

Pan v Alexander

2017 NY Slip Op 31670(U)

August 7, 2017

Supreme Court, New York County

Docket Number: 805305/2014

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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RICHARD CHIANG PAN, holder of Limited Letters of
Administration for the estate of his late mother, ESTHER
BEN-MIN PAN,

Index No.
805305/2014

Plaintiff,

**DECISION
and ORDER**

- v -

Mot. Seq. 005

DR. BEENA ALEXANDER, THE HEBREW HOME FOR
THE AGED AT RIVERDALE, DR. SANFORD J. FRIEDMAN
and THE MOUNT SINAI HOSPITAL,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This action sounds in medical malpractice and pertains to the treatment received by Esther Ben-Min Pan from defendants Dr. Beena Alexander (“Dr. Alexander”), The Hebrew Home for the Aged at Riverdale (“The Hebrew Home”), Dr. Sanford J. Friedman (“Dr. Friedman”), and The Mount Sinai Hospital (collectively, “Defendants”) from the period of her stay at Mount Sinai Hospital under the care of Dr. Friedman from December 2, 2010 until January 5, 2011 and her stay at The Hebrew Home under the care of Dr. Alexander from January 5, 2011 through January 8, 2011. Esther Ben-Min Pan died on May 10, 2011.

Richard Chiang Pan (“Mr. Pan”), Esther Ben-Min Pan’s son, initially commenced an action against Dr. Alexander and The Hebrew Home on June 27, 2013 in the capacity as “Richard C. Pan, anticipated estate administrator for and son of Esther Ben-Min Pan” (bearing index number 800012/13). Mr. Pan filed an Amended Complaint on October 24, 2013.

Dr. Alexander and The Hebrew Home brought motions to dismiss the action based on Mr. Pan’s lack of capacity to sue because Mr. Pan had not been granted letters of administration for his mother’s estate. Additionally, he is not the verified sole beneficiary of his mother’s estate, as she was also survived by her husband

and two daughters. The motions were granted by Order dated March 7, 2014 and the action was dismissed. The Order stated:

Mr. Pan has submitted documents indicating that he has filed a Petition for Administration of the Estate of Esther Pan in September 2013. To date he has not been granted letters. He claims his inability to receive the letters was due to the failure of the attorneys he has consulted. Plaintiff has been unable to receive the letters of administration, and he lacks standing to sue.

On June 3, 2013 Mr. Pan commenced a separate action against Dr. Friedman and The Mount Sinai Medical Center. He then filed an Amended Complaint in that action on September 26, 2013.

Defendants Dr. Friedman and The Mount Sinai Medical Center moved to dismiss the action under CPLR 3211 (a) (3) on the grounds that Mr. Pan lacked the capacity to bring the action. On April 7, 2014, the court granted this motion to dismiss without prejudice.

Subsequently, on August 4, 2014, Mr. Pan obtained limited letters of administration “for the sole purpose of pursuing the medical malpractice and/or wrongful death actions for the decedent upon behalf of the estate...”

Mr. Pan recommenced the instant action against Dr. Alexander and The Hebrew Home on September 4, 2014 in the capacity as “Richard Chiang Pan, holder of Limited Letters of Administration for the estate of his late mother, Esther B. Pan.” The Hebrew Home interposed an answer on September 22, 2014. Dr. Alexander interposed an answer on November 19, 2014. On July 2, 2015, the action was consolidated with Richard C. Pan, holder of Limited Letters of Administration for the estate of his late mother, *Esther Ben-Min Pan v. Dr. Sanford J. Friedman and The Mount Sinai Hospital*, Index No. 805305/2014.

In June 2016, defendants Dr. Friedman, Mount Sinai Hospital, and Dr. Alexander moved to dismiss because “there is no issue of fact that Mr. Pan is not an attorney nor is he the sole beneficiary of plaintiff’s decedent’s Estate, and therefore, as a matter of law, Mr. Pan is barred from acting as attorney *pro se* in litigation this action.” On August 30, 2016 Justice Lobis granted defendants’ motions to dismiss. The Order stated:

The matter is dismissed. If Mr. Pan gets counsel to represent the estate of his mother or can present evidence that establishes that he is the sole beneficiary of his mother's estate within 6 months he may move to restore the case. The motion must include an affirmation or affidavit of merits.

In the transcript attached to the August 30, 2016 order, the Court clarified the first requirement of the order:

You [Mr. Pan] will have to move to restore it with an affidavit establishing that you are the sole beneficiary that's true, but it has to be significant evidence of that and not just your statement... Retainer agreement will be fine if you get counsel... (tr. at 4, lines 15-22)

You have to make a motion to restore to active calendar. To do that you're going to have to satisfy one of the two prongs which would allow you to proceed. One is that you have an attorney and they are representing the estate. Or B, your siblings and other beneficiary of your mother's estate have renounced any claim to her, any benefits of her estate in a way that's legally binding... (tr. at 5-6, lines 23-6)

Presently before the Court is Mr. Pan's motion for an Order pursuant to CPLR 5015 "for restoration and vacation of dismissal and for additional time to obtain expert reports." The motion was filed on February 11, 2017 by Laurence H. Olive, Esq., on Mr. Pan's behalf. In support of the motion, Mr. Olive and Mr. Pan submitted affirmations:

Defendants Dr. Friedman, Mount Sinai Hospital, and Dr. Alexander cross move for an Order denying Mr. Pan's motion to restore the matter to the calendar and dismissing the action with prejudice for failure to comply with the prior order of the court.

Mr. Olive, in his affirmation dated February 10, 2017, states, "I represent the plaintiff in the within matter and am fully familiar with facts and circumstances of this action."

Mr. Olive also discusses in the affirmation his multiple attempts to contact Doctors John N. Penek, David Ting-Chin Shen, and Chone Ken Chen:

5. As attorney of record for the plaintiff, I requested a signed medical malpractice report or an Affirmation of Merit from three medical doctors licensed in the United States who according to the plaintiff, had in the past, agreed with significant medical malpractice findings.

6. I sent John Penek, M.D., FCCP, FAAS... a letter with Exhibits on January 31, 2017 by Registered USPS mail... and according to the USPS, the letter has not yet been given to a resident of the address, after one delivery attempt February 2nd, 2017...

7. David Ting-Chin Shen, M.D., was sent a letter with Exhibits on February 6, 2017, one copy of which was mailed by USPS Certified mail... to David Ting-Chin Shen, M.D., University of Pennsylvania Perelman School of Medicine, South Pavilion... and another copy of which was mailed by first-class USPS mail to Dr. David Ting-Chin Shen, M.D., Ph.D., University of Pennsylvania Perelman School of Medicine, 914 Biomedical Research Building II/III...

8. I sent Dr. Chone Ken Chen a letter with Exhibits on February 6, 2017, one copy of which was mailed by USPS Certified mail... to Dr. Chone Ken Chen... and one additional copy of which was mailed by first-class USPS mail to him in the care of his attorney-referral, Attorney John M. Daly, of The Law Office of John M. Daly and Of Counsel to The Fitzgerald Law Firm...

Although the letters sent to Doctors David Ting-Chin Shen and Chone Ken Chen were not provided to the court, a letter to Doctor John N. Penek dated January 31, 2017 was submitted with the Affirmation of Attorney.

Mr. Olive continues, and states:

The lack of valid and detailed information on what actually happened at The Mount Sinai Hospital in the first five days of January 2011 makes medical malpractice report authorship difficult. As the attorney of record for the plaintiff, I ask for restoration of the case which will allow proper collection of medical records fact and all the additional time for expert medical malpractice reports The Court can allow.

Mr. Pan, in his affidavit, states, "As the plaintiff I am glad to report Attorney Laurence H. Olive, a New York State Bar licensed attorney, is my lawyer for the instant case, the primary demand of The Court from August 30th, 2016." As for the Court's directive for Mr. Pan to obtain an affirmation or affidavit of merit to accompany his motion to restore, Mr. Pan states:

Court-ordered new Affirmation of Merit is a secondary demand stated in the August 30th, 2016 Decision, for which I and my attorney have made considerable effort to satisfy, within very limited time constraints. Three U.S.-licensed M.D.s who had offered extreme certainty of medical malpractice conclusions in the past, were contacted again during January and February 2017, as described below. In the event that helpful reply is received by my attorney or myself in the coming weeks, the important document(s) will be posted at NYSCEF. For the record, from 2013 to 2015 I alone, and since late 2016, re-affirmed in early 2017 with Attorney Laurence H. Olive, had always planned to seek cardiology and nephrology medical malpractice reports among several medical specialties. However, due to extreme limitations of time imposed by the Aug 30, 2016 Decision to find medical specialists and to post their formal medical malpractice reports as Affirmations of Merit bearing proper M.D. affirmation or signature in front of a notary public, by the end of February, 2017, I must now ask for significantly greater time. A multiple commencement pro-se plaintiff for the case, I believe unusual case aspects hold, which justify prompt case restoration now and allow standard request for eye-witness subpoena and critical medical records transcription, from the last week

at Mount Sinai Hospital in particular. These unusual case aspects are now described.

In their opposition and cross motions, Defendants argue that Mr. Pan has failed to comply with the Court's August 30, 2016 Order because he has not proven that the other estate beneficiaries, Mr. Pan's father and two sisters, consented to or were aware of the retention of Mr. Olive. They also argue that he failed to comply with the Order as "there is no reasonable excuse for the plaintiff's failure to obtain the affirmation or affidavit of medical malpractice merit that this Court required as a pre-condition to restoration" (affirmation in opposition of defendant Dr. Alexander's counsel at 3).

After the filing of the cross motions, Mr. Pan filed an affidavit of merit without a certificate of conformity from Doctor John N. Penek, an out-of-state practitioner, sworn on April 10, 2017 and filed on April 24, 2017. Defendants opposed by motion, asserting that the failure to include a certificate of conformity with the affidavit as well as the lack of the specificity of the actual language of the affidavit made it an insufficient basis for a meritorious claim. In response, Plaintiff submitted a revised affidavit of merit from the same John N. Penek sworn on May 4, 2017 and filed on the same day. Plaintiff's counsel also submitted a certificate of conformity on May 4, 2017 in accordance with CPLR 2309 (c) which requires:

An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation.

Plaintiff's counsel's certificate of conformity avers:

The undersigned does hereby certify that he is an attorney at law duly admitted to practice in the State of New York... that he makes this affidavit in accordance with the requirements of the Clerk of the County of New York pertaining to the acknowledgment of the proof of the Affidavit of Merit of Dr. John Penek... that the foregoing acknowledgment of Dr. John N. Penek named in the foregoing instrument taken before Doreen Dennis,

a Notary in the State of New Jersey, being in the state which it was taken, and based upon my review thereof, appears to conform with the law of the State of New York...

In response to the affidavit of merit, Defendants argue that the filing of the second affidavit was an improper attempt to correct initial deficits, including insufficient and impermissibly vague references to defendants and missing certificate of merit. Defendants assert that the second affidavit of merit should be disregarded by the court as untimely and inappropriate. On that basis, Defendants argue that Plaintiff's motion to restore must be denied.

Under CPLR 3012-a and CPLR 3012-a (a) (2) where an Affidavit of Merit cannot be obtained timely:

...the complaint shall be accompanied by a certificate, executed by the attorney for the plaintiff, declaring that that... the attorney was unable to obtain the consultation required by paragraph one of this subdivision [confirming that there is a reasonable basis for the commencement of such action] because the attorney had made three separate good faith attempts with three separate physicians... to obtain such consultation and none of those contacted would agree to such a consultation.

In his Affirmation of Attorney, Mr. Olive describes attempts to contact three separate physicians and subsequent failure to obtain a certificate.

Defendants aver that the letter provided with the Affirmation of Attorney includes language that shows the attempt to get an Affidavit of Merit from John Penek was coercive and impermissible. Defendants specifically discuss the following paragraph from the January 31, 2017 letter:

As the attorney of the plaintiff in the instant case, I am afraid I should mention if the case does indeed fail to win restoration at the end of February, 2017, on grounds of an insufficient or lacking medical malpractice report acceptable for an Affirmation of Merit, yours in particular, my client intends to demand the most intense

law suit against you and your many associates, allowed by the law of our nation in an as yet undetermined Court of law.

According to CPLR 3012-a (a) (2), the attempts to obtain physician consultation must be made in "good faith." Dr. Penek has not disavowed his statement nor, objected to the inartful language used by Mr. Olive to elicit the affidavit of merit.

Moreover, Plaintiff's submission of the certificate of conformity on May 4, 2017 instead of accompanying the initial affidavit of merit on April 24, 2017 was not a fatal flaw to the affidavit of merit. A defect in the form of an affidavit's compliance with CPLR 2309 (c) can be corrected nunc pro tunc. (*See Moccia v Carrier Car Rental, Inc.*, 40 AD3d 504, 504 [1st Dept. 2007])

The purpose of an affidavit or certificate of merit as required by CPLR 3012-a is to "improve the quality of medical malpractice adjudications and deter the commencement of frivolous cases" (1986 McKinney's Session Laws of NY, Chap. 266, § 1). The affidavit of merit and certificate of conformity provided by Mr. Olive on behalf of Mr. Pan reflect this legislative intent by confirming that based on an expert's opinion Mr. Pan has presented a potentially meritorious claim. For this reason, the submission of the revised affidavit of merit and late certificate of conformity are permissible and not basis for dismissal of the motion to renew.

Mr. Pan has fulfilled the requirements of the August 30, 2016 Order by 1) acquiring counsel and 2) submitting an affidavit of merit from Dr. John N. Penek.

Wherefore, it is hereby

ORDERED that Plaintiff's Motion for Restoration is granted.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: AUGUST 7, 2017



EILEEN A. RAKOWER, J.S.C.