

Massie v Westchester NY Presbyterian Hosp.
2012 NY Slip Op 33411(U)
November 8, 2012
Sup Ct, New York County
Docket Number: 102528/12
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

JA PART 16

Index Number : 102528/2012
MASSIE, RICHARD
vs.
WESTCHESTER NY PRESBYTERIAN
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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 granted and this
action is dismissed in accordance with
the accompanying memorandum decision.

FILED

NOV 14 2012

**COUNTY CLERKS OFFICE
NEW YORK**

NOV 08 2012

Dated: November 8, 2012

Alice Schlesinger J.S.C.
ALICE SCHLESINGER

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

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

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

-----X
RICHARD MASSIE,

Plaintiff,

Index No. 102528/12
Motion Seq. No.001

-against-

WESTCHESTER NY PRESBYTERIAN HOSPITAL,
LENNOX HILL HOSPITAL,

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Defendants.

-----X
SCHLESINGER, J.:

**COUNTY CLERK'S OFFICE
NEW YORK**

Defendant Lenox Hill Hospital has moved to dismiss this action before answering pursuant to CPLR §3211(a)(7) and (a)(5) for failure to state a cause of action and because the plaintiff's claims are time-barred. Alternatively, defendant seeks an order striking certain allegations in the plaintiff's complaint and directing that the balance be repleaded.

A review of the papers submitted with the motion and those on file with the County Clerk reveals the following. Plaintiff Richard Massie commenced this action representing himself by filing a summons and complaint with the County Clerk on April 26, 2012. Although the complaint is rambling and unclear, Mr. Massie has named Westchester NY Presbyterian Hospital and Lenox Hill Hospital as defendants and he summarizes his claims against them in his "Conclusion" as follows:

Sue for Violation of Hippa (*sic*) and wrongful medical records due to premeditated negligence and incompetence (*sic*) by head staff al (*sic*) the way around ... Pay for every insult in the psyche reports against both places, and return my money that was illegally generated for the GHI [and] sue for whatever happened in the hospital that amounted to be spiteful and slanted against me ...

According to the moving papers, the plaintiff served Lenox Hill with the complaint on August 24, 2012, exactly 120 days after filing and on the last date for service. Lenox Hill served Mr. Massie with the instant motion by mail on September 11, 2012, returnable October 2. In the motion Lenox Hill argues that the Hospital is unaware of any HIPAA violation and that, in any event, plaintiff's recourse would be the filing of a complaint with the Secretary of Health and Human Services, as no viable cause of action exists in state court. See 45 CFR Parts 160, 164; *see also Jurado v Kalache*, 29 Misc. 3d 1005, 1008-09 (Sup. Ct., Westchester Co. 2010), citing *Webb v Smart Document Solutions, LLC*, 499 F3d 1078 (9th Cir 2007).

Lenox Hill further argues that the plaintiff's complaint fails to adequately state any other cause of action. To the extent plaintiff suggests a claim sounding in slander or defamation, he has failed to state the defamatory words with sufficient particularity to state a claim. See, e.g., *Murganti v Weber*, 248 AD2d 208 (1st Dep't 1998). Similarly, any claim sounding in misrepresentation or fraud must be pleaded with specificity, which was not done in this case. *Block v Landegger*, 44 AD2d 671 (1st Dep't 1974). Additionally, any claim sounding in negligence or medical malpractice is deficient, as plaintiff has not alleged that Lenox Hill breached a duty of care or departed from accepted standards of medical care and thereby caused plaintiff injury. *Solomon v City of New York*, 66 NY2d 1026 (1985).

Lenox Hill further alleges that the plaintiff's claims are time-barred. If the claim sounds in negligence, it is subject to a three-year statute of limitations; if it sounds in medical malpractice, the period is two and one-half years. CPLR §§ 214, 214-a. In virtually incomprehensible papers, the year "2001" is mentioned several times, as are

other years, but there appears to be no mention of any care and treatment provided to Mr. Massie at Lenox Hill at any time within the statute of limitations period.

Upon receipt of the motion, Mr. Massie filed a handwritten document dated September 16, 2012, stating that: "Due to technical difficulty, the case is closed against both hospitals." It appears that the referenced "difficulty" was Mr. Massie's inability to retain counsel, and he suggested in his filing that he wished to reserve his right to "reopen the case" in the future, presumably with the assistance of counsel. The County Clerk's minutes indicate that defendant Westchester obtained from Mr. Massie and filed with the Clerk's Office a Stipulation of Discontinuance on October 4, 2012.

Thereafter, Mr. Massie submitted another document responding to the motion; namely, a five page handwritten letter restating his claims, acknowledging that he had previously written to close his case, and stating that he wanted an opportunity to speak to a lawyer. In reply, Lenox Hill maintains its position that the action should be dismissed.

This Court agrees that the action must be dismissed pursuant to CPLR § 3211, subd. (a)(7), for failure to state a cause of action. As Lenox Hill correctly argues, the complaint is so deficient and so lacking in specificity that it cannot stand. Plaintiff is not entitled to leave to replead under these circumstances; where the pleadings fail to set forth even the most basic elements of a claim, dismissal is warranted.

The complaint is also dismissed as untimely pursuant to CPLR § 3211(a)(5). As indicated earlier, the complaint is so unclear that it is difficult to ascertain what claims are being asserted against which party and the precise basis for those claims. Lenox Hill reads the complaint to state that plaintiff last presented to the Hospital in 2004. Accepting that date, the commencement of the action by filing on April 26, 2012 would

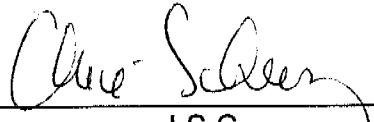
be untimely, whether the Court were to apply the three-year statute of limitations for negligence and other tort claims or the two and one-half year statute for medical malpractice. To the extent that the complaint includes later dates, they do not appear to be directly related to any claims against Lenox Hill. The plaintiff had an opportunity to clarify his claims in opposition to the motion to dismiss on timeliness grounds, but he failed to do so.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendant Lenox Hill Hospital s/h/a Lennox Hill Hospital is granted, and the Clerk is directed to enter judgment in favor of the moving defendant dismissing this action.

Dated: November 8, 2012

NOV 08 2012



J.S.C.
ALICE SCHLESINGER

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NEW YORK**