

Guzman v Friedwald Center for Rehabilitation & Nursing, LLC

2014 NY Slip Op 33793(U)

December 23, 2014

Supreme Court, Rockland County

Docket Number: 2549/2011

Judge: Margaret Garvey

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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YESENIA GUZMAN, as Administratrix of the Estate of
EDWIN DAVID GUZMAN, SR., Deceased,

Plaintiff,

-against-

FRIEDWALD CENTER FOR REHABILITATION AND
NURSING, LLC,

Defendant.

-----X
YESENIA GUZMAN, as Administratrix of the Estate of
EDWIN DAVID GUZMAN, SR., Deceased,

Plaintiff,

-against-

FRIEDWALD CENTER FOR REHABILITATION AND
NURSING, LLC,

Defendant.

-----X
Margaret Garvey, J.S.C.

DECISION AND ORDER

Index No. 2549/2011

Index No. 033317/2014

The Court has before it a Notice of Motion filed by Plaintiff under both of the above-captioned index numbers seeking consolidation of the two separate matters, as well as a Notice of Cross-Motion filed by Defendant seeking dismissal of Index No. 033317/2014. In light of the issues raised by the pending motions, and for ease of reference, the Court will refer to Index No. 2549/11 as "Action #1," and will refer to Index No. 033317/2014 as "Action #2."

The following papers, numbered 1 to 4, were considered in connection with Plaintiff's Notice of Motion for an Order (1) consolidating Action #1 and Action #2 under Index No. 033317/2014 and an Order amending the caption accordingly, or (2) in the alternative, joining Action #1 and Action #2 for a joint trial, (3) upon consolidation or joining, setting the consolidated or joined matter(s) down for a Preliminary Conference, and (4) for such other and

further relief as this court deems just and proper; and were also considered in connection with Defendant's Notice of Cross-Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3211(a)(5), dismissing Action #2 in its entirety and with prejudice as it is barred by the Statute of Limitations, and for such other relief as this Courts deems just and proper:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION OF JAMES G. KAPRALOS, ESQ. DATED SEPTEMBER 19, 2014/EXHIBITS (A-H)	1
NOTICE OF CROSS-MOTION/AFFIRMATION OF GRACE CARRERAS MCCALLEN, ESQ. DATED OCTOBER 9, 2014 IN SUPPORT OF CROSS-MOTION/EXHIBITS (A-B)	2
AFFIRMATION OF MICHAEL B. ZARANSKY, ESQ. DATED NOVEMBER 3, 2014 IN OPPOSITION TO DEFENDANT'S CROSS-MOTION AND IN FURTHER SUPPORT OF PLAINTIFF'S MOTION	3
REPLY AFFIRMATION OF GRACE CARRERAS MCCALLEN, ESQ. DATED NOVEMBER 10, 2014/EXHIBITS (A-B)	4

Upon the foregoing papers, the Court now rules as follows:

Action #1 was commenced by Plaintiff on March 24, 2011 with the filing of a Summons and Verified Complaint, and alleges injuries suffered by decedent EDWIN DAVID GUZMAN, SR. as a result of nursing home negligence and abuse by Defendant FRIEDWALD CENTER FOR REHABILITATION AND NURSING, LLC (hereinafter "FRIEDWALD") during decedent EDWIN DAVID GUZMAN, SR.'s stay at FRIEDWALD on the following dates: June 5, 2008 through June 30, 2008; and July 10, 2008 through July 29, 2008. Issue was joined with the service of an Answer dated June 10, 2011 by Defendant FRIEDWALD. Action #1 progressed through the discovery phase, and a Note of Issue was filed by Plaintiff on or about September 17, 2012, certifying the completion of discovery and readiness for trial. Action #1 was then placed on the trial calendar on May 20, 2013 for commencement of trial.

Decedent EDWIN DAVID GUZMAN, SR. died on September 9, 2012.

Letters of Administration were issued by Surrogate's Court to decedent's daughter, YESENIA GUZMAN, on or about October 29, 2013.

Action #2 was commenced by Plaintiff on or about July 17, 2014 with the filing of a Summons and Verified Complaint. Action #2 repeats the allegations of negligence contained in Action #1, but adds a claim for wrongful death, based on the September 9, 2012 death of EDWIN DAVID GUZMAN, SR.. The dates of the alleged treatment in Action #2 remain June 5, 2008 through June 30, 2008, and July 20, 2008 through July 29, 2008.

Plaintiff now moves to consolidate Action #1 and Action #2, alleging that the two matters have the same parties, the same attorneys, and the same claims, therefore, judicial economy and convenience of the parties/attorneys would be best served with an Order consolidating the matters. Plaintiff further notes that discovery in Action #1 is complete, and the only discovery needed for Action #2 would be a Bill of Particulars and Note of Issue. Plaintiff's motion was filed with the Court on September 25, 2014.

The motion to consolidate filed by Plaintiff is Motion Sequence # 1 on Index No. 033317/2014, and Motion Sequence # 2 on Index No. 2549/11.

Defendant FRIEDWALD filed the cross-motion, opposing the motion to consolidate the actions or join them for trial, and affirmatively moving to dismiss Action #2 on the grounds that the underlying negligence claims and wrongful death claims are barred by the Statute of Limitations. Defendant notes that decedent EDWIN DAVID GUZMAN, SR. was discharged from Defendant's facility on July 29, 2008, and thereafter admitted to Northern Manor Multicare

Center, a long term nursing home residence, where he stayed from August of 2008 until his death.

Defendant notes that the underlying negligence claims contained in Action #2 are barred by a three-year Statute of Limitations, and as a result, the wrongful death cause of action falls as well. Defendant's counsel argues that the instant motion to consolidate is an effort by Plaintiff's counsel to avoid an amendment of the complaint in Action #1, which would require an affidavit of merit regarding the causal relationship between the allegations of negligence, and the death of EDWIN DAVID GUZMAN, SR., which occurred more than four years later. Defendant's counsel argues that the consolidation motion is an attempt to tack on a cause of action for wrongful death after the Statute of Limitations for the alleged negligence has expired. Defendant's counsel further argues that Plaintiff's counsel does not address how the death was occasioned by the purported acts of negligence by the Defendant FRIEDWALD.

Defendant's cross-motion to dismiss is Motion Sequence # 2 on Index No. 033317/2014.

Pursuant to Estates, Powers and Trusts Law § 5-4.1, a wrongful death action must be commenced by the personal representative of the decedent within two years of the decedent's death. [EPTL § 5-4.1; see also, Lanni v. Sekar, 249 A.D.2d 515 (2d Dept. 1998)]. "However, if the Statute of Limitations has expired on the underlying cause of action to recover damages for personal injuries or medical malpractice, the wrongful death cause of action is also time-barred." [Lanni v. Sekar, 249 A.D.2d 515, 515-16 (2d Dept. 1998); see also, Phelps v. Greco, 177 A.D.2d 559, 560 (2d Dept. 1991) ("... the cause of action to recover damages for medical malpractice accrued in August 1984... [S]ince that cause of action was no longer viable when the plaintiff's decedent died in October 1987 the wrongful death cause of action was time

barred as well...").

It is not disputed that the underlying negligence claims alleged in Action #2 were time-barred when Action #2 was filed, in that they allege conduct occurring on or before July 29, 2008. Consequently, the wrongful death cause of action in Action #2 cannot survive Defendant's dismissal motion. Plaintiff's argument that the wrongful death cause of action in Action #2 is not time-barred because the negligence claims in Action #1 were timely is without merit.

It would seem that the appropriate action by Plaintiff's counsel would have been to move to amend the Complaint in Action #1 to include the wrongful death cause of action immediately upon the death of the decedent and the issuance of letters to YESENIA GUZMAN. Had such an application been successfully made, then the wrongful death cause of action would have been timely because it would have been brought within two years of the decedent's death, and the underlying negligence claims were timely.

Additionally, Defendant's counsel correctly noted in the cross-motion to dismiss that an application to amend would have required a showing that the proposed amendment had merit, i.e. some causal connection between the alleged negligence and the death. Despite this issue being raised by Defendant's counsel, it was not addressed in Plaintiff's opposition to the cross-motion. Additionally, Defendant's counsel provided a portion of the records from Northern Manor Multicare Center that show that the sacral ulcer (the injury claimed by Plaintiff) allegedly caused by Defendant's negligence was fully healed by May 28, 2009, more than three years before decedent's death. Additionally, the Certificate of Death attached by Plaintiff to the motion to consolidate lists the cause of death as "cardiorespiratory arrest acute myocardial infarct".

Therefore, Defendant's motion to dismiss Action #2 is granted and that action is dismissed with prejudice. In light of said dismissal, there is nothing to consolidate or join. Therefore, Plaintiff's motion is denied as moot.

Accordingly, it is hereby

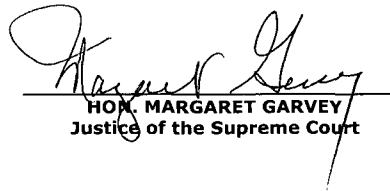
ORDERED that Plaintiff's motion to consolidate the two actions is denied; and it is further

ORDERED that Defendant's motion to dismiss Action # 2 under Index No. 033317/2014 is granted and that action is dismissed with prejudice; and it is further

ORDERED that this matter is scheduled for a conference before the undersigned on **THURSDAY, JANUARY 15, 2015 at 9:15 a.m.** and the Court will schedule the trial date at said conference.

The foregoing constitutes the Decision and Order of this Court on Motion # 1 under Index No. 033317/2014, Motion # 2 under Index No. 033317/2014 and Motion # 2 under Index No. 2549/11.

Dated: New City, New York
December 23, 2014



HON. MARGARET GARVEY
Justice of the Supreme Court

To:
PARKER WAICHMAN LLP
Attorneys for Plaintiff
(e-filed)

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Attorneys for Defendant
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