

Randall v Professional Radiology
2008 NY Slip Op 33721(U)
December 1, 2008
Supreme Court, Kings County
Docket Number: 2917/06
Judge: Randolph Jackson
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At an IAS Term, Part 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1 day of December, 2008

P R E S E N T:

HON. RANDOLPH JACKSON,

Justice.

-----X
RANDALL SNODGRASS, as Administrator of the
Estate of BEVERLY GAINES-SNODGRASS, Et. Ano.,

Index No. 2917/06

Plaintiffs,

- against -

PROFESSIONAL RADIOLOGY, et. al.,

Defendants.

-----X
PROFESSIONAL RADIOLOGY,

Index No. 75581/08

Third-Party Plaintiff,

- against -

MENACHEM MENDALL, M.D.,

Third-Party Defendant.

-----X

The following papers numbered 1 to 8 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-4

Opposing Affidavits (Affirmations) _____

5-7a

Reply Affidavits (Affirmations) _____

7b-8

_____ Affidavit (Affirmation) _____

Other Papers _____

Upon the foregoing papers, defendant/third-party defendant Menachem Mandell, M.D., s/h/a, Menachen Mandell, M.D., moves for an order, pursuant to CPLR

205(a), 3211(a)(8) and 3212, dismissing the complaint insofar as asserted against him or, in the alternative, dismissing the action commenced by plaintiff in his individual capacity. Plaintiff Randall Snodgrass, in his capacities as Administrator of the Estate of Beverly Gaines-Snodgrass and individually, cross-moves for an order, pursuant to CPLR 306-b, 2001, and/or 2004, granting him an extension of time to serve Dr. Mandell. Alternatively, plaintiff seeks an order, pursuant to CPLR 3215, granting him a judgment by default against Dr. Mandell. Finally defendant John Lewis Romanelli, M.D. cross-moves for an order, pursuant to CPLR 205(a) and 3211(a)(8), dismissing the individual action insofar as asserted against him.

This is an action sounding in medical malpractice, wrongful death and lack of informed consent which allegedly occurred from June 14, 2000 to February 2001. The action was originally commenced on September 27 2002, under Index No. 38921, by plaintiff as "proposed administrator of the estate of Beverly Gaines-Snodgrass." In an order dated January 24, 2006, this court (Levine, J) granted defendants' cross motions to dismiss the action on the ground that plaintiff lacked standing due to his failure to timely appoint an administrator for the estate.

By this time, plaintiff Randall Snodgrass had obtained Letters of Administration and, on January 30, 2006, he commenced the instant action, pursuant to CPLR 205(a). That statute permits a plaintiff who has commenced a timely action which 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" to "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.¹ These motions and cross motions followed.

The court turns first to Dr. Mandell's motion to dismiss the complaint for failure to timely serve him with the summons and complaint, as well as to the plaintiff's related cross motion for an extension of time to serve Dr. Mandell.

The essential facts are not in dispute. In 2002, plaintiff served Dr. Mandell with the summons and complaint in the prior action by delivering a copy to the office manager at Professional Radiology (Professional). Following the dismissal of that action, on or about February 28, 2006, plaintiff again served Dr. Mandell by serving the pleadings upon the office manager at Professional. Plaintiff's attorney then forwarded the affidavit of service to Dr. Mandell's counsel.

In response, Dr. Mandell's attorney sent plaintiff's attorneys a letter dated June 30, 2006, advising them that "service has not been properly made on Dr. Mandell [because] ... Professional Radiology was not Dr. Mandell's actual place of business at the time service was attempted." The letter further noted that the defendant's attorney who had attended the CAMP conference on April 26, 2006, had advised plaintiff's attorney in attendance that day that Dr. Mandell was no longer employed by Professional. Similar notifications of this defective service were sent to plaintiff's attorneys by letters dated September 5, 2006, April 11, 2006 and November 13, 2007.

¹ In a decision dated March 3, 2008, the Supreme Court, Appellate Division, Second Department, reversed an order of this court dated September 17, 2007, in which the court had granted reargument and adhered to its decision dated February 7, 2007 dismissing the action.

In an affirmation submitted with his motion to dismiss, Dr. Mandell affirms that he has not been employed by Professional since November 30, 2002. He further states that he did not receive the summons and complaint in this action until he was served at his current place of employment on June 20, 2008.

The summons and complaint were filed on January 30, 2006 and, pursuant to CPLR 306-b, plaintiff had 120 days from that date to timely serve Dr. Mandell. Moreover, in order to take advantage of CPLR 205(a), which permitted the recommencement of this action despite the expiration of the statute of limitations, plaintiff was required to commence the action *and* serve Dr. Mandell within six months from January 24, 2006, the date of dismissal of the prior action. Plaintiff attempted to meet both these deadlines by serving the office manager at Professional on February 28, 2006, however, it is undisputed that Professional was not Dr. Mandell's "actual place of business" on February 28, 2006, and, thus, service there did not confer this court with jurisdiction over Dr. Mandell. Despite being advised by Dr. Mandell's attorney on numerous occasions that Dr. Mandell had not been properly served, plaintiff did not serve him at his actual place of business until June 30, 2008, way beyond the time frames set out in both CPLR 205(a) and 306-b.

As a recitation of these facts make plain, Dr. Mandell was never timely served with the summons and complaint in this action and, thus, this court lacks personal jurisdiction over him. Faced with dismissal of the complaint on this ground, and because the statute of limitations has long expired, plaintiff seeks an order, pursuant to CPLR 306-b extending his time to serve Dr. Mandell. For the reasons that follow, the court denies plaintiff's cross motion.

When a plaintiff fails to effectuate service upon a defendant within 120 days of the filing of the summons and complaint, the court may, upon motion, grant an extension of time to serve defendant "upon good cause shown or in the interest of justice." The court will assume for the sake of this motion, that the court has the same discretion to extend the time to serve pursuant to CPLR 203(a).

Here, plaintiff has failed to demonstrate "good cause" for his failure to timely serve Dr. Mandell. As noted, Dr. Mandell's attorneys repeatedly advised plaintiff's attorneys as far back as April, 2006 that Dr. Mandell was no longer employed at Professional and that, therefore, service there was ineffectual. Nonetheless, rather than attempt to rectify the situation immediately, plaintiff waited until June, 2008 to serve Dr. Mandell at his current place of employment. In an attempt to explain this delay, plaintiff essentially blames "law office failure" (the firm was "barraged by the co-defendants' dismissal motions"). However, not only is this excuse unconvincing as a reason for the long delay, but such "law office failure" does not constitute good cause under CPLR 306-b (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-105 [2001]).

The alternative "interest of justice" standard authorized by the statute is more flexible. As the Court of Appeals explained:

The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. The court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant. No one factor is determinative.

(*Lededer*, 97 NY2d at 105-106).

Here, consideration of the foregoing factors militates against plaintiff. As noted, there was a complete lack of diligence in serving Dr. Mandell, or in moving for an extension of time in which to serve him, and plaintiff has failed to establish the existence of a meritorious cause of action, either with an affidavit of merit, an expert's report, or from the face of the complaint (*see Gem Flooring, Inc. v Kings Park Indus., Inc.*, 27 AD3d 617 [2006]; *Baione v Central Suffolk Hosp.*, 14 AD3d 635, 636 [2005]; *Kazimierski v New York Univ.*, 18 AD3d 820 [2005]).

Thus, the court grants Dr. Mandell's motion to dismiss the complaint as asserted against him on the grounds that the court lacks jurisdiction over his person² and plaintiff's cross motion for an extension of time to serve Dr. Mandell is denied.

The court also grants the cross motion of Dr. Romanelli to dismiss the "action" commenced by plaintiff in his individual capacity. The court notes in this regard that, while the caption reflects plaintiff as an individual party to this action, no causes of action are brought by him in that capacity, derivatively or otherwise. Thus, the action must be dismissed, pursuant to CPLR 3211 (a)(7), for failure to state a cause of action upon which relief may be granted. Additionally, the individual action cannot stand since CPLR 205(a) only authorizes the original plaintiff in the dismissed lawsuit to recommence the action despite the expiration of the statute of limitations (*see Reliance Ins. Co. v PolyVision Corp.*, 9 NY3d 52 [2007]). Here, plaintiff did not bring an individual action in his prior lawsuit, and, thus, he cannot use the saving provision of CPLR 205(a) to bring the action after the expiration of the statute of limitations. While Professional seeks the same relief, it does so

² The third-party action against Dr. Mandell is not affected by this decision.

through an affirmation rather than by bringing a motion. The court denies Professional's request, without prejudice to it bringing a proper and formal motion seeking that relief.

The court has considered the parties' remaining contentions and finds them to be without merit.

Accordingly, that portion of Dr. Mandell's motion for an order dismissing the plaintiff's complaint for lack of personal jurisdiction is granted. Plaintiff's cross motion for an extension of time to serve Dr. Mandell with the summons and complaint is denied. The action is severed and continued against the remaining defendants. Dr. Romanelli's cross motion to dismiss that portion of the complaint commenced by plaintiff in his individual capacity, as asserted against him is granted.

This constitutes the decision and order of the court.

ENTER

J. S. C.

HON. JUSTICE RANDOLPH JACKSON
SUPREME COURT, KINGS COUNTY
CIVIL TERM - PART 11

DEC 01 2008