

St. Clair v Bolognese

2019 NY Slip Op 34533(U)

June 11, 2019

Supreme Court, Nassau County

Docket Number: Index No. 601808/18

Judge: Sharon M.J. Gianelli

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 NASSAU - IAS/TRIAL PART 20
Present: Hon. Sharon M.J. Gianelli, J.S.C.

AMANDA LYNN ST. CLAIR and
MICHAEL ST. CLAIR,

Plaintiffs,

-against-

X

Index No. 601808/18

Mot Seq. Nos. 001, 002,
003, and 004

PAOLO BOLOGNESE, M.D., KATHERINE WAGNER,
M.D., LAVERN BROWN, R.N., ROSE KLEIN –
SEYMOUR, N.P., NORTH SHORE LIJ – NORTH SHORE
UNIVERSITY HOSPITAL, SANDRA ATLAS BASS
HEART HOSPITAL AT NORTH SHORE UNIVERISTY
HOSPITAL, NORTHWELL HEALTH, NSPC BRAIN AND
SPINE SURGERY, NEUROSURGICAL, P.C. and CHIARI
NEUROSURGICAL CENTER AT NSPC,

Defendants.

Papers submitted on this motion:

Plaintiff's Notice of Motion (#001)

for Leave to File a Late Notice of Medical Malpractice
Action

**Defendants Notice of Cross-Motion to Dismiss,
Preclude and Compel and Affirmation in
Opposition (#002)** (Katherine Wagner, M.D.,
Lavern Brown R.N., Rose Klein-Seymour, N.P.,
"North Shore University Hospital" and "Sandra
Atlas Bass Heart Hospital at North Shore
University Hospital" and Northwell Health, Inc.
s/h/a "Northwell Health")

Plaintiffs Cross-Motion for Summary Judgment
and opposing Defendants Motion to Dismiss and
Reply Affirmation (#003)

Defendants Affirmation in Reply and in
Opposition to Plaintiffs Cross-Motion and
**Notice of Defendants Cross-Motion for
Summary Judgment (#004)**
(Katherine Wagner, M.D., Lavern Brown, R.N,

X

X

X

X

Rose Klein-Seymore, N.P, North Shore University Hospital s/h/a “North Shore LIJ-North Shore University Hospital” and “Sandra Atlas Bass Heart Hospital at North Shore University Hospital” and Northwell Health, Inc. s/h/a “Northwell Health”)_____X

The underlying medical malpractice action is the basis upon which the four (4) motions herein are based. On or about February 7, 2018, Plaintiffs, in a self-represented (*Pro Se*) capacity filed a Summons and Verified Complaint against Defendants. On September 11, 2018, Plaintiffs retained current counsel Dankner Milstein, P.C. to prosecute their malpractice action.

Plaintiffs herein seek an Order of the Court granting Plaintiffs leave to file a Notice of Medical Malpractice Action more than sixty (60) days after joinder of issue, pursuant to CPLR §§ 2004, 2005 and 3406(a). CPLR §§ 2004, 2005 and 3406(a), collectively, afford the Court discretion to extend the time fixed by statute upon good cause shown, as here, where Plaintiffs commenced this medical malpractice action as *pro se* litigants, and no unreasonable amount of time has elapsed.

Defendants (as specified above) have opposed Plaintiffs’ motion and have cross-moved for summary judgment, dismissal and preclusion. Plaintiffs also have cross-moved for summary judgment. For a grant of summary judgment, it must clearly appear that no material triable issue of fact is presented (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues

exist (see *Barr v. Albany County*, 50 N.Y.2d 247 [1980]; *Miller v. Journal-News*, 211 A.D.2d 626 [2d Dept. 1995]; *Daliendo v. Johnson*, 147 A.D.2d 312 [2d Dept. 1989]). The evidence should be construed in a light most favorable to the party moved against for summary judgment (see *Corvino v. Mount Pleasant Cent. School District et al.*, 305 A.D.2d [2d Dept. 2003]; *Weiss v Garfield*, 21 A.D.2d 156 [3rd Dept. 1964]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue (see *Palacino v. Equity Mgmt. Group*, 272 A.D.2d 457 [2d Dept. 2000]; *Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]; *Moskowitz v. Garlock*, 23 A.D.2d 943 [3d Dept. 1965]). Here, all factors considered, the Court finds that material issues of fact exist that militate against a grant of summary judgment at this time.

The same is true for Defendants' motion to dismiss. In considering a motion to dismiss a complaint pursuant to *CPLR § 3211(a)(7)*, the Court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Leon v Martinez*, 84 NY2d 83, 88; *Sokol v Leader*, 74 AD3d 1180, 1181). Here, a grant of dismissal at this time would be premature, as would a grant of preclusion.

Accordingly, it is hereby

ORDERED, that Plaintiffs' motion (#001) for leave to file a Notice of Medical Malpractice Action more than sixty (60) days after joinder of issue, pursuant to CPLR §2004, §2005, and §3406(a) is GRANTED; and it is

ORDERED, that Plaintiff shall file a Notice of Medical Malpractice Action within twenty (20) days of the date of this Order, and shall together with such filing, also file proof of service upon all parties to the action; and it is

ORDERED, that Defendants' cross-motion (#002) is DENIED; and it is

ORDERED, that Plaintiffs' cross-motion (#003) is DENIED; and it is

ORDERED, that Defendants' cross-motion (#004) is DENIED; and it is

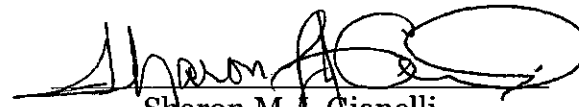
ORDERED, that the parties are directed to appear on July 10, 2019 for a Preliminary Conference as previously scheduled in the Preliminary Conference Part. Located at the Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, lower level; and it is

ORDERED, that Plaintiff's counsel is directed to serve the Preliminary Conference Clerk and all counsel with this Order.

All applications not specifically addressed herein are DENIED.

This is the Decision and Order of the Court.

DATED: Mineola, New York
June 11, 2019



Sharon M.J. Gianelli
Justice of the Supreme Court

ENTERED

JUN 12 2019

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**