

Gallo v Guo
2017 NY Slip Op 30527(U)
February 21, 2017
Supreme Court, Richmond County
Docket Number: 150155/16
Judge: Kim Dollard
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
LINDA GALLO, as Administratrix of the Estate of
JOSEPH GALLO, DECEASED, and LINDA GALLO,
Individually,

DCM PART 4

Hon. Kim Dollard

Plaintiff,

-against-

DECISION AND ORDER

JENNY GUO, M.D., and EGER HEALTH CARE AND
REHABILITATION CENTER,

Index No: 150155/16
Motion Nos. 3758-004
4921-005

Defendant.

-----X
The following papers numbered 1 to 3 were fully submitted on the 6th day of
January, 2016.

Defendant Guo’s Notice of Motion and Affirmation in Support..... 1
Plaintiff’s Notice of Cross Motion for Extension of Time to Serve.....2
Defendant’s Reply to Plaintiff’s Cross-Motion.....3

Upon the foregoing papers, the motion (No. 3758-004) of defendant Jenny Guo,
M.D., for dismissal of the complaint as against her is granted; plaintiff’s cross-motion for, *inter
alia*, an extension of time to serve the above-named defendant pursuant to CPLR 306-b is denied.

To the extent relevant, plaintiff’s deceased, Joseph Gallo, died on February 15, 2014, as
the result of the purportedly wrongful acts, neglect or default of defendants Jenny Guo,
M.D.(hereinafter “Dr. Guo”) and the agents, servants and/or employees of the Eger Health Care
and Rehabilitation Center (herein “Eger”) which is located at 140 Meisner Avenue, Staten Island,
New York. Insofar as it appears, Mr. Gallo came under the care of the above defendants on or
about January 22, 2014, and remained their patient until his date of death.

Based on the foregoing events, plaintiff commenced a wrongful death action against the

aforementioned defendants, by the filing of a summons and complaint in the Supreme Court of Richmond County on February 10, 2016, i.e. within two years of the decedent's death under Index No; 150155/16 (see EPTL 5-4.1). Subsequently, plaintiff commenced a like action in the Richmond County Supreme County against Dr. Guo, alone. Predicated on the same series of transactions or occurrences, this action, bearing Index No: 100585/16 was commenced on July 14, 2016.

Alleging that she had not been properly served, Dr. Guo moved for dismissal of the complaint against her in the earlier (February) action (hereinafter, Action No. 1) which prompted plaintiff to cross-move to consolidate the above action with that commenced on July 14, 2016 (hereinafter Action No. 2)¹

In a Short Form Order dated September 9, 2016, this Court granted both the motion and corss motion, dismissing the complaint in Action No. 1 as against the defendant-doctor for lack of personal jurisdiction² and consolidating that action (where Eger remained as a party-defendant) with Action No. 2 where Guo was the lone defendant. The index number assigned to the consolidated action was 150155/16.

In the motion presently before the Court. Dr. Guo moves to dismiss the complaint as against

¹Co-defendant did not participate in any of the motion practice presently before the Court.

²The affidavits of service upon Dr. Guo in Action No. 1, indicate that plaintiff's process server made five attempts at service; twice on April 4, 2016, upon an "authorized agent" at Eger, her purported place of employment; again on April 4, 2016 upon another "authorized agent" at an alternative "place of employment," the former St. Elizabeth Ann's Healthcare and Rehabilitation Center located at 91 Tompkins Avenue on Staten Island; once upon the doctor on June 29, 2016; and once on Dr. Guos mother at Dr. Guo's alleged of residence in New Jersey on September 22, 2016. However, in support of her motion to dismiss, Dr. Guo affirmed that she last worked at St. Elizabeth Ann's in 2012 never mention an office either there or at Egers; never resided in either place and never authorized anyone to accept service on her behalf. All of the above stands unchallenged by plaintiff. In any event, no attempts after June 9, 2016 would conform to the requirements of CPLR 306-b unless an extension of time have been granted.

her in the consolidated action, on the grounds that (1) that the action is untimely; and (2) for lack of personal jurisdiction (see CPLR 3211 [a][5],[8]). In this regard, the doctor notes that the remaining cause of action against her (i.e. the action for wrongful death asserted in the former Action No. 2) was not filed until July 14, 2016, approximately two years and five months after the decedent passed. However, the statute of limitations applicable to wrongful death actions under EPTL 5-4.1 is two years from the date of death, here, February 15, 2014. Moreover, plaintiff has adduced no evidence indicating that Dr. Guo “held out” either nursing home “as her place of business” (see CPLR 308[b]).

Under these circumstances, the acceptance of plaintiff’s argument would operate to ratify *nunc pro tunc* the untimely service of process upon Dr. Guo which was effected without leave of court in violation of CPLR 306-b (see footnote 2). Alternatively, it could be seen as sanctioning plaintiff’s to use the date of the commencement of the original action against Dr. Guo (as that action was later dismissed on the ground of improper service) to satisfy the statute of limitations in EPTL 5-4.1 and the date of service upon the doctor in the (untimely) second action to satisfy the 120-day service requirement in CPLR 306-b. The resultant inconsistency is anathema to the Court.

In any event, plaintiff has failed to sustain her burden of proving that service in the former Action No. 2 was proper (see CPLR 308[2]) *Samuel v. Brooklyn Hosp. Ctr.*, 88 AD3d 979, 980³

In view of the foregoing, plaintiff’s cross-motion for an extension of time to effect service under CPLR 306-b must be denied, as her commencement of the action against Dr. Guo after the

³In dismissing the complaint against Dr. Guo in Action No. 1, this Court necessarily found invalid, *inter alia*, the purported service of the summons and complaint upon “Boris” as Dr. Guo’s “authorized agent”. The salutary doctrine of law of the case requires a like result here; i.e. that “Boris” was not authorized to accept service on the doctor’s behalf.

statute of limitations had expired was a nullity. (See, *Gonzalez v. New York City Health & Hosps. Corp.*, 29 AD3d 369, 370).

Accordingly, it is

ORDERED that the complaint as against defendant Jenny Guo, M.D, is dismissed and any cross claims against her are severed and dismissed; and it further

ORDERED that plaintiff's cross motion is denied and it is further

ORDERED that the Clerk of the Court mark his records accordingly.

Dated: February 21, 2017



Kim Dollard, A.J.S.C.