SHORT FORM ORDER **INDEX NO.: 606186/2015**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motions Submit Date: 04/19/18
Mot SCH: 04/12/17
Mot Seqs 002 & 003 MG; CASE DISP

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KENNETH J. STROHL, as Administrator of the Estate of Malcolm J. Strohl,

Plaintiff,

-against-

UTOPIA HOME CARE, INC.,

Defendant.

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PLAINTIFF'S COUNSEL:
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DEFENDANT'S COUNSEL:
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Upon the following papers read on defendant's motion for summary judgment pursuant to CPLR 3212; Notice of Motion & Affirmation in Support and supporting papers; Affirmation in Opposition; Reply in Further Support; and upon due deliberation and full consideration, it is,

ORDERED that defendant's motion for summary judgment pursuant to CPLR 3212 dismissing the complaint as a matter of law as time-barred on statute of limitations grounds is **granted** for the following reasons; and it is further

ORDERED that plaintiff's complaint is dismissed as time-barred; and it is further

ORDERED that a copy of this decision and order be served with notice of entry on counsel for plaintiff forthwith electronically and by overnight mail.

FACTUAL BACKGROUND & PROCEDURAL POSTURE

Estate administrator Malcolm J. Strohl commenced this action on behalf of decedent Kenneth J. Strohl, his uncle, electronically filing summons and complaint on June 12, 2015 against defendant Utopia Home Care Inc. alleging negligence, gross negligence and nursing home negligence. Defendant joined issue serving an answer with affirmative defenses on August 7, 2015, including arguing that plaintiff's causes of action were untimely under the applicable statutes of limitation.

Plaintiff amended the pleadings on August 12, 2015, and amplified the pleadings serving a verified bill of particulars on May 16, 2016. The bill of particulars was subsequently amended and supplemented on September 12, 2016. The parties held a preliminary conference

setting forth a pretrial discovery scheduling order on March 7, 2016. The matter has since appeared before this Court on the discovery compliance conference calendar, including a pre-motion conference pertaining to the presently pending application for summary judgment by defendant. To date, the parties have made clear that party depositions have yet to be completed.

Plaintiff alleges that defendant was negligent in rendering care or treatment for the decedent from August 21, 2007 to June 28, 2012, the date of decedent's passing. Decedent was a patient of defendant's home health care agency, receiving services, treatment or care at his residence located in Halesite, New York. Plaintiff generally alleges that the care and treatment provided was negligent or grossly negligent in that decedent, a patient confined to his bed, was permitted to reside in an unsafe or unsanitary environment which in his view lead to an infection, sepsis and eventually decedent's death.

DISCUSSION

The Parties Contentions & Arguments

Defendant presently moves to dismiss plaintiff's complaint as untimely as a matter of law. In support of this application, defendant submits a copy of the pleadings, as well as an affidavit of its records custodian to authenticate its treatment. Focusing upon plaintiff's complaint and asserted causes of action seeking recovery for negligence, wrongful death and/or nursing home negligence, defendant argues that plaintiff's causes of action are untimely having been filed after the expiration of the relevant statutes of limitation. Thus, relying on treatment and billing records, defendant notes that it rendered home care services to decedent at his residence from August 23, 2007 to June 7, 2012. Defendant argues that records indicate that decedent passed away on June 28, 2012, after its relationship with decedent had ceased.

Further, defendant argues that its billing records and other decedent's medical records indicate that immediately preceding his passing, decedent had been admitted and discharged from other nursing home facilities and hospitals. Thus, interpreting the statutes of limitations for wrongful death under Estate Powers & Trusts Law 5-4.1 at 2 years from decedent's passing; ordinary negligence under CPLR 214-a at 3 years from defendant's last rendering of care, treatment or service of decedent; and Public Health Law 2801-d at 3 years for nursing home negligence. Here, defendant notes that this matter was commenced on June 12, 2015, more than 3 years after defendant's last date of care, service or treatment of the decedent. Thus, defendant argues by simple arithmetic that plaintiff's complaint and its asserted causes of action must be dismissed as time-barred.

Further, defendant argues that plaintiff cannot recover against defendant under Pub. Health L. § 2801-d to the extent that defendant is not a "healthcare residential facility", but rather a licensed "home healthcare agency." Thus, defendant argues that as a matter of law, plaintiff cannot state a private right of action for recovery for nursing home negligence where it is categorically not the type or kind of entity regulated pursuant to that statute. Instead, defendant emphasizes that it is regulated and licensed under a separate section of the statute, Pub. Health L. § 3605.

Arguing in opposition to entry of summary judgement, plaintiff argues first that judgment as a matter of law dismissing the complaint as untimely is premature under CPLR 3212(f).

Here, plaintiff urges that additional discovery is necessary to determine whether or not Pub. Health L. § 2801-d applies to defendant at all.

Additionally, plaintiff argues that the tolling provision of CPLR 208 should operate to save any alleged untimely claims in the complaint, to the extent that plaintiff argues his decedent suffered a mental disability rendering him unable to care, manage or perceive his legal affairs. In furtherance of this plaintiff offers the affirmation of a physician who reviewed and relied upon both plaintiff's affidavit, as well as decedent's medical records, focusing primarily on decedent's hospitalizations and admissions to nursing homes prior to his passing in 2012. More specifically, plaintiff argues in reliance on the physician's affirmation that decedent's medical records in part contained several references and observations that he suffered from dementia or senility and was confused or noncompliant with medical or nursing staff at both hospitals and nursing homes prior to his death. Thus, plaintiff argues this evidences plaintiff's decedent suffered a mental disability which should have tolled of the statute of limitations measured from the expiration of the disability on decedent's passing.

Standard of Review

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636 [2d Dept. 1988]).

Seeking dismissal of the complaint as a matter of law for untimeliness under the applicable statute of limitations, movant must show "that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable" (***Shah v Exxis, Inc.***, 138 AD3d 970, 971, 31 NYS3d 512, 514 [2d Dept 2016][construing CPLR 3211(a)(5)]).

I. Premature Application Under CPLR 3212(f)

Plaintiff seeks to prevent dismissal of the statutory nursing home negligence claims partly based on reasoning that incomplete pretrial disclosure could reveal information allowing the Pub. Health L. 2801-d claims to apply to defendant. This reasoning is misguided, and as explained below, plaintiff fails to sustain his burden of identifying specific areas of inquiry or discovery not yet possessed or explored to prevent entry of summary judgment.

Under CPLR 3212(f), "where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (***Juseinoski v. New York Hosp. Med. Ctr. of Queens***, 29 AD3d 636, 637, 815 NYS2d 183, 184-85 [2d Dept 2006]; ***Baron v. Inc. Vil. of Freeport,*** 143 AD2d 792, 92-93; 533 NYS2d 143, 148 [2d Dept 1998]). Case law therefore requires that a party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated (***Chmelovsky v. Country Club Homes, Inc.***, 106 AD3d 684, 964 NYS2d 245, 246 [2d Dept 2013]; ***Martinez v. 305 W. 52 Condo.***, 128 AD3d 912, 914, 9 NYS3d 375, 377 [2d Dept 2015]["a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment"]). Generally speaking then a non-movant should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (*see* ***Video Voice, Inc. v. Local T.V., Inc.,*** 114 AD3d 935, 980 NYS2d 828; ***Bank of Am., N.A. v. Hillside Cycles, Inc.,*** 89 AD3d 653, 932 NYS2d 128; ***Venables v. Sagona,*** 46 AD3d 672, 673, 848 NYS2d 238). Further, non-movant is also entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated (*see* CPLR 3212[f]; ***Nicholson v. Bader,*** 83 AD3d 802, 920 NYS2d 682; ***Family-Friendly Media, Inc. v. Recorder Tel. Network,*** 74 AD3d 738, 739, 903 NYS2d 80; ***Juseinoski v. New York Hosp. Med. Ctr. of Queens,*** 29 AD3d 636, 637, 815 NYS2d 183). ***Malester v. Rampil***, 118 A.D.3d 855, 856, 988 N.Y.S.2d 226, 227-28 [2d Dept 2014]).

Accordingly, a party seeking to preclude summary judgment may argue prematurity in light of incomplete discovery (*see e.g.* ***Adrianis v Fox***, 30 AD3d 550, 550–51, 817 NYS2d 374, 375 [2d Dept 2006][holding that a motion court properly denies a summary judgment motion as premature where at least one party's deposition was still outstanding and the parties had previously stipulated to hold that deposition only seven days after the motion was made, or in other words accepting non-movant's argument that they were unfairly deprived the opportunity to fully probe availability of a defense to liability in the case, not having the benefit of party depositions]; *see also* ***Amico v Melville Volunteer Fire Co., Inc.***, 39 AD3d 784, 785, 832 NYS2d 813 [2d Dept 2007][resolving that a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment]).

By the same token however, the Second Department has also clearly ruled that non-movant's mere hope or speculation that additional discovery might lead to or create a triable fact issue is insufficient to preclude the entry of summary judgment on liability in this negligence motor vehicle action (*see e.g.* ***Rodriguez v Farrell***, 115 AD3d 929, 931, 983 NYS2d 68, 70 [2d Dept 2014][appellate court determining that summary judgment not premature where defendant failed to demonstrate that discovery would lead to relevant evidence or that facts essential to justify opposition to the motions were exclusively within the knowledge and control of the plaintiffs]; ***Medina v Rodriguez***, 92 AD3d 850, 851, 939 NYS2d 514, 515 [2d Dept 2012]; ***Kimyagarov v Nixon Taxi Corp.***, 45 AD3d 736, 737, 846 NYS2d 309, 310–11 [2d Dept 2007]; ***Hill v Ackall***, 71 AD3d 829, 829–30, 895 NYS2d 837, 838 [2d Dept 2010]).

Applied here, this Court remains unpersuaded by plaintiff's submission that he has carried his burden of demonstrating that this application seeking dismissal of the statutory nursing home negligence claims cannot be resolved absent party depositions. Plaintiff has made no showing at all precisely what sort of information he seeks that would shed a light on the dispute. Moreover, the question posed by defendant's application appears purely legal in nature and can be resolved by the instant motion practice without resort to discovery. Thus, because this Court does not agree that the pre-disclosure status of defendant's motion warrants denial solely for that reason under CPLR 3212(f), that aspect of defendant's opposition is unsuccessful.

II. **Statutory Nursing Home Negligence Claim**

At the outset, defendant's argument concerning the timeliness of plaintiff's claim for nursing home negligence relying on a statutory violation of Public Health Law is rendered academic because defendant correctly argues that it is not the type or kind of entity regulated by Section 2801-d. Courts within the Second Department have recognized that pursuant to the statute's plain text and legislative history, licensed home health care agencies such as defendant lacking a physical care facility, are not a proper defendant for plaintiff's private right of recovery under that section. This is clear from the Court's statement as follows:

> Liability under the Public Health Law 'contemplates injury to the patient caused by the deprivation of a right conferred by contract, statute, regulation, code or rule, subject to the defense that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient,' and claims brought pursuant to this statute are governed by the three-year statute of limitations"

Moore v St. James Health Care Ctr., LLC, 141 AD3d 701, 703, 35 NYS3d 464, 466-67 [2d Dept 2016]

Lest there be any doubt, the law within the Second Department is clear in this regard. Courts similarly situated on similar applications have been affirmed with the Appellate Division ruling proper summary judgment dismissing a Public Health Law § 2801–d nursing home negligence determining such a private right of action only properly lies against nursing homes (*see* ***Novick v S. Nassau Communities Hosp.***, 136 AD3d 999, 1001, 26 NYS3d 182, 185 [2d Dept 2016]

This approach has been followed by the Fourth Department as well (*see e.g.* ***Burkhart v People, Inc.***, 129 AD3d 1475, 1477, 10 NYS3d 767, 769 [4th Dept 2015][ruling that the term

'residential health care facility' was intentionally used by the Legislature in an effort to curb abuses in the nursing home industry and provide a more flexible penalty system against nursing homes than was previously available" and thus concluding that the cause of action provided by section 2801–d was intended to apply to nursing homes, and other facilities such as assisted living facilities, operated by entities in the "nursing home industry."]).

Thus, applying this guidance to the present circumstances, this Court holds that plaintiff cannot recover for a statutory violation of nursing home negligence against this defendant a home health care agency. Accordingly, defendant's motion for judgment as a matter of law is **granted** and thus plaintiff's claim pursuant to Pub. Health L. § 2801-d is **dismissed**.

III. **Application of Statutes of Limitations to Remaining Claims & Whether Tolling Provision Applies**

Under its ordinary operation in normal circumstances, defendant is entirely correct and plaintiff's claim for wrongful death of decedent would be properly dismissed having been prosecuted more than 2 years from his passing (***Scanzano v Horowitz***, 49 AD3d 855, 856, 854 NYS2d 734, 735 [2d Dept 2008][construing EPTL 5–4.1, a cause of action to recover damages for wrongful death may be maintained against persons "who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued and such an action must be commenced within two years after the decedent's death."]; *see also* ***Mikus v Rosell***, 62 AD3d 674, 675, 878 NYS2d 203, 204 [2d Dept 2009][ruling timely wrongful death interposed within two years of the decedent's death]).

On the other hand, plaintiff's causes of action sounding in ordinary negligence follow the 3-year statute of limitations set forth in CPLR 214(5) (***Dispenzieri v Hillside Psychiatric Hosp.***, 283 AD2d 389, 390, 724 NYS2d 203, 204 [2d Dept 2001]). At any rate, defendant clearly establishes that the complaint here was filed and served more than 3 years after defendant's last date of service rendered for plaintiff's decedent, which in the ordinary course would warrant summary dismissal. However, in his opposition, plaintiff has sought to invoke the tolling provision of CPLR 208 to prevent dismissal as untimely his claims.

CPLR 208 provides that where the plaintiff is suffering from the disability, as relevant here, of insanity at the time the cause of action accrues, the statute of limitations is extended "by the period of disability." The toll for insanity applies "to only those individuals who are unable to protect their legal rights because of an over-all inability to function in society," and should be narrowly interpreted. "The provision of CPLR 208 tolling the Statute of Limitations period for insanity, a concept equated with unsoundness of mind, should not be read to include the temporary effects of medications administered in the treatment of physical injuries" (***Thompson v Metro. Transp. Auth.***, 112 AD3d 912, 914, 977 NYS2d 386, 388 [2d Dept 2013]; *see also* ***Seppala v Meadowbrook Care Ctr., Inc.***, 292 AD2d 368, 368-69, 738 NYS2d 79, 80 [2d Dept 2002]).

Toward that end, the Second Department has been mindful to caution counsel that the standard of review is not whether the decedent ever attained lucidity during that period, but whether, generally, he was "unable to protect [his] legal rights because of an over-all inability to function in society" (***Schulman v Jacobowitz***, 19 AD3d 574, 577, 797 NYS2d 547, 549 [2d Dept 2005]). Thus, courts have been affirmed in dismissing complaints which failed to allege

sufficient facts to support a finding that the plaintiff was unable to function in society, as is required for a toll under CPLR 208 (***Ingvarsdottir v Gaines, Gruner, Ponzini & Novick, LLP***, 144 AD3d 1099, 1104, 43 NYS3d 68, 73 [2d Dept 2016]; ***Santo B. v R.C. Archdiocese of New York***, 51 AD3d 956, 958, 861 NYS2d 674, 676 [2d Dept 2008][ruling that plaintiff failed to aver sufficient evidentiary facts to support a finding of his insanity which, for the purposes of CPLR 208, requires a showing that he was unable to protect his legal rights because of an overall inability to function in society]).

Here, plaintiff has failed to sustain its burden by competent and admissible proof, of raising a triable question of fact warranting submission of this matter to an evidentiary hearing to determine whether decedent suffered a mental disability rising to the level of imposing a toll under CPLR 208. In opposition to defendant's motion, plaintiff submitted an affirmation of a physician who did not treat decedent or even examine decedent prior to his passing. Instead, the physician-affirmant relied upon review of medical records, which largely speak for themselves, as well as reviewed plaintiff's hearsay conclusions concerning his decedent's mental status prior to his death.

At most, plaintiff established that on occasion after decedent's care and treatment relationship with defendant had ceased, it was documented that decedent suffered from unspecified dementia or confusion, combined with presentations of pneumonia and other serious health conditions, attendant to examinations prior to hospitalization or admission to nursing homes and hospitals immediately prior to his passing in June 2012. Without more, this is insufficient to raise a fact issue for hearing. Missing from plaintiff's opposition is any definitive or conclusive evidence that the alleged dementia robbed decedent from appreciating or participating in all of his affairs including management of his legal or medical affairs. This is even more the case where defendant's reply papers include references to their business records containing entries indicative that decedent participated in treatment decisions and understood or managed his day to day affairs right up to the termination of defendant's services rendered to him.

Thus, viewed as a whole, plaintiff's submission is insufficient to raise a triable question of fact, and having failed to sustain his burden to do so, defendant's motion for summary judgment dismissing plaintiff's claims for wrongful death and negligence is **granted** accordingly and those claims and the complaint are hereby **dismissed** as a matter of law.

The foregoing constitutes the decision and order of this Court.

Dated: January 16, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

X FINAL DISPOSITION