

Serrano v Safarov

2018 NY Slip Op 31107(U)

January 2, 2018

Supreme Court, Dutchess County

Docket Number: 2016-50003

Judge: James V. Brands

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AD

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:
Hon. JAMES V. BRANDS
Justice.

SUPREME COURT: DUTCHESS COUNTY

JEFFREY SERRANO and FRANCENE SERRANO,
Plaintiffs,

-against-

ALEXANDR SAFAROV, M.D.; JOSEPH ANTONIO, M.D.;
JOHN McNULTY, M.D.; MOBILE LIFE SUPPORT
SERVICES, INC; AIR METHODS CORPORATION
and VASSAR BROTHERS MEDICAL CENTER,
Defendants.

DECISION AND ORDER
ON FIVE MOTIONS
Index No. 2016-50003

The following papers were read and considered on five motions¹ pending for dismissal of this matter as time-barred by the applicable statute of limitations.

NYSCEF Docs. No. 72-204 filed as Motion Seq. No. 2, 3, 4, 5, 6

Plaintiffs commenced this action alleging medical malpractice resulting in injury to plaintiff Jeffrey Serrano. Plaintiff's spouse Francene Serrano asserts a derivative claim. Plaintiffs allege that the defendants failed to properly evaluate and treat plaintiff for an 'evolving' stroke upon presentment to Vassar on 1/16/2013. It is further alleged that defendants failed to timely transport plaintiff from Vassar to Westchester Medical Center (WMC), the latter having the capability of performing endovascular intervention. Plaintiffs claim that the foregoing exacerbated plaintiff's stroke, neurological injuries, including left hemiparesis and cognitive disability (*see* Motion #4, Pole Aff. page 9; *see also* Verified Complaint).

Moving Defendants' Motions

There are four motions pending before this court, all of which essentially seek identical relief, that is, dismissal of this matter based upon plaintiffs' failure to timely commence this action within the applicable 2 ½ year statute of limitations period for medical malpractice actions (*see* CPLR §214-a). In so moving, they reject the complaint allegation that Mr. Serrano "has been under a medical disability constituting a toll under applicable law, including but not limited to Section 208 of the CPLR, for some or all of the period of 1/16/2013 to the present". (Verified Complaint ¶136).

¹ Motion Seq. No.2 filed by Vassar; Motion Seq. No.3 filed by Mobile Life Support Services. Inc.; Motion Seq. No.4 filed by John McNulty M.D.; Motion Seq. No. 5 filed by Alexandr Safarov, M.D.; Motion Seq. No.6 filed by Joseph Antonio. M.D.

The moving defendants argue that Mr. Serrano cannot prove that he was continuously unable to assert his legal claim due to a complete inability to function during the relevant time period so as to support 'tolling' the statute of limitations time frame within which to file the complaint. The moving defendants further contend that Mrs. Serrano cannot rely on any such tolling of Mr. Serrano's claims to extent the statute of limitations relates to her derivative claims.

In support of the pending motions, the moving defendants cite relevant portions of Mr. Serrano's medical records to demonstrate that he was not completely incapacitated for a continuous period commencing from the date he presented to Vassar on 1/16/2013 through the date of his eventual discharge from inpatient rehabilitation on 6/27/2013 so as to permit tolling the applicable statute of limitations period. Counsel cites plaintiff's extensive medical record which includes medical notes, neurological assessments, and in-patient psychiatric consultation. Such records, in part, state that plaintiff was, at times, alert, responsive, cognizant of surroundings, persons, time, place, as well as responsive to questions and able to follow commands.

Notably, psychiatrist Dr. Hornstein's findings on 1/30/2013 included plaintiff's cooperation (albeit irritable to go home), alert and cooperative. (Motion #2 Ex. F p. HHHOOI73-174). Neurologist Dr. Siegler's findings on 2/18/2013 while plaintiff was at Helen Hayes Hospital for in-patient rehabilitation noted plaintiff's "day-to-day memory is becoming quite sharp and orientation" (*id.* at p. I-IHHOO184). On 2/25/2013, upon readmission to Helen Hayes Hospital, plaintiff was noted as being alert, oriented, and no word difficulties, with a memory score of 5 out of 5, logical and goal-oriented (*id.* at p. HHHOO188). Psychiatrist Dr. Hornstein's findings on 2/27/2013 during plaintiff's second admission found plaintiff to be fully alert, cooperative, coherent, goal-oriented, with no evidence of dysphoria or psychomotor retardation or agitation (*id.* at p. HHHOO193-194). Upon his discharge on 4/13/2013, plaintiff was noted to have made progress, with improved diet and dysphasia, thus recommending a subacute program to receive additional physical and occupational therapy (*id.* at p. I-IHH00224-225).

Upon admission to Elant on 4/18/2013, plaintiff executed a Consent for Treatment on his own accord (*see* Motion #3 Ex. L). Plaintiff was noted as oriented, communicative, awake with only limited forgetfulness.

Plaintiff again presented to Vassar on 5/13/2013. The medical records indicate that plaintiff "states" on his own behalf that he fell while transferring from his wheelchair to his bed. Also noted was the recording agent's observations that plaintiff was alert, oriented, demonstrating clear speech and appropriate behavior (*see* Motion #2, Ex. D, p. VBMC0055). A neurological assessment rendered plaintiff's sensory as "fully intact", "oriented" and "alert" (*id.* at VBMC0037).

Also noted by counsel for Mobile Life Support Services, Inc. is plaintiff's testimony at the 50-h hearing held on 12/12/2014. During the hearing, plaintiff testified that he did not have difficulty understanding any questions posed. Also cited is Court Evaluator's finding in connection with the guardianship proceedings filed by Mrs. Serrano. The evaluator found that plaintiff did not require a guardian of the person and/or his property. (Motion #3, Ex. Hand G respectively).

Counsel also noted the fact that plaintiff signed the retainer agreement for counsel in the instant action.

Based on the foregoing, the moving defendants contend that CPLR §208 insanity toll is inapplicable since the medical records contradict any allegation that plaintiff was continuously under a disability of insanity from the date the action accrued (1/16/2013) until at least 2 ½ years before he commenced this action on 1/4/2016 (which would have been 7/4/2013). Furthermore, the movants claim that CPLR §208 cannot serve to toll Mr. Serrano's derivative claim.

Plaintiffs' Opposition

Counsel for plaintiffs argues that the proper inquiry is whether plaintiff is entitled to a tolling of the statute of limitations for a six-month period after his stroke (Deutsch Opp. Aff. ¶4). In that regard, counsel cites CPLR §208 to support plaintiffs' contention that plaintiff's action commenced on 1/4/2016 was timely filed when applying a six-month toll from the date the action accrued provided that the statute of limitations was tolled through 7/4/2013. Counsel claims that plaintiff was under continuous treatment for an entire six-month period from 1/16/2013 until his discharge on 6/27/2013. Following his discharge, it is alleged that plaintiff remained "debilitated, both mentally and physically, for many more months, i.e. well beyond the single week after discharge required to render all his claims timely under CPLR 208" (*id.* at ¶13). Counsel submits plaintiff's post-discharge home aide records as analyzed by plaintiff's rehabilitation expert as well as the affidavits of plaintiff's spouse and brother in support of this contention (*see* Deutsch Opp. Aff. Ex. A-C). Based on the foregoing, counsel contends that "Mr. Serrano was incapable of 'participating in society or capable of' defending his interests" (Deutsch Opp. Aff. ¶18). Counsel cited several cases to support the contention that the statute of limitations is properly tolled for a stroke patient with significant cognitive impairment, such as plaintiff (*see id.* at ¶25-¶28).

Counsel rejects defendants' argument that the medical records noting plaintiff was "alert" demonstrate plaintiff is not entitled the statute of limitations toll. In that regard, counsel claims that the fact that plaintiff was noted to be periodically "alert" or able to communicate basic needs is irrelevant to the inquiry of whether or not plaintiff is cognitively functional for purposes of the disability toll set forth in CPLR §208 (*see* Deutsch Opp. Aff. at Point I). Counsel also rejects defendants' reliance on the retainer agreement, 50-h hearing testimony, and lack of appointed guardian on behalf of plaintiff as irrelevant to the tolling inquiry. (*id.* at Point II, III).

As to Mrs. Serrano's derivative claim, counsel argues that while her medical malpractice claim (bearing a 2 ½ year statute of limitations) is time-barred, her negligence claim (bearing a 3-year statute of limitations) is timely (*see* Deutsch Opp. Aff. ¶21 fn. 2; Point VI). Counsel states that plaintiffs properly asserted a general negligence claim against Vassar and Mobile Life Support by alleging negligence of "all defendants for delay in administering and effectuating a timely transfer of a patient who was already deemed to be an urgent transfer" (*id.* at ¶103).

Counsel argues that plaintiffs' medical malpractice claims against Mobile Life cannot be dismissed as untimely due to the applicable tolling statutes as previously argued. Furthermore, counsel contends that plaintiffs' negligence claims against Mobile Life are not time-barred and any dismissal motion absent discovery is premature. (*id.* at Point V).

Decision

CPLR §214-a states, in pertinent part, that a medical malpractice action shall be commenced within 2 years and six months (or 2 ½ years) of the act or omission alleged. It is well settled that a malpractice claim includes any alleged act or omission which "constitute[s] medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician" including those transport services performed during the course of and at the direction of medical providers. (*Morales v. Carcione*, 48 AD3d 648 [2nd Dept. 2008]).

Under CPLR §208, a party is entitled to an disability toll if the party, at the time of the accrual of the cause of action, was "unable to protect [his or her] legal rights because of an overall inability to function in society" (*McCarthy v. Volkswagen of Am.*, 55 NY2d 543, 548 [1982]). Matters related to a litigant's mental capabilities are generally factual issues to be resolved by a trier of fact at an evidentiary hearing (*see id.*, *Rosenfeld v. Schlecker*, 5 AD3d 461 [2nd Dept. 2004]; *Stackrow v. New York Prop. Ins. Underwriter's Assn.*, 115 AD2d 883 [3rd Dept. 1985], *Barnes v. County of Onondaga*, 103 AD2d 624, 628 [1984]).

The motion record contains conflicting factual affidavits and expert evaluations regarding to plaintiff's mental competence during all relevant times as it relates to the issue of tolling the applicable statute of limitations. Accordingly, this matter is hereby remitted to a Court Attorney-Referee to conduct an evidentiary hearing to hear and determine the period of time, if any, that plaintiff was "unable to protect [his] legal rights" so as to toll the applicable statute of limitations period in accordance with CPLR §208 and, upon such finding, whether plaintiff timely commenced the instant action.

Plaintiffs' counsel conceded that Mrs. Serrano's derivative claim of medical malpractice is time-barred by the 2 ½ year statute of limitations per CPLR 214-a. (Deutsch Aff. ¶121 fn. 2). Plaintiff's counsel argues in the alternative that Mr. Serrano's "general negligence" claims against Vassar and Mobile Life for untimely transport based on an "ostensible agency" theory was timely filed within 3-year statute of limitations as per CPLR 214 (*citing Mduba v. Benedictine Hosp.*, 52 AD2d 450 [3rd Dept. 1976]). However, the record demonstrates that the transport of Vassar to WMC was so intertwined with the medical assessment and care that it bears a substantial relationship to the rendition of medical treatment by a licensed physician. (*See Bleiler v Bodnar*, 65 NY2d 65, 72 [1985]; *Webb v Albany Medical Ctr.*, 151 AD3d 1435 [3rd Dept. 2017]). A minute-by-minute account of the medical physicians' involvement in assessing the plaintiff upon presentment to Vassar and rendering a medical determination that plaintiff's medical needs required ground transport to WMC as set forth in detail in this court's prior decision dated 7/13/2017 and the underlying motion record thereof. Evidently, the decision to transfer plaintiff was integral to the exercise of medical decision-making by those physicians involved in the initial diagnostic assessment of plaintiff's medical condition and treatment needs (*see Webb v Albany Medical Ctr.*, *supra.*).

Based on the foregoing, it is hereby

ORDERED that this matter is hereby remitted to Court Attorney-Referee Lisa Rubenstein for purposes of conducting an evidentiary hearing as it relates to the issues raised hearing including, without limitation, the tolling of the applicable statute of limitations (CPLR §214-a, CPLR §208). It is further

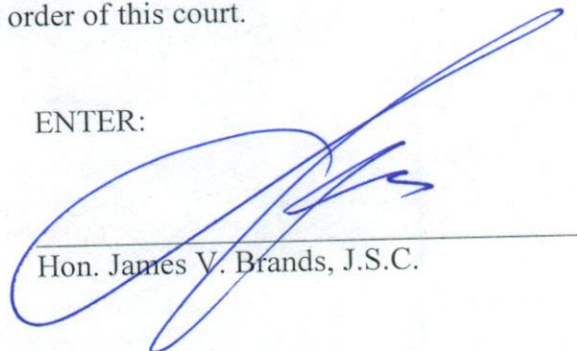
ORDERED that counsel are directed to appear for a conference before the Court Attorney-Referee on **January 29, 2018 at 2:00 P.M.**

Counsel shall contact the Referee directly at lrubenst@nycourts.gov for scheduling or related purposes.

The foregoing constitutes the decision and order of this court.

Dated: January 2, 2018
Poughkeepsie, New York

ENTER:



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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Brands' Chambers, please do not submit any copies. Submit only the original papers.