

Cagle-Mujahid v North Gen. Hosp.

2010 NY Slip Op 30580(U)

March 17, 2010

Supreme Court, New York County

Docket Number: 113105/09

Judge: Joan B. Lobis

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Joan B. Lobis
Justice

PART 6

Index Number : 113105/2009
CAGLE-MUJAHID, JAFAR
vs.
NORTH GENERAL HOSPITAL
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 1/6/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-5
6-14

NOTICE OF MOTION/ Order to Show Cause — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

MAR 19 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/17/10

JBL
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 STATE OF NEW YORK
COUNTY OF NEW YORK**

-----X
JAFAR CAGLE-MUJAHID, as Administrator of the
Estate of BARBARA CAGLE, deceased,

Plaintiff,

Index No. 113105/09

- against -

Decision and Order

NORTH GENERAL HOSPITAL,

Defendant

-----X
JOAN B. LOBIS, J.S.C.:

FILED

MAR 19 2010

NEW YORK

COUNTY CLERK'S OFFICE

Defendant North General Hospital (the "Hospital") moves for an order, pursuant to C.P.L.R. Rules 3211(a)(5) and (7), Rule 3212, and Section 214-a, dismissing, with prejudice, all claims of medical malpractice and wrongful death against the Hospital as time-barred by statute of limitations.¹

This action, sounding in medical malpractice, was commenced by the filing of a summons and complaint² on or about September 15, 2009. Plaintiff alleges that on February 27, 2007, the Hospital transfused a unit of packed red blood cells into decedent Barbara Cagle's veins. The complaint alleges that the blood transfused "was of a type foreign to and fatally different from" decedent's actual, recorded and known blood type. The complaint further alleges that as a result of this transfusion, decedent was injured and went into shock, her pulse became rapid, her respiratory

¹ The Hospital also asserts that plaintiff's complaint should be dismissed for failure to state a cause of action, but this argument receives no further attention in the attorney's affirmation and has not been considered by the court.

² Although the complaint is referred to as a "Verified Complaint," the verification was not included in either party's papers.

function became weakened, and she died from her injuries on March 16, 2007. The Hospital answered on or about October 27, 2009, asserting eight affirmative defenses. On or about November 16, 2009, the Hospital served an amended answer, adding a ninth defense that the causes of action are barred by the statute of limitations. On or about November 23, the Hospital served this motion to dismiss. On or about December 7, 2009, plaintiff served an amended complaint,³ adding a third cause of action that specifically pled wrongful death. Counsel for plaintiff states that he did not initially bring a cause of action for wrongful death because his medical consultants were only able to timely certify a medical malpractice action. But, he asserts that after the Hospital filed this motion, he became aware of case law indicating that courts have equitably estopped and barred the defense of statute of limitations in similar circumstances as this case.

Relying on E.P.T.L. § 5-4.1, the Hospital maintains that the last day for plaintiff to bring his wrongful death claim was March 16, 2009, or two years after plaintiff's decedent died on March 16, 2007. As to the medical malpractice claim, the Hospital argues that all claims are based on the February 27, 2007 blood transfusion. Relying on C.P.L.R. § 214, the Hospital maintains that the last day for plaintiff to bring a claim for medical malpractice was August 27, 2009, or two-and-one-half years after the alleged malpractice.

Plaintiff, in opposition to the motion, maintains that the relief the Hospital is seeking should be denied based on the doctrines of equitable estoppel and continuous treatment. Regarding the doctrine of continuous treatment, counsel for plaintiff asserts, relying on C.P.L.R. § 214-a and

³ Again, no verification was included with these papers.

Borgia v. City of New York, 12 N.Y.2d 151 (1962), that the decedent was under the continuous treatment and care of the Hospital until March 16, 2007, the date she died, and so the medical malpractice cause of action was timely. Regarding estoppel and the wrongful death cause of action, plaintiff claims that the Hospital delayed in providing pertinent and material copies of the decedent's medical records. Plaintiff states that he was issued letters of administration on June 13, 2007. Via correspondence dated June 19, 2007 and July 25, 2007, together with authorizations, counsel for plaintiff requested copies of decedent's medical records from the Hospital. According to counsel for plaintiff, the Hospital did not respond. On February 12, 2008, plaintiff again demanded the records from the Hospital via correspondence. Together with correspondence dated April 24, 2008, counsel for plaintiff sent the Hospital a check in the amount of \$706.50, in reference to decedent's medical records. Plaintiff's attorneys received the medical records on May 2, 2008. Eight months later, on January 5, 2009, plaintiff's attorneys contacted the Hospital, via certified mail, advising the Hospital that certain records pertaining to blood work and laboratory tests were missing from decedent's medical records copied and sent to plaintiff. It is unclear whether the Hospital responded with more records. On May 4, 2009, plaintiff's offices sent correspondence to the Hospital, again complaining that certain records were missing, specifically, records for blood work and laboratory tests performed between February 25 and February 28, 2007, and records relating to the results of a leucoagglutinin titer requested by a hematologist on March 15, 2007. Counsel for plaintiff asserts that it was only subsequent to March 17, 2009, that his medical consultants advised him that they could certify that deviations took place with respect to the medical malpractice cause of action, but that an expert opinion would require the additional records. Plaintiff states that, despite another letter dated August 24, 2009, demanding the missing records, as of the date of the opposition papers to this motion he had still not received them.

“On a motion to dismiss pursuant to [C.P.L.R. Rule 3211], the pleading is to be afforded a liberal construction.” Leon v. Martinez, 84 N.Y.2d 83, 87 (1994), citing C.P.L.R. § 3026. The court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” Id., at 87-88 (citations omitted).

With respect to the medical malpractice claim, C.P.L.R. § 214-a provides that:

[a]n action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure For the purpose of this section the term ‘continuous treatment’ shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient’s condition.

“A defendant who seeks dismissal of a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired.” Gravel v. Cicola, 297 A.D.2d 620, 620-21 (2d Dep’t 2002) (citations omitted). Defendant satisfied this burden as to plaintiff’s claims regarding the red blood cell transfusion on February 27, 2007, by annexing plaintiff’s summons and complaint to the motion, indicating that the action was commenced more than two-and-one-half years after the incident. Since this action was commenced by the filing of a complaint on September 15, 2009, the issue is whether the continuous treatment doctrine applies under these circumstances so that plaintiff may pursue a claim against the Hospital for any conduct that occurred prior to March 15, 2007. Plaintiff alleges that the decedent was under the continuous treatment and care of the Hospital from February 27 through March 16, 2007, the date of her death. In affording plaintiff the “benefit of all favorable

inferences to which [he is] entitled,” (Shrank v. Lederman, 52 A.D.3d 494, 496 [2d Dep’t 2008]), it cannot be determined that there was no continuous treatment as a matter of law. Discovery should serve to clarify this issue.

“[A]n action to recover damages for a wrongful act, neglect or default which caused the decedent’s death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued . . . must be commenced within two years after the decedent’s death.” E.P.T.L. § 5-4.1. However, “equitable estoppel will preclude a defendant from using the statute of limitations as a defense “where it is the defendant’s affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding.”” Putter v. North Shore Univ. Hosp., 7 N.Y.3d 548, 552 (2006), citing Zumpano v. Quinn, 6 N.Y.3d 666, 673 (2006), quoting General Stencils v. Chiappa, 18 N.Y.2d 125, 128 (1966). A plaintiff asserting the doctrine of equitable estoppel must demonstrate that the defendant’s affirmative actions kept her from timely commencing her action. Putter, 7 N.Y.3d at 552; Walker v. New York City Health & Hosps. Corp., 36 A.D.3d 509, 510 (1st Dep’t 2007). Estoppel is applicable when plaintiff is “prevented from filing an action within the applicable statute of limitations due to his or her reasonable reliance on deception, fraud or misrepresentations by the defendant.” Putter, 7 N.Y.3d at 552-53; see also Walker, 36 A.D.3d at 510. When there is timely awareness of the facts underlying the potential claim, however, equitable estoppel is inappropriate. See Putter, 7 N.Y.3d at 553-54; Walker, 36 A.D.3d at 510.

Plaintiff has failed to demonstrate that defendant’s affirmative wrongdoing prevented him from timely commencing the wrongful death action on behalf of the decedent, or that plaintiff

reasonably relied on any fraud, deception, or misrepresentation of the Hospital. Although there may have been some delay in the Hospital responding to the initial request for the record (see Walker, 36 A.D.3d at 510), after the records were received in May 2008, plaintiff waited eight months to follow up with a demand for missing records. Defendant is correct, as well, that if plaintiff believed that defendant was refusing to furnish certain records, C.P.L.R. § 3012-a(d) enables the plaintiff to withhold a certificate of merit, still file his action, and not be required to serve the certificate until ninety (90) days after the records have been produced. The doctrine of equitable estoppel is not applicable and the claim for wrongful death is time-barred. Accordingly, it is hereby

ORDERED that the motion to dismiss is granted only as to plaintiff's cause of action sounding in wrongful death, and the wrongful death cause of action in the complaint is severed and dismissed as against North General Hospital; and it is further

ORDERED that the motion to dismiss the claim for medical malpractice is denied.

The parties shall appear for a preliminary conference on April 13, 2010, at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: March 17, 2010

FILED
MAR 19 2010
NEW YORK
COUNTY CLERK'S OFFICE



JOAN B. LOBIS, J.S.C.