

Kole v New York Presbyt. Hosp.
2017 NY Slip Op 32914(U)
December 18, 2017
Supreme Court, Rockland County
Docket Number: 030770/2016
Judge: Thomas E. Walsh II
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
GAIL KOLE, AS EXCEUTRIX OF THE ESTATE OF
RICHARD L. KOLE, DECEASED, AND GAIL KOLE,
INDIVIDUALLY,

Plaintiff,

-against-

THE NEW YORK PRESBYTERIAN HOSPITAL, JOHN
CHABOT, M.D. AND MARC BESSLER, M.D.,

Defendants.

-----X
Thomas E. Walsh, II, J.S.C.

Index No. 030770/2016

DECISION AND ORDER

MOTION # 1 - MG
DC - N
ADJ: 2/9/18

The following papers, numbered 1 - 3 were considered on Defendant's Notice of Motion (Motion #1) for and Order pursuant to Civil Practice Law and Rules § 3211(a)(5) and Estates, Powers and Trusts Law §5-4.1 dismissing Plaintiff's Fourth Cause of Action alleging Wrongful Death since it was not timely commenced within the two year statute of limitations:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION OF MICHAEL N. ROMANO, ESQ./ EXHIBITS (A-C)	1
AFFIRMATION OF ALLAN J. AHEARNE, JR., ESQ. IN OPPOSITION TO MOTION TO DISMISS PLAINTIFF'S CAUSE OF ACTION FOR WRONGFUL DEATH	2
REPLY AFFIRMATION OF MICHAEL N. ROMANO. ESQ.	3

Upon the foregoing papers, the Court now rules as follows

This is a medical malpractice and wrongful death action that arose out of Plaintiff's death son January 20, 2014 following a Whipple Surgery performed at The New York Presbyterian Hospital by Defendant JOHN CHABOT, M.D. (hereinafter CHABOT). Plaintiff alleges that the medical malpractice occurred from January 3, 2014 to January 19, 2014.

The action was commenced by the e-filing of a Summons and Complaint on March 8, 2016. Defendants joined issue by filing a Verified Answer on May 2, 2016 which contained statute of limitations as an affirmative defense.

In the instant motion, Defendants submit that pursuant to Estates, Powers, Trusts Law §5-4.1 the Fourth Cause of action sounding in wrongful death was not timely commenced and should be dismissed based on the expiration of the statute of limitations.

Turning now to Defendant's argument that the Plaintiff's Complaint must be dismissed pursuant to Civil Practice Law and Rules § 3211(a)(5) as the instant action was commenced past the two (2) year statute of limitations set in Estates, Powers, Trusts Law § 5-4.1. Specifically, Civil Practice Law and Rules § 3211(a)(5) states "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations or statute of frauds." Specifically, Defendant submits that the decedent died on January 20, 2014 and the instant action was not commenced until March 8, 2016, more than two (2) years after the decedent's death. As such, Defendant states that the Fourth Cause of Action for Wrongful Death must be dismissed.

In opposition the Plaintiff first submits that the motion was submitted without compliance with Part IV of the undersigned's part rules. Specifically, Defendant states that the Defendant's motion is procedurally defective and should be denied due to Defendant's failure to inform the undersigned first via letter and schedule a conference. Defendant concedes that he did not seek a conference before filing the instant motion. The Court would rather the parties follow the requirements of the part, but since Plaintiff has been able to file opposition papers, it appears Defendant's failure to notify the undersigned before filing is a minor mistake which has had no effect on Plaintiff.

As to the timeliness of Plaintiff's Fourth Cause of Action for Wrongful Death,

Defendant submits that the Defendant is incorrect on the law. Plaintiff asserts that in a wrongful death a personal representative of the estate must first be appointed, which tolls the time to file a wrongful death action by six (6) months until a representative if the estate is appointed. Since a wrongful death action cannot be commenced before a personal representative is filed, the Plaintiff avers that the right to recover for a wrongful death action does not arise until the personal representative has been named through the issuance of letters. Further, Plaintiff applies Civil Practice Law and Rules § 205 arguing that the six (6) month tolling within § 205 applies to the instant action, and therefore Plaintiff's wrongful death action is timely and should not be dismissed.

In considering Plaintiff's arguments the Court first notes that there is no language within the Estates, Powers, Trusts Law § 5-4.1 that allows for a tolling of a wrongful death action while a personal representative is being appointed. The statute clearly indicates that a wrongful death action commences upon the "death of the decedent." As to Plaintiff's argument that a six (6) month tolling period is applicable to a wrongful death action from Civil Practice Law and Rules § 205, the Court notes that for § 205 to apply there must be a timely action already commenced. In the instant action the Plaintiff commenced the medical malpractice action and the wrongful death action at the same time, therefore there was no intervening event in a commenced matter which was terminated that adds an additional six (6) months to the statute of limitations. Further, as to Plaintiff's argument that the Plaintiff was delayed in obtaining a certificate of merit required for a medical malpractice action and therefore the wrong ful death cause of action does not begin to run until the certificate is obtained that is also unpersuasive. The Plaintiff could have commenced the instant action allowing all of the causes of action to be timely with a letter to the Court indicating the difficulty in obtaining a certificate of merit based on the unique nature of the procedure that the Plaintiff underwent prior to his death. The Estates, Powers and Trust Law does not contain a condition precedent requirement within in it, as does the medical malpractice statute, which requires the

certificate of merit and as such the application of the conditions precedent of another statute to the wrongful death statute is also incorrect.

Based on the foregoing, Plaintiff's arguments are unpersuasive and as such the Court must grant Defendant's motion.

Accordingly, it is hereby

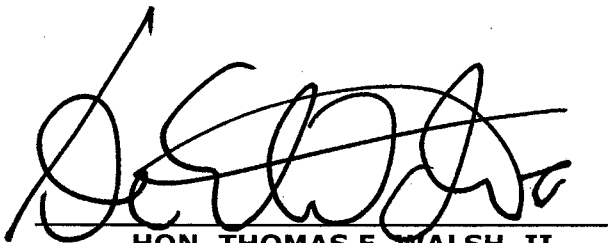
ORDERED that Defendant's Notice of Motion (Motion #1) for dismissal of the Fourth Cause of Action is granted in its entirety; and it is further

ORDERED that the Fourth Cause of Action for Wrongful Death in Plaintiff's Complaint is dismissed; and it is further

ORDERED that this matter is scheduled for a conference before the undersigned on **FRIDAY FEBRUARY 9, 2018** and appearances by counsel for the parties are required.

The foregoing constitutes the Decision and Order of this Court on Motion #1.

Dated: New City, New York
December 18, 2017


HON. THOMAS E. WALSH, II
~~Acting~~ Justice of the Supreme Court

TO:

THE AHEARNE LAW FIRM, PLLC
Attorney for Plaintiffs
(via e-file)

SLAVIN & SLAVIN, ESQs.
(via e-file)

MICHAEL N. ROMANO, ESQ.
PILKINGTON & LEGGETT, P.C.
Attorney for Defendants
(via e-file)