

Gallagher v Orzac Ctr. for Rehabilitation

2019 NY Slip Op 34231(U)

May 7, 2019

Supreme Court, Nassau County

Docket Number: 610185/18

Judge: Sharon M.J. Gianelli

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 20
Present: Hon. Sharon M.J. Gianelli, J.S.C.

JAMES A. GALLAGHER and PATRICIA GALLAGHER,

Plaintiffs,

-against-

ORZAC CENTER FOR REHABILITATION, ORZAC
CENTER FOR EXTENDED CARE & REHABILITATION,
LONG ISLAND JEWISH VALLEY STREAM, a division of
LONG ISLAND JEWISH MEDICAL CENTER, d/b/a NORTH
SHORE-LIJ ORZAC CENTER FOR REHABILITATION,
LONG ISLAND JEWISH MEDICAL CENTER d/b/a NORTH
SHORE-LIJ ORZAC ENTER FOR REHABILITATION,
FRANKLIN HOSPITAL MEDICAL CENTER, FRANKLIN
HOSPITAL, LONG ISLAND JEWISH MEDICAL CENTER,
LONG ISLAND JEWISH MEDICAL CENTER d/b/a LIJ
VALLEY STREAM HOSPITAL, RANDY MARC COHN, M.D.,
JOHN DOE NURSES NOS. 1-10, JANE DOE NURSES
NOS. 1-10, JOHN DOE PHYSICAL THERAPISTS NOS. 1-10,
JANE DOE PHYSICAL THERAPISTS NOS. 1-10, JOHN DOE
MEDICAL ASSISSTANTS NOS. 1-10, JANE DOE MEDICAL
ASSISTANTS NOS. 1-10, JOHN DOE RADIOLOGISTS NOS.
1-10, JANE DOE RADIOLOGISTS NOS. 1-10, JOHN DOE
MEDICAL LAB TECHNICIANS NOS. 1-10, JANE DOE
MEDICAL LAB TECHNICIANS NOS. 1-10, JOHN DOE
HOSPITAL and REHABILITATION PHARMACISTS
NOS. 1-10, JANE DOE HOSPITAL and REHABILITATION
PHARMACISTS NOS. 1-10,

Defendants.

_____X

AMENDED ORDER

Index No. 610185/18

Motion Seq.
Nos.: 001, 002

XXX

Papers submitted on this motion:

- Defendants' Notice of Motion and Affirmation (Seq. 1) _____X
- Plaintiffs' Memorandum of Law and Reply in Opposition (Seq. 1) _____X
- Plaintiffs' Notice of Cross-Motion and Affidavit (Seq. 2) _____X
- Defendants' Affirmation in Opposition to Plaintiffs' Cross-Motion
and Reply Affirmation _____X

Defendants Orzac Center For Rehabilitation, Orzac Center For Extended Care & Rehabilitation, Long Island Jewish Valley Stream, A Division Of Long Island Jewish Medical Center, D/B/A North Shore-LIJ Orzac Center For Rehabilitation, Long Island Jewish Medical Center D/B/A North Shore-LIJ Orzac Enter For Rehabilitation, Franklin Hospital Medical Center, Franklin Hospital, Long Island Jewish Medical Center, Long Island Jewish Medical Center D/B/A LIJ Valley Stream Hospital, Randy Marc Cohn, M.D., (“Defendants”), seek an Order pursuant to CPLR § 3012(b) dismissing Plaintiffs’ action in its entirety based upon Plaintiffs failure to timely serve the Defendants with a complaint.

Plaintiffs, *pro se*, oppose dismissal and cross-move for an extension of time to serve the complaint for 90 days and to have time to retain an attorney.

Underlying Facts/Procedural History

The underlying action is one for alleged medical malpractice and/or negligence.

Plaintiffs filed a Summons with Notice on July 31, 2018 (see Defendants’ Exhibit “A”).

Plaintiffs served the Summons with Notice by substituted service of process upon Defendants on or about November 27, 2018.

On December 17, 2018, Defendants served notices of appearance and a demand for the Complaint (see Defendants’ Exhibit “B”).

To date, a complaint has not been served upon Defendants despite such demand.

Law/Analysis

Pursuant to CPLR § 3012(b):

Service of Complaint Where Summons Served Without Complaint. If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand. Service of the demand shall extend the time to appear until twenty days after service of the complaint. If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision. A demand or motion under this subdivision does not of itself constitute an appearance in the action.

Pursuant to CPLR § 3012(d):

Extension of Time to Appear or Plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for the delay or default.

Here, Plaintiffs, pursuant to the demand for the complaint by Defendants, were required to serve the complaint by January 11, 2019. This did not occur and to date, the complaint has not been served by Plaintiffs, instead Plaintiffs cross-move for an extension of 90 days to serve the complaint.

“To avoid dismissal of an action for failure to serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012(b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a potentially meritorious cause of action” (*Khamis v Corporate Transp. Group, Ltd.*, 135 A.D.3d 825 [2d Dept. 2016] citing *Telian v Freund*, 129 A.D.3d 828 [2d Dept. 2015] quoting *Carducci v. Russell*, 120 A.D.3d 1375-76 [2d Dept. 2014];

Stout v. Heyer, 40 A.D.3d 743 [2d Dept. 2007]; *Amodeo v. Gellert & Quartararo, P.C.*, 26 A.D.3d 705 [3d Dept. 2006]).

The Court has discretion to determine what constitutes a reasonable excuse for a default (*see Mitrani Plasterers Co., Inc. v. SCG Contr. Corp.*, 97 A.D.3d 552 [2d Dept. 2012]).

Here, it is undisputed that a demand for service of the complaint was made by Defendants and that Plaintiffs have not complied with such demand. Plaintiffs instead file a cross-motion for an additional 90 days to serve the complaint. However, Plaintiffs have failed to asset either a reasonable excuse for such delay or a meritorious cause of action. Specifically, Plaintiff Patricia Gallagher, *pro se*, asserts in her affidavit that “I do not have a medical background to understand whether anything documented in those records establishes a meritorious cause of action” (*see* Gallagher Affirmation in Opposition and Reply at Para. 8). Plaintiff merely claims that her husband, Plaintiff James Gallagher “confided to me that he believed medical malpractice had occurred” (*id.*). Thus, at this juncture, Plaintiffs themselves state that they are not sure whether medical malpractice is properly alleged but speculate that as a result of Plaintiff James Gallagher’s deteriorating condition, this appears to be the case. This is woefully insufficient to establish a meritorious cause of action and to permit the extension of time to file the complaint as requested by Plaintiffs in their cross-motion.

Furthermore, Plaintiffs assertion that they were unaware of the statutory time-frame to file the complaint is unavailing.

Upon review of all relevant facts and circumstances as set forth in the submissions, Defendants' motion is Granted, and Plaintiffs' cross-motion is Denied.

Accordingly, it is hereby

ORDERED, that Defendant's application pursuant to CPLR 3012(b) to dismiss the Complaint is GRANTED;

and it is

ORDERED, that Plaintiffs cross-motion is DENIED; and it is further

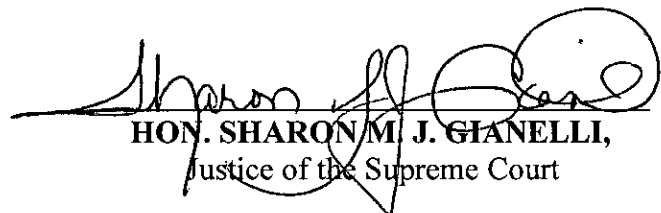
ORDERED, that upon service of this Order upon Plaintiffs with Notice of Entry, service is deemed complete;

and it is

All applications not specifically addressed herein are denied.

This constitutes the Decision and Order of the Court.

DATED: May 7, 2019
Mineola, New York



HON. SHARON M. J. GIANELLI,
Justice of the Supreme Court

ENTERED

MAY 08 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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