

Rinaldo v Marwin

2019 NY Slip Op 32582(U)

August 22, 2019

Supreme Court, New York County

Docket Number: 805067/18

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:HON. JOAN A. MADDEN

PART 11

Justice

**ROBERT RINALDO and TONI ANN RINALDO,
Plaintiffs,**

INDEX NO. 805067/18

- v -

MOTION SEQ. NO.:001

SCOTT E. MARWIN, M.D., MONICA M. SHEPPARD, R.P.A., SHARON L. WALTON, M.D., JORDAN WERNER, M.D. AND NYU LANGONE MEDICAL CENTER,

Defendants

The following papers, numbered 1 to _____ were read on this motion to dismiss.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____	_____
Answering Affidavits — Exhibits _____	_____	_____
Replying Affidavits _____	_____	_____

Cross-Motion: [] Yes [x] No

In this medical malpractice action, defendants move to dismiss the complaint pursuant to CPLR 306-b for failure to serve them within 120 days of filing the summons with notice,¹ and for failure to timely file a certificate of merit pursuant to CPLR 3012-a. Plaintiffs oppose the motion.

Defendants argue that the claims against them should be dismissed as plaintiff failed to serve them within 120 days of filing the summons with notice on March 8, 2018, which would have been on or before July 7, 2018. In support of the motion, defendants submit affidavits of

¹Defendant Sharon L. Walton, M.D. did not move to dismiss as service was not made on her. After the motion was submitted plaintiff discontinued the claims against Dr. Walton with prejudice.

service showing that defendant Scott E. Marwin, M.D. was served on March 6, 2019 at his actual place of business by leaving the summons with notice on a person of suitable age and discretion, with following up mailing on March 7, 2019; that defendant Monica Sheppard, RPA, was served in the same manner on March 6, 2019, with follow-up mailing on March 7, 2019 as was defendant Jordan Werner, M.D. who was served on March 7, 2019, with follow up mailing made on March 11, 2019. As for defendant NYU Langone Medical Center (“NYU”), no affidavit of service has been filed, although defendants state that NYU was served on March 6, 2019. Defendants also assert that with respect to NYU and Dr. Werner, whose treatment of plaintiff ended on May 19, 2015, when he was discharged from NYU, the two and a half year statute of limitations for medical malpractice actions expired before the action was commenced.² With respect to defendants Dr. Marwin and P.A. Sheppard, defendants assert that their treatment of plaintiff Robert Rinaldo (“Rinaldo”) ended on December 10, 2015, and the statute of limitations expired on June 10, 2018, after the action was commenced but before these defendants were served.

In opposition to the motion, plaintiffs argue that the failure to timely serve the initiating papers was caused by law office failure, and that counsel was unaware that service had to be made within a 120 days of filing of the summons with notice. As for the lack of any affidavit of service filed with respect to NYU, plaintiffs’ counsel states that the failure was attributable to the process server who did not follow an instruction to efile the affidavit. Plaintiffs also argue that the extension of time should be granted as defendants have not shown that they have been

²Defendants do not seek to dismiss the claims on statute of limitations grounds at this time.

prejudiced as the result of the delay in serving them and that, in fact, plaintiffs will be prejudiced if the dismissal motion is granted since the statute of limitations has expired. Additionally, plaintiffs argue that the action is meritorious based on a note in the medical records from an infectious disease specialist indicating that Mr. Rinaldo suffered a prosthetic joint infection after a hip revision surgery at the defendant hospital.

In reply, defendants argue that plaintiffs have failed to show good cause for the delay which they concede is wholly attributable to the misfeasance of their counsel and that defendants have been prejudiced by the delay given the passage of time between the alleged malpractice and service of the complaint, particular as service was made after the expiration of the statute of limitations.

CPLR 306-b provides, in relevant part, that:

Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding, provided that in an action or proceeding.... If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

Here, plaintiffs have failed to they have “diligently attempted to serve defendants” as required for an extension of the time for service based on good cause. See American BankNote Corp. v. Daniele, 45 AD3d 338, 340 (1st Dept 2007).

That said, however, an extension of time for service is properly granted in the interest of justice. The interest of justice standard “requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an

extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." See Leader v. Maroney, Ponzini & Spencer, 97 NY2d 95, 105-106 (2001).

Here, as plaintiffs have demonstrated that they will be prejudiced if the extension is not granted as the statute of limitations has expired, and as defendants have not shown any specific prejudice resulting from the delay in service, an extension based on the interests of justice is warranted. Id at 106-107; See also Redmond v. Jamaica Hospital Center, 29 AD3d 768 (2d Dept 2006)(granting an extension of time to serve summons and complaint in medical malpractice action in the interest of justice where physician had not demonstrated prejudice); Darko v. Guerrino, 169 AD3d 768, 770 (2d Dept 2019)(trial court did not abuse its discretion in extending time for service of summons and complaint in medical malpractice action where plaintiff attempted service and statute of limitations expired at time plaintiff sought an extension and there was no demonstrable prejudice to defendant).

As for the defendants' argument that the action should be dismissed for failure to provide a certificate of merit, "CPLR 3012-a requires that a medical malpractice complaint be accompanied by a certificate of merit, executed by plaintiff's attorney, which states that there is a 'reasonable basis' for the commencement of the action." Perez v. Lenox Hill Hosp., 159 AD2d 251, 251 (1st Dept 1990). In this case, defendants assert that plaintiffs served a summons with notice and attached a complaint and attorney verification, but did not include a certificate of

merit. However, there is no dispute that the complaint has not been filed. Under these circumstances, the motion to dismiss pursuant to CPLR 3012-a is denied.

In view of the above, it is

ORDERED that the motion to dismiss for failure to timely serve defendants is denied;

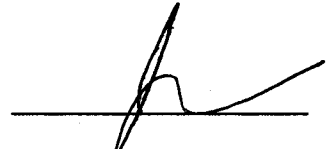
and it is further

ORDERED that the time to serve defendants is extended and deemed timely *nunc pro tunc*; and it is further

ORDERED that within 30 days of e-filing this order, plaintiffs shall file and serve a complaint and certificate of merit; and it is further

ORDERED that a preliminary conference shall be held in Part 11, room 351, 60 Centre Street on December 5, 2019 at 11 am.

DATED: August 22, 2019



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

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION