

**Thomas v Morningside House Nursing Home Co.,
Inc.**

2012 NY Slip Op 33319(U)

January 17, 2012

Supreme Court, Bronx County

Docket Number: 301040/10

Judge: Stanley B. Green

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NEW YORK SUPREME COURT - COUNTY OF BRONX

IA-6M

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-6M

----- X

JEANNINE THOMAS, as Administratrix of the Estate
of LYNN JOHNSON,

INDEX No.: 301040/10

Plaintiff(s),

- against-

MORNINGSIDE HOUSE NURSING HOME COMPANY,
INC., and REGEIS CARE CENTER, LLC, Individually and
d/b/a REGEIS CARE CENTER,

Defendant(s)

Present:
HON. STANLEY GREEN
J.S.C.

----- X

The following papers numbered 1 to 3 read on this motion

No. on the Calendar of

PAPERS NUMBERED

- Notice of Motion -Exhibits and Affidavits Annexed..... 1
- Answering Affidavit and Exhibits..... 2
- Replying Affidavit and Exhibits..... 3
- Sur-reply Affidavits and Exhibits.....
- Stipulation(s) - Referee's Report - Minutes.....
- Memoranda of Law.....

Upon the foregoing papers, this motion is decided in accordance with the attached memorandum decision.

Dated: January 17, 2012


STANLEY GREEN, J.S.C.

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Plaintiff(s),

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MORNINGSIDE HOUSE NURSING HOME COMPANY,
INC., and REGEIS CARE CENTER, LLC, Individually and
d/b/a REGEIS CARE CENTER,

Defendant(s)

DECISION

-----X
HON. STANLEY GREEN:

The motion by Morningside House Nursing Home Company for an order pursuant to CPLR §3211(a)(5) dismissing the complaint on the ground that the action is barred by the statute of limitations is hereby consolidated for decision with the motion by Regeis Care Center for an order dismissing plaintiff's claims against it which are based upon decedent's admission to Regeis Care Center from January 18, 2007 through January 26, 2007 and upon consolidation. the motions are granted.

Plaintiff commenced this action on February 8, 2010, to recover damages for personal injuries and death of decedent Lynn Johnson allegedly sustained as a result of defendants' failure to provide proper care and treatment to decedent.

Decedent was admitted to Morningside House from December 26, 2006 through January 6, 2007. She was admitted to Regeis Care Center from January 18, 2007 through January 26, 2007 and from February 7, 2007 through March 2, 2007.

Morningside seeks dismissal of the complaint on the ground that the action is barred by the applicable statutes of limitation for negligence and statutory violations, medical malpractice

and wrongful death. Morningside also contends that contrary to the allegation in the complaint, the statute of limitations was not tolled to March 14, 2010 pursuant to CPLR §208.

Regeis seeks dismissal of plaintiff's claims which arise out of the treatment Regeis provided to decedent from January 18 through January 26, 2007 on the same grounds.

In support of the motion, Morningside submits a transcript of plaintiff's deposition testimony which shows, inter alia, that plaintiff visited decedent every day while she resided at Morningside's facility, that during these visits decedent communicated her opinions and dissatisfaction about her treatment at the facility and that, as a result of decedent's complaints that the people at Morningside were "aggressive and rough" and plaintiff's complaints to Morningside about decedent's treatment, decedent was transferred on January 6, 2007 to Albert Einstein for care.

In support of its motion, Regeis submits a copy of decedent's medical records, which show that during her admission, decedent was alert and responsive and able to make her needs known. Regeis contends that any diminishment of this capacity was due to the administration of pain-killing drugs and that this is insufficient to establish that decedent was under a disability within the meaning of CPLR §208.

Plaintiff contends that the statute of limitations was tolled from December 26, 2006 through decedent's death on March 14, 2007 because during that time decedent was disabled and unable to protect her legal rights because of an overall inability to function in society.

In opposition to the motion, plaintiff submits portions of decedent's medical records and the affidavit of Dr. Joseph Namey, who is Board Certified in Internal Medicine and board certification eligible in Geriatric Medicine.

Dr. Namey reviewed decedent's medical records and notes that at the time decedent was admitted to Morningside House on December 26, 2006, she was suffering from numerous medical conditions, including atrial fibrillation, cirrhosis, end-stage renal disease on hemodialysis, pancreatitis, diabetes mellitus type II, hepatitis C, congestive heart failure hypertension, and coronary artery disease. He also notes that decedent suffered from a fall while at Morningside House and opines that the medical record "contains information to support the fact that Ms. Johnson suffered from a decline in her mental capacity upon admission to the nursing home which declined to the point where she required hospital transfer for evaluation of worsening of her medical condition." However, he makes reference to only a few occasions where decedent was described as depressed, confused or displaying physical and verbal abuse to staff members and does not address decedent's condition during her first admission to Regeis Care Center, from January 18, 2007 through January 26, 2007, other than to opine that decedent never returned to her full level of consciousness and "suffered from a decreased mental capacity from her admission at Morningside House until her death to such an extent that she exhibited an overall inability to function in society."

The Court of Appeals has stated that the insanity toll of CPLR 208 must be narrowly interpreted and only applied to "individuals who are unable to protect their legal rights because of an over-all inability to function in society" (McCarthy v. Volkswagen of America, 55 NY2d 543). It does not apply to individuals who are treated with pain-killing drugs (Eisenbach v. Metropolitan Transportation Authority (62 NY2d 973) or to individuals who can manage his or her own personal affairs (McCarthy, supra).

Here, plaintiff's testimony and decedent's records show that during her admission to

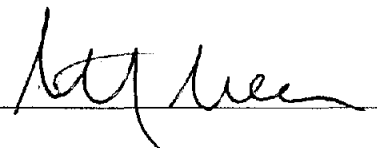
Morningside and Regeis, decedent was able to express her dissatisfaction with the care and treatment she received and that complaints were made known to both facilities. While plaintiff's expert opines that her mental capacity diminished from December 26, 2006 to the date of her death, his opinion is conclusory and based on sporadic descriptions of decedent's mental state that are insufficient to demonstrate or raise a triable issue of fact as to whether decedent was under a disability that rendered her unable to protect her legal rights because of an over-all inability to function in society.

It is noted that the cases cited by plaintiff involve plaintiffs who were entitled to the application of the toll because the evidence showed that they were clearly unable to protect their legal rights. For example, in Sanchez v. Wolkoff (247 AD2d 529) the plaintiff was comatose and in Schulman v. Jacobowitz (19 AD3d 574), the plaintiff suffered a stroke and the testimony of an expert showed that he had significant cognitive impairment. While plaintiff's decedent was very ill and often in pain, she complained about the care that was provided to her at Morningside repeatedly and was moved, at her request and the request of plaintiff, from Morningside to Einstein and as late as one week before her death, she made the decision to stop dialysis. Under the circumstances, decedent was not under a disability that would toll the statute of limitations pursuant to CPLR §208.

Movants shall serve a copy of this order with Notice of Entry on the Clerk of the Court who shall enter judgment dismissing the complaint against Morningside House Nursing Home.

This constitutes the decision and order of the court.

Dated: January 17, 2012


STANLEY GREEN, J.S.C.