

Cramer v Saratoga County Maplewood Manor

2016 NY Slip Op 32712(U)

July 21, 2016

Supreme Court, Saratoga County

Docket Number: 2013-3690

Judge: Robert J. Chauvin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

PAUL CRAMER, AS EXECUTOR OF THE ESTATE OF
IRENE CRAMER, Deceased,

Plaintiff,

-against-

SARATOGA COUNTY MAPLEWOOD MANOR AND
COUNTY OF SARATOGA, AS OWNER AND OPERATOR
OF SARATOGA COUNTY MAPLEWOOD MANOR,

Defendants.

ORIGINAL

DECISION AND ORDER

**Index No: 2013-3690
RJI No: 45-1-2014-0693**

Appearances:

For Plaintiff: Benjamin T. Decker, Esq.
Doolan Platt & Setareh, LLP
5428 State Route 23
Windham, NY 12496

For Defendants: Thomas K. Murphy, Esq.
Murphy, Burns, Barber & Murphy, LLP
226 Great Oaks Boulevard
Albany, NY 12203

Before: Hon. Robert J. Chauvin, J.S.C.

2016 JUL 21 PM 3:01
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

FILED

By notice of motion dated March 30, 2016 the defendants have moved for an order of summary judgment, both pursuant to CPLR §§ 3211 (a) (5), (7) and 3212, dismissing the plaintiff's complaint. In support of such motion defendants submitted the affidavit of Thomas K. Murphy, Esq. dated March 29, 2016 along with annexed exhibits "A" through "I" including copies of the underlying summons and complaint; answer; demand for a bill of particulars; verified bill of particulars; supplemental verified bill of particulars; an order to show cause; prior order of the court dated September 25, 2013, entered September 26, 2013; notice of entry; and certificate of death. In addition defendants submitted the affirmation of Leonard M. Gelman, M.D., C.M.D. dated March 29, 2016 with annexed exhibits "A" through "C" including copies of the affiant's resume and medical records. Defendants also submitted a memorandum of law dated March 30, 2016.

In opposition plaintiff submitted the affirmation of Benjamin T. Decker, Esq. dated May 13, 2016 along with annexed exhibits "A" through "D" including copies of a prior order of this

court dated September 25, 2013 and corresponding letter dated September 26, 2013; copies of certified mail receipts; a notice of 50-h hearing; and the affirmation Perry Starer, MD. Plaintiff also submitted a memorandum of law dated May 13, 2016.

Defendants submitted the reply affidavit of Thomas K. Murphy, Esq. dated May 19, 2016.

The motion was initially returnable April 22, 2016, but was later adjourned until May 20, 2016 and fully submitted upon receipt of the defendants' reply affidavit May 23, 2016.

The underlying action herein was commenced by the filing of a summons and verified complaint on November 19, 2013. Such complaint sets forth four causes of action all concerning the care and treatment of the decedent, Irene Cramer, at the Maplewood Manor nursing home in Ballston Spa, New York from on or about April 10, 2012 to June 23, 2012 (Pursuant to plaintiff's application to file a late notice of claim said decedent was a resident of Maplewood Manor from on or about January 6, 2012 until June 23, 2012). The first three causes of action allege and seek to recover for injuries sustained as a result of the negligent and otherwise improper care and treatment of the decedent while at the nursing home. The fourth cause of action is a wrongful death action. As set forth in the caption and alleged within the complaint, at all relevant times, the County of Saratoga was the owner and operator of said nursing home.

For purposes of the instant motion the court notes that the complaint alleges that while the decedent was a patient and/or resident at the defendant nursing home, she sustained a fall on or about April 10, 2012. Specifically, plaintiff alleges that on or about April 10, 2012 Ms. Cramer, through the negligence of the defendants, fell and sustained a fractured hip which later resulted in a pressure ulcer. Subsequent thereto Ms. Cramer left Maplewood Manor, June 23, 2012 and thereafter passed away on August 27, 2012.

Further, again, as pertinent to the underlying motion, the court notes that the plaintiff previously moved by order to show cause for an order permitting the filing of a late notice of claim. Although it is unclear as to when such order to show cause was served it was filed with the court on August 26, 2013, signed by the court August 28, 2013 and service was required to be completed by August 30, 2013. Thereafter such relief was granted by the order of this court dated September 25, 2013 and entered September 26, 2013. The plaintiff served a copy of said order, with notice of entry dated October 8, 2013 and entered October 10, 2013, upon the defendants. Such notice of entry appears to have been received by the defendants on or about

October 11 and 12, 2013. In addition, the court notes that although plaintiff has submitted a copy of a notice served by defendants pursuant to General Municipal Law § 50-h dated November 19, 2013, the plaintiff acknowledges that such was not served prior to the filing of the summons and complaint and, in fact, the complaint, paragraph 12, expressly sets forth that no examination pursuant to General Municipal Law § 50-h had been demanded by the defendants.

As otherwise relevant to the instant motion the defendants have submitted the affidavit of Leonard M. Gelman, M.C., C.M.D., a physician, board certified in family practice, geriatrics, and the decedent's former treating physician, who, based upon his treatment of said decedent and review of exhaustive medical records, has affirmed to a reasonable degree of medical certainty that the cause of her death was the result of the routine progression of pre-existing, chronic illnesses and not as a result of a hip fracture or pressure ulcer. Although plaintiff has submitted the prior affirmation of Perry Starer, M.D., in opposition, it is noted that, despite indicating that Ms. Cramer's fall may have been due to inadequate supervision, such affirmation in no manner sets forth any opinion as concerns her cause of death. In fact, the copy of the death certificate submitted is completely consistent with the opinion of Dr. Gelman.

Upon the present motion defendants argue that the first three causes of action set forth in plaintiff's complaint are subject to dismissal as time barred. Plaintiff argues that in accordance with various mandatory tolling periods of the applicable statute of limitations and calculation of the pertinent time period the actions were timely commenced.

In regard to the remaining action based upon wrongful death, defendants have submitted the affidavit of Dr. Gelman and contend that there is no factual basis for such claim. Again, the plaintiff has submitted a prior affirmation concerning the lack of adequate supervision of the decedent by the defendants.

To begin, as the defendants motion is in large part brought pursuant to CPLR § 3211, the court notes that in reviewing the sufficiency of a pleading pursuant to CPLR § 3211, both as relevant to the actions being barred by the applicable statute of limitations and for failure to set forth a cause of action, the court must liberally construe the pleadings, accept the facts as alleged within the complaint as true, give plaintiff the benefit of every possible favorable inference, and determine whether the facts fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *ARB Upstate Communications LLC v R.J. Reuter, L.L.C.*, 93 AD3d 929, 930 [3d Dept. 2012]; *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815 [2d Dept.

2008]).

Further as concerns the defendants' motion as being premised in part upon CPLR § 3212 the court notes that it is well settled that in order to be entitled to summary judgment, the moving party must establish its defense or cause of action sufficiently to warrant a court's directing judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Crowley's Milk Co. v Klein*, 24 AD2d 920 [3d Dept 1965]; *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept 1965]). However, once such is presented, the party opposing the motion, must produce proof sufficient to require a trial of material questions of fact on which the opposing claim rests (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988], citing *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

As concerns the applicable time period within which to commence an action as against a municipal defendant, the court notes that General Municipal Law § 50-I requires that an action as against a county for personal injury alleged to have been sustained as a result of the negligence of any officer, agent or employee thereof, must be commenced within one year and ninety days of the event which gives rise to such claim, except that an action for wrongful death may be commenced within two years after the happening of the death. In this regard the court further notes that in accordance with CPLR § 204 such time period is specifically tolled from the time a proceeding to file a late notice of claim pursuant to General Municipal Law § 50-e is commenced until the time that a subsequent order goes into effect (*Giblin v Nassau County Med. Ctr.*, 61 NY2d 67 [1984]).

However, at the same time the court notes that the obligation to file a notice of claim thirty days prior to commencement of an action pursuant to the General Municipal Law § 50-e has been held not to toll or otherwise extend the applicable time period within which to file suit as against a municipality, as per CPLR § 204 (*Baez v New York City Health & Hosps. Corp.*, 80 NY2d 571, 577 [1992]; *Stazio v County of Albany*, 60 AD2d 934 [3d Dept. 1978]). Likewise it has been held that the requirement set forth in General Municipal Law § 50-h prohibiting commencement of an action wherein a demand for an examination of a claimant has been served pursuant to said statute does not toll or otherwise extend the applicable time period within which to commence an action in such circumstances (*Baez*, 80 NY2d 571, 577; *Cruz v City of New York*, 232 AD2d 446 [2d Dept. 1996]; *Simon v Capital Dist. Transp. Auth.*, 95 AD2d 902 [3d Dept. 1988]).

Further the court notes that for purposes of calculating the above time periods a motion brought on by way of order to show cause is made when it is served, not signed, and that an order becomes effective upon its entry, as opposed to when it is signed (*Foley v Fitzpatrick Container Co.*, 267 AD2d 637 [3d Dept. 1999]; *Cespedes v City of New York*, 172 AD2d 640 [2d Dept. 1991]).

Finally CPLR § 210 does provide that where a person entitled to commence an action dies prior to the expiration of the applicable limitation of time within which to commence such action, an action may be commenced by that person's representative within one year of the date of death.

First, it is clear, that in accordance with that set forth above, plaintiff's action as premised upon the first three causes of action set forth in the complaint was not timely commenced and such causes of action are subject to dismissal.

Based upon the allegations contained within the plaintiff's complaint and assuming acts of negligence above and beyond the failure to adequately supervise which caused her to fall on April 10, 2012, the last day that the decedent received care and treatment at the defendant nursing home was June 23, 2012. Thus, as argued by defendants, such is the last day upon which the claims set forth in the first three causes of action within plaintiff's complaint can be based or accrued. One year and ninety days from June 23, 2012 was September 21, 2013.

Further, although, the plaintiff did apply, by way of order to show cause, for leave to file a late notice of claim, and such did serve to toll the running of the statute of limitations while such application was pending, it at most extended the time within which to have commenced such actions until October 22, 2013.

In this regard, although neither party has set forth when such application by order to show cause was served, it is noted that as reflected upon the copy of the order to show cause submitted such was initially filed on August 26, 2013 and that the subsequent order granting such relief was entered September 26, 2013. Thus, even calculating from the time that the application was first filed, as opposed to served, the applicable time period within which to have commenced the first three causes of action would have been extended for a maximum of thirty-one (31) days or until October 22, 2013.

In accordance with that set forth herein, the court finds no merit in plaintiff's arguments that additional time should be excluded up until the filing of the notice of entry of the applicable

order. As acknowledged in the arguments of the plaintiff the effective date of an order is the date of entry. The order herein is marked entered as of September 26, 2013.

However, even if the court were to apply plaintiff's argument to its calculations in this matter the actions are still subject to dismissal. Based upon the proof presented the notice of entry was sent October 8, 2013 and entered October 10, 2013. Calculating the time based upon the date that the notice of entry was entered the applicable period would, at most, be extended for some forty-six (45) days or until November 5, 2013.

Likewise, despite the general arguments of the plaintiff that the requirements of General Municipal Law §§ 50-e and 50-h served to somehow toll or extend the applicable statute of limitations, not only does plaintiff fail to set forth how or until when such provisions tolled or extended the time within which to have commenced the first three causes of action herein, but as noted above such arguments have been expressly rejected in the past. Despite plaintiff's argument that such provisions may have required dismissal of the action, it has expressly been ruled that neither provision effectuates the statutory tolling or extension of CPLR § 204.

Moreover, specifically as concerns the requirements of General Municipal Law § 50-h, which prohibits the commencement of an action after a demand to examine the claimant has been served and is pending, there is no evidence presented in this matter that prior to the filing of the summons and complaint such a demand had been served. In fact plaintiff acknowledges that at the time that the summons and complaint were filed that such a demand had not been served and such is expressly set forth within the complaint.

The action herein was not commenced until November 19, 2013, and despite the various arguments of the plaintiff, such causes of action are untimely and subject to dismissal.

The court further notes that the extension of time provided for in CPLR § 210 does nothing to extend the time within which to have commenced the negligence actions herein. As noted Ms. Cramer passed away August 27, 2012 and thus at most, such statute would have only extended the time within which to commence the actions herein until August 27, 2013.

As such, defendants' motion to dismiss the first three causes of action set forth in plaintiff's complaint pursuant to CPLR § 3211 (a) (5) is **GRANTED**.

In regard to defendants' remaining motion to dismiss, and as set forth above, although the plaintiff's fourth cause of action was timely interposed, within two years of the date of death, the defendants have presented the clear and unequivocal opinion of a board certified physician and

treating physician based upon a reasonable degree of medical certainty that the decedent's death was the result of chronic, ongoing symptoms and not as a result of any fall sustained or resulting ulcer. In opposition the plaintiff has not submitted any countering opinion or other evidence to contest such opinion. Thus there is no sufficient factual basis upon which to sustain the cause of action for wrongful death.

As such, defendants' motion to dismiss plaintiff's fourth cause of action for wrongful death is **GRANTED**.

This memorandum shall constitute the decision and order of the court. The original decision and order and the underlying papers are being delivered directly to the Saratoga County Clerk for filing. The signing of this decision and order and the delivery of this decision and order to the Saratoga County Clerk shall not constitute notice of entry under CPLR § 2220, and the parties are not relieved from the applicable provisions of that rule regarding service of notice of entry.

DATED: July 21, 2016
Ballston Spa, NY 12020

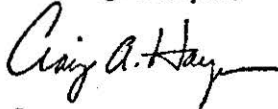

HON. ROBERT J. CHAUVIN
SUPREME COURT JUSTICE

The following papers were read and considered:

1. Notice of Motion dated March 30, 2016;
2. Affidavit of Thomas K. Murphy, Esq. dated March 29, 2016 with attached exhibits "A" through "I";
3. Affidavit of Leonard M. Gelman, M.D., C.M.D. dated March 29, 2016 with attached exhibits "A" through "C";
4. Memorandum of Law dated March 30, 2016;
5. Affirmation in Opposition of Benjamin T. Decker, Esq. dated May 13, 2016 with attached exhibits "A" through "D";
6. Memorandum of Law dated May 13, 2016; and
7. Reply Affidavit of Thomas K. Murphy, Esq. dated May 19, 2016

2016 JUL 21 PM 3:41
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

ENTERED

ENTERED
Craig A. Hayner

Saratoga County Clerk