

Mortman v Burbige
2015 NY Slip Op 32121(U)
August 18, 2015
Supreme Court, New York County
Docket Number: 800013/12
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. MARTIN SHULMAN, J S C

PRESENT: _____
Justice

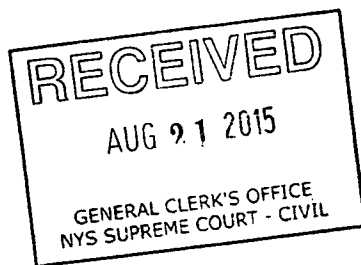
PART 1

Index Number : 800013/2012
MORTMAN, MARA
vs.
BURBIGE, CHRISTINE E.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 800013/12
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion ~~to~~ for summary judgment
Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits A-J No(s) 1
Answering Affidavits — Exhibits A-B No(s) 2
Replying Affidavits _____ No(s) 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the attached decision and
order.



FILED
AUG 21 2015
COUNTY CLERK'S OFFICE
NEW YORK

Dated: Aug. 18, 2015

[Signature], J.S.C.
HON. MARTIN SHULMAN, J S C

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
MARA MORTMAN, as Mother and Natural
Guardian of ZACHARY MORTMAN, an infant
under the age of 18 years,

Index No. 800013/12

Plaintiff,

- against -

CHRISTINE E. BURBIGE, as Executrix of
the Estate of KEVIN A. BURBIGE,
KEVIN A. BURBIGE, M.D., P.C., NEW YORK-
PRESBYTERIAN HOSPITAL/COLUMBIA UNIVERSITY
MEDICAL CENTER, and BABIES & CHILDREN'S
HOSPITAL OF NEW YORK,

Defendants.
-----X

FILED

AUG 21 2015

COUNTY CLERK'S OFFICE
NEW YORK

HON. MARTIN SHULMAN, J.:

Defendants, Christine E. Burbige, as Executrix of the Estate of Kevin A. Burbige, Kevin A. Burbige, M.D., P.C., New York Presbyterian Hospital s/h/a New York-Presbyterian Hospital/Columbia University Medical Center ("New York Presbyterian"), and Babies & Children's Hospital of New York ("Babies & Children's Hospital"), move pursuant to CPLR 3212 for an order dismissing the complaint in this medical malpractice action on the ground that it is barred by the statute of limitations.

BACKGROUND

The action arises from the treatment rendered by the late physician Kevin A. Burbige, M.D. ("Dr. Burbige") to the infant plaintiff, Zachary Mortman, beginning on April 22, 1999 at New York Presbyterian, and continuing to January 18, 2001 at Kevin A. Burbige, M.D., P.C. and Babies & Children's Hospital. Dr. Burbige died on June 6, 2010. The complaint essentially alleges that defendants were negligent in failing to

properly and timely diagnose and treat the infant plaintiff's hydronephrosis, resulting in further serious injury.

Plaintiff Mara Mortman, the mother and natural guardian of the infant plaintiff, commenced this action by filing the summons and complaint on January 13, 2012. Issue was joined with the service of defendants' answers on March 7, 2012. Defendants served demands for bills of particulars on May 11, 2012 and plaintiff served bills of particulars on or about June 1, 2012. Thereafter the parties engaged in discovery. Plaintiff filed the note of issue on January 12, 2015. Defendants now move to dismiss the complaint.

DISCUSSION

The record reveals that defendants did not make any pre-answer motion or raise the statute of limitations defense in their answer. They first raised this defense in the instant motion filed on March 11, 2015.

CPLR 3211(e) expressly provides that a defense based on the statute of limitations is waived unless raised in a pre-answer motion to dismiss or in a responsive pleading (CPLR 3211[e]; *see also Dougherty v City of Rye*, 63 NY2d 989, 991-992 [1984]). However, leave to amend pleadings is freely given absent prejudice or surprise directly resulting from the delay (*see CPLR 3025[b]*). Courts have retained discretion to grant leave to assert a statute of limitations defense in an amended answer, absent prejudice or surprise to the plaintiff (*see Seda v New York City Hous. Auth.*, 181 AD2d 469, 470 [1st Dept 1992]).

Defendants assert that they did not raise the statute of limitations defense in their answers because they did not know whether they had a valid basis for the defense. In particular, they state that they were not in possession of Dr. Burbige's

complete office records concerning his treatment of the infant plaintiff when they filed their answers. They also state that Dr. Burbige's office closed following his death and they encountered delays in obtaining copies of his records concerning the infant plaintiff.

Plaintiff claims prejudice and surprise from defendants' belated attempt to raise the statute of limitations defense. Specifically, plaintiff argues that she would have sought discovery relative to the defense, including a deposition of a person with knowledge of records or billing maintenance for Dr. Burbige's practice, or a witness from the hospital to explore the possibility of additional treatment beyond January 18, 2001. Plaintiff's argument is unavailing, however, as she testified at her April 24, 2014 deposition that the last time Dr. Burbige saw the infant plaintiff was on January 18, 2001 (see Mortman Deposition, Notice of Mot, Exh G, p. 32). Under these circumstances, plaintiff cannot claim prejudice or surprise. Failure to plead the defense in defendants' answer does not mandate denial of defendants' motion for summary judgment where, as here, the defense is the principal ground relied upon in support of the motion and plaintiff fully opposed it. *Rogoff v San Juan Racing Assn., Inc.*, 54 NY2d 883, 885 (1981); *Allen v Matthews*, 266 AD2d 782, 784 (3d Dept 1999); *Lance Intl., Inc. v First Natl. City Bank*, 86 AD3d 479, 479 (1st Dept 2011).

Here, defendants' motion must be granted as the action is barred by the statute of limitations. CPLR §208 extends the two years and six months statute of limitations applicable to a cause of action for medical malpractice (see CPLR §214-a) to a maximum of "ten years after the cause of action accrues" for actions involving infants (CPLR §208; see also *Jaffee v New York Hosp.*, 202 AD2d 276 [1st Dept], *lv dismissed* 83 NY2d 953 [1994]). As a general rule, a cause of action accrues when all of the facts

necessary to sustain the claim have occurred, so that a party can obtain relief in court (*Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 221 [1996]).

Contrary to plaintiff's assertion, the causes of action accrued on April 22, 1999, when the infant plaintiff was first treated by Dr. Burbige at New York Presbyterian. An action in medical malpractice accrues at the date of the original negligent act or omission (see *Matter of Daniel J. v New York City Health & Hosps. Corp.*, 77 NY2d 630, 634 [1991]). Subsequent continuous treatment does not change or extend the accrual date (*id.*). See also *Ramirez v St. Luke's Hosp. Ctr.*, 188 AD2d 419, 419 (1st Dept 1992); *Jaffee*, 202 AD2d at 277.

Therefore, plaintiff would have had until April 22, 2009 to commence a timely action. Plaintiff's argument that CPLR §210(b) extends the limitations period for an additional 18 months as a result of Dr. Burbige's death is unavailing, as Dr. Burbige died on June 6, 2010, over a year after the statute of limitations expired. See Siegel, NY Prac §55 at 80 (5th ed 2011) ("The death of a potential party after the statute of limitations expires has no effect on the claim - the claim is barred . . ."). The complaint on behalf of the infant plaintiff was filed on January 12, 2012 and the action is thus time-barred.

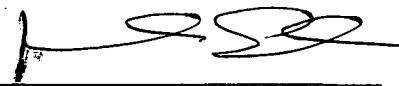
Accordingly, it is

ORDERED that the motion is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
August 18, 2015

FILED
AUG 21 2015
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NEW YORK


Martin Shulman, J.S.C.