

Kagan v Erber

2009 NY Slip Op 30779(U)

March 5, 2009

Supreme Court, Kings County

Docket Number: 14741/05

Judge: Marsha Steinhardt

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At an IAS Term, Part 15 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 5th day of March, 2009.

P R E S E N T:

HON. MARSHA L. STEINHARDT,

Justice.

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BORIS KAGAN AS ADMINISTRATOR OF THE ESTATE OF MARINA KAGAN, DECEASED, AND BORIS KAGAN, INDIVIDUALLY,

Plaintiffs,

- against -

Index No. 14741/05
(Action No. 1)

WILLIAM F. ERBER, M.D.,
WILLIAM F. ERBER, M.D., P.C.,
ALEXANDER BRODSKY, M.D.,
ILYA BILIK, M.D.,
SHEEPSHEADBAY MEDICAL ASSOCIATES, P.C.,
YEFIM VAYNSHELBAUM, M.D.,
BORIS KHORETS, M.D., AND
KHORETS & BILIK,

Defendants.

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BORIS KAGAN, AS ADMINISTRATOR OF THE ESTATE OF MARINA KAGAN, DECEASED, AND BORIS KAGAN, INDIVIDUALLY,

Plaintiffs,

- against -

Index No. 2643/08
(Action No. 2)

SHIEL MEDICAL LABORATORY,
QUENTIN MEDICAL LABORATORY,
WILLIAM F. ERBER, M.D.,
WILLIAM F. ERBER, M.D., P.C., AND
ALEXANDER BRODSKY, M.D.,

Defendants.

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The following papers numbered 1 to 14 read on these motions:

Papers Numbered

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

1-2 8-9 12-13

Answer/Opposing Affidavits (Affirmations)_____

3, 4, 5, 6 10

Reply Affidavits (Affirmations)_____

7 11 14

Other Papers_____

The parties have presented motions in two separate actions. In Action No. 1, plaintiff Boris Kagan (the plaintiff), both individually and in his capacity as the administrator of the estate of Marina Kagan (Marina), cross-moves for an order: (a) restoring such action to active status; (b) pursuant to CPLR 3025 (b), amending the complaint in such action to add a claim for wrongful death; and (c) pursuant to CPLR 602 (a), consolidating it with Action No. 2.

In Action No. 2, defendants William F. Erber, M.D. and William F. Erber, M.D., P.C. (collectively, Erber) move for an order: (a) pursuant to CPLR 3025 (b), granting leave to amend their answer to add an affirmative defense of the statute of limitations, and (b) pursuant to CPLR 214-a and 3211 (a) (5), dismissing the complaint insofar as asserted against them based on that affirmative defense. Also in Action No. 2, defendant Alexander Brodsky (Brodsky) moves for an order, pursuant to CPLR 214-a, 3211 (a) (5) and 3212, granting summary judgment and dismissing the complaint insofar as asserted against him as barred by the statute of limitations.

Now, upon the foregoing papers and upon hearing oral argument on January 8, 2009 and after due deliberation had thereon, the plaintiff's cross motion is granted, as follows: (a) Action No. 1 is restored to active status; (b) the plaintiff is granted leave to serve the amended complaint in Action

No. 1; and (c) Action No. 2 is consolidated with Action No. 1 under Index No. 14741/05. The respective motions of defendants Erber and Brodsky in Action No. 2 are dismissed as moot.

Factual and Procedural Background

The plaintiff alleges that the defendants negligently failed to diagnose and treat his wife, Marina's, Stage IV gastric cancer (linitis plastica¹) which caused her death at the age of 43. The plaintiff has commenced two actions.

Action No. 1

The original complaint filed in Action No. 1 on or about May 11, 2005 by the plaintiff and Marina asserted three separate claims: medical malpractice, lack of informed consent, and loss of consortium. Subsequent to Marina's death on February 2, 2006, the plaintiff obtained letters of administration and, by order dated July 27, 2007, was substituted as the administrator of her estate. In accordance with the Central Compliance Part Order of September 12, 2007 (the CCP Order), Justice Joseph Silverman set June 30, 2008 as the deadline by which the plaintiff was required to file a note of issue. The CCP order expressly states that it does not constitute a CPLR 3216 notice. The plaintiff failed to file a note of issue by June 30, 2008 and Action No. 1 was marked "disposed" on July 11, 2008 when a computer-generated "note of issue no appearance date" came up. The plaintiff now moves to restore Action No. 1 to active status.

The plaintiff also moves for leave to serve a proposed amended complaint alleging an additional cause of action for wrongful death (Plaintiff's Ex. F). In support of his request for leave,

¹ "Linitis" is defined as "inflammation of cellular tissue, specifically of the perivascular tissue of the stomach" (Stedman's Medical Dictionary, 28th ed., at 1104). "Linitis plastica" was "originally believed to be an inflammatory condition, but [is] now recognized to be due to infiltrating scirrhous (hard) carcinoma causing extensive thickening of the wall of the stomach; often called leather-bottle stomach" (*id.*).

the plaintiff submits a redacted affirmation of a board-certified gastroenterologist who avers, based upon his review of Marina's medical records, that the defendants departed from accepted standards of medical care, diagnosis, and treatment in the community (Plaintiff's Ex. E).

Action No. 2

On or about January 21, 2008, the plaintiff commenced Action No. 2 against Erber and Brodsky, who were also named as the defendants in Action No. 1, as well as Shiel Medical Laboratory (Shiel) and Quentin Medical Laboratory (Quentin), asserting four causes of action: medical malpractice, lack of informed consent, loss of consortium, and wrongful death. Action No. 2 was dismissed with prejudice against Shiel and Quentin (the laboratories) by orders dated January 8, 2009 and December 4, 2008, respectively. The remaining defendants, Erber and Brodsky, move for dismissal of Action No. 2 on the statute of limitations grounds. The plaintiff seeks to consolidate Action No. 2 with Action No. 1.

Law and Analysis

The court will first address the plaintiff's cross motion. In light of its decision, the court need not address the motions of defendants Erber and Brodsky.

Restoration of Action No. 1

The plaintiff asserts that Action No. 1 should be restored to active status as a matter of law. In the alternative, the plaintiff contends that Action No. 1 should be restored because he has a reasonable excuse for not timely filing a note of issue and this action has merit.

Defendants Khorets, Brodsky, and Erber assert that the plaintiff's failure to file a note of issue was a wilful and inexcusable violation of the CCP order, irrespective of the merits of the plaintiff's claim, and, thus, the plaintiff's request for reinstatement should be denied. Defendant

Erber further asserts that dismissal of Action No. 1 is appropriate under CPLR 3126 (3)² due to the plaintiff's violation of the CCP order or, alternatively, because the conclusory statements by the plaintiff's expert in his affirmation of merit are "insufficient to raise a triable issue of fact concerning proximate cause" (Pratt Aff., ¶ 9). Defendant Bilik contends that, insofar as he is concerned, the plaintiff may not reinstate Action No. 1 against him because he never treated the plaintiff's decedent.

The Appellate Division, Second Department has held that marking a case off the calendar as "disposed" is not a penalty available when a plaintiff fails to file a note of issue by its due date and, therefore, such case must be restored to court calendar (*see Gorski v St. John's Episcopal Hosp.*, 36 AD3d 757 [2d Dept 2007]; *Andre v Bonetto Realty Corp.*, 32 AD3d 973, 974-975 [2d Dept. 2006]; *Khaolaead v Leisure Video*, 18 AD3d 820, 821 [2d Dept 2005]; see generally Greenberg, Outside Counsel, *Calendar Control 2007 – 'Pre-Note of Issue' Cases*, NYLJ, June 25, 2007, at 4, col 4).

² Pursuant to CPLR 3126 (3), a court may "dismiss[] the action or any part thereof" as a sanction against "a party [who] refuses to obey an order for disclosure."

Moreover, the various provisions of the Uniform Court Rules and the CPLR do not compel a contrary result. The so-called “disposition” that occurred here does not constitute an order of dismissal pursuant to 22 NYCRR § 202.27³ (*see Dergousova v Long*, 37 AD3d 645 [2d Dept 2007]; *Bar-El v Key Food Stores, Inc.*, 11 AD3d 420, 421 [2d Dept 2004]). CPLR 3404,⁴ which governs dismissal of abandoned actions, does not apply to pre-note of issue actions (*see Lopez v Imperial Delivery Serv.*, 282 AD2d 190, 198 [2d Dept 2001]). Next, CPLR 3216, which permits a court to dismiss an action for want of prosecution after the defendant has served the plaintiff with a written demand to resume prosecution of the action and to file a note of issue within 90 days after the receipt of the demand, does not apply because the defendants never issued a 90-day written demand that a note of issue be filed, and the CCP order specifically states that “[t]his order does not constitute a CPLR 3216 Notice” (*see Gorski*, 36 AD3d at 757; *Andre*, 32 AD3d at 975; *Bar-El*, 11 AD3d at 421).

Finally, the record before the court does not establish the necessity of sanctions pursuant to CPLR 3126 (3), which permits a court to “dismiss[] the action or any part thereof” as a sanction against “a party [who] refuses to obey an order for disclosure.” It is well settled that “[a]ctions

³ 202 NYCRR § 202.27 provides, in relevant part:

“At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:

* * *

“(b) If the defendant appears but the plaintiff does not, the judge may dismiss the action . . .”

⁴ CPLR 3404 provides that “[a] case in the supreme court or a county court marked “off” or struck from the calendar or unanswered on a clerk’s calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute.”

should be resolved on their merits wherever possible, and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter vested in the broad discretion of the trial court” (*Pascarella v City of New York*, 16 AD3d 472, 472 [2005]). To invoke the drastic remedy of dismissal, the court must determine that the offending party’s lack of cooperation with disclosure was willful, contumacious or in bad faith (*see Mohammed v 919 Park Place Owners Corp.*, 245 AD2d 351, 352 [2d Dept 1997]). Even if willfulness is demonstrated, the non-compliant party still has the opportunity to offer a reasonable excuse for its failure to comply (*see Byrne v City of New York*, 301 AD2d 489, 490 [2d Dept 2003]). In opposing a CPLR 3126 motion, the resisting party has no statutory obligation to furnish an affidavit of merit (*see Read v Dickson*, 150 AD2d 543, 544 [2d Dept 1989]).

The plaintiff explains that he failed to file the note of issue in Action No. 1 because he relied on Action No. 2, which he had commenced prior to the note of issue due date and which, at that time, he believed to be meritorious. The plaintiff states that, subsequently, a pathologist reviewed the laboratory slides and found that neither laboratory (the defendants in Action No. 2, but not in Action No. 1) had misread the slides. Although the pathologist’s reading of the slides is beside the point because Action No. 2 against the laboratories was barred by the statute of limitations in any event, the court is satisfied that the plaintiff’s non-compliance with the CCP order was not wilful, contumacious, or in bad faith warranting a draconian sanction of dismissal. Accordingly, that branch of the plaintiff’s cross motion which requests that Action No. 1 be restored to active status is granted (*see Galati v C. Raimondo & Sons Constr. Co., Inc.*, 35 AD3d 805, 806 [2d Dept 2006]; *Travis v Cuff*, 28 AD3d 749, 750 [2d Dept 2006]).

Amendment of Complaint in Action No. 1

The plaintiff also seeks leave to serve its proposed amended complaint which contains a cause of action for wrongful death. The plaintiff asserts that since the original claim for malpractice was timely, the claim for wrongful death relates to the original claim and, therefore, is also timely.⁵

Defendant Khorets submits that “in order to add a cause of action for wrongful death, plaintiff is required to submit an Affidavit from a medical expert which demonstrates a causal connection between the alleged malpractice and the decedent’s death” (Soscia Aff., ¶ 22), and that the affirmation of the plaintiff’s expert is insufficient in that regard (¶ 28). Defendants Brodsky and Bilik echo Khorets’ arguments.

Last year, the Appellate Division, Second Department in *Lucido v Mancuso* (49 AD3d 220 [2d Dept 2008]) overruled a 50-year-old line of cases which had required a competent showing of merit before a complaint could be amended to add a cause of action for wrongful death. Since none of the defendants have cited this controlling decision to the court and instead cited prior decisions which *Lucido* expressly overruled, the holding of *Lucido* is reproduced below:

“Cases involving CPLR 3025 (b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed. No evidentiary showing of merit is required under CPLR 3025 (b). The court need only determine whether the proposed amendment is ‘palpably insufficient’ to state a cause of action or defense, or is patently devoid of merit. Where the proposed amended pleading is palpably insufficient or patently

⁵ In May 2007, in connection with the plaintiff’s request to be substituted as the administrator of Marina’s estate, the plaintiff moved to amend the complaint in Action No. 1 to assert a wrongful death claim. The plaintiff did not attach an affirmation of merit to his moving papers. Following the defendants’ strenuous objections that an affirmation of merit was required, the plaintiff withdrew that portion of his motion which sought the amendment. In February 2008, the Appellate Division, Second Department decided *Lucido v Mancuso* (49 AD3d 220 [2008]), described below, which dispensed with such an affirmation in the context of a motion for leave to amend to add a wrongful death claim.

devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied. If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing (*see* CPLR 3212).”

(*Lucido*, 49 AD3d at 229).

Since *Lucido* exempts the plaintiff from providing an affirmation of merit in support of his requested amendment to add a claim for wrongful death, the alleged deficiencies with the expert affirmation provided by the plaintiff herein are irrelevant. Leave to serve the proposed amendment complaint, therefore, is examined under the general standards of CPLR 3025 (b).

In the proposed amended complaint, the plaintiff sufficiently alleges that defendants failed to diagnose and treat Marina’s gastric cancer which ultimately caused her death. The proposed amended complaint is neither palpably insufficient nor patently devoid of merit (*see Lucido*, 49 AD3d at 231).

Furthermore, the proposed cause of action for wrongful death is timely. Pursuant to EPTL § 5-4.1 (1), a cause of action for wrongful death, with certain exceptions not relevant here, must be commenced within two years after the decedent’s death. However, pursuant to EPTL § 11-3.3 (b) (2), “[w]here an action to recover damages for personal injury has been brought, and the injured person dies, as a result of the injury, before verdict, report or decision, his personal representative may enlarge the complaint in such action to include the cause of action for wrongful death under [EPTL §] 5-4.1.” An amendment of a complaint to assert a cause of action for wrongful death, based upon the same acts which have already occasioned a pending personal injury action, will be within the “relation back” provisions of EPTL § 11-3.3 (b) (2), notwithstanding that the motion for such amendment is made more than two years after the decedent’s death (*see Caffaro v*

Trayna, 35 NY2d 245, 250 [1974]). Thus, since Action No. 1 for the underlying medical malpractice was commenced timely, the proposed amendment to add a cause of action for wrongful death is also timely under *Caffaro*, even though the instant motion is made more than two years after the date of death. Moreover, a timely cause of action for wrongful death may be interposed pursuant to the “relation-back” doctrine of CPLR 203 (f)⁶ (see *Francis v Nassau Health Care Corp.*, 22 AD3d 715 [2d Dept 2005]; *Velez v Springer*, 102 AD2d 823, 824 [2d Dept 1984]).

Finally, it does not appear that the defendants are surprised or prejudiced by the proposed amendment. The original complaint gave notice of the events on which a wrongful death cause of action in the amended complaint is based. Moreover, according to the plaintiff, he served the proposed amendment complaint on the defendants in May 2007 and, since that time, they were on notice that the plaintiff would assert a wrongful death claim.

The plaintiff’s request to amend is not barred by the doctrine of laches, which requires “delay, and prejudice to the nonmoving party resulting directly from the delay” (*Slavet v Horton Memorial Hosp.*, 227 AD2d 465, 466 [2d Dept 1996]). The plaintiff served the instant cross motion on December 2, 2008, which is approximately 16 months after the plaintiff was substituted as the administrator of Marina’s estate in Action No. 1. Although the plaintiff could have acted expeditiously in seeking the amendment, there is no evidence that the defendants were prejudiced

⁶ CPLR 203 (f) provides:

“A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.”

by this delay. The defendants deposed Marina on October 20, 2005 and November 2, 2005 before her death on February 2, 2006. Thus, the doctrine of laches is inapplicable.

Accordingly, that branch of the plaintiff's cross motion for leave to amend the complaint in Action No. 1 to plead a cause of action for wrongful death is granted and the proposed amended complaint in the form annexed as Plaintiff's Ex. F shall be deemed served upon service, in the same envelope, of: (a) a copy of this order with notice of entry, and (b) a copy of said complaint with the word "AMENDED" to be added by the plaintiff's counsel before the words "Verified Complaint" on page 1 thereof.⁷ The defendants shall serve their answers to the amended complaint within 20 days from the date of said service.

Consolidation of Both Actions

The plaintiff further requests that Action No. 1 be consolidated with Action No. 2 for purposes of discovery and trial. Defendant Bilik states that he does not oppose consolidation if, as is the case here, Action No. 1 is restored to active status. Defendant Khorets contends that consolidation will delay the resolution of both actions and will prejudice him because (a) Action No. 1 is in a later stage of discovery than Action No. 2, and (b) Action No. 1 does not allege a wrongful death claim, while Action No. 2 alleges a wrongful death claim. However, if the court orders consolidation of both actions, Khorets requests that they be consolidated under Index No. 14741/05 (rather than under Index No. 2643/08 as requested by the plaintiff) and that discovery in the consolidated action be expedited.

⁷ The proposed amended complaint (Plaintiff's Ex. F) fails to state, on its face, that it is an "amended" pleading.

Pursuant to CPLR 602 (a),⁸ when actions involving a common question of law or fact are pending before a court, the court may consolidate such actions.⁹ “[C]onsolidation is favored by the courts as serving the interests of justice and judicial economy. The motion to consolidate should be granted unless the opposing party succeeds in demonstrating prejudice to a substantial right” (*Zupich v Flushing Hosp. & Med. Ctr.*, 156 AD2d 677, 677 [2d Dept 1989] [internal citations omitted]).

Here, Action No. 2, in its current form,¹⁰ names, as the only remaining defendants, Khorets and Erber, who are also co-defendants in Action No. 1. The events giving rise to Action No. 2 are the same as those set forth in Action No. 1’s proposed amended complaint. As both actions are being defended vigorously, the requested relief will not prejudice any of the parties to this action.¹¹

Accordingly, in the exercise of its discretion, the court orders that Actions No. 1 and 2 be consolidated under Index No. 14741/05, which is the index number of Action No. 1. The complaint underlying this consolidated action shall be Action No. 1’s amended complaint, dated December 1,

⁸ CPLR 602 (a) provides:

“When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

⁹ In addition, where two identical actions are pending, CPLR 3211 (a) (4) does not mandate dismissal, but rather allows the court to “make such order as justice requires.”

¹⁰ Both laboratories have been dismissed from Action No. 2.

¹¹ Khorets’ argument concerning prejudice is based on his erroneous assumption that the plaintiff may not amend the complaint in Action No. 1 to assert a wrongful death claim against him. As stated above, however, an affirmation of merit is no longer required under *Lucido* for leave to add a wrongful death claim.

2008 (Plaintiff's Ex. F); *provided* that the plaintiff's counsel shall add the word "AMENDED" before the words "Verified Complaint" on page 1 thereof.

Conclusion

In sum, the court rules as follows:

(1) That branch of the plaintiff's cross motion to restore Action No. 1 to active status is granted. The Clerk is directed to restore Action No. 1 (Index No. 14741/05) to active status and to schedule a preliminary conference so that any outstanding discovery issues may be resolved.

(2) That branch of the plaintiff's cross motion for leave to amend the complaint in Action No. 1 to assert a wrongful death claim is granted and the proposed amended complaint in the form annexed as Plaintiff's Ex. F shall be deemed served upon service, in the same envelope, of: (a) a copy of this order with notice of entry, and (b) a copy of said complaint with the word "AMENDED" to be added by the plaintiff's counsel before the words "Verified Complaint" on page 1 thereof. The defendants shall serve their answers to the amended complaint within twenty (20) days from the date of said service.

(3) That branch of the plaintiff's cross motion for an order consolidating Actions Nos. 1 and 2 is granted to the extent that such actions are consolidated under Index No. 14741/05. The new caption shall read as follows:

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BORIS KAGAN AS ADMINISTRATOR OF THE ESTATE OF
MARINA KAGAN, DECEASED, AND BORIS KAGAN, INDIVIDUALLY,

Plaintiffs,

- against -

Index No. 14741/05

WILLIAM F. ERBER, M.D., WILLIAM F. ERBER, M.D., P.C.,
ALEXANDER BRODSKY, M.D., ILYA BILIK, M.D.,
SHEEPSHEADBAY MEDICAL ASSOCIATES, P.C.,
YEFIM VAYNSHELBAUM, M.D., BORIS KHORETS, M.D., AND
KHORETS & BILIK,

Defendants.

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(4) The motions of defendants Erber and Khorets are dismissed as moot.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.