

**Fuentes v Nassau Health Care Corp.**

2010 NY Slip Op 33828(U)

June 28, 2010

Supreme Court, Nassau County

Docket Number: 430/10

Judge: Ute Wolff Lally

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SCAN

SHORT FORM ORDER

md, mg

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY  
Justice

JUAN CARLOS FUENTES,  
Plaintiff,

Motion Sequence #1, #2  
Submitted April 30, 2010

-against-

INDEX NO: 430/10

THE NASSAU HEALTH CARE CORPORATION  
and NASSAU UNIVERSITY MEDICAL CENTER,

Defendants.

The following papers were read on this motion to dismiss:

Notice of Motion and Affs.....	1-4
Notice of Cross-Motion and Affs.....	5-8
Affs in Opposition.....	9&10
Affs in Reply.....	11-14

Upon the foregoing papers, it is ordered that this motion by defendants Nassau Health Care Corporation and Nassau University Medical Center for an order pursuant to CPLR 3211 dismissing plaintiff's action as against said defendants, and the cross-motion by plaintiff Juan Carlos Fuentes for orders pursuant to CPLR 3012(d), 2004, 2001, and 2005 (1) extending plaintiff's time to plead *nunc pro tunc*, (2) allowing plaintiff to correct errors, (3) excusing plaintiff's delay due to law office failure and (4) compelling defendants to accept plaintiff's pleadings are disposed of as follows:

This is an action in which plaintiff seeks to recover money damages for personal injuries allegedly sustained due to the defendants' alleged negligence. On October 7, 2008 plaintiff, while a patient at defendants' facilities, allegedly fell over debris in the hospital corridor and sustained injury. Plaintiff served a notice of claim upon defendants on or about December 22, 2008. On April 23, 2009 plaintiff purchased index number 7870/09, paid the fee for a Request for Judicial Intervention, and moved the court by order to show cause for pre-litigation discovery pursuant to CPLR 3102(c). The purpose of this motion was to identify additional defendants for suit. Plaintiff's motion for pre-litigation discovery was denied by a prior order of this court (Marber, J.) dated July 31, 2009.

Plaintiff, without purchasing a new index number, personally served defendants with a summons and complaint bearing the aforementioned index number on September 2, 2009, and filed the same with the County Clerk of Nassau County on September 15, 2009 (the "first filing"). The County Clerk accepted the pleadings. Defendants thereafter filed an answer bearing the same index number, and the parties commenced discovery. A dispute arose in December 2009 and plaintiff made a request for a preliminary conference on or about December 31, 2009. On January 5, 2010 a Court Clerk rejected the request on the basis that the case associated with the index number had been marked disposed. Plaintiff received the rejection sheet on January 7, 2010. On January 8, 2010 plaintiff purchased a new index number (430/2010), and then reserved and refiled the summons and complaint (the "second filing").

Defendants bring this motion to dismiss in lieu of an answer on the basis that when the pre-litigation discovery proceedings were terminated by Judge Marber's order,

the index number upon which plaintiff made the first filing was likewise terminated, causing the first filing to be a nullity. Defendants further argue the second filing was likewise a nullity due to the statute of limitations having run on January 5, 2010, three days before the purchase of the second index number. The statute of limitations for this action is one year and ninety days.

Plaintiff in opposition to defendants' motion and in support of his cross motion, contends the first filing did not require a new index number as it was an adjunct to the properly commenced pre-litigation discovery proceedings. He asserts that this action arose out of the same transaction or occurrence, and was commenced by and against the same parties. Alternatively, plaintiff argues the statute of limitations was tolled during the three month pendency of the pre-litigation discovery proceedings, resuming only after the prior order dated July 31, thereby extending the statute of limitations to at least April 2010. Alternatively, plaintiff argues that he is entitled to a six month grace period from the order denying his request for pre-action discovery pursuant to the authority of CPLR 205(a). Finally, plaintiff requests the court grant leave in the interests of justice to correct errors arising from law office failure pursuant to CPLR 2001, 2004, 2005 and 3012(d).

CPLR 3012(d) grants this court the discretion to compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default. Factors that courts have looked to in determining whether an extension of time for service is proper include the apparent merit to the action, whether the delay was willful, whether the opposing party suffered any prejudice as a result of the delay, in addition to considering the strong public policy

in favor of resolving cases on the merits (*Ryerson & Son v Petito*, 133 AD2d 668).

Further, CPLR 2004 grants this court this authority to extend the time fixed by any statute as may be just and upon showing good cause, except where expressly prescribed by law. Specifically, this court may not extend the time limited by law for the commencement of an action (*McCoy v Feinman*, 99 NY2d 295, 300 [quoting CPLR 201]). New York is a commencement by filing state. (CPLR 304, *Matter of Gershel*, 89 NY2d 327). A plaintiff commences an action by purchasing an index number from the County Clerk and filing the summons and complaint with the County Clerk within the cause of action's statute of limitations (*id.*). The purchase of an index number within the statute of limitations is essential to give the court subject matter jurisdiction (*Matter of Fry v Village of Tarrytown*, 89 NY2d 714).

However, plaintiff's actions may toll the statute of limitations. Once filed, the cause of action's statute of limitations is tolled for the duration of the proceedings, resuming only after the case is dismissed (if at all) (*Spodek v Comm'r of Taxation*, 85 NY2d 760). Additionally, CPLR 205(a) provides that should plaintiff properly commence an action that is subsequently dismissed in some manner other than by a voluntary discontinuance, failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff may commence a new action upon the same transaction or occurrence within six months of the dismissal, and have the subsequent commencement be treated as timely even if done after the running of the statute of limitations. Furthermore, if the subsequent action is an "adjunct" to the first action, it arose out of the same transaction or occurrence and is by and against the same parties; the subsequent action does not

require a new index number to be validly commenced (*Dubinsky v D'Amico*, 304 AD2d 828; *Papikian v McGrath*, 283 AD2d 471).

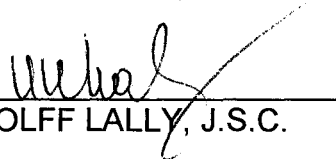
The facts here are analogous to those of *Papikian v McGrath*. In *Papikian*, plaintiff commenced a special proceeding for pre-litigation discovery for a medical malpractice action against defendants. Subsequently, plaintiff filed a summons and complaint commencing a medical malpractice action against the same defendants without purchasing a new index number. Defendants moved to dismiss for failure of personal jurisdiction and failure to comply with the statute of limitations. The appellate division held the medical malpractice action be an "adjunct" of the special proceedings as it was by and against the same parties and arose out of the same transaction or occurrence (*id.*).

Applying the foregoing here, plaintiff did not need to purchase a second index number to properly commence the present action. The parties agree that the pre-litigation discovery proceedings were properly commenced against the defendants under the first index number. The court, thus, had jurisdiction over the matter. The express purpose of the special proceedings was to identify additional parties for suit and to produce and preserve certain records plaintiff believed essential to maintain the expected subsequent negligence action. Following the denial of plaintiff's motion for pre-litigation discovery, plaintiff filed and served his summons and complaint. The negligence action thus commenced may properly be described as "adjunct" to the special proceedings, the object of which was to obtain discovery for the subsequent negligence action. Furthermore, the special proceedings and the negligence action were commenced by the same plaintiff against the same defendants, and were founded

upon the same allegedly tortious occurrence (*c.f. Mandal v Waltco Truck Equipment Co.*, 243 AD2d 542).

Therefore, plaintiff's cross-motion for relief pursuant to CPLR 3012(d), 2001, 2004 and 2005 compelling defendants to accept the summons and complaint *nunc pro tunc* and defend this action is granted as against defendants Nassau Health Care Corporation and Nassau University Medical Center. Accordingly, said defendants' motion for an order pursuant to CPLR § 3211 dismissing plaintiff's complaint as against defendants is denied.

Dated: June 28, 2010

  
UTE WOLFF LALLY, J.S.C.

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**ENTERED**  
JUL 01 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE