

Jakubowski v Huntington Hosp.

2012 NY Slip Op 30365(U)

January 31, 2012

Supreme Court, Suffolk County

Docket Number: 10-43970

Judge: Joseph C. Pastorella

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commence a new action upon the purchase of a new Index Number and filing of the summons and complaint within six months of the date of entry of this order; and it is further

ORDERED that motion (003) by the defendants, Huntington Hospital, Nick Fitterman, M.D., and Cristina Pruzan, M.D., pursuant to CPLR 3211 (a)(5) for an order dismissing the action for medical malpractice as barred by the applicable 30 month statute of limitations, is denied; and that branch of the motion which seeks a further order pursuant to CPLR 3211 (a) (3) dismissing the action on the basis that the plaintiff did not have the capacity to sue when the action was commenced, is granted without prejudice to the commencement of a new action within six months of the date of the entry of this order pursuant to CPLR 205 (a).

The complaint, filed on December 3, 2010, asserts a first cause of action for medical malpractice as to all the defendants, a second cause of action for lack of informed consent as to all defendants, a third cause of action premised upon negligent hiring and supervision by Huntington Hospital, Hilaire Farm Skilled Living and Rehabilitation Center and Huntington Village Rehabilitation, and a fourth cause of action for loss of services on behalf of Diane Jakubowski, spouse of the decedent, Jan Jakubowski.

The defendants seek dismissal of the complaint on the basis that the plaintiff, Diane Jakubowski, as the proposed executrix of the estate of the decedent Jan Jakubowski, lacked the capacity to commence the action on December 3, 2010, as she had not yet been appointed executrix of the decedent's estate. Dismissal is also sought on the basis that the statute of limitations premised upon the alleged medical malpractice by the defendants had expired when the plaintiff served the amended summons and complaint to reflect her capacity as executrix of the estate of Jan Jakubowski, and thus, the action was untimely commenced. The plaintiff, in turn, seeks leave to amend the complaint to reflect her capacity to commence the action in that she received Letters Testamentary after commencement of the action. In the alternative, the plaintiff seeks permission to recommence the action within six months of the date of dismissal of this action pursuant to CPLR 205 (a).

Capacity to sue may depend on a litigant's status or on authority to sue. A litigant's lack of capacity to sue is an affirmative defense and provides a basis for dismissal of an action pursuant to CPLR 3211 (a) (3). It is noted that there is a distinction between an action for the personal injuries of the decedent and an action for wrongful death of the decedent. An action for personal injuries of a decedent is brought on behalf of the estate of the deceased. Thus, a claim of a loss of services for a deceased spouse's services, and society is properly dismissed where it is derived from and dependent upon the viability of the personal injury action (*see, Caracciolo v Solar, M.D.*, 16 Misc 1127A [Sup. Ct., Kings County 2007]). Although the defense of lack of capacity to sue is waived if it is not asserted in an answer or pre-answer motion to dismiss (*see, CPLR 3211 (e)*), it may be asserted in an amended answer served with leave of the court so long as the amendment does not cause surprise or prejudice attributable directly to the delay (*Sayers v Winthrop University Hospital*, 28 Misc3d 1201A [Sup. Ct. Suffolk County 2010]; *Harte v Richmond County Savings Bank*, 224 AD2d 585 [2d Dept 1996]).

Here, the affirmative defense of lack of capacity to sue was raised in the verified answer dated April 4, 2011 served by Hilaire Farm Skilled Living and Rehabilitation Center and Huntington Village Rehabilitation and Nursing, the answer dated April 19, 2011 served by Huntington Hospital, and the answers dated May 26, 2011 served by Cristina Pruzan, M.D. and Nick Fitterman. On June 15, 2011, the plaintiff served an amended complaint amending the caption to reflect her appointment as executrix of the estate of Jan Jakubowski. Again, the defendants asserted the affirmative defense that the plaintiff lacked the capacity to sue in their respective answers. Accordingly, the defendants properly asserted the affirmative defense that the plaintiff lacked capacity to sue.

The defendants seek dismissal of the complaint on the basis that the action was not commenced within thirty months of the accrual of the cause of action, and also assert that the action is untimely in that when the amended summons and complaint was served on June 16, 2011, it was more than 35 months after the last possible date of treatment of June 26, 2008. The initial burden is on the defendant to show that the alleged malpractice took place more than two and one half years beyond the statute of limitations (*Butler v Kings County Hospital Center*, 30 Misc3d 1229A [Sup. Ct., Kings County 2011]). Once the burden is met, the burden then shifts to the plaintiff to establish the applicability of the continuous treatment doctrine.

The first cause of action for medical malpractice sets forth that beginning on or about June 3, 2008 and continuing during a continuous course of treatment through on or about June 26, 2008, Jan Jakubowski was a patient of Huntington Hospital, Nick Fitterman, M.D and Cristina Pruzan and that they failed to properly care for him, causing him to sustain serious and severe injuries and complications. The first cause of action also alleges that Jan Jakubowski was a patient of Huntington Village Rehabilitation and Nursing and Hilaire Farm Skilled Living and Rehabilitation Center from on or about, May 6, 2008 through a continuous course of treatment to on or about June 4, 2008, and that the defendants failed to properly treat the plaintiff's condition, causing him to sustain severe injuries and complications.

Pursuant to CPLR 214-a, an action alleging medical 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 said act, omission or failure. Here, it has been demonstrated by the complaint of this action that the last date of continuing treatment alleged by the plaintiff is June 26, 2008 as to defendants Huntington Hospital, Fitterman and Pruzan. Thus, an action for medical malpractice should have been commenced against them by December 26, 2010. As to Huntington Village Rehabilitation and Nursing and Hilaire Farm Skilled Living and Rehabilitation Center, in that the last date of treatment is asserted to be June 4, 2008, the medical malpractice action should have been commenced by December 4, 2010. The instant action was commenced on December 3, 2010, upon the filing of the summons and complaint with the Clerk of the County of Suffolk. Based upon the foregoing, it is determined that the defendants have not met their burden of establishing prima facie that the action was not timely commenced within the applicable statute of limitations, as this action was commenced within the applicable statutory period against all defendants. Thus, the defendants' applications to dismiss the complaint on the basis that it was not timely commenced is denied.

CPLR 3211 (a) (3) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the party asserting the cause of action does not have legal capacity to sue. A proposed administrator lacks the capacity to bring a wrongful death action since the appointment of a qualified administrator is an essential element of the right to bring suit for wrongful death (*see, Rivera v Viva Bar & Lounge*, NY Slip Op 30595U [Sup. Ct. New York County 2010]; *Brandon v Columbian Mutual Life Insurance Company*, 264 AD2d 436 [2d Dept. 1999]). It is well established that capacity to sue is a threshold question involving the power of a litigant to present a grievance for judicial review (*see, Carpen v Nussbaum*, 36 AD3d 176 [2d Dept. 2006]). The existence of a duly appointed executor or administrator is essential to the commencement and prosecution of an action on behalf of an estate (*Estate of Sir. J. Edward Tinsley v Walsh Manning Corp.*, NY Slip Op 31458U [Sup. Ct., New York County 2009]).

When the instant action was commenced on December 3, 2010, Diane Jakubowski had not yet been appointed executrix of her husband's estate. Any action commenced by or against an estate without a duly appointed executor or administrator must be dismissed as a matter of law (*Estate of Sir J. Edward Tinsley v*

Walsh Manning Corp., NY Slip Op 31458U [Sup. Ct., New York County 2009]). Although the plaintiff served an amended summons and complaint to amend the caption to reflect Diane Jakubowski in her capacity as executrix of the estate of Jan Jakubowski on June 16, 2011, upon receipt of Letters Testamentary, this did not cure the defect (*Butler v Kings County Hospital Center*, 30 Misc3d 1229A [Sup. Ct., Kings County 2011]). Accordingly, the complaint must be dismissed as a matter of law.

CPLR 205 (a) provides in pertinent part that “[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a 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 or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon the defendant is effected within such six-month period” (see, *Ogburn v Auto Driveway Co.*, 159 Misc2d 704 [Sup. Ct., New York County 1993]). The six month period begins to run upon the date of entry of the order (see, *Tulis v Nyack Hospital*, 271 AD2d 684 [2d Dept 2000]; *Yates v Genesee County Hospice Foundation, Inc.*, 299 AD2d 900 [4th Dept 2002]). Dismissal of the complaint is without prejudice to the plaintiff’s right to recommence the action as executor of the estate (*Caracciolo v Solar, M.D.*, 16 Misc3d 1127A [Sup. Ct., Kings County 2007]).

CPLR 205 (a) merely requires that the new action be based upon the same transaction or occurrence or series of transactions or occurrences as the prior action (*Genova v Madani*, 283 AD2d 860 [3d Dept. 2001]). The function of a CPLR 205 (a) extension is to ameliorate the potentially harsh effect of the statute of limitations in cases in which the defendant has been given timely notice of a claim previously brought by a party, but not fully litigated for reasons not enumerated and excluded in the statute. As a remedial statute, its broad and liberal purpose is not to be diminished by a narrow construction (*Miller v Waldbaums*, 7 Misc3d 1003A [Sup. Ct., Queens County 2005]).


Here, it is determined that the instant action, which was timely commenced, gave the defendants notice of the causes of action asserted in the complaint. As the defendants have been given timely notice of the claims being asserted, there is no bar to recommencement of the action pursuant to CPLR 205 (a) (see, *Carrick v Central General Hospital*, 51 NY2d 242 [1980]; *McGuire v Southside Hospital*, 301 AD2d 505 [2d Dept 2003]; *Goldberg v Nathan Littauer Hospital Association*, 160 Misc2d 571 [Sup. Ct., Albany County 1994]).

In *Mendez v Kyung Yoo*, 23 AD3d 354 [2d Dept. 2005], an initial action for wrongful death and medical malpractice was brought by a proposed administrator of the decedent’s estate. After that action was dismissed for lack of capacity of the proposed administrator to sue, another action was begun six months later by the administrator, who was then duly appointed. Based on those facts, the court found that the lower court correctly applied the six-month extension in CPLR 205 (a) in denying the defendants’ motions to dismiss the claims as time barred as the defendants had been given timely notice of the cause of action by the proper service of the summons and complaint in the initial action. The Appellate Division affirmed the denial of the defendants’ motions to dismiss the plaintiff’s action as time barred. Likewise, the instant action was timely commenced by the proposed executrix, and gave timely notice of the claim to the defendants. The instant action is dismissed herein as a matter of law, as the plaintiff lacked the capacity to sue when the action was timely commenced. Here, there has been no 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 (see, *George v Mt. Sinai Hospital*, 47 NY2d 170 [1979]). Thus, the plaintiff is entitled to the benefit conferred by CPLR 205 (a), and may recommence the action upon the purchase of a new Index Number and filing of a summons and complaint within six months of the date of entry of this order (see, *Horvath D.C. v Progressive Casualty*

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Insurance Company, NY Slip Op 29093 [Dist. Ct., Nassau County 2009]).

Dated: January 31, 2012



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