

Wong v German Masonic Corp.

2009 NY Slip Op 33355(U)

June 29, 2009

Sup Ct, New York County

Docket Number: 108906/06

Judge: Joan B. Carey

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Honorable Joan B. Carey
Justice

PART 29

JOYCE WONG, Individually and as the
Administratrix of the Goods, Chattels and
Credits of FREDESBINDA WONG a/k/a
FREDESWINDA WONG, Deceased,

Plaintiffs,

Index No.: 108906/06
MOTION DATE _____
MOTION SEQ. NO. 03
MOTION CAL. NO. _____

-v-

GERMAN MASONIC CORPORATION d/b/a
DUMONT MASONIC HOME, IGOR ISRAEL,
M.D., and JOHN DOE, as the name of a fictitious
person the identity of whom is unknown at the
present time

Defendants.

FILED
JUL 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

GERMAN MASONIC CORPORATION d/b/a
DUMONT MASONIC HOME,

Third-Party Index No.: 08590286/08

Third-Party Plaintiffs,

-v-

GERIATRIC MASONIC CORPORATION, P.C.
and NATALIYA GORELKO, M.D.

Defendants.

The following papers, 1- 24, were read on this motion by third-party defendant Nataliya Gorelko, M.D. to dismiss the amended complaint, as asserted against her, pursuant to CPLR 3211(5), on the ground that plaintiffs' direct claims asserted against her are time-barred by the statute of limitations; and cross-motion by plaintiffs for leave to extend time to initiate a direct action against defendants Geriatric Services, P.C. and Nataliya Gorelko, M.D., and to, *inter alia*, strike the answer of defendant Igor Israel, M.D. for a failure to appear at a Court Ordered further deposition.

| | |
|---|--------------|
| Notice Of Motion - Affidavits - Exhibits | <u>1-7</u> |
| Notice Of Cross-Motion - Affidavits - Exhibits | <u>8-16</u> |
| Affirmation In Response to Motion | <u>17</u> |
| Affirmation In Response to Cross-Motion | <u>18</u> |
| Affirmation In Opposition to Cross-Motion | <u>19-21</u> |
| Affirmation In Partial Opposition to Cross-Motion | <u>22-23</u> |
| Replying Affirmation | <u>24</u> |

Cross-Motion: Yes No

On or about June 27, 2006, plaintiffs commenced the instant medical malpractice action against defendants German Masonic Corporation d/b/a Dumont Masonic Home, Igor Israel, M.D. and a John Doe. The action alleges that defendants provided negligent medical treatment to plaintiffs' decedent, Fredesblnda Wong a/k/a Fredeswinda Wong, from February 9, 2005 through March 25, 2005, the date on which plaintiffs' decedent died. Thereafter, on or about April 11, 2008, defendant German Masonic Corporation d/b/a Dumont Masonic Home commenced a third-party action against Geriatric Services, P.C. and Natallya Gorelko, M.D. based upon their alleged involvement in the care and treatment of plaintiffs' decedent. On or about May 23, 2008, plaintiff filed an amended summons and complaint asserting direct claims against Geriatric Services, P.C. and Dr. Gorelko. Dr. Gorelko presently moves to dismiss the direct action as asserted against her in the amended complaint, pursuant to CPLR 3211(5), as such action is time-barred under the applicable Statute of Limitations.

Dr. Gorelko contends that the medical malpractice alleged herein occurred on February 9, 2005 through March 25, 2005, and, thus, the two-years and six months Statute Of Limitations, as set forth in CPLR 214-a, had expired by the time plaintiffs sought to amend the complaint to assert a claim against third-party defendants. Dr. Gorelko acknowledges that the plaintiffs have the benefit of the relation-back doctrine, in that the date of the third-party summons and complaint is the point for determining whether a plaintiff's Statute of Limitations has expired for any direct claims against the third-party defendant. As Dr. Gorelko points out, the applicable Statute of Limitations had expired prior to April 11, 2008, the date on which defendant German Masonic Corporation d/b/a Dumont Masonic Home commenced the third-party action.

Plaintiffs oppose the instant motion and cross-move for leave to extend time to initiate a direct action against defendants Geriatric Services, P.C. and Dr. Gorelko. Plaintiffs first argue that they properly amended the summons and complaint, pursuant to CPLR 1009, adding Geriatric Services, P.C. and Dr. Gorelko as direct defendants. CPLR 1009 sets forth that "[w]ithin twenty days after service of the answer to the third-party complaint upon plaintiff's attorney, the plaintiff may amend his complaint without leave of the court to assert against third-

party defendant any claim plaintiff has against third-party defendant.” Although CPLR 1009 permits a plaintiff to amend the complaint without leave of Court to assert a claim against a third-party defendant within 20 days of service of the third-party answer, it “does not relieve a plaintiff from the operation of a Statute of Limitations otherwise applicable to the claims asserted.” *Zaveta v. Portelli*, 127 AD2d 760 [2d Dept 1987]; see also *Mason v. Rodolitz Organization*, 282 AD2d 581 [2d Dept 2001]; *Polo, Ralph Lauren v. City of New York*, 193 AD2d 411 [1st Dept 1993]. As the claims contained in the third-party complaint were not interposed prior to the expiration of the applicable Statute of Limitations, plaintiffs’ direct action against the third-party defendants is time-barred. See *Mason v. Rodolitz Organization, supra*; *Polo, Ralph Lauren v. City of New York, supra*; *Zaveta v. Portelli, supra*.

Plaintiffs further argue that the Court, pursuant to CPLR 2004, should extend their time to initiate a direct action against defendants Geriatric Services, P.C. and Dr. Gorelko. CPLR 2004 expressly sets forth that “[e]xcept where otherwise expressly prescribed by law, the court may extend time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the time fixed.” Plaintiff contends that defendant German Masonic Corporation d/b/a Dumont Masonic Home withheld the identities of Geriatric Services, P.C. and Dr. Gorelko, and in the interest of justice, their time to assert a direct action as against them should be extended.¹ Notwithstanding plaintiffs’ arguments to the contrary, CPLR 2004 may not be invoked to extend the Statute of Limitations. See *Dioguardi v. Glassey*, 5 AD3d 430 [2d Dept 2004]; *Lennox v. Rhodes*, 39 AD2d 801 [3d Dept. 1972]. As noted by Professor Siegel:

“CPLR 2004 gives courts broad discretion to extend periods of time contained in the CPLR for doing a myriad of things, ‘[e]xcept where otherwise expressly prescribed by law’. The statute of limitations is one of those exceptions. CPLR 201 provides that ‘[n]o court shall extend time limited by law for the commencement of an action’.”

Siegel, NY Prac. § 33 [4th ed.]. Accordingly, plaintiffs’ cross-motion to extend time to initiate a direct action against defendants Geriatric Services, P.C. and Dr. Gorelko must be denied, and the direct action as asserted against these third-party defendants in the amended complaint are dismissed as they are time-barred under the applicable Statute of Limitations.

Lastly, that portion of the plaintiffs’ cross-motion seeking to, *inter alia*, strike the answer of defendant Dr. Israel, for a failure to appear at a Court Ordered further deposition is denied. A discovery scheduling conference will be held on July 30, 2009, at which time a schedule will be set forth for all outstanding discovery, including Dr. Israel’s further deposition.

¹ German Masonic Corporation d/b/a Dumont Masonic Home disputes plaintiffs’ allegation that it withheld information relating to Geriatric Services, P.C. and Dr. Gorelko. Furthermore, according to German Masonic Corporation d/b/a Dumont Masonic Home, plaintiffs were aware of the involvement of Geriatric Services, P.C. and Dr. Gorelko prior to the commencement of the third-party action.

Based on the foregoing, it is hereby

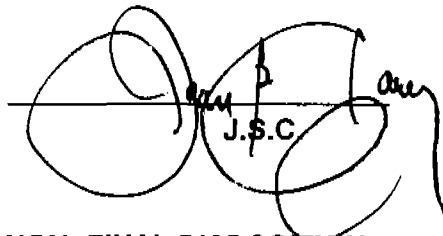
ORDERED that the motion by third-party defendant Nataliya Gorelko, M.D. to dismiss the amended complaint, as asserted against her, pursuant to CPLR 3211(5), on the ground that plaintiffs are time-barred by the statute of limitations is granted; and it is further

ORDERED that the portion of plaintiffs' cross-motion for leave to extend time to initiate a direct action against defendants Geriatric Services, P.C. and Nataliya Gorelko, M.D. is denied; and it is further

ORDERED that the portion of plaintiffs' cross-motion to, *Inter alia*, strike the answer of defendant Igor Israel, M.D. for a failure to appear at a Court Ordered further deposition is denied; and it is further

ORDERED that counsel for all parties are to appear before the court on July 30, 2009, at 9:30am, at 60 Centre Street, room 228, Part 29, for a status conference.

Dated: 6/29/2009



Check one: FINAL DISPOSITION

NON- FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

FILED
JUL 01 2009
COUNTY CLERK'S OFFICE
NEW YORK