

McKenney v Beth Abraham Family of Health Serv.
2011 NY Slip Op 33711(U)
August 2, 2011
Sup Ct, Bronx County
Docket Number: 303315/2009
Judge: Norma Ruiz
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8/9/11 #2



NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 303315/2009

COURTNEY MCKENNEY and SHERYL MCKENNEY
as Proposed Co-Administrators of the Goods, Chattels
Credits which were of RONALD MCKENNY, deceased,

Plaintiffs,

-against-

Decision and Order

Present: HON. NORMA RUIZ

BETH ABRAHAM FAMILY OF HEALTH SERVICES,
FLORA TABBUDOUR, M.D., MORNINGSIDE
NURSING HOME, THE JACK D. WEILER HOSPITAL
OF THE ALBERT EINSTEIN COLLEGE OF MEDICINE
A DIVISION OF MONTEFIORE MEDICAL CENTER
and EASTCHESTER REHABILITATION AND
HEALTH CENTER,

Defendants.

The following papers numbered 1 to 18 Read on this motion Dismissal
Noticed on 11/20/10 and duly submitted as No. 22 on the Motion Calendar of 11/29/10

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion

to:	Papers	Numbered
	Notice of Motions and Affidavits Annexed.....	1-2
	Notice of Cross Motions and Answering Affidavits	3-12
	Replying Affidavits	13-16
	In Camera of Un redacted Physician Affidavit	17
	Correspondence dated December 9, 2010	18
	Other:	

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

Defendant Morningside Nursing Home ("Morningside") moves to dismiss the plaintiffs' complaint on the grounds that the Court lacks jurisdiction of said defendant. Defendants Eastchester

Rehabilitation and Health Care (“Eastchester”), Montefiore Medical Center s/h/a The Jack D. Weiler Hospital of the Albert Einstein College of Medicine (“Montefiore”), Beth Abraham Family of Health Services (“Beth Abraham”) cross move for the same relief. The Plaintiff cross moved for an extension of time to serve the moving defendants.

This is a medical malpractice and wrongful death action in which the plaintiffs allege the defendants departed from accepted standards of care in providing skilled nursing and medical care to Ronald McKenny causing him to develop severe decubitus ulcers, complications therefrom and ultimately expiring on April 25, 2008. The Court notes that while the caption nominates Courtney McKenny and Sheryl McKenny as proposed co-administrators of the deceased estate, they were in fact issued Letters of Limited Administration on February 3, 2009 (prior to the commencement of this action on April 24, 2009).

**Defendant Morningside’s Motion and
Plaintiff’s Cross Motion**

Defendant Morningside moves pursuant to CPLR § 3211(a)(8) to dismiss the plaintiff’s complaint and all cross claims as against it on the ground that this Court lacks personal jurisdiction over it.

As noted above, this action was commenced on April 24, 2009. Morningside interposed a Verified Answer (“Answer”) on or about September 9, 2009 and included in its Answer the Affirmative Defense of lack of jurisdiction. In turn, it timely moved to dismiss on October 29, 2009. See CPLR § 3211(e).

Morningside contends it is a domestic corporation and as such the plaintiff was required to serve it pursuant to CPLR § 311 or BCL § 306. Instead, on August 24, 2009, the plaintiffs’ Summons and Complaint was improperly served on Anna Clark, a Morningside employee who was not authorized to accept legal process. According to Ms. Clark’s affidavit, a gentleman requested a tour of the defendant’s facility on behalf of his grandmother who was seeking admission to a nursing home. When Ms. Clark began the tour, the man stated that he did not want a tour. He wanted to serve “these papers” and handed Ms. Clark a copy of the plaintiffs’ Summons and Complaint. Ms. Clark, was the Admissions Coordinator. Ms Clark averred that she was not an officer, director, managing or general agent, cashier, assistant cashier or any other agent authorized to accept service. She further averred that at no time did she make the representation that she was

authorised to accept service.

The plaintiffs do not dispute that service on Morningside was improper. In light of the fact that the one hundred and twenty (120) days to serve process and the statute of limitations to commence this action have both expired, the plaintiffs cross moved for an extension of the time to serve the defendants. The plaintiffs re-served some of the defendants and seek in the alternative to have the subsequent service deemed timely *nunc pro tunc*.

Since the Summons and Complaint was filed on April 24, 2009 the time to serve same expired on August 24, 2009. CPLR § 306-b provides that if “service is not made upon a defendant within the time provided ...the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause or in the interest of justice extend the time for service.” CPLR § 306 -b.

Morningside opposed the cross motion for an extension to serve process on the grounds of laches. It argues that the plaintiffs failed to promptly make an application for an extension of time. Movant noted that the plaintiffs’ cross motion was not made until February 22, 2010 (approximately three months after Morningside made its motion to dismiss and approximately seven months from the time of improper service of process on this defendant). In addition, Morningside opposes an extension of time to serve the defendants on the grounds that it has suffered prejudice due to the fact that it was not served prior to the expiration of statute of limitation.

In the seminal case of *Leader v. Ponzini*, the Court of Appeals held that Courts have two separate standards by which to measure an application for an extension of time to serve, to wit good cause shown or in the interest of justice. *Leader v. Ponzini*, 97 NY2d 95, 104 (2001). In distinguishing between the two standards the Court further held that

The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to the defendants.

Id at 105-106. The Court made it clear that “[n]o one factor is determinative - the calculus of the court’s decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served.” *Id* at 106. *See also De Vries v. Metropolitan Transit Authority*, 11 AD3d 312 (1st Dept 2004).

In deciding this motion the court considered the fact that the Statute of Limitations has already expired and the factors set forth below.

The plaintiff did serve Morningside within the 120 day time period. While the service was improper, that was through no fault of the plaintiffs. Plaintiffs’ counsel alleges that it first became aware of the improper service when the defendant moved. Upon learning same, they cross moved for an extension of time to serve process.

Also considered was the plaintiffs’ physician’s affidavit wherein he opined that the defendants departed from accepted standards of care which resulted in Ronald Mckenney’s demise. Admittedly, the physician’s affidavit does little more than list all of the alleged departures without attributing to the defendant their respective departures. However, since there has been no formal discovery, no depositions held and at this juncture it can not be said that all pertinent medical records have been exchanged, the Court deems the physician’s affidavit sufficient enough to establish merit to the plaintiffs’ claim.

In addition, the Court finds there is no evidence that Morningside has been prejudiced. Morningside was served on August 24, 2009, the 120th day of the 120 day time period provided for making service. Clearly, the improper service was insufficient to subject the defendant to the Court’s jurisdiction. However, it is evident that Morningside had actual knowledge of the plaintiffs’ action before the end of the 120 day time limit. The Court finds that “[i]n this regard, [movant] has not established that, as a result of plaintiff’s failure to [properly] serve it timely or plaintiff’s delay in seeking an extension, the [defendant] has lost some special right, or incurred some change of position or some significant expense.” *Sutter v. Reyes*, 60 AD3d 448, 449 (1st Dept 2009).

Accordingly, defendant Morningside’s motion to dismiss the action is denied and the plaintiffs’ cross motion pursuant to C.P.L.R. § 306-b, for an extension of time within which to effect service on defendant Morningside is granted in the interest of justice. *Leader, supra*. Plaintiffs’ time within which to effect service is **extended to sixty (60) days** from the entry of this order.

Defendants Beth Abraham's Cross Motion

Defendant Beth Abraham moves pursuant to CPLR § 3211(a)(8) to dismiss the plaintiff's complaint and all cross claims as against it on the ground that this Court lacks personal jurisdiction over it and on the grounds that the action is barred by the statute of limitations.

As noted above, this action was commenced on April 24, 2009. Beth Abraham's Verified Answer dated August 26, 2009, included the Affirmative Defense of Lack of Jurisdiction. The Answer was verified by Beth Abraham's counsel on August 31, 2009. However, there was no affidavit of service annexed to the Answer. As such, the Court issued an interim order directing Beth Abraham to submit the affidavit of service for its Answer. Despite the Court's directive, Beth Abraham did not submit same. The Court notes that the instant cross motion was made on November 16, 2009 (77 days after the Answer was verified). Without an Affidavit of Service for the Answer, it is impossible to determine the timeliness of this motion. CPLR section 3211(e) states that "an objection that the summons and complaint ...was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship." *Id.* In the Reply Affirmation, Beth Abraham concedes that the motion was untimely but nonetheless pleads with the Court to accept and consider same based on the plaintiff's concession that service on Beth Abraham was improper. While not determinative, the Court points out the irony in Beth Abraham's position. Beth Abraham failed to make its motion to dismiss within the 60 day time allotment provided for in CPLR 3211 (e) and failed to move for an extension of time to make such a motion. It prays for this Court to consider its untimely motion and dismiss the plaintiffs' action because the plaintiff failed to properly serve it within the 120 day time period. Thus, the plaintiffs and defendant both failed to comply with statutory time limits, yet Beth Abraham is of the position that only the plaintiffs should be penalized.

Assuming *arguendo*, that the motion to dismiss were timely, the Court would have nonetheless denied the motion and granted the plaintiffs' cross motion for an extension of time to serve in the interests of justice based on the factors set forth above.

Since Beth Abraham failed to timely move within the sixty days or to request any extension to move beyond the sixty days, the Court deems its affirmative defense of lack of jurisdiction waived (CPLR 3211 [e]).

The Court also denies that branch of the motion which seeks to dismiss the action as time barred pursuant to the statutes of limitation. Since the time of the decedents death on April 25, 2008, he had a viable claim for negligence and medical malpractice, the plaintiffs had until April 26, 2009 to bring the claim on the decedent's behalf. *See* CPLR § 210(a); *Cancel v. Posner*, 82 AD3d 575 (1st Dept 2011). This action was timely commenced on April 24, 2009.

Accordingly, Beth Abraham's cross motion to dismiss is denied.

Defendant Eastchester's Cross Motion

Defendant Eastchester moves pursuant to CPLR § 3211(a)(8) to dismiss the plaintiff's complaint and all cross claims as against it on the ground that this Court lacks personal jurisdiction over it.

As noted above, this action was commenced on April 24, 2009. Eastchester interposed an Answer on October 13, 2009 which did not include the Affirmative Defense of lack of jurisdiction. Subsequently, Eastchester interposed an Amended Verified Answer on November 2, 2009 which did include the Affirmative Defense of lack of jurisdiction. In turn, it timely moved to dismiss on November 9, 2009. *See* CPLR § 3211(e).

Plaintiffs conceded in their cross motion that Eastchester was not served properly on August 24, 2009 when the process server served Eastchester's Director of Admissions.

For the reasons set forth above, the Court grants the plaintiffs' cross motion.

Accordingly, defendant Eastchester's motion to dismiss the action is denied and the plaintiffs' cross motion pursuant to C.P.L.R. § 306-b, for an extension of time within which to effect service on defendant Eastchester is granted in the interest of justice. *Leader, supra*. Plaintiffs' time within which to effect service is **extended to sixty (60)** days from the entry of this order.

Defendant Montefiore's Cross Motion

Montefiore moves to dismiss with prejudice all claims prior to May 9, 2006 sounding in negligence and all claims prior to August 22, 2006 sounding in medical malpractice as they are time-barred pursuant to CPLR § § 214 and 214-a. Upon a review of the moving papers and opposition submitted thereto, the motion is denied without prejudice with leave to renew upon the completion

of discovery.

Montefiore concedes the negligence claims from May 16, 2009 onward and the medical malpractice claims from December 20, 2006 onward were timely assessed and is only challenging the timeliness of claims prior to May 9, 2006 sounding in negligence and all claims prior to August 22, 2006 sounding in medical malpractice. The plaintiff contends that the claims prior to May 9, 2006 sounding in negligence and all claims prior to August 22, 2006 sounding in medical malpractice were timely commenced pursuant to the continuous treatment doctrine.

Since there has been no formal discovery, the Court denies the motion without prejudice with leave to renew upon completion of discovery. Upon completion of discovery, the Court will be in a better position to determine the applicability of the continuous treatment doctrine.

This constitutes the decision and order of the Court.

Dated: 8/02/11
Bronx, New York



HON. NORMA RUIZ, J.S.C.