Vincenty v Lurio
2018 NY Slip Op 32415(U)
September 26, 2018
Supreme Court, New York County
Docket Number: 157094/13
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11

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MATILDA VINCENTY,

Plaintiff,

-against-

JOSEPH LURIO, M.D., NANCY TENNEY, FNP, THE INSTITUTE FOR FAMILY HEALTH (AMSTERDAM CENTER), ST LUKE'S-ROOSEVELT HOSPITAL CENTER, CONTINUUM HEALTH PARTNERS, INC. and JOHN DOE AND JANE DOE, as further described in the annexed Complaint,

Defendants.

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JOAN A. MADDEN

In this medical malpractice action, defendants move for an order dismissing the complaint pursuant to CPLR 1021 for failure to timely substitute a guardian for plaintiff. Plaintiff opposes the motion, which is denied for the reasons below.

Background

This action, which was commenced on June 5, 2013, arises out of allegations that on or about February 17, 2011, defendants failed to properly diagnose and treat an ulcer/abscess on plaintiff's left foot resulting in infection. On or about December 18, 2013, defendants served a Verified Answer and Demands for Bill of Particulars on behalf of each of the individually named defendants and various discovery demands. After plaintiffs did not respond to the demands for discovery, or to correspondence from defense counsel, defendants served plaintiff with a 90 day demand on April 3, 2015.

In the meantime, on November 28, 2014, as the result of a proceeding brought under

Article 81 of the Mental Hygiene Law, New York Foundation for Senior Citizens, Guardian Services, Inc. ("the Foundation") was appointed as the guardian of plaintiff's person and property. In response to the 90 day notice, by letter dated June 29, 2015, plaintiff sent to defendants a copy of the order appointing the Foundation as plaintiff's guardian, and the parties stipulated to extend plaintiff's time to respond to the 90 day notice to February 1, 2016. By order dated September 17, 2015, United Guardianship Services ("United") was appointed as the successor guardian for plaintiff.

Plaintiff counsel, however, maintains that the firm did not learn about the substitution of United as guardian until February 1, 2016. By stipulation dated February 1, 2016, the parties agreed to extend plaintiff's time to respond to the 90 day notice to July 1, 2016. By letter dated February 16, 2016, counsel for plaintiff wrote to defense counsel that United had been appointed as the successor guardian, and that she had reached out to United that day, and United has not yet responded. Plaintiff's counsel maintains that after this time, counsel attempted to speak to, and/or to obtain the cooperation of Jason Epstein, United's then Director of Guardianship, but such attempts failed. By stipulation dated June 29, 2016, the parties agreed to extend plaintiff's time to respond to the 90 day notice to October 5, 2016, and by stipulation dated October 2, 2016, the date was extended to January 5, 2017.

On or around January 3, 2017, plaintiff's counsel requested more time to respond to the 90 day notice, advising that she was having difficulty setting up a meeting with United. By stipulation dated January 3, 2017, the date was extended to April 5, 2017, and then extended a final time to August 31, 2017, in a stipulation dated April 5, 2017.

On or about September 8, 2017, defendants moved pursuant to CPLR 3126 to dismiss the

complaint for failure to prosecute. By order dated February 7, 2018, the court denied the motion on the ground that plaintiff was incapacitated, and no guardian had been substituted as plaintiff in the action. The denial was without prejudice to defendants making an appropriate motion to dismiss.

On February 13, 2018, defendants made the instant motion to dismiss pursuant to CPLR 1021 based on plaintiff's failure to substitute plaintiff's guardian, United, as plaintiff in this action. By letter to the court dated March 23, 2018, plaintiff's counsel requested that the motion be adjourned, as her firm had an appointment on March 26, 2018, to meet with Mike Scholar, United's new Director of Guardianship, and that it was anticipated that at the meeting, the firm would receive a signed retainer agreement, and therefore would be able to move for the substitution of the guardian as plaintiff shortly thereafter. By letter dated March 26, 2018, defendants objected to the adjournment request. After a conference call with the parties, the court issued an interim order dated March 28, 2018 extending plaintiff's time to submit opposition to defendants' motion to April 30, 2018 and scheduling argument for May 17, 2018.

On April 30, 2018, plaintiff submitted an affirmation from Scott Epstein, Esq, of plaintiff's firm, in which he states that despite numerous attempts by his office, his firm was unable to obtain the cooperation of United so that it would not be able to substitute United as plaintiff. Specifically, Mr. Epstein states that on March 26, 2018, an associate from the firm went to United's offices to meet with Mr. Scholar in person to obtain a signed retainer agreement, but that Mr. Scholar would not agree at that time to execute a retainer. Plaintiff's counsel also submits documents indicating numerous attempts by the firm after the March 26, 2018 meeting

to obtain Mr. Scholar's cooperation, which attempts were unsuccessful.[1]

Oral argument of the motion was adjourned from May 17, 2018 to June 7, 2018. At the June 7, 2018 return date, counsel for plaintiff represented that Mr. Epstein had spoken to Mr. Scholar, who informed him that United had made in application before Hon Shawn T. Kelly to extend United's guardianship, which was scheduled to be heard on June 27, 2018, and that if the extension was granted, United wanted to proceed with this action. Over defendants' objection, the matter was adjourned to July 19, 2018, for a decision on the extension of the guardianship. On July 19, 2018, plaintiff's counsel sought, and was granted, an adjournment of the matter to August 9, 2018, over defense counsel's objection, based on plaintiff's counsel's representation that United's attorney had informed Mr. Epstein that Judge Kelly had granted United's motion to extend the duration of the guardianship but that he did not yet have documentation of this extension.[2]

On August 9, 2018, the court held a conference call with the parties and the matter was adjourned to August 23, 2018. On August 23, 2018, the court was provided with a copy of Judge Kelly's order dated August 8, 2018, extending United's guardianship over plaintiff until July 5, 2020.

Defendants' Motion to Dismiss for Failure to Substitute Guardian for Plaintiff

Defendants argue that this action should be dismissed as an unreasonable time has

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[1]Plaintiff's counsel moved, by order to show cause issued on May 1, 2018, to withdrew as counsel for plaintiff. By order dated August 23, 2018, the court permitted the motion to be withdrawn.

[2]It appears that while the motion was granted, the order had not yet been signed by Judge Kelly.

elapsed since plaintiff was declared incompetent and the initial guardian was appointed in November 2014, and the successor guardian was appointed in September 2015. Moreover, defendants assert that there is no evidence of diligence by plaintiff or her guardian or counsel for plaintiff to timely substitute the guardian before defendants made the instant motion to dismiss.

Furthermore, defendants argue that they have been prejudiced by the delayed prosecution of the action as they have continued to incur costs to defend the action and have not obtained crucial and necessary discovery. In this connection, defendants argue that as the cause of action arose in February 2011, or more than seven and a half years ago, the medical records related to the treatment may no longer exist since doctors and hospitals are only required to keep medical records for six years based on the last known treatment.

CPLR 1021 provides, in relevant part, that "[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however, such dismissal shall not be on the merits unless the court shall so indicate." To determine whether the time for substitution is reasonable the court considers, "several factors, including the diligence of the party seeking substitution, prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has merit." Borruso v. New York Methodist Hosp, 84 AD3d 1293, 1294 (2d Dept 2011)(internal citations and quotations omitted).

In response to a motion to dismiss for failure to obtain timely substitution, the party opposing the motion "must provide a reasonable excuse for the delay and make a prima facie showing of merit." Public Administrator v. Levine, 142 AD3d 467, 468 (1st Dept 2016)(internal citations and quotations omitted). At that same time, however, "to prevail on a CPLR 1021

motion, a defendant must show that a plaintiff's failure to secure substitution in a timely fashion resulted in undue prejudice.[3]" Id; See Largo-Chicaiza v. Westchester Scaffold Equipment Corp., 90 AD3d 716, 717 (2d Dept 2011)(upholding trial court's grant of leave to substitute a representative of estate as plaintiff despite failure to provide explanation for lengthy delay in seeking such substitution where third-party defendant "suffered no prejudice by the [court] granting the motion").

In this case, plaintiff has adequately established a reasonable excuse for the delay in substitution in light of the proceedings resulting in the guardianship of plaintiff after the commencement of the action, followed by the replacement of the initial guardian with a successor guardian, and the proceedings to extend the successor guardianship. Here, where plaintiff is incapacitated, plaintiff has shown sufficient diligence in securing substitution of plaintiff, even if the record indicates that plaintiff's counsel could have pursued substitution of the guardian more aggressively. In this regard, the court notes that efforts by plaintiff's counsel to obtain consent from the guardian to substitute it as plaintiff in this action appeared to have been complicated by the fact that the guardian appointed was an institutional guardian as opposed to a family member of plaintiff.

As for the merits of the action, under the circumstances here, the complaint and certificate of merit are sufficient to establish prima facie merit of the action. Public Administrator v. Levine, 142 AD3d at 469 (affirming trial court's denial of motion to dismiss for failure to timely

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[3]The cases cited by defendants for the proposition that plaintiff must show lack of prejudice are inapposite as they do not involve motions to dismiss under CPLR 1021. See e.g. Basualdo v Guzman, 110 AD3d 610 (1st Dept 2013)(denying motion by plaintiff to serve late notice of claim based, inter alia, on plaintiff's failure to show lack of substantial prejudice); Casias v City of New York, 39 AD3d 681 (2d Dept 2007)(same).

substitute Public Administrator, finding, *inter alia*, that the amended complaint, and the verified bill of particulars sufficiently establish the merit of the action in the absence of physician affirmation);Leonardelli v. Presbyterian Hosp. in City of New York, 288 AD2d 105, 106 (1st Dept. 2001)(holding that "plaintiff's bill of particulars and verified complaint allege sufficient detailed facts to establish that the case has merit, especially since the opposing affidavits offer nothing to dispute the merit of the cause of action").

Furthermore, defendants have not adequately demonstrated that they will be prejudiced by the delay. While defendants argue that the records "may" no longer exist, such argument is insufficient to establish prejudice. Public Administrator v. Levine, 142 AD3d at 469 (noting that "bare allegations of prejudice are insufficient to defeat a motion for substitution") In this connection, issues regarding any missing documents that are determined to be relevant and material can be resolved during discovery and pre-trial proceedings.

In view of the foregoing and in light of the strong public policy favoring disposition of cases on the merits (Id at 470, citing Peters v. City of New York Health & Hosps. Corp, 48 AD3d 329 (1st Dept 2008)), the motion to dismiss for failure to timely substitute is denied.

However, given that no discovery has been exchanged in this action commenced more than five years ago, and that plaintiff's counsel has represented that United is now willing to proceed with this action, such denial is conditioned on plaintiff seeking to substitute United within 30 days of efiling of this order.

Conclusion

In view of the above, it is

ORDERED that defendants' motion to dismiss pursuant to CPLR 1021 is denied; and it is

further

ORDERED that this denial is condition on plaintiff moving, by order to show cause, within 30 days of efiling of this order to substitute plaintiff with her guardian, United Guardianship Services; and it is further

ORDERED that absent compliance with the immediately proceeding paragraph, the court shall enter an order dismissing the complaint pursuant to CPLR 1021.

Dated: September 26 2018

J.S.C.

HON. JOAN A. MADDEN
J.S.C.