

**Delango v New York-Presbyt. Health Care Sys.**

2010 NY Slip Op 33654(U)

December 10, 2010

Supreme Court, New York County

Docket Number: 106815/10

Judge: Joan B. Lobis

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

PRESENT: Joan B. LoSis

PART 6

Index Number : 106815/2010  
DELANGO, JOAN  
vs.  
NY PRESBYTERIAN HEALTHCARE  
SEQUENCE NUMBER : 001  
STRIKE ANSWER

INDEX NO. \_\_\_\_\_  
MOTION DATE 10/20/10  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
1-8  
xmvt. 9-12; xmvt. 13-15  
16-19

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion

DEC 15 2010

NEW YORK  
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION  
& ORDER

Dated: 12/10/10

JBL  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
JOAN DELANGO and DENIS DELANGO as  
Administrators of The Estate of DANIELLE M. DELANGO,  
deceased; and ANDREW DENIS DELANGO, an infant  
under the age of 14 years, by his Guardians, Denis Delango  
and Joan Delango,

Plaintiffs,

Index No. 106815/10

-against-

Decision and Order

NEW YORK-PRESBYTERIAN HEALTHCARE SYSTEM,  
LAWRENCE HOSPITAL CENTER, DANIEL GEOFFREY  
DAVIS, D.O., ALLERGAN, INC., INAMED HEALTH (a  
wholly owned subsidiary of Allergan, Inc.), BIOENTERICS  
CORPORATION and JOHN DOES 1-5,

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Defendants.

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

Plaintiffs Joan, Denis, and Andrew Delango move to strike defendants' affirmative defenses of the statute of limitations. Defendant Allergan, Inc. ("Allergan") cross-moves for partial summary judgment on the basis that plaintiffs' wrongful death claim was brought after the expiration of the statute of limitations. Defendants New York Presbyterian Healthcare System, Inc. s/h/a New York-Presbyterian Healthcare System and Daniel Geoffrey Davis, D.O., (collectively "NYPH") submit a separate cross motion joining in Allergan's cross motion. The motion and cross motions are decided as follows.

Joan and Denis Delango are the parents of decedent Danielle M. Delango, the co-administrators of Danielle's estate, and the legal guardians of Andrew Delango, Danielle's son. The allegations of products liability, medical malpractice, and wrongful death in plaintiffs' lawsuit stem from Danielle's laparoscopic gastric band surgery on January 15, 2008, and her subsequent

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death on March 3, 2008. Andrew, Danielle's only son and sole distributee, was two years old when Danielle died. On June 17, 2008, plaintiffs were appointed the joint legal guardians of Andrew. On August 8, 2008, they were issued letters of limited administration of Danielle's estate. This action was commenced by the filing of a summons and verified complaint on or about May 24, 2010.

The only claim for which the issue of the statute of limitations is contested is the wrongful death claim. The wrongful death claim was commenced over two years after Danielle's death, but within two years from the date that plaintiffs were appointed the guardians of Andrew. Plaintiffs, in support of their motion to strike defendants' respective affirmative defenses of the statute of limitations, argue that the wrongful death claim is timely because Danielle's sole issue is an infant and the statute of limitations as to a wrongful death claim is tolled until such time as a legal guardian of an infant is appointed.

Allergan maintains that it is entitled to summary judgment dismissal of the wrongful death claim because the statute of limitations had expired before plaintiffs commenced the action. In opposition to plaintiffs' motion and in support of its cross motion, Allergan maintains that plaintiffs' motion must be denied because they failed to demonstrate that there was no one eligible to seek letters of administration prior to Joan's and Denis' appointment as guardians. Plaintiffs failed to show that Danielle did not leave a will naming an executor or that no guardian existed prior to Joan's and Denis' appointment. Allergan questions why Andrew's natural father could not have timely commenced the wrongful death action. It maintains that either an executor or a prior guardian would have been able to seek letters of administration and commence the action, which would negate

the alleged toll and render the wrongful death claim untimely. Allergan also claims that plaintiffs had a reasonable time to file the wrongful death claim without the necessity of a toll, so they should not benefit from a toll. Finally, Allergan argues that plaintiffs' motion must be denied as premature because they have not responded to Allergan's discovery demands that sought information related to the statute of limitations toll.

In opposition to Allergan's cross motion, plaintiffs attach an affidavit from Joan Delango wherein she attests that Danielle died intestate. Ms. Delango also sets forth the efforts that she and her husband took to locate Andrew's natural father after Danielle's death. She states that Andrew's father never legally acknowledged his paternity, never cohabited with Danielle or Andrew, never had custody of Andrew, and never paid child support. After Danielle died, Joan and Denis located this person and he executed a document ceding any parental rights to Andrew to Joan and Denis; they required this document to support their application for legal guardianship over Andrew. Plaintiffs also attach Andrew's certificate of live birth as an exhibit to their opposition papers; the father's name and information on the birth certificate is blank. There were no reply papers submitted in response to plaintiffs' opposition to Allergan's cross motion.

On a motion for summary judgment, the court may search the record and award summary judgment "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." C.P.L.R. Rule 3212(d). In reviewing the submissions as a whole, the court finds no merit to defendants' affirmative defenses of the statute of limitations as to the wrongful death claim.

Under Hernandez v. New York City Health & Hosps. Corp., 78 N.Y.2d 687 (1991), the statute of limitations for a wrongful death action is tolled if the sole distributee is an infant and there is no will appointing an executor. See also C.P.L.R. § 208. The toll ends at “the earliest moment when there is a personal representative or potential personal representative who can bring the action, whether by appointment of a guardian or majority of the distributee, whichever occurs first.” Hernandez, 78 N.Y.2d at 693. In Baker v. Bronx Lebanon Hosp. Ctr., 53 A.D.3d 21 (1st Dep’t 2008), the First Department clarified that in circumstances where an administrator of an estate cannot be appointed until a guardian over the property of the infant is appointed, the infancy toll of C.P.L.R. § 208 terminates upon the Surrogate’s appointment of a guardian of the property of the infant. Plaintiffs’ proofs in support of their motion and in opposition to the cross motions demonstrate that the sole distributee to Danielle’s estate is Andrew, that Danielle did not execute a will, that Andrew’s father was never legally established, and that there was no legal guardian over Andrew’s property until Joan’s and Denis’ appointment on June 17, 2008. The facts of the cases that Allergan cites in support of its argument are distinguishable from this case. In Baez v. New York City Health & Hosps. Corp., 80 N.Y.2d 571 (1992), the Court of Appeals found that the infancy toll was not applicable because the decedent had executed a will appointing an executor; this is not the case here. In Ortiz v. Hertz Corp., 212 A.D.2d 374 (1st Dep’t 1995), the First Department found that the infancy toll was not applicable because the natural mother was obligated to seek letters of administration prior to the expiration of the statute of limitations. The First Department’s decision in Ortiz indicates that the natural mother was known and involved in the children’s affairs shortly after the decedent’s death. In this case, paternity was never legally established, and the putative father was uninvolved with Andrew and relinquished all legal rights to the child.

This action was commenced within two years of the date that Joan and Denis were appointed as Andrew's guardians. Having reviewed the parties' respective submissions and searched the record presented, the court has determined that the wrongful death claim is timely and plaintiffs are entitled to an order striking defendants' affirmative defenses of the statute of limitations as to the wrongful death claim. Plaintiffs' motion is granted and the two cross motions are denied.

Accordingly, it is hereby

ORDERED that plaintiffs' motion is granted and the twelfth affirmative defense of the statute of limitations in Lawrence Hospital Center's answer, the second affirmative defense of the statute of limitations in Allergan's answer, the fifth affirmative defense of the statute of limitations in NYPH's answer, and the fifth affirmative defense of the statute of limitations in Daniel Geoffrey Davis, D.O.'s answer, are hereby dismissed as to the wrongful death claim; and it is further

ORDERED that defendants Allergans' and NYPH's cross motions are denied in their entirety; and it is further

ORDERED that the partes appear for their previously scheduled compliance conference on March 29, 2011, at 10:00 a.m.

Dated: December 10, 2010

**FILED**

DEC 15 2010

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JOAN B. LOBIS, J.S.C.