

McGriff v Ginsberg

2009 NY Slip Op 30148(U)

January 26, 2009

Supreme Court, New York County

Docket Number: 109197/08

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 109197/2008
MCGRIFF, KARL
vs.
GINSBERG, JONATHAN
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 12/22/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED
1-3
4-9
10-12

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. — ~~As to~~ preliminary conference is scheduled for March 23, 2009 at noon.

FILED
JAN 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/20/09

[Signature]
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
KARL McGRIFF and NATALIE McGRIFF,

Plaintiffs,

-against-

Index No.: 109197/08

DECISION AND ORDER

JONATHAN GINSBERG, JONATHAN GINSBERG
& ASSOCIATES, LLP, JOSHUA SCHULMAN
and JOSHUA SCHULMAN, LLC,

Defendants.

FILED
JAN 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

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SOLOMON, J.

This is an action for legal malpractice. Plaintiffs allege that they retained the defendant lawyers to prosecute a medical malpractice lawsuit against a municipal hospital. It is alleged that, before defendants were retained, plaintiffs filed a notice of claim one day after the ninety-day limit, and that the defendant lawyers failed to take action to seek timely leave of court to file a late notice of claim. The date of the alleged malpractice was July 21, 2003. Plaintiffs allege they retained defendants on January 26, 2004, and that a summons and complaint in the underlying action was filed in the New York State Supreme Court, Queens County (index no. 19455/04) on August 26, 2004, and served upon the defendant hospital on September 17, 2004. Plaintiffs contend that defendants had a year and ninety-days from the July 21, 2003 malpractice to seek court approval for the late notice of claim, which time ended on October 19, 2004. The

lawsuit eventually was dismissed due to their failure to file a timely notice of claim.

In their motion to dismiss, defendants Joshua Schulman and Joshua Schulman, LLC (together referred to as the Schulman Defendants) allege that plaintiffs' file was transferred to them from defendants Jonathan Ginsberg and Jonathan Ginsberg & Associates, LLP (Ginsberg Defendants) on October 21, 2004. The Schulman Defendants argue that the complaint should be dismissed against them as a matter of law because plaintiffs cannot prove that but for the Schulman Defendants's negligence they would have prevailed in the underlying lawsuit. The Schulman Defendants further contend that they were not retained by plaintiffs before the year and ninety day deadline passed, so their negligence could not have proximately caused plaintiffs the harm complained of. Finally, all defendants argue that plaintiffs cannot prove that leave to file a late notice of claim would have been granted even if timely sought, so they cannot show that they would have prevailed in the underlying action "but for" defendants' negligence.

The Ginsberg Defendants cross-move to dismiss the complaint, and also oppose in part the Schulman Defendants' motion. The Ginsberg Defendants contend that they had an agreement to share cases, including plaintiffs' lawsuit, that pre-dated October 2004. The retainer agreement executed by

Ginsberg and plaintiffs specifically references Joshua Schulman as co-counsel, and the summons and complaint filed in August 2004 show that the underlying lawsuit names "Law Office of Joshua Schulman, LLC" as the attorney of record. Moreover, plaintiffs allege in the complaint that they retained all defendants to represent them in January 2004. Accordingly, that branch of the Schulman Defendants' motion alleging that they were not involved in representing plaintiffs until October 21, 2004 is denied because the allegations of the complaint are not refuted as a matter of law.

The remaining argument in favor of dismissal, that plaintiffs cannot make a prima facie case that "but for" defendants' negligence they would have succeeded based on the speculative nature of the relief not sought, is also unavailing. Courts look to the circumstances of a parties' request for leave to file a late notice of claim, including whether there is a reasonable excuse for the delay and whether the municipal defendant would be prejudiced by the delay, all of which involves a factual inquiry that is beyond the scope of this motion to dismiss (General Municipal Law § 50-e [5], and see *Harris v City of NY*, 297 AD2d 473 [1st Dept 2002]). Defendants have not established that the outcome of a motion for leave to file a late notice of claim is so speculative that plaintiffs fail to make a prima facie case. Accordingly, it hereby is

ORDERED that the motion and cross-motion to dismiss are denied, and defendants are directed to serve answers within 20 days of service of a copy hereof with notice of entry, and counsel shall appear in Part 55 (60 Centre Street, Room 432) for a preliminary conference on March 23, 2009 at 12 noon.

Dated: January 26, 2009

ENTER:



J.S.C

FILED
JAN 27 2009
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