

Fortune v New York City Health & Hosps. Corp.

2019 NY Slip Op 34117(U)

July 11, 2019

Supreme Court, Bronx County

Docket Number: 26389/2016

Judge: George J. Silver

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

-----X
**AYALHA CARMEL FORTUNE, as Administratrix
of the ESTATE of KAREEM COOLEY a/k/a
KAREEM W. COOLEY and KAREEM WILLIAM
COOLEY and AYALHA CARMEL FORTUNE as
Mother and Natural Guardian of A.A.C. an infant,**

Index No. 26389/2016

DECISION & ORDER

Plaintiffs,

-against-

**NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, and LINCOLN MEDICAL
and MENTAL HEALTH CENTER,**

Defendants.

-----X
HON. GEORGE J. SILVER:

In this medical malpractice action, plaintiffs AYALHA CARMEL FORTUNE, as Administratrix of the ESTATE of KAREEM COOLEY (“decedent”) a/k/a KAREEM W. COOLEY and KAREEM WILLIAM COOLEY and AYALHA CARMEL FORTUNE as Mother and Natural Guardian of A.A.C. an infant (collectively “plaintiffs”) seek an order, deeming the notice of medical malpractice annexed to their moving papers timely filed *nunc pro tunc*. Defendants NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (“NYCHHC”) and LINCOLN MEDICAL and MENTAL HEALTH CENTER (“Lincoln Hospital” collectively “defendants”), cross-move for an order, dismissing plaintiffs’ summons and complaint for failure to file a certificate of merit in accordance with CPLR § 3012-a. For the reasons discussed below, the court grants plaintiffs’ motion and denies defendants’ cross-motion.

BACKGROUND AND ARGUMENTS

The substance of plaintiffs' wrongful death claim is that from June 22, 2015 to June 23, 2015, decedent was a patient at Lincoln Hospital when he was prematurely discharged in violation of good and accepted medical practice. Plaintiffs allege that as a result of discharging decedent while he was at risk of doing harm to himself and others, decedent committed suicide on June 24, 2015.

On August 10, 2015, plaintiffs served a notice of claim upon NYCHHC. On September 20, 2016, plaintiffs filed a summons and complaint. Thereafter, issue was joined on October 4, 2016. On October 8, 2018, plaintiffs filed a motion to deem the notice of medical malpractice annexed to their moving papers timely filed *nunc pro tunc*.

Plaintiffs explain that they failed to timely file a notice of medical malpractice due to law office error. Plaintiffs also assert that an order deeming their proposed notice of medical malpractice timely filed *nunc pro tunc* would not prejudice defendants. According to plaintiffs, defendants have been sued and served within the proper statute of limitations, and plaintiffs' instant motion was made in good faith and in the interest of justice and judicial economy.

In their cross-motion, defendants highlight that plaintiffs' counsel annexed a certificate of merit to the complaint, affirming that he was "unable to obtain a consultation with a physician as required by CPLR 3012-[a] because a time limitation would bar this action and that the required certification could not be reasonably obtained before such time expired." Defendants argue that this case must be dismissed unless plaintiffs set forth a reasonable excuse for their failure to submit a certificate of merit and an affidavit of merit from a medical expert in a timely manner. Defendants contend that because plaintiffs' complaint was filed thirteen months after plaintiffs served a notice of claim, plaintiffs' counsel's certificate of merit, claiming he could not obtain a consultation with

a physician due to a time limitation, cannot be credited. Defendants also aver that plaintiffs had over a year in between the service of the notice of claim and filing of the complaint to obtain the required consultation, but failed to do so. Defendants further assert that because the complaint was served on September 21, 2016, plaintiffs had until December 20, 2016, another ninety days, to serve the certificate of merit, but again failed to do so.

In addition, defendants maintain that because issue was joined on October 4, 2016, plaintiffs' notice of medical malpractice is over two years late. However, defendants assert that despite plaintiffs' delay, they take no position with respect to plaintiffs' application for leave to file a late notice of medical malpractice.

In opposition to defendants' cross-motion, plaintiffs argue that because CPLR § 3012-a permits a certificate of merit to be filed 90 days after receipt of medical records, their certificate of merit filed on November 9, 2018 is only two months late. Plaintiffs contend that although they requested decedent's medical records from defendants as early as January of 2017, they did not receive the records until June of 2018. Plaintiffs also assert that they were engaged in settlement discussions with defendants, which kept them from timely filing a notice of medical malpractice and certificate of merit. Plaintiffs further argue that contrary to defendants' assertion, CPLR § 3012-a does not require plaintiffs to serve a physician's affirmation or affidavit.

In reply, defendants assert that the court must dismiss the complaint since plaintiffs' opposition does not provide a reasonable excuse for their initial failure to provide a certificate of merit or an expert affidavit. Defendants reiterate that plaintiffs' certificate of merit filed on November 9, 2018 is over 22 months late. Defendants contend that although plaintiffs asserted that the certificate of merit could not be filed with the pleadings due to a "time limitation," plaintiffs fail to address the alleged "time limitation," but only assert that the certificate was not filed due to

settlement talks and plaintiffs' failure to obtain medical records. In contrast, defendants maintain that they have not engaged in "settlement talks" in this matter, and even if the parties did engage in settlement talks, that would not constitute a reasonable excuse for plaintiffs' failure to timely file a certificate of merit since the alleged settlement discussion occurred in June of 2018, one year and six months after the certificate of merit was due.

Additionally, defendants argue that plaintiffs' failure to obtain decedent's medical records is not a reasonable excuse. Defendants contend that plaintiffs' claim that the certificate of merit could not be filed as the medical records were not received until June of 2018 is inaccurate since the records were available to download on April 25, 2018. Defendants also submit that plaintiffs' defective authorizations could not be processed until April 10, 2018, over 18 months after the complaint was filed, and that plaintiffs' failure to reference their invalid authorizations incorrectly leads the court to believe that the authorizations were ignored when they were in fact improperly executed. Defendants further assert that plaintiffs failed to explain why, after receiving the invalid authorization notice in January of 2017, they waited until April of 2018 to request the records again or serve defendants with a demand for the records.

Defendants also argue that even if the court allows an extension pursuant to CPLR § 3012-a(d), plaintiffs have nonetheless failed to timely serve a certificate of merit. According to defendants, because plaintiffs' certificate of merit was filed on November 9, 2018, 109 days late, plaintiffs needed to provide an expert affidavit and a reasonable excuse for their delay, neither of which have been provided. Defendants also contend that because decedent's medical records were available to download on April 25, 2018, the certificate of merit was due 90 days later on July 24, 2018. Lastly, defendants argue that plaintiffs' contention that an expert affidavit is unnecessary ignores pertinent caselaw that requires a reasonable excuse and an expert affidavit to avoid

dismissal for failure to comply with CPLR § 3012-a. In that regard, defendants contend that this case must be dismissed since plaintiffs failed to provide either.

DISCUSSION

I. Plaintiffs' Motion

CPLR § 3406(a) provides that in an action to recover damages for dental, medical or podiatric malpractice, a plaintiff must file a notice of malpractice action “not more than sixty days after issue is joined.” “The time for filing a notice of dental, medical or podiatric malpractice action may be extended by the court only upon a motion made pursuant to section two thousand four of this chapter” (CPLR § 3406(a)). CPLR § 2004 allows a court to “extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown.”

Here, plaintiffs' notice of medical malpractice was filed on October 8, 2018, two years after issue was joined. Plaintiffs' explanation that their delay was due to a law office failure is reasonable, especially in light of the lack of prejudice to defendants (*Negron v. Hosp. of Albert Einstein Coll. of Med.*, 158 A.D.2d 408, 409 [1st Dept. 1990] [granting plaintiffs leave to file a late notice of medical malpractice action where plaintiffs were two years late in seeking leave due to a “law office failure,” and there was no prejudice to defendant]; *Casiano v. New York Hosp.-Cornell Med. Ctr.*, 169 A.D.2d 806, 807 [2d Dept. 1991] [granting plaintiff leave to serve a late notice of malpractice action where plaintiff's “brief delay was not prejudicial and was adequately explained [law office failure]; *Nagi v. Chan*, 159 A.D.2d 278, 278 [1st Dept. 1990] [granting plaintiff leave to serve a late notice of medical malpractice action where plaintiff “made showing of ‘good cause’ for the delay, premised in law office failure . . . and there is no evidence that defendant has been prejudiced in any way”]). Moreover, defendants do not oppose plaintiffs'

application for leave to file a late notice of medical malpractice.¹ Accordingly, plaintiffs' motion for an order deeming the notice of medical malpractice annexed to their moving papers timely filed, *nunc pro tunc*, is granted.

II. Defendants' Cross-Motion

CPLR § 3012-a(a)(1) requires a complaint in a medical malpractice action to be accompanied by a certificate of merit, in which the plaintiff's attorney affirms that he or she has reviewed the facts of the case, consulted with at least one physician, and concluded that there is a reasonable basis for the lawsuit based upon the consultation. In the event an attorney is unable to consult with a physician due to a time limitation, then "the certificate required by [CPLR § 3012-a(a)(1)] shall be filed within ninety days after service of the [c]omplaint" (CPLR § 3012-a(a)(2)). Further, CPLR § 3012-a(d) provides that where a plaintiff has requested records from the defendant, and such records have not been produced, the plaintiff has 90 days to file a certificate of merit after the records have been produced. Under CPLR § 2004, "the court may extend the time to file the notice, upon the showing of good cause" (*Grad v. Hafliker*, 68 A.D.3d 543, 544 [1st Dept. 2009]).

Here, plaintiffs failed to file a certificate of merit in compliance with CPLR §§ 3012-a(a)(1), 3012-a(a)(2), and 3012-a(d). Based on plaintiffs' assertion that they could not obtain a consultation due to a time limitation under CPLR § 3012-a(a)(2), they were required to file a certificate of merit by December 20, 2016, 90 days after service of the complaint. Similarly, based on plaintiffs' representation that they did not receive decedent's medical records until June of

¹ Defendants assert that they take no position with respect to plaintiffs' motion for leave to file a late notice of medical malpractice. Although the parties do not refer to the same relief, the court will assume that defendants similarly take no position with respect to plaintiffs' application to deem the notice of medical malpractice annexed to plaintiffs' moving papers timely filed *nunc pro tunc*.

2018, plaintiffs had until September of 2018 to file a certificate of merit. Therefore, plaintiffs' certificate of merit filed on November 9, 2018 is beyond the time permitted by CPLR § 3012-a.

However, dismissal of plaintiffs' complaint is unwarranted (*see Kolb v. Strogh*, 158 A.D.2d 15, 23 [2d Dept. 1990] ["[It] is clear that neither statute nor rule authorizes dismissal of the action as a sanction for a violation of CPLR 3012-a."] *cit*ing *Tewari v. Tsoutsouras*, 75 N.Y.2d 1, 5 [1989] ["Appellate Division abused its discretion in determining that plaintiff's motion to extend the time to file the notice must be denied because she failed to demonstrate both the meritorious nature of her claims and a 'reasonable excuse' for the delay"]; *see also, Grad*, 68 A.D.3d at 544, *supra* ["Plaintiff's failure to file a timely notice does not warrant the harsh sanction of dismissal."]; *Casiano*, 169 A.D.2d at 807, *supra* ["There is no statute or rule which authorizes dismissal of an action as a sanction for a violation of CPLR [§] 3012-a"])).

Contrary to defendants' assertion, plaintiffs need not demonstrate a reasonable excuse for their delay or a meritorious cause of action (*Tewari*, 75 N.Y.2d at 5). Nevertheless, plaintiffs have demonstrated that their delay was relatively short, and that defendants have not been prejudiced by their delay. Based on plaintiffs' receipt of decedent's medical records in June of 2018, plaintiffs' certificate of merit filed on November 9, 2018 is only two months late (CPLR § 3012-a(d); *Casiano*, 169 A.D.2d at 807, *supra* [two-month delay was brief and not prejudicial]). Furthermore, despite the vagueness of plaintiffs' explanation, plaintiffs' excuse that they were engaged in settlement discussions with defendants as they awaited the production of decedent's medical records demonstrates good cause for their delay (*see e.g., id., supra* [counsel's clerical error constitutes reasonable excuse for delay]). Moreover, in light of the "well accepted policy that actions should be considered on their merits, particularly when there is no showing of prejudice suffered by the movant," defendants' application to dismiss the complaint must be denied (*see e.g.,*

Perez v. Lenox Hill Hosp., 159 A.D.2d 251, 251 [1st Dept. 1990] [denying defendant's motion to dismiss where defendant has not been prejudiced by the initial absence of the certificate and plaintiff has since filed the certificate of merit]; *Cirigliano v. DePerio*, 134 Misc. 2d 1065, 1067 [Sup. Ct. 1987] [denying defendants' motion to dismiss pursuant to CPLR § 3012-a where plaintiff's lawyer stated that "earlier compliance was not effected due to inadvertence on his part and there has been no showing of any prejudice to movants"]).

Similarly, plaintiffs' failure to submit a physician's affirmation does not warrant dismissal of the complaint (*see Kolb*, 158 A.D.2d at 23, *supra*; *Tewari*, 75 N.Y.2d at 11, *supra*; *see also Casiano*, 169 A.D.2d at 807, *supra* [Pursuant to CPLR § 2004, "the court may, in its discretion, extend a plaintiff's time to file such a notice, and the plaintiff need not demonstrate a meritorious claim or a reasonable excuse for the delay in order for the motion to be granted"]; *Cirigliano*, 134 Misc. 2d at 1067, *supra* ["The potential meritorious nature of the action is demonstrated . . . by the service, though late, of the required Certificate . . . and the short length of delay of the service required."]). Accordingly, defendants' application to dismiss the complaint is denied.

Based on the foregoing, it is hereby

ORDERED that plaintiffs' application for an order, deeming the notice of medical malpractice annexed to their moving papers timely filed, *nunc pro tunc*, is granted; and it is further

ORDERED that defendants cross-motion for an order, dismissing plaintiffs' complaint for failure to file a certificate of merit in accordance with CPLR § 3012-a is denied; and it is further

ORDERED that the parties are directed to appear for a conference on August 14, 2019 at 9:30 a.m. at 851 Grand Concourse (Room 600), Bronx, New York, 10451.

This constitutes the decision and order of the court.

Dated: July 11, 2019

George J. Silver
HON. GEORGE J. SILVER

GEORGE J. SILVER