

Williams v Kent

2012 NY Slip Op 31819(U)

July 5, 2012

Sup Ct, NY County

Docket Number: 800341/11

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Index Number : 800341/2011
WILLIAMS, PATRICIA CAROL
vs.
DR. DAVID M. KENT, ET AL.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is by defendant
Kevin Ende, M.D. to dismiss is denied
in accordance with the accompanying
memorandum decision.

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

FILED

JUL 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

Alice Schlesinger, J.S.C.

ALICE SCHLESINGER

Dated: JUL 05 2012

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
PATRICIA CAROL WILLIAMS,

Plaintiff,

-against-

Index No. 800341/11
Mot Seq. Nos. 002 & 003

DR. DAVID M. KENT, LIFESTYLE LIFT
DR. MARC BELANGER, LIFESTYLE LIFT
DR. R. JAMES KOCH, LIFESTYLE LIFT
KEVIN H. ENDE, M.D., LIFESTYLE LIFT
HELEN (last know unknown and withheld), LIFESTYLE LIFT
LORI (last know unknown and withheld), LIFESTYLE LIFT
SHELLYANN (last know unknown and withheld), LIFESTYLE LIFT
SCOTT HECK, LIFESTYLE LIFT
LISA C. SLICKER, LIFESTYLE LIFT

Defendants.

-----X
SCHLESINGER, J.:

FILED

JUL 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Patricia Carol Williams commenced this medical malpractice action representing herself in October 2011 and retained counsel later that year. Since that time, this Court has considered various motions and also conducted extensive oral argument, initially on March 28, 2012 and then again on May 9, 2012 after additional issues had been briefed. As confirmed by a short form order dated June 20, 2012, during the May 9, 2012 proceedings this Court granted the motion made by various defendants (seq 001) to the extent of dismissing the complaint against Lifestyle Lift, which had not been properly named as a party defendant. Also at that time, because the plaintiff had decided not to pursue her claims against any individual defendants other than Dr. Kevin Ende and Helen Vlahos, the Court dismissed the action against all the individually named defendants except Dr. Ende and Ms. Vlahos. The Court reserved decision on the dismissal request by those two defendants and directed further papers, all of which have now been received.

Three issues are pending at this time. The first is the request by defendant Vlahos to dismiss the complaint against her based on improper service. Ms. Vlahos was originally sued as "HELEN (last name unknown and withheld), LIFESTYLE LIFT" but she has since been identified by defense counsel as a former employee of Lifestyle Lift. Counsel asserts that service was not completed in accordance with CPLR §308(2) because the papers were delivered to the offices of Lifestyle Lift *after* Ms. Vlahos had left its employ. Therefore, service failed to meet the statutory requirement of delivery to an "actual place of business."

The second matter before the Court at this time is the motion by Dr. Ende for an order pursuant to CPLR § 3211(a)(7) dismissing the complaint for failure to state a cause of action on the ground that none of the pleadings he received set forth any allegations of malpractice against him (seq. 002). He also asserts that because he was never properly served with a complaint, Court never acquired jurisdiction over him and service at this point would be time-barred.

The third matter pending is the plaintiff's motion for leave to file an amended complaint drafted by counsel that limits the number of defendants named and clarifies the allegations against them (seq. 003). Plaintiff also seeks to extend her time to complete proper service on the defendants pursuant to CPLR §306-b and to obtain an address for Ms. Vlahos. Both Ms. Vlahos and Dr. Ende oppose that motion, except that counsel agrees to provide an address for Ms. Vlahos should this Court allow the action to proceed.

The resolution of all three matters depends largely on the procedural history of the case, which is somewhat confusing but can be summarized as follows. The *pro se*

[* 4]

plaintiff commenced this action by filing a Summons with Notice, dated October 3, 2011 (Exh A to motion). That document simply stated that: "The nature of this action is reckless endangerment, negligence, willful misconduct, blatant disregard for plaintiff's health, safety and will [sic] being, pain and suffering and mental distress, medical malpractice, assault mutilation, damage to plaintiff's credit history and fraud." Both Ms. Vlahos and Dr. Ende acknowledge receipt of this document.

In response, defense counsel served a Notice of Appearance and Demand for Complaint on behalf of Helen Vlahos, dated October 13, 2011 (Exh C to Vlahos motion). On October 26, 2011, the *pro se* plaintiff apparently attempted service on Ms. Vlahos and the various other defendants by leaving at the offices of Lifestyle Lift multiple copies of a 111-paragraph Complaint, dated October 25, 2011. Verified Answers were interposed on behalf of eight defendants, including Ms. Vlahos, on November 17, 2011 (Exh F to Vlahos motion).

However, Dr. Ende did not file an Answer because, he asserts, he did not receive a copy of the 111-paragraph complaint that plaintiff delivered to the offices of Lifestyle Lift on October 26, 2011, even though he was working at the office during that time period. Therefore, in response to the Summons with Notice that Dr. Ende had received, counsel served a Notice of Appearance and Demand for Complaint, dated November 2, 2011 (Exh B to Ende motion). Because she believed that she had properly served the Complaint but did not receive an Answer from Dr. Ende, the *pro se* plaintiff served Dr. Ende with a document entitled "Complaint and Request for Default Judgement", dated November 23, 2011 (Exh B to Ende Opposition). There plaintiff asserted (at ¶5) that she had served Dr. Ende "at the defendant's place of business,

where he does business and where the medical procedures that prompt this civil suit were done to the plaintiff." No specifics regarding the medical treatment were alleged in those papers.

Plaintiff further indicated in her November 23 Complaint and Request for Default Judgment against Dr. Ende that she had received a copy of an October 12, 2011 letter from Dr. Ende's insurer to the doctor confirming coverage, presumably in response to Dr. Ende's admitted receipt of the Summons with Notice. Plaintiff then stated in her papers that she opposed any dismissal of the complaint, and she requested a default judgment against Dr. Ende. Although Dr. Ende opposed the motion, plaintiff had not properly noticed her request as a motion and, due to the title, the document was apparently simply filed with the County Clerk. To the extent that the document could be viewed as a motion for a default judgment, it is denied for the reasons stated below.

As indicated earlier, at or about the time that Ms. Vlahos and Dr. Ende moved to dismiss, the plaintiff retained counsel. Because of the compelling arguments made by the defendants that the *pro se* plaintiff had failed to effectuate proper service of a valid complaint upon them, plaintiff's recently retained counsel moved for leave to serve an amended complaint that clarified the allegations. She also requested an order directing defense counsel to provide an address for service on defendant Helen Vlahos and extending plaintiff's time to complete proper service of the amended complaint on both Dr. Ende and Ms. Vlahos.

As noted above, in the Proposed Amended Complaint (Exh 1 to plaintiff's moving papers), the plaintiff does not include most of the originally named defendants and names only Lifestyle Lift, Dr. Kevin Ende, and Helen Vlahos. The Complaint contains

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58 paragraphs divided into various causes of action. Counsel asks that should the Court find that plaintiff failed to properly serve an adequate complaint on the defendants, plaintiff's time to serve the Proposed Amended Complaint should be extended pursuant to CPLR §306-b for good cause shown or in the interest of justice, as both defendants received the Summons with Notice, the *pro se* plaintiff did the best she could to follow up thereafter by delivering additional documents, and the plaintiff would be greatly prejudiced should the action be dismissed and the claims be rendered time-barred.

In opposition, Dr. Ende asserts that this Court never acquired jurisdiction over him and that the service of any further papers upon him should therefore be denied as time-barred. The October 3 Summons with Notice that he received was too vague and sparse to serve as a basis for jurisdiction, he asserts, he never received the 111-paragraph complaint dated October 25, 2011, and the November 23, 2011 Complaint and Request for a Default Judgment was served beyond the 2½ year statute of limitations for medical malpractice relating to treatment that ended on or about May 12, 2009. Citing *Parker v Mack*, 61 NY2d 114 (1984), Dr. Ende's counsel correctly notes that a plaintiff is not entitled to the six-month extension for commencement of a new action provided by CPLR 205(a) following dismissal after the statute of limitations has expired if the action was dismissed because the pleadings failed to give adequate notice of the claims as required by CPLR 305(b). As to the Proposed Amended Complaint itself, Dr. Ende argues that the claims of fraud and reckless endangerment have no basis in fact, are highly prejudicial and should not be allowed.

The opposition submitted by counsel for Helen Vlahos is somewhat different because Ms. Vlahos was served with a copy of the 111-page complaint, although she

denies that service was proper. Her counsel argues that plaintiff is not entitled to an extension of time to complete proper service pursuant to CPLR §306-b because the plaintiff has failed to demonstrate either "good cause" or "the interest of justice" as required by the statute. However, counsel agrees to provide a last known address for Ms. Vlahos should the Court allow this action to proceed.

At the May 9, 2012 oral argument, this Court indicated that while Lifestyle Lift could not be a party to any amended complaint because it had not been named in the first instance, further briefing was required to address the remaining issues relating to Dr. Ende and Helen Vlahos. In particular, based on information brought to light for the first time during oral argument, the Court requested comment in connection with the alleged filing and service of the 111-paragraph complaint prepared by the *pro se* plaintiff and dated October 25, 2011 insofar as it related to Dr. Ende. That complaint includes allegations of medical malpractice against Dr. Ende and Helen Vlahos based on treatment primarily provided on May 12, 2009, but continuing through May 31, 2009. Although Dr. Ende in his papers mentions only the May 12 date, neither defendant directly disputes the May 31 date alleged by the plaintiff.

As part of his supplemental papers, Dr. Ende has provided his own Affirmation insisting (at §5) that, while he did receive the Summons With Notice dated October 3, 2011, he "never received any additional papers or documents ..." With respect specifically to the 111- paragraph complaint, he states (at § 6) that he "never received a copy of the complaint from either a process server, or from anyone who resided in my office building, or from anyone at my employment. I have never received a copy of the complaint in the mail." In his Affirmation (at §4), Dr. Ende also disputes the suggestion

in the plaintiff's Affidavit of Service that he was served with the Complaint at 5:15 p.m. on October 25, 2011 at the offices of Lifestyle Lift. Specifically he says:

A review of my October 25 schedule annexed hereto reveals that my 4:00 pm appointment did not show [up,] prompting me to leave Lifestyle Lift immediately thereafter for the day after that patient was contacted with no response. Accordingly, I left Lifestyle Lift at approximately 4:00 in the afternoon on October 25, 2011 and was not at Lifestyle Lift at 5:15 in the afternoon when service of plaintiff's complaint was purportedly made. Furthermore, at no time did any receptionist or anyone else affiliated with Lifestyle Lift give me a copy of the complaint in this case. More specifically I have never received a complaint in the mail.¹

Defense counsel reiterates this point in his supplemental Affirmation and adds that the Affidavit of Service is defective on its face (a copy is attached as Exhibit B). Not only does the process server Judy Seely fail to provide her own address, but she fails to properly complete the portions of the affidavit describing the person served. For example, she checks the box for "substituted service" by delivery to a person of suitable age and discretion and mailing to the defendant, but appears to state that she gave the papers to Dr. Ende himself. She further fails to complete the required physical description of the person served or indicate whether she inquired about military service.

The supplemental papers submitted by plaintiff's counsel consist of a single handwritten page and some documents. Most significant is the copy of the 111 -page

¹ Dr. Ende's schedule is not as clear as he suggests because all patient names are crossed out, presumably to maintain confidentiality. The notation next to the 4:00 patient states "NO ANSWER, MACHINE FULL 10/24 - CP", suggesting that someone with the initials CP attempted to give the patient a reminder call the day before the October 25 appointment but was unable to leave a message. Nowhere is there a specific indication that the patient failed to appear for the appointment on October 25, leading Dr. Ende to leave the office before service was attempted that afternoon.

Complaint dated October 25, 2011 that prominently displays on the first page proof that the Complaint was filed with the New York County Clerk's Office on November 17, 2011. A review of the Supreme Court's on-line database confirms the filing of the 111-paragraph complaint on that date. Therefore, since no one disputes that treatment continued through at least May 20, 2009, the action was timely commenced by filing on November 17, 2011 within 2½ years of treatment, assuming that this document was sufficiently specific so as to constitute a valid complaint. This Court finds that it was.

The 111-paragraph *pro se* complaint contains countless paragraphs regarding the examination, diagnosis and cosmetic procedures allegedly performed on the plaintiff by Helen Vlahos, who is not a physician, in a negligent manner. In paragraphs 54-55, plaintiff alleges that Dr. Ende performed cosmetic procedures under her chin; at paragraphs 93-95, she alleges that various procedures were billed under Dr. Ende's name; and at paragraphs 104-108 plaintiff indicates that Dr. Ende was assisting Ms. Vlahos with procedures (even though arguably Ms. Vlahos, who was not the physician, was assisting Dr. Ende). Negligence is alleged throughout the complaint in that plaintiff repeatedly alleges that the cosmetic surgery amounted to "mutilation" and that the defendants failed to fulfill their promises of an improved appearance and then abandoned her. These allegations are sufficient to constitute a valid complaint and to put the defendants on sufficient notice of the claims against them at the pleadings stage of the proceedings. Certainly, more information can be obtained in a Bill of Particulars and discovery.

But that determination does not end the inquiry here, as counsel for Ms. Vlahos vigorously asserts that the plaintiff has failed to satisfy either the "good cause" or

"interest of justice" requirements in CPLR §306-b for an extension of time to complete proper service. That section provides in pertinent part that:

If service is not made upon a defendant with the time period provided in this section [within 120 days from the filing of the summons with notice], the court, upon motion, shall dismiss the action without prejudice as to that defendant, or *upon good cause shown, or in the interest of justice*, extend the time for service.

(Emphasis added).

To establish "good cause," a plaintiff must demonstrate reasonable diligence in attempting service. *Leader v Maroney, et al.*, 97 NY2d 95, 104 (2001). When applying the "interest of justice" standard, the courts consider various factors such as efforts at service, delay in service, the meritorious nature of the claims. *Leader, supra* at 105-106.

This Court finds that the plaintiff has satisfied both standards. The Summons with Notice was served on both defendants and was admittedly received by them, and the plaintiff filed it with the County Clerk on October 3, 2011. It was reasonable to attempt service at the place of business where the plaintiff had received the medical treatment at issue in the case. When she received the October 13 Demand for Complaint from counsel for Ms. Vlahos, the plaintiff served a Complaint dated October 25 that contains serious allegations of medical malpractice based on cosmetic procedures allegedly performed by Ms. Vlahos. Counsel for Ms. Vlahos received that Complaint and served an Answer on November 17. Thus, while Ms. Vlahos contests that service failed to comply with the technical requirements of the CPLR, she did receive the Complaint within weeks of the commencement of the action, and issue was promptly joined by her filing of an Answer.

Dr. Ende also acknowledges receipt of the Summons with Notice, his insurer confirmed coverage based on that document, and his counsel served a Demand for a Complaint in response to that document. Although Dr. Ende denies having received the 111-paragraph Complaint, it was reasonable of the plaintiff to attempt service at his offices, where Dr. Ende was in fact working on the day of service. The plaintiff diligently pursued the matter when she did not receive an Answer from Dr. Ende. Specifically, she served a Complaint and Request for Default Judgement, dated November 23, 2011, and she retained counsel to assist her in pursuing her claims. The claims include serious allegations of medical malpractice based on the services provided by Dr. Ende while working at Lifestyle Lift with Ms. Vlahos. Thus, an extension of time to properly serve the defendants is warranted as to both Dr. Ende and Ms. Vlahos.

Finally, the Court turns to plaintiff's request to serve and file an Amended Complaint in the form attached to the moving papers. As the Court has already indicated that Lifestyle Lift is not a proper defendant and may not be included in any Amended Complaint, any Amended Complaint must reflect that ruling. However, as leave to amend is freely granted pursuant to CPLR §3025, it will be permitted here, with the modification noted above. The amendment actually serves the interests of all parties as it significantly streamlines and clarifies the plaintiff's allegations.

The Court declines Dr. Ende's request to dismiss at this point certain causes of action on the ground that they lack merit. While it is true that some of the allegations appear unnecessarily inflammatory and may lack merit, the litigation has just begun and Dr. Ende has failed to persuade this Court that no valid claims can be asserted against him. Notably, no discovery has yet been conducted, and neither party has provided much information or documentation about the merits of the case to allow this Court to make an accurate assessment of the claims at this time.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant Kevin Ende, M.D., is denied; and it is further

ORDERED that the motion to dismiss by defendant Helen Vlahos, s/h/a HELEN (last know unknown and withheld), LIFESTYLE LIFT is denied and counsel for Helen Vlahos shall promptly provide to plaintiff's counsel a valid address for service upon Ms. Vlahos; and it is further

ORDERED that plaintiff's motion for leave to amend her complaint is granted and plaintiff may proceed to serve on counsel for Dr. Ende and Ms. Vlahos and file with the County Clerk in Room 141B an Amended Complaint similar to the one attached to the moving papers but not including Lifestyle Lift as a defendant; and it is further

ORDERED that the caption shall be amended to remove all defendants except Kevin Ende, M. D., and Helen Vlahos, and upon the plaintiff's filing of a copy of the Amended Complaint with the Clerk in Trial Support in Room 119, the Clerk shall amend the records to reflect the amendment of the caption; and it is further

ORDERED that plaintiff's motion for an extension of time to serve Dr. Ende and Helen Vlahos with an Amended Complaint is granted to the extent of giving plaintiff ninety days from the date of this decision to serve Dr. Ende and ninety days from receipt of an address to serve Helen Vlahos; and it is further

ORDERED that all counsel shall appear in Room 222 for a preliminary conference on Wednesday, October 31, 2012 at 9:30 a.m.

Dated: JUL 05 2012 **FILED**

JUL 12 2012

NEW YORK
COUNTY CLERK'S OFFICE


J.S.C.
ALICE SCHLESINGER