 1999]; *see Ault v. Richman*, 299 AD2d 613 [3d Dept. 2002]; *Lucido v. Vitolo*, 251 AD2d 383 [2d Dept. 1998]; *Sober v. Kallna*, 208 AD2d 1140 [3d Dept. 1994]), thereby, in theory, reducing the number of frivolous lawsuits. Such a certificate does not contain the sine qua non of a physician's affirmation, namely an expert's opinion to a reasonable degree of professional certainty that the defendant departed from accepted medical, dental or podiatric practice and that such departure was a proximate cause of the plaintiff's injuries (*see generally e.g. Fiore v. Galang*, 64 NY2d 999 [1985]; *Mosberg v. Elahi*, 176 AD2d 710 [2d Dept. 1991], *aff'd* 80 NY2d 941 [1992]; *Schuller v. Martinelli*, 304 AD2d 967 [3d Dept. 2003]; *Spicer v. Community Family Planning Council Health Ctr.*, 272 AD2d 317 [2d Dept. 2000]; *Damen v. North Shore Univ. Hosp.*, 262 AD2d 598 [2d Dept. 1999]; *Orr v. Meisel*, 248 AD2d 451 [2d Dept. 1998]; *Gibson v. Victory Mem. Hosp.*, 221 AD2d 503 [2d Dept. 1995]; *Dorgan v. Dunda*, 165 AD2d 949 [3d Dept. 1990]; *Daponte v. Weber*, 134 AD2d 319 [2d Dept. 1987])."

Similarly, in the instant action, the CPLR 3012-a certificate of merit accompanying plaintiff's complaint does not itself demonstrate the meritoriousness of the plaintiff's claim for the purpose of granting the relief sought by plaintiff herein. Accordingly, plaintiff has failed to adequately establish that her complaint has merit.

Plaintiff appears to argue that because movants have not filed a notice of appearance they are precluded from seeking the relief sought in the instant motion. Although the CPLR §3012(b) states that "[a] demand or motion under this subdivision does not of itself constitute an appearance in the action," this statute does not set forth any requirement that a notice of appearance be filed prior to moving for dismissal for a failure to timely serve the complaint, following the service of a written demand. Plaintiff also seems to argue that the time to serve a complaint, pursuant to CPLR §3012(b), starts to run from the time the defendant serves a notice of appearance. However, CPLR §3012(b) clearly states that "[s]ervice of the complaint shall be made within twenty days after service of the demand."

Based upon the foregoing, it is hereby

ORDERED that the motion by defendants Paul Chambliss M.D., Florentino Reyes, PAC, and Howard A. Grossman, M.D., to dismiss the complaint for a failure to serve the complaint within 20 days of service of defendants' written demand for the complaint, pursuant to CPLR §3012(b) is granted; and it is further

ORDERED that plaintiff's cross-motion, pursuant to CPLR §3012(d), to compel the acceptance of plaintiff's untimely served answer, in the interest of justice and upon reasonable excuse is denied; and it is further

ORDERED that counsel for the remaining parties (plaintiff and Polari Medical Group) are to appear before the court on December 12, 2008, at 100 Centre Street, Room 1306, Part 40D, at 9:30 am for a preliminary conference.

Dated: 11/13/2008



J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

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