At an IAS Term, Part MMESP-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of March, 2014

P R E S E N T:

HON. ANN T. PFAU,

Justice.

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MARIE LICARI as Administratrix of the Estate of NANCY LELLA, Deceased,

Plainitiff,

- against -

KINGS COUNTY HOSPITAL CENTER and NEW YORK HEALTH AND HOSPITAL CORPORATION,

Defendants.

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Index No. 501558/2013

DECISION and ORDER

The following papers were read on motion sequence numbers 01 and 02:

All papers electronically filed with the New York State Courts E-Filing (NYSCEF) system in connection with this petition, including document numbers 11- 29.

The plaintiff in this medical malpractice action moves for an order striking certain of defendants' affirmative defenses. Specifically, plaintiff seeks to strike the following affirmative defenses: number six (that the action was not commenced within the time specified in section 7401 of the Unconsolidated Laws of New York); number ten (that the action is barred by the principles of res judicata and collateral estoppel); and number

twelve (that there is another action pending on appeal between the same parties seeking the same relief). Defendants Kings County Hospital and New York City Health and Hospitals Corporation (together referred to as HHC) cross-move pursuant to CPLR 3211(a)(5) to dismiss the action on the ground that it was filed after the one year and ninety day statute of limitations for conscious pain and suffering and the two year statute of limitations for wrongful death.

The malpractice claim relates to treatment administered to plaintiff's decedent, Nancy Lella, at Kings County Hospital from March 4 through May 8, 2008 (Affirmation of Simcha Baruch Rivkin in Support of the Cross Motion and in Partial Opposition to the Motion, ¶2). Plaintiff alleges that defendants administered morphine to Ms. Lella despite being advised that she was allergic to it, resulting in severe irreversible brain damage and other serious injuries (Affirmation of Matthew T. Gammons in Support of the Motion, ¶4).

An earlier action was commenced by plaintiff against HHC in May 2009 under index number 13003/2009 (The 2009 Action, Rivkin Aff., ¶3). By order dated December 12, 2012, the action was dismissed for failure to comply with General Municipal Law (GML) § 50-h (December 2012 Order, annexed to Rivkin Aff., Exh. B). In the December 2012 Order, the court granted HHC's motion to dismiss the claim after the required 50-h hearing was adjourned on at least eleven occasions primarily at plaintiff's request (*id.*). The court determined that compliance with a demand for a 50-h examination is a condition precedent to the commencement of an action against a municipal defendant, and plaintiff's failure to do so warranted dismissal of the 2009

Action (*id.*). Plaintiff filed a notice of appeal with respect to the December 2012 Order (Rivkin Aff., ¶17); that appeal is now pending.

Plaintiff then filed a new summons and complaint on March 28, 2013 based upon the identical factual allegations. Plaintiff contends that this was done pursuant to CPLR 205(a). HHC answered on April 25, 2013, asserting sixteen affirmative defenses including the three that plaintiff seeks now to strike.

Both the motion by plaintiff and the cross-motion by defendant deal with the question of whether the new complaint filed in March 2013 is time-barred as beyond the statute of limitations. Plaintiff asserts that CPLR 205(a) applies, providing plaintiff with six months from the termination of the prior action in which to commence a new action on the same occurrence. HHC disagrees, arguing that CPLR 205(a) does not apply because the 2009 Action was dismissed for failing to comply with a condition precedent, i.e. she did not appear for a hearing demanded pursuant to GML §50-h, and because the prior dismissal was for a failure to prosecute. Unconsolidated Laws §7401(2) provides that an action against HHC to recover for personal injuries shall be commenced no more than one year and ninety days after accrual, and that HHC may require a claimant to submit to an examination under GML §50-h. The 2009 Action was timely filed; the present action is timely only if the statute of limitations is tolled by CPLR 205(a)

CPLR 205(a), entitled New Action by Plaintiff, provides:

> If 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 failure to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives,

his or her executor or administrator, 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 defendant is effected within such six-month period. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

In its cross motion, HHC seeks dismissal of the current complaint as untimely, arguing that it was filed after the applicable statute of limitations period and that, contrary to plaintiff's assertion, the statute of limitations was not tolled by the provisions of CPLR 205(a).

HHC first claims that CPLR 205(a) does not apply because a claimant's submission to a 50-h examination is a condition precedent to bringing an action, with the result that the failure to appear for a hearing warrants dismissal–as happened in the 2009 Action. Citing appellate caselaw, HHC argues that CPLR 205(a) does not apply to revive a dismissed claim when the prior action was dismissed for failure to comply with a statutory condition precedent. The Court of Appeals in *Yonkers Constr. Co. v Port Auth. Trans-Hudson Corp* (93 NY2d 375 [1999]) addressed the issue of whether CPLR 205(a) would serve to toll the applicable statute of limitations after the plaintiff's first complaint was dismissed for failure to comply with a condition precedent–the failure comply with the requirement that it has submit the disputed claim to the project's Chief Engineer for resolution before commencing litigation within the statutory period provided for the commencement of the lawsuit–and allow the plaintiff to re-institute the claim within six months. The Court of Appeals affirmed the holdings of both the Supreme Court and the

Appellate Division, stating that those courts "held that the toll of CPLR 205(a), which may extend a Statute of Limitations, could not obviate the requirements of a statutory condition precedent to suit. We agree. . . ." (93 NY2d at 378). The Court found that "[t]he requirement to bring an action within one year under Unconsolidated Laws § 7107 is a condition precedent to suit which cannot be tolled under CPLR 205(a)" (*id.*). The statute conditions the existence of the right of action, thereby creating a substantive limitation on the right, and as a result, a dismissal for failure to comply with the statutory condition precedent is on the merits.

Plaintiff argues that notwithstanding the Court of Appeals decision in *Yonkers Constr. Co.*, the Appellate Division, Second Department, repeatedly has applied CPLR 205(a) to allow the claimant to file a second lawsuit after the statutory period for filing had run and the first lawsuit had been dismissed because plaintiff failed to appear for the statutory examination prior to filing suit. In *Jacker v County of Suffolk* (304 AD2d 528 [2nd Dept 2004]), the Second Department affirmed the dismissal of a claim that was filed without the plaintiff having appeared for the 50-h examination demanded by defendant. The Supreme Court order, which was affirmed by the Appellate Division, dismissed the complaint without prejudice and permitted the plaintiff to recommence the action pursuant to CPLR 205(a) despite the expiration of the statute of limitations. In *Knotts v City of New York*, 6 AD3d 664 (2d Dept 2004) and *Inzerillo v Town of Huntington*, 67 AD3d 736 [2d Dept 2009]), and other cases, the Second Department has adhered to the rule that a dismissal for failure to comply with the conditions precedent set forth in GML

§§ 50-h or 50-i is not a dismissal on the merits, and is made without prejudice to a plaintiff's rights pursuant to CPLR 205(a).

The Second Department decision in *Miller v County of Suffolk* (48 AD3d 524 [2nd Dept 2008]) is relevant, although it does not invoke CPLR 205(a) as apparently the tolling of the statute of limitations was not at issue. The plaintiff in *Miller* filed a notice of claim, following which the County demanded a 50-h hearing. Plaintiff commenced an action against the County before the hearing was held. Following commencement of the lawsuit, the 50-h hearing was adjourned and rescheduled several times, with the plaintiff failing to appear at any of the rescheduled hearings. Defendant moved to dismiss, which was granted because of plaintiff's failure to appear for the hearing prior to commencing the action against the County. The plaintiff then sought again to schedule a 50-h hearing, which the County refused to do. The plaintiff commenced a subsequent action and the County moved to dismiss the second action on the grounds of res judicata and/or collateral estoppel, which the Supreme Court granted. The Appellate Division reversed, stating that the dismissal of the prior action "was for failure to comply with a condition precedent and was not a determination on the merits." (48 AD3d at 525). The Appellate Division also stated that the plaintiff's non-compliance with the condition precedent was excused because the County had, in effect, precluded that compliance (*id.*).

CPLR 205(a) by its terms applies to toll the statute of limitations unless there is, among other circumstances, a final judgment on the merits. The Appellate Division, Second Department, has allowed the recommencement of an action against a governmental entity after the expiration of the statutory time to bring suit and after the

initial suit was dismissed for failure to comply with a condition precedent. Moreover, the Second Department has specifically held that dismissal of an action for failure to comply with a condition precedent is not a determination on the merits. Following the Second Department, as this court must, the December 2012 order of the court dismissing the matter for failure to appear for a 50-h hearing on at least eleven occasions cannot be said to be a final judgment on the merits for purposes of CPLR 205(a).

HHC alternatively contends that CPLR 205(a) should not apply because the prior action was dismissed for failure to prosecute. HHC argues that the re-scheduling of the 50-h hearing on at least eleven occasions should be considered a dismissal for lack of prosecution. Plaintiff contends that HHC's argument for dismissal for failure to prosecute has no merit, noting that HHC never moved to dismiss the prior action for failure to prosecute and that they never argued a failure to prosecute in support of that motion (Gammons Aff., ¶20). Further, plaintiff asserts that the adjournments of the 50-h hearings sought by plaintiff were granted with HHC's express consent (*id.*).

The Court of Appeals addressed this exception to CPLR 205(a) in *Andrea v Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C.*, 5 NY3d 514 (2005). The Court concluded that the exception for failure to prosecute can be applied not only where the dismissal of the prior action is specifically for lack of prosecution pursuant to CPLR 3216, but also where failure to prosecute is in fact the basis for the decision. In *Andrea*, the Court of Appeals upheld an order of Appellate Division dismissing the claim for repeated disregard for the trial court's discovery orders. The trial court had noted in its order on the issue that the plaintiff's counsel "demonstrated such a disregard for the

case management order and scheduling order that one would not believe such orders existed" (5 NY3d at 518). The Court of Appeals found that the record created by the trial court judge made clear that the basis for the Appellate Division's dismissal was lack of prosecution (*id.* at 521). The Court of Appeals concluded that "[w]here a case is dismissed for reasons like this, it is not acceptable to permit plaintiffs to start all over again, . . . To countenance that result would be to convert the dismissal itself into just one more opportunity to try again . . . The plain purpose of excluding actions dismissed for neglect to prosecute from those that can be, in substance, revived by a new filing under CPLR 205(a) was to assure that a dismissal for neglect to prosecute would be a serious sanction, not just a bump in the road" (5 NY3d at 521).

The December 2012 Order dismissing the 2009 Action does not specifically address the issue of lack of prosecution. It is addressed to HHC's motion to dismiss for failure to comply with GML §50-h. To constitute dismiss for failure to prosecute under CPLR 205(a), a judge must "set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation."

In reciting the facts underlying the motion, the December 2012 Order sets forth the following: "The Comptroller served a demand for a 50-h hearing to take place on September 30, 2008. Plaintiff's attorney sought an adjournment until November 18, 2008. On November10, 2008, plaintiff's attorney again requested an adjournment because Ms. Lella died on November 8, 2008. A new date was scheduled for February 26, 2009, and, on February 24, 2009, plaintiff's new attorney sought another adjournment until March 30

2009. Upon further requests of plaintiff's counsel, the hearing was adjourned until April 30 2009; May 22, 2009; August 10, 2009; November 5, 2009; December 7, 2009; January 25, 2009; February 25, 2010; and April 23, 2010. In all, the hearing was adjourned at least 11 times." (December 2012 Order, 2). After the summons and complaint were filed in May 2009, the hearing was again postponed at plaintiff's request several times (*id.*). Plaintiff's counsel alleged that a letter was sent requesting a new hearing, but no response was received. HHC contends that it never received such letter, and plaintiff did not follow up to ensure that the letter was received. Based on this history, the court concluded that plaintiff's choice to treat defendant's failure to respond to the letter as waiver of the hearing is unsupported by the record and granted HHC's motion to dismiss.

It cannot be said that the 2009 Action was dismissed for lack of prosecution. While the 50-h hearing was rescheduled multiple times at plaintiff's request, there is no record that HHC failed to agree to such rescheduling or that plaintiff failed to continue to seek new hearing dates. Also, plaintiff's failures were not in violation of a court order (*see Andrea*, 5 NY3d at 521). As such, the court finds that the prior dismissal was not one for failure to prosecute as to preclude the application of CPLR 205(a).

Accordingly, HHC's cross-motion to dismiss the action because it was filed after the statute of limitations had run is denied, and plaintiff's motion to dismiss HHC's sixth affirmative defense is granted.

The tenth affirmative defense alleges that this action is barred by the principles of res judicata and collateral estoppel in that an action is pending on appeal with an index number of the earlier action which sought the same relief and was

dismissed with prejudice. HHC does not oppose the branch of plaintiff's motion seeking to dismiss this affirmative defense because they agree that the 2009 Action was not dismissed on the merits. Accordingly that branch of plaintiff's motion is granted.

The twelfth affirmative defense states that there is another pending action on appeal between the parties seeking the same relief (i.e., the 2009 Action). "The principle is well established...that an action is not terminated within the meaning [of CPLR 205(a)] until the determination of the appeal" (*Bernardez v City of New York*, 100 AD2d 798 [1st Dept 1984] [citations omitted]; and see *Andrea, supra*, 519 - 520). Since an appeal is still pending in the 2009 Action, HHC has shown a factual basis for the twelfth affirmative defense, and accordingly, plaintiff's motion is denied to the extent that it seeks to strike that affirmative defense.

It hereby is

ORDERED that plaintiff's motion is granted to the extent that the sixth and tenth affirmative defenses are stricken, and the motion otherwise is denied; and it further is

ORDERED that defendant's cross-motion to dismiss pursuant to CPLR 3211(a)(5) is denied; and it further is

ORDERED that counsel shall appear in Part MMESP-2, 360 Adams Street, Room 724, Brooklyn, NY for a preliminary conference on May 1, 2014 at 9:30 AM.

ENTER,

J. S. C.

HON. ANN T. PFAU