

Erkomaishvili v Volovoy
2014 NY Slip Op 31924(U)
May 1, 2014
Supreme Court, Kings County
Docket Number: 505057/2013
Judge: Laura Lee Jacobson
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At an IAS Term, Part 21 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Borough of Brooklyn, City and State of New York, on the 1st day of May 2014.

PRESENT:
HON. LAURA L. JACOBSON

Justice

IRMA ERKOMAISHVILI, as Administrator of the Estate of MERI ERKOMAISHVILI, and IRMA ERKOMAISHVILI, Individually,

Plaintiffs,

-against-

Cal. No.:3

Index No.:505057/2013

VITALY VOLOVOY, M.D., STEVE B. LOSIK, M.D., MULTI CARE MEDICAL NY PLLC, PULMONARY SOLUTION, P.C., and OCEAN RADIOLOGY, P.C.,

Defendants.

The following papers numbered 1 to 4 read on this motion

Papers Numbered

Notice of Motion - Order to Show Cause-Cross-Motion and Affidavits (Affirmations) Annexed _____
Answering Affidavit (Affirmation) _____
Reply Affidavit (Affirmation) _____
_____ Affidavit (Affirmation) _____
Pleadings-Exhibits _____
Stipulations - Minutes _____
Filed Papers _____

1-2 _____
3 _____
4 _____

Plaintiffs move for an order: (1) pursuant to CPLR §3406(a) and §2004, extending

plaintiffs' time for filing a Notice of Medical Malpractice and deeming the annexed Notice of Medical Malpractice as filed against said answering defendants nunc pro tunc and entered herein; (2) pursuant to CPLR §3215 directing that defendants Multi Care Medical NY PLLC, Pulmonary Solution, P.C., and Ocean Radiology, P.C. are in default and that this matter against said defendants be set down for an assessment of damages; (3) pursuant to CPLR §3025(b) granting leave to plaintiff to serve the proposed amended summons and complaint as presented herein to reflect the addition of Advantage Radiology, P.C. as a named defendant; and setting the case down for a preliminary conference at the court's earliest convenience. In this action sounding in medical malpractice, plaintiffs allege that the plaintiff decedent suffered grave injuries and wrongful death due to the negligent medical care rendered by defendants to the plaintiff decedent.

On or about August 27, 2013, this action was commenced by the filing of a summons and complaint and certificate of merit. A supplemental summons and amended complaint were filed on October 15, 2013. On or about October 29, 2013 and October 31, 2013, issue was joined by the service of an answer by defendant Steve B. Losik, M.D. and defendant Vitaly Volovoy, M.D., respectively. According to plaintiff, defendants Multi Care Medical NY PLLC, Pulmonary Solution, P.C., and Ocean Radiology, P.C. have failed to answer or appear.

Plaintiffs argue that in this instance, defendants will not be prejudiced by extending the time for filing a notice of medical malpractice since they have knowledge of the essential facts constituting the cause of action. Plaintiffs further assert that discovery has been expedited as updated authorizations for plaintiffs' respective medical providers have been sent to the answering defendants. Additionally, Plaintiffs contend that since the defaulting defendants who were properly served still have not answered, plaintiffs are entitled to an order granting a default judgment against said defendants, setting this matter down for an assessment of damages. Finally, citing a lack of prejudice to the existing defendants, plaintiffs argue that an order should be issued permitting plaintiffs to amend the complaint to reflect the addition of Advantage Radiology, P.C. as a named defendant.

In opposition to the motion, defendant Steve B. Losik alleges that plaintiffs are not entitled to an order extending the time to file a notice of medical malpractice because plaintiffs have failed to provide a reason for the delay in filing the notice. Defendant Losik argues that if the court grants plaintiffs' application, plaintiff should be required to serve the parties within a set number of days after the Court's order adjudicating the motion and the notice should not be deemed served nunc pro tunc. Defendant Losik further asserts that he takes no position on plaintiffs' application for a default judgment as to defendants Multi Care Medical, PLLC and Pulmonary Solutions, P.C. However, defendant Losik claims that Ocean Radiology is not the proper radiology facility which

provided medical treatment to the plaintiff decedent. Defendant Losik contends that Ocean Radiology, P.C. is a dissolved corporation with a former principal place of business located at 2350 Ocean Parkway in Brooklyn, New York. Defendant Losik claims that he has never been affiliated with this corporation which was dissolved before defendant Losik graduated from medical school in 2001. According to defendant Losik, he is the sole shareholder and CEO of a radiology corporation known as Advantage Radiology, P. C. doing business as a radiology practice known as Ocean Radiology, located at 3409 Ocean Parkway in Brooklyn, New York. Defendant Losik claims that this is the location where the plaintiff decedent was treated. Defendant Losik alleges that he has no affiliation with the defaulting defendant Ocean Radiology, P.C. and there are no medical records to suggest that the plaintiff decedent was a patient of Ocean Radiology, P.C. since that corporation was dissolved in December 2000, prior to the plaintiff decedent's arrival in the United States. Defendant Losik argues that to the extent that the court is considering entering a default judgment against Ocean Radiology, P. C. based on the belief that it is in some way involved in this litigation as defendant Losik's corporation, this part of plaintiff's motion should be denied. Finally, defendant Losik objects to the plaintiffs amending the complaint to add Advantage Radiology, P.C. as a defendant on the grounds that defendant Losik is the sole shareholder of this P. C., and the P. C. does not have a separate policy of malpractice insurance.

In reply¹, plaintiffs allege that they clearly indicated in their papers that they were not only moving to extend the time to file the notice of medical malpractice, but they were also moving for additional relief including default judgments against defendants Pulmonary Solutions, P.C. and Ocean Radiology, P.C. Plaintiffs claim that they were not able to file a notice of medical malpractice within sixty (60) days of receipt of the answers interposed by the responding defendants, due to the fact that answers had not been interposed by the defaulting defendants and plaintiffs were allowing additional time for defendants Pulmonary Solutions, P.C. and Ocean Radiology, P. C. to answer before filing and requesting the drastic relief of a default judgment. Plaintiffs further assert that they have e-filed the notice of medical malpractice, which is viewable, obtainable and printable by all parties in this action, and they have also provided copies of the notice to all parties via regular mail. Consequently, plaintiffs argue that they have fulfilled their duty of serving defendants with the notice of medical malpractice and the notice should be deemed served nunc pro tunc. Plaintiffs argue that they should be granted a default judgment against defendant Ocean Radiology, P.C. Plaintiffs allege that they sued the

¹Plaintiffs submitted an amended reply affirmation which contained additional arguments in favor of granting the motion. However, the Court will not accept the supplemental papers.

defendants based on information found in the medical records. Plaintiffs contend that the medical records indicated that defendant Losik treated the plaintiff decedent on May 29, 2013 and May 31, 2013 at Ocean Radiology located at 3049 Ocean Parkway in Brooklyn, New York 11235. Plaintiffs' counsel claims that in an effort to ensure that all appropriate parties were named in the lawsuit, plaintiffs served any and all radiology practices named Ocean Radiology inclusive of one located at 2350 Ocean Parkway, Brooklyn, New York 11229 and 3049 Ocean Parkway, Brooklyn, New York 11235. Plaintiffs contend that if necessary they will file a motion to amend the caption to reflect the appropriate Ocean Radiology without P.C. in the practice name. Additionally, plaintiff argues that they should be permitted to amend the complaint to reflect the addition of Advantage, P.C. as a named defendant. Plaintiff contends that since defendant Losik is the sole shareholder of Advantage Radiology, P.C., that fact creates a relationship between the two that makes each liable for the acts and omissions of the other.

On a motion to extend the time to file a Notice of Medical Malpractice made pursuant to CPLR § 3406(a), the plaintiff need not demonstrate a meritorious claim or a reasonable excuse for the delay in order for the motion to be granted (*Russo v. Pennings*, 46 AD3d 795, 797 [2nd Dept. 2007]). Here, despite plaintiffs less than adequate excuse for the delay, in this instance where there has been no showing of prejudice to defendants, and since defendants had notice of the allegations, plaintiff is entitled to an extension of time to file the Notice (see *Tewari v. Tsoutsouras*, 75 NY2d 1 [1989]). Moreover, defendant Losik has not offered a sufficient reason for the court to deny plaintiffs' application to deem the Notice of Medical Malpractice served nunc pro tunc. Additionally, defendant Losik does not have standing to argue for the defaulting defendant Ocean Radiology, P.C. In this instance, where plaintiff has made a prima facie showing that the application is timely and that the defaulting defendants were served with the pleadings but failed to respond or appear, plaintiff is entitled to a default judgment against the subject defendants. Finally, leave to amend pleadings lies within the broad discretion of the trial court and it should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (see *Gitlin v. Chirinkin*, 60 AD3d 901 [2nd Dept. 2009]). Here, there is no evidence of prejudice or surprise and defendant Losik has failed to offer a sufficient reason for this court to deny plaintiff's application to amend the complaint.

Accordingly, plaintiffs' motion is granted as follows: the time to file the Notice of Medical Malpractice is extended and the Notice of Medical Malpractice annexed to the motion papers is deemed as filed against the answering defendants nunc pro tunc; and it is further ORDERED that plaintiffs are granted default judgments against defendants Multi Care Medical NY PLLC, Pulmonary Solution, P.C., and Ocean Radiology, P.C. with an assessment of damages to be held at the time of the trial of this action at the discretion of

the Trial Judge; and it is further ORDERED that plaintiffs are granted leave to amend the complaint to reflect the addition of Advantage Radiology, P.C. as a named defendant; and it is further ORDERED that the caption of this action shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X Index No.: 505057/2013
IRMA ERKOMAISHVILI, as Administrator of the Estate of
MERI ERKOMAISHVILI, and IRMA ERKOMAISHVILI,
Individually,

Plaintiffs,

-against-

VITALY VOLOVOY, M.D., STEVEN B. LOSIK, M.D.,
MULTI CARE MEDICAL NY PLLC, PULMONARY
SOLUTION, P.C., OCEAN RADIOLOGY, P.C. and
ADVANTAGE RADIOLOGY, P.C.,

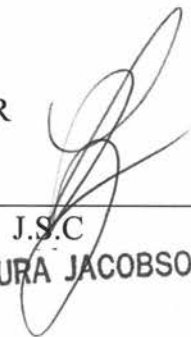
Defendants.

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and it is further ORDERED that the parties are directed to appear for a preliminary conference on June 30, 2014 at 9:30am in the Preliminary Conference Part at 360 Adams Street, Room 282 in Brooklyn, New York. That date will provide the plaintiff with sufficient time to serve an amended summons and complaint on the newly named defendant who must then timely respond.

This constitutes the decision and order of the court.

ENTER



J.S.C
HON. LAURA JACOBSON

FILED
KINGS COUNTY CLERK
2014 JUL 18 AM 9:53

