

Lee v Osorio
2015 NY Slip Op 32103(U)
July 2, 2015
Supreme Court, New York County
Docket Number: 116651/04
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

ALICE SCHLESINGER

PRESENT: SCHLESINGER
Justice

IA PART 16
PART 16

LEE, CHI YOUNG

INDEX NO. 116651/04

-v-
SUBRAMA H. OSOANIO, M.D.,
R?AC.

MOTION DATE _____

MOTION SEQ. NO. 04

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 denied in accordance with the accompanying memorandum decision.

FILED
JUL 07 2015
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
JUL 6 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

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

JUL 02 2015

Dated: _____

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

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

-----X
CHI YOUNG LEE, as Father and Natural Guardian of
MERRICK LEE, an infant under fourteen (14) years, and
CHI YOUNG LEE, Individually,

Plaintiffs,

-against-

Index No. 116651/04
Motion Seq No. 004

SNEZANA M. OSORIO, M.D., MICHELLE MEZA, M.D.,
ANDRIA CHIZNER, M.D., HENRY M. USHAY, M.D.,
NILI ISRAELI, M.D., DOMINIC HOLLMAN, M.D.,
CHANT TRAUBE, M.D., BARBARA BINKERT, M.D.,
SUMEET VERMA, M.D., ERIN MAUREEN THELANDER,
M.D., MARIA NOVOA, R.N., DEBBIE C. CERNA-GEORGE,
R.N., INJA NOH, R.N., "JOHN DOE," R.N. (First and last
names fictitious), NEW YORK PRESBYTERIAN HOSPITAL
WEILL CORNELL CAMPUS, and WEST END PEDIATRICS,

Defendants.

FILED
JUL 07 2015
NEW YORK
COUNTY CLERK'S OFFICE

SCHLESINGER, J.:

This case stems from the tragic life and untimely death of Merrick Lee, an infant who spent virtually all of his eight short years of life hospitalized at New York Presbyterian Hospital Weill Cornell (NYPH). While not directly addressing those extremely sad circumstances or the medical malpractice claims that gave rise to this action, this motion itself presents a startling set of facts and a shocking request for relief by the Department of Social Services of the City of New York (DSS); that is, DSS has moved to vacate and/or modify this Court's July 1, 2010 Order Approving Final Accounting and Discharging Trustees following the death of Merrick Lee so that DSS can recover from the Co-Trustees the \$4.8 million that it mistakenly (or in this Court's opinion, negligently) paid to defendant NYPH to reimburse the hospital for the cost of medical services rendered to the infant while he was a Medicaid recipient. The motion is opposed by NYPH and by the Co-Trustees Chi Young Lee and BNYMellon, N.A.

Background Facts

Merrick Lee was born on June 26, 2002 and hospitalized at NYPH on or about November 8, 2003. He allegedly suffered injuries later in November 2003 due to the claimed negligence of some or all of the defendants named herein. This medical malpractice suit was commenced in 2004 and assigned to Justice Sheila Abdus-Salaam at that time.

By Settlement Agreement dated April 28, 2008, NYPH agreed to settle the matter for six million dollars, and the action was discontinued against the remaining defendants (see Kandel Affirm in Opp to Motion, Exh A). An Infant Compromise Order was signed on June 26, 2008 and amended on December 15, 2008 (ICO), and a Supplemental Needs Irrevocable Trust (SNT) was established naming the infant's father Chi Young Lee and The Bank of New York (BNY) as Co-Trustees (Exhs B and C). As relevant here, the ICO required NYPH to pay the full amount of the settlement, and NYPH waived "any and all hospital liens and indemnification against any and all Medicaid liens from the date of subject hospitalization to discharge." Further, the Settlement Agreement provided (at ¶ 4) that: "NYPH agrees and stipulates that, if and when Medicaid asserts a lien or claim for return of any monies paid by Medicaid for care and treatment rendered to Merrick Lee during his hospitalization that commenced on or about November 8, 2003, NYPH will assume full responsibility for any monies which are ultimately found to be due to Medicaid in connection with the aforementioned hospitalization."

The infant remained hospitalized until his death on March 20, 2010. Upon application to the Surrogate's Court, Letters of Administration were issued to Lee and BNY appointing them Co-Administrators of the infant's Estate (Exh D and E). In May 2010, the

Co-Trustees filed by Order to Show Cause a Verified Petition for Settlement of Final Accounting and Discharge of Trustees (Exh F). The OSC expressly stated on the cover page that a final accounting was being sought and that the infant had died on March 20, 2010. In accordance with the directions in the OSC, counsel for the Co-Trustees served the moving papers on the Human Resources Administration of the City of New York (HRA)¹ based on Medicaid services provided in the City and on the Nassau County Department of Social Services based on the family's residence there (Exh G). Both agencies were listed in the petition as "possible creditors."

The case was at that point reassigned to this Court. Counsel for DSS acknowledges in its papers here that the agency was properly served with the OSC and that it submitted no papers in response (Dreyfuss Aff, ¶¶12, 13). It is further undisputed that, in response to a request by the Court to Jay Sangerman as counsel for the Co-Trustees, Mr. Sangerman sent an email to HRA forwarding the initial pages of the OSC, confirming the agency's failure to respond to the OSC and the Court's inquiry about the status, and further inquiring whether the agency was asserting a lien (Kandel Aff, Exh H). It appears that a number of HRA individuals reviewed the email and its attachments before HRA sent a letter dated June 16, 2010 from "Sherilyn James, Esq., IREA/Division of Liens and Recovery"² asserting a lien for \$7,133.00 (Exh J). HRA also forwarded to Mr. Sangerman a copy of Ms. James' letter and the Notice of Lien that it had sent to defense counsel asserting a lien in the amount of \$7,133.00 (Exh K).

¹ The movant here, DSS, is a Department within the NYC Human Resources Administration. The two are interchangeable here.

² IREA stands for Investigation, Revenue and Enforcement Administrator, as indicated on Ms. James' letterhead.

The Co-Trustees and their counsel appeared before this Court when the OSC was returnable in June 2010, but no one appeared from the agency to offer any additional or different information. Thus, the Court issued a Final Trust Accounting Order on July 1, 2010, which counsel for the Co-Trustees served on HRA with Notice of Entry dated July 21, 2010 (Exh L). The Order referenced the HRA lien in the amount of \$7,133.00, describing it as “an accurate and up to date lien” based on the HRA’s June 16, 2010 letter, and providing for payment of that amount in full. The Order also provided that the balance of the funds in the SNT, totaling in excess of \$2,500,000.00, was to be delivered to the Co-Administrators of the Estate. On or about November 19, 2013, BNY filed a Verified Affidavit of Full Distribution from the Trust, which confirmed the \$7,133.00 payment to HRA and distributions to other parties not relevant here (Exh M).

In the meantime, by letter dated January 28, 2013 from HRA to the Co-Trustees, the agency claimed that it was entitled to be reimbursed in the amount of \$5,175,886.02 for Medicaid payments made to NYPH for services rendered to the infant for the period from June 26, 2002 through the infant’s death on March 20, 2010 (Exh O). HRA indicated in the letter that, based on a claim made by NYPH in November 2010 and subsequently revised in 2011 and 2012, HRA had paid to NYPH \$4,886,870.01 (Exh O). HRA further stated that it was seeking reimbursement of those monies from NYPH, but that it would pursue the Trust if the monies were not paid. Additionally, HRA claimed that the Trust was obligated to reimburse the agency \$289,016.01 for Medicaid services for the period prior to the hospitalization.

HRA had made the payment to NYPH, even though it was on notice from the ICO that the Hospital had “waived its hospital lien and assumed full responsibility for any

monies that would be owed to Medicaid for the care and treatment rendered to Merrick Lee during his hospitalization which commenced on November 8, 2003.” The multi-million dollar payment was made even though the agency was on notice via the OSC that the infant had died and that the Final Accounting Order approved payment to the agency only in the \$7,133.00 amount that the agency had demanded when the matter was before the Court.

To pursue its claim for reimbursement, HRA commenced a second separate action against NYPH and the Co-Trustees by summons and complaint dated April 2, 2014, Index No. 450714/14 (Exh P), which was assigned to Justice Charles Ramos. By motion and cross-motion, the Co-Trustees each moved to dismiss, pointing to the Final Accounting Order and arguing that the agency was barred by *res judicata* from seeking reimbursement from the Trust or the infant’s Estate. During the October 16, 2014 argument before Justice Ramos, counsel for HRA (the same counsel appearing before this Court) acknowledged that the agency had been properly served with the OSC seeking a final accounting, that the petition was not defective, and that the agency had simply failed to take steps to thoroughly investigate the matter and respond appropriately (Exh Q).

By order dated November 6, 2014, based on a decision on the record on October 16, 2014, Justice Ramos granted the motion and cross-motion and dismissed the action against both of the Co-Trustees (Exh R and Q). Justice Ramos found that the Final Accounting Order discharged both Co-Trustees and that the Order remained in full force and effect until and unless it was vacated (Exh R). As NYPH had not moved or answered, and no discovery had been conducted, Justice Ramos severed the claims against NYPH and allowed them to continue.

The agency then filed the instant OSC before this Court seeking to vacate and/or modify the Final Accounting Order so that it could assert in this forum its claim against the Co-Trustees for Medicaid reimbursement, including the millions mistakenly paid to NYPH. Additionally, the agency moved before Justice Ramos to reargue the November 6, 2014 order.

Both the Co-Trustees and NYPH opposed HRA's motion to vacate the Final Accounting Order, relying largely on the fact that HRA had been given notice and an opportunity to be heard before the Order was issued. This Court then held extensive oral argument on the record on January 14, 2015, when the above set of facts was essentially confirmed by the parties. While indicating an inclination to deny the motion, this Court determined to await a decision by Justice Ramos on the reargument motion.

By decision and order dated March 27, 2015, Justice Ramos denied reargument. After reviewing the various causes of action asserted by DSS, the Court held as follows:

While DSS is correct that these issues were not addressed in the [motion for a Final Accounting Order], it fails to acknowledge that it was DSS that failed to raise these issues and that the effect of *res judicata* "applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*In re Hunter*, 4 NY3d 260, 269 [2005]). In addition "[t]hese principles apply with equal force to judicially settled accounting decrees" (*id.*).

Justice Ramos then concluded that the Court had correctly determined in the first instance that the claims by DSS against the Co-Trustees were barred by the Final Accounting Order and that DSS had failed to establish any basis for reargument of the original decision. Lastly, Justice Ramos held the remaining portions of the action in abeyance pending a determination of the motion pending before this Court to vacate the Final Accounting Order.

Discussion

In its motion to vacate the Final Accounting Order, DSS relies primarily on CPLR § 5015(a), subd. 2 and 3. Those provisions state in relevant part that:

The court which rendered a judgment or order may relieve a party from it upon such terms as may be just ... upon the ground of ...

2. newly-discovered evidence which, if introduced at the [time of decision], would probably have produced a different result and which could not have been discovered in time to move for [relief]; or

3. fraud, misrepresentation, or other misconduct of an adverse party.

Citing cases such as *Woodson v Mendon Leasing Corp*, 100 NY2d 62 (2003), DSS also argues that the Order should be vacated “in the interests of substantial justice.” (Dreyfuss Aff in Support, ¶ 18).

This Court finds that DSS has wholly failed to establish any of those grounds.³ As all the opponents point out, and as the record makes crystal clear, DSS had before it in 2010 all the evidence it needed to act, yet it simply failed to proceed in a diligent manner to investigate the issues and take steps to pursue or preserve any rights its had. As DSS counsel readily acknowledges in his moving papers, and as he unequivocally confirmed on the record in open court before Justice Ramos, DSS was served with the OSC seeking a final accounting in May 2010. DSS further acknowledges that it also received a fax from Jay Sangerman, then counsel for the Co-Trustees, forwarding another copy of the initial

³ The Court also agrees with BNY that this motion is untimely, as DSS unreasonably delayed more than four years after this issue was brought to its attention before taking action. *See Mark v Lenfest*, 80 AD3d 426 (1st Dep’t 2011)(denying motion to vacate order under CPLR 5015 based on movant’s “unreasonable” four-year delay in moving). However, the Court prefers to rule on the merits.

pages of the OSC and inquiring, at the behest of the Court, whether DSS intended to take a position even though it had failed to submit any papers by the deadline set. The OSC indicated its purpose in capital letters on the very first page via its title: "ORDER TO SHOW CAUSE FOR SETTLEMENT OF FINAL ACCOUNTING AND DISCHARGE OF TRUSTEES." The text of the OSC also indicated on the cover page that "MERRICK LEE died on the 20th day of March, 2010." (BNY Opp, Exh F).

Thus, the evidence was placed squarely before DSS in June 2010. As DSS counsel conceded during the argument before Justice Ramos, the reason DSS failed to act was because "no one had understood the import of the petition." (BNY Aff, ¶152, quoting record attached as Exh Q). That lack of understanding rests solely on the doorstep of DSS. In no way can it be attributed to the Co-Trustees.

In fact, DSS concedes that at least four different people — including Sherilyn James, Esq. as counsel for the DSS IREA/Division of Liens and Recovery — reviewed the matter on behalf of the agency before DSS rendered its decision. That decision was to assert a lien solely in the amount of \$7,133.00, as discussed above. This decision was made with full awareness of the facts set forth in the OSC for a Final Accounting. The information was confirmed when DSS was served with the Final Accounting Order and Notice of Entry dated July 21, 2010. The information was reiterated when DSS received the check to satisfy the amount demanded, and when BNY filed a Verified Affidavit of Full Distribution from the Trust in 2013. In addition, at some point well before this motion was made BNY ceased sending to DSS any annual accountings. And while DSS does not seek relief here against NYPH, presumably because of its claim pending before Justice Ramos, DSS acknowledges that it first received a claim for reimbursement from NYPH in

November 2010, not long after the OSC was resolved, offering further evidence that a Medicaid claim might exist (Exh O).

To be entitled to relief pursuant to CPLR § 5015(a)(2), DSS must meet the “heavy burden of showing this evidence could not have been discovered earlier with due diligence.” *Matter of Alicia Monique S. (Oswald S.)*, 68 AD3d 525, 525-26 (1st Dep’t 2009), citing *H&Y Realty Co. V Baron*, 193 AD2d 429, 430 (1st Dep’t 1993); see also *Coastal Sheet Metal Corp v RJR Mech. Inc.*, 85 AD3d 420, 421 (1st Dep’t 2011)(evidence qualifies as “newly discovered” within the meaning of CPLR 5015(a)(2) only “if it was in existence at the time of the original order or judgment, but was undiscoverable with due diligence”).

DSS has failed to meet its burden. Quite the contrary, the evidence was available and all the facts were either directly presented or readily available back in 2010. To the extent the agency failed to comprehend the import of the OSC and the underlying facts, the failure was caused by its admitted lack of due diligence. Frankly, the claim that the agency and its counsel failed to comprehend a plainly written OSC is shocking. Accordingly, DSS is not entitled to relief under CPLR 5015(a)(2).

Nor is the agency entitled to relief pursuant to CPLR 5015(a)(3) based on “fraud, misrepresentation, or other misconduct of an adverse party.” The Court rejects the agency’s claim that the notice given by the Co-Trustees was improper because the papers were served by overnight courier as directed by the OSC rather than by certified mail in accordance with Article VIII(f) of the Trust Agreement. The Court similarly rejects the argument that notice should have been given to a Mr. Fouks at the DSS Division of Liens and Recovery.

Notice was given in accordance with the Order of this Court. What is more, it was received and reviewed by various persons at the agency and acted upon by counsel in the Division of Liens and Recovery, the very division where Mr. Fouks was assigned. The Co-Trustees had no duty to do more than they did to notify DSS that the infant had died and that the Co-Trustees sought to proceed with a final accounting and discharge.

Nor does the Court find any misrepresentation due to the use of the term "lien" rather than "claim." The Settlement Agreement and ICO quoted above covered both liens and claims. It was the responsibility of DSS upon its receipt of the OSC to investigate to determine whether any liens or claims existed. Again, the Co-Trustees were not obligated to do more than they did.

DSS appears to suggest that the Co-Trustees should have had reason to believe that the \$7,133.00 was erroneous. If such were the case and the error was so obvious, DSS itself should have noticed the mistake. Its failure to do so was caused by its own negligence. As no fraud, misrepresentation or misconduct by the Co-Trustees has been shown, no basis for relief pursuant to CPLR 5015(a)(3) has been established.

Nor do the interests of justice compel the granting of this motion. The life and death of Merrick Lee was tragic. The Co-Trustees did all they were required to do under the controlling documents and the law to wind up the affairs of the Trust upon the infant's death and disburse the trust corpus. While it may well be that NYPH should take steps to return to DSS some of the funds it received in apparent conflict with the settlement papers, that matter is not before this Court. The only relief requested here is an order "vacating and/or modifying the Order Approving Final Accounting and Discharging Trustees [and] directing the Trustees of the Merrick Lee Supplemental Needs Irrevocable Trust to

reimburse the Department from the trust corpus for the value of Medicaid benefits provided to Merrick Lee." As demonstrated above, no basis for that relief against the Co-Trustees has been established.

Accordingly, it is hereby

ORDERED that the motion by the Department of Social Services of the City of New York is denied in its entirety.

Dated: July 2, 2015

JUL 02 2015



J.S.C.
ALICE SCHLESINGER

FILED
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