

Abreu v New York City Health & Hosps. Corp.

2014 NY Slip Op 30762(U)

February 20, 2014

Sup Ct, Bronx County

Docket Number: 350565/08

Judge: Douglas E. McKeon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA 19A

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ANTHONY ABREU, An Infant by his Mother and Natural
Guardian, ROSEMARY CAMINERO,

Plaintiff,

MEMORANDUM DECISION

-against-

Index No. 350565/08

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION (JACOBI MEDICAL CENTER),

Defendant.

-----X
HON. DOUGLAS E. MCKEON:

Defendant's motion for an order dismissing Plaintiff's complaint for failure to comply with General Municipal Law §§50-i and e and for failure to timely commence the action pursuant to CPLR §205-a and Plaintiff's cross-motion for an order vacating the court's September 21, 2004 order which dismissed the prior action, restoring the action to the discovery calendar and striking the Defendant's answer are consolidated for disposition and decided as follows:

The history of this case is as follows: On January 25, 2001, the Plaintiff moved for permission to serve a late Notice of Claim. The application was granted by the Honorable Stanley Green on February 9, 2001. The order directed Plaintiff to serve a Notice of Claim on the Defendant within 30 days of entry of the order. No Notice of Claim was received by Defendant within 30 days of entry of the order. On February 26, 2001, Plaintiff commenced an action against Defendant under Index Number 8671/01. After discovery had commenced, Plaintiff's counsel moved to withdraw and the application was granted by this court on

September 10, 2003. On June 24, 2004, this court issued an order directing Plaintiff to appear for a conference on September 21, 2004 if she desired to continue her lawsuit. The Plaintiff failed to appear at the scheduled conference and the court dismissed the action on September 21, 2004. On June 20, 2006, a Notice of Claim was received by Defendant. Defendant argues that as Plaintiff failed to commence the instant action within six months of the dismissal of the prior action, this action must be dismissed as untimely pursuant to CPLR §205-a. Furthermore, Defendant argues that Plaintiff failed to timely serve a Notice of Claim and so the complaint must be dismissed for failure to comply with the statutory precondition to suit. Finally, Defendants argue that Plaintiff can't rely on the February 9, 2001 order of the court by Justice Green as Plaintiff failed to comply with the specific terms of that order which directed a Notice of Claim to be served within 30 days.

In opposition, Plaintiffs argue that Defendant's motion should be denied because the dismissal of the prior action was for failure to appear at a court conference and not on the merits. Accordingly, the Plaintiff was not barred from bringing the present action which was timely commenced within the statute of limitations as tolled by CPLR §208. The court agrees. CPLR §205(a) is a remedial provision which extends or tolls the running of the statute of limitations for certain dismissals not on the merits when the limitations period would otherwise bar a new action. In essence, the section, when applicable, can extend but does not shorten the limitations period.

As for Plaintiff's failure to comply with the Notice of Claim filing provisions, Plaintiff argues that should the court determine that the Notice of Claim was not properly

filed in strict accordance with the court order granting leave for the late filing of the Notice of Claim, the Defendant should be equitably estopped from raising the alleged failure as grounds for dismissal because Defendant delayed the present motion to dismiss for more than two years after the commencement of the action until after the running of the ten year statute of limitations period following the infant-Plaintiff's birth. Plaintiff argues that this is a meritorious medical malpractice action that should be determined on the merits and has provided the court with an expert affirmation in support of his position. Plaintiff also cross-moves for an order vacating the September 21 court order dismissing the prior action and restoring the action to the discovery calendar. Plaintiff claims he was denied due process by Defendant's failure to serve Plaintiff with the September 21, 2004 court order and the June 23, 2004 court order to notify the Plaintiff's mother to appear in court for a conference or be subject to a possible dismissal of the action.

The court finds that restoration is appropriate: because the Plaintiff's action has merit; because there is a reasonable excuse for the failure of the then pro se Plaintiff's failure to appear for a conference on September 21, 2004; because the order of September 21, 2004 was never served with notice of entry; because Plaintiff had not evidenced an intent to abandon the action and because there is no prejudice to the Defendant.

Plaintiff argues that a Notice of Claim was actually served in this matter on January 26, 2001. As proof of this, it refers to NYCHHC's admission in its verified answer in the prior action (dated March 14, 2001) that on or about January 26, 2001 a Notice of Claim was served in writing upon the office of the General Counsel of the New York City

Health and Hospitals Corporation. Plaintiff has also attached a copy of the letter dated March 2, 2001 from the Tort Division addressed to Plaintiff's former attorney acknowledging service of the Notice of Claim and scheduling a General Municipal Law §50-h hearing. The letter further states that the claim is currently under investigation, negating an allegation of prejudice due to delay. Although Defendant argues that there is no evidence of service of the Notice of Claim in accordance with the February 9, 2001 order granting leave to file a late Notice of Claim, there is a prior admission that a Notice of Claim was served on or about January 26, 2001. Based on Defendant's admission and proof that a Notice of Claim was served on or about January 26, 2001, and because there will be no prejudice to a substantial right of any party, the court amends the prior order to provide that the Notice of Claim served on January 26, 2001 was proper service of the late Notice of Claim. This was a direction Justice Green could properly have made in his order in the first instance and Defendant has not been prejudiced by the amendment.

The court rejects Defendant's argument that the court lacks jurisdiction over the cross-motion to vacate the dismissal of the first action because the present cross-motion is brought in the action bearing Index Number 350565/08 rather than under Index Number 8671/01. The cross-motion to vacate the September 21, 2004 dismissal under Index Number 8671/01 is before the same court that issued the dismissal order.

It would be unfair to dismiss an action based upon a pro se party's failure to appear for a conference whose date, place and time she had no notice of. Had the court known on September 21, 2004 that Plaintiff's mother had not been given notice of the

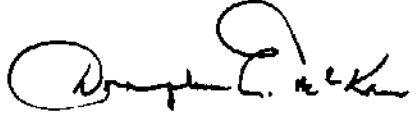
conference date, the dismissal order would not have been made. Plaintiff's mother has denied receipt of the order or of any correspondence from former counsel on or after June 23, 2004 and there is no basis to conclude that prior counsel served the order on her.

That portion of the cross-motion seeking to strike defendant's answer is granted only to the extent of directing defendant to comply with the preliminary conference order dated September 29, 2009.

Defendant's motion to dismiss the complaint is denied and plaintiff's cross-motion to vacate the dismissal of the prior action, and restore the prior action to the calendar, is granted.

So ordered.

Dated: Feb 20, 2014



Douglas E. McKeon, J.S.C.