

Susco v St. Joseph's Hosp. & Health Ctr.
2017 NY Slip Op 33249(U)
December 1, 2017
Supreme Court, Onondaga County
Docket Number: 2017EF667
Judge: James P. Murphy
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NYSCEF DOC. NO. 24

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RECEIVED NYSCEF: 12/01/2017

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

SANDRA M. SUSCO, Individually and as the Executrix of the
ESTATE OF PAUL E. SUSCO,

Plaintiffs, **DECISION**

vs.

Index No. 2017EF667
RJINo. 33-17-1286

ST. JOSEPH'S HOSPITAL AND HEALTH CENTER,

Defendant.

APPEARANCES:

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By: Minla Kim, Esq.
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MURPHY, J.

This action was commenced by the electronic filing of a Summons and Complaint on February 14, 2017, by Plaintiff Sandra M. Susco, Individually and as the Executrix of the Estate of Paul F. Susco ("Plaintiff") against Defendant St. Joseph's Hospital and Health Center ("Defendant"). Defendant, now, by Notice of Motion dated April 24, 2017, seeks an Order to dismiss Plaintiff's Complaint pursuant to C.P.L.R. §§ 3211, 3016 (a) and 214-a.

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By way of background, Plaintiff alleges that she is the Executrix of the Estate of Paul B. Susco who died on August 16, 2014. Plaintiff was granted Preliminary Letters by the Onondaga County Surrogate's Court on February 14, 2017. The Complaint alleges that Paul F. Susco ("decedent") received a thoracotomy with aortic valve replacement by Dr. Zhoum on December 27, 2011, at St. Joseph's Hospital and Health Center, and that a Sorin heater-cooler was used in the procedure. The decedent experienced complications, including fevers and infection. Thereafter, in May, 2013, decedent was diagnosed with Mycobacterium Avium and continued to be seen and treated at St. Joseph's. He was re-admitted to the hospital on April 2, 2014, with a fever and thereafter, on August 16, 2014, decedent was pronounced dead while an inpatient at the hospital. See, Affidavit of Minla Kim, Esq., dated April 24, 2017, Exhibit A, Summons and Complaint.

The Complaint further alleges that on July 15, 2015, the FDA announced that the device used in decedent's surgery was recalled, however, St. Joseph's did not advise Plaintiff or decedent of the recall until December 8, 2016.

The first cause of action of the Complaint alleges as follows:

16. The Defendant St. Joseph's Hospital Health Center, its employees, agents, and/or servants, was negligent, deviated from the standard of care and departed from good, usual, customary and accepted practice in the continuous care and treatment of the Decedent from December 27, 2011 as follows:
 - 1) Failing to properly monitor the Sorin machine ("Pump 41").
 - 2) Failing to properly diagnose and treat the Decedent's infection.

3) Failing to follow good, usual, customary and accepted practice in the treating of the Plaintiff's decedent.

17. By reason of the premises, the Plaintiff, on behalf of the Estate of Paul B. Susco, seeks judgment against the Defendant ST. JOSEPH'S HOSPITAL HEALTH CENTER, in an amount to be determined by a jury upon the trial of the issues herein.

The second cause of action of the Complaint alleges as follows:

19. the Defendant knew, or show have known at the time when the Estate could have pursued a cause of action against the manufacturer and the Defendant Hospital for negligence, strict liability, manufacturing defects, violation of implied and explicit warranties, and other tort causes of action including negligence and malpractice.

20. The Defendant Hospital was aware or should have been aware of the FDA recall on July 15, 2015.

21. The Defendant Hospital failed to advise the Plaintiff of its knowledge until December 8, 2016, after the causes of action against the manufacturer and the hospital have, upon information and belief, expired.

22. The Defendant did knowingly withhold this information.

The third cause of action of the Complaint alleges as follows:

24. The Defendant Hospital was aware or should have been aware of the FDA recall on July 15, 2015 and the Defendant did negligently withhold this information.

25. The Defendant by virtue of its joint and several negligence and fraud caused the Decedent's conscious pain and suffering, medical expense, loss of income, loss of quality of life, fear of imminent death, and caused the Estate lost income, vicariously pain and suffering and funeral expenses, thereby damaging said Plaintiff in a fair and reasonable amount to be determined by a jury, together with interest and costs.

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26. The Defendant's negligence deprived the Plaintiff of the claims set forth above for negligence and wrongful death, loss of income, loss of parental guidance and all appropriate negligence and wrongful death claims, as well as breach of warranty, breach of contract and all appropriate causes as and against the manufacturer.

See, Affidavit in Opposition of Stephanie Palmer, Esq., sworn to on September 5, 2017, Exhibit A, Letter to Decedent dated December 8, 2016.

In summary, Plaintiff alleges the pertinent dates, including the dates of Defendant's treatment of decedent, as follows:

- 12/27/11 Decedent's surgery at Defendant St. Joseph's Hospital utilizing the Sorin device.
- 5/2013 Decedent diagnosed with mycobacterium avium.
- 4/2/14 Decedent was re-admitted to Defendant St. Joseph's Hospital.
- 8/16/14 Decedent dies while an inpatient at Defendant St. Joseph's Hospital
- 7/15/15 FDA announces recall of Sorin device.
- 12/8/16 Defendant St. Joseph's Hospital notifies Plaintiff of the FDA recall. *See*, Letter dated December 8, 2016, *supra*.
- 2/14/17 Complaint filed in the Onondaga County Clerk's Office.

In support, Defendant seeks to dismiss Plaintiff's first cause of action alleging medical malpractice, contending that Plaintiff's action is untimely and was not brought within the applicable statute of limitations of two years and six months pursuant to C.P.L.R. § 214-a.

Defendant further seeks to dismiss Plaintiff's second cause of action, contending that Plaintiff's second cause of action fails to state a cause of action for a purported claim of fraud. Defendant also contends that Plaintiff's purported claim of wrongful death as alleged in the third cause of action is governed by a two-year statute of limitations and is untimely.

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In opposition, Plaintiff's attorney asserts that they believe the above action was timely commenced, however, stresses that they have not had an opportunity to conduct any discovery to date, specifically involving Defendant's use of the Sorin heater-cooler device during decedent's heart surgery that allegedly caused the Mycobacterium Avium infections which caused the decedent's death. Plaintiff further asserts that in order to prosecute its claim for fraud, they need to conduct discovery to prove when and what the Defendant knew of problems with the Sorin device, specifically as it relates to alleged warnings and subsequent recall of the device by the FDA on July 15, 2015. Plaintiff does not know what transpired between July 15, 2015, and December 8, 2016, when Defendant undertook the duty to notify Plaintiff of the FDA recall.

The law is well established that on a motion to dismiss, the pleadings are necessarily afforded a liberal construction and that plaintiffs are accorded the benefit of every possible, favorable inference. *See, Goshen v. Mutual Life Insurance Company of New York*, 98 N.Y.2d 314 (2002).

C.P.L.R. § 3211 (d), titled "Facts unavailable to opposing party," provides:

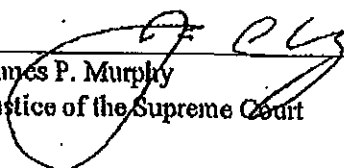
Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, . . . or may order . . . disclosure to be had and may make such other order as may be just.

Here, in the first instance, the Court finds that Defendant fails to meet its burden showing that the alleged malpractice claim is untimely. Decedent died on August 16, 2014, while an inpatient at Defendant St. Joseph's Hospital. Plaintiff commenced this action on February 14, 2017, which is within two years and six months and, therefore, arguably timely. What is unclear however, is whether the treatment and care rendered by Defendant through the years was continuous treatment, including Defendant's use of the Sorin machine in 2011, and whether it contributed to decedent's condition that ultimately led to his death.

In this regard, the Court finds compelling Plaintiff's arguments that facts may exist in support of her claim, but cannot now be stated as such facts are exclusively in the possession of Defendant, specifically as it relates to the timing and receipt of the alleged warnings issued by the FDA and subsequent recall of the Sorin device. Plaintiff should have an opportunity to explore all facts on the issues pending before the Court. Accordingly, based on all of the foregoing, the Court denies Defendant's motion pursuant to C.P.L.R. § 3211 (d). *See, Castagnazzi v. Schlecker*, 129 A.D.2d 605 (2d Dept. 1987). The above constitutes the Decision of the Court. Plaintiff's attorney shall electronically file a proposed Order to the Court, on notice to opposing counsel, within fifteen (15) days of the date of this Decision.

Dated: December 1, 2017

ENTER



 James P. Murphy
 Justice of the Supreme Court