Estrella v East Tremont Med. Ctr.
2019 NY Slip Op 35023(U)
September 3, 2019
Supreme Court, Bronx County
Docket Number: Index No. 28030/2018E
Judge: Joseph E. Capella
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA PART 23

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REINALDO ESTRELLA,

Plaintiff,

-against-

EAST TREMONT MEDICAL CENTER, DR. GUY RENVOIZE, and JOHN AND JANE DOES #1 THROUGH #100,

Defendants.

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Index No.: 28030/18E

Decision/Order

PAPERS	NUMBERED
Notice of Motion and Affidavit Annexed	1
Answering Affidavit and Exhibits	2
Replying Affidavit and Exhibits	3

UPON THE FOREGOING CITED PAPERS, THIS MOTION IS DECIDED AS FOLLOWS:

Defendants, East Tremont Medical Center (ETMC) and Dr. Guy Renvoize (Dr. Renvoize), move for an order dismissing the complaint on the ground that it is barred by the statute of limitations (CPLR 3211(a)(5)), for a lack of personal jurisdiction (CPLR 3211(a)(8)), and based on the lack of a certificate of merit accompanying the complaint (CPLR § 3012-a). This action is premised on claims of medical malpractice and lack of informed consent where plaintiff alleges that on July 18, 2014, Dr. Renvoize perforated his colon during a colonoscopy. On June 29, 2018, this court dismissed a prior action commenced in 2016, with identical parties, facts and allegations, due to plaintiff's failure to take a default judgment against defendants within one year of their default (CPLR § 3215(c)). Following that dismissal, plaintiff commenced the instant action on July 11, 2018. In an order dated November 21, 2018, this court denied plaintiff's motion to restore the 2016 action.

Defendants argue that the instant action is barred by the statute of limitations as it was commenced more than four years from the date the alleged malpractice occurred (CPLR § 214-a) and therefore should be dismissed pursuant to CPLR 3211(a)(5). Defendants contend that CPLR § 205(a), which allows a plaintiff to commence a new

action based upon the same facts within six months of a timely commenced action being dismissed, does not apply in this case since the 2016 action was dismissed as abandoned. In other words, defendants argue that this court's dismissal of the prior action pursuant to CPLR § 3215(c) was effectively a dismissal for neglect to prosecute such that the CPLR § 205(a) tolling provision is inapplicable.

Dismissal of the prior action was based on plaintiff's failure to take a default judgment within one year, pursuant to CPLR § 3215(c) and not neglect to prosecute under CPLR 3216 or any other rule allowing for dismissal based on dilatory conduct (i.e. CPLR 3404 or § 3126). In fact, the June 28th order of dismissal did not include any findings of specific conduct demonstrating a general pattern of delay in proceeding with the litigation, nor indications that neglect to prosecute was "in fact the basis for dismissal." (*Andrea v Arnone*, 5 NY3d 514 [2005].) Therefore, defendants' contention that plaintiff is barred from invoking the savings provision of CPLR § 205(a), as the prior action was dismissed due to neglect to prosecute, is misplaced.

The defendants also move for dismissal based on plaintiff's failure to file a certificate of merit with the summons and complaint, pursuant to CPLR § 3012-a. Defendants aver that only now, in response to the instant motion and nearly a year after filing the summons and complaint, plaintiff has filed a certificate of merit in this case. Defendants argue that failure to file the certificate is a pleading defect which can only be cured by establishing a reasonable excuse for the failure and providing an affidavit of merit.

In opposition, plaintiff, somewhat perplexingly, argues simultaneously that (1) due to law office failure a certificate of merit, which was timely filed in the 2016 action, was mistakenly not filed in the 2018 action; and (2) the certificate of merit was not filed in the instant action because defendants have to date refused to provide records necessary for plaintiff's counsel to review the facts of this case, consult with a physician and certify the merits of this action. The two demands for medical records submitted in support of plaintiff's opposition are dated October 21, 2016 (relating to the previously dismissed 2016 action), and June 11, 2019 (nearly one year after commencement of the present

action and a month after the original return date of the instant motion). Yet somehow, on June 21, 2019, still lacking the alleged necessary records, plaintiff's attorney filed a certificate of merit.

In a medical malpractice action, to avoid dismissal for failure to serve a certificate of merit with the complaint, a plaintiff must present a reasonable excuse for not complying with CPLR § 3012-a *and* an affidavit of merit from a medical expert. (*Grad v Hafliger*, 68 AD3d 543 [1st Dept 2009]; *George v St. John's Riverside Hosp*, 162 AD2d 140 [1st Dept 1990].) Here, it is undisputed that plaintiff failed to provide a certificate of merit with his complaint. Plaintiff's belatedly filed certificate of merit is insufficient to avoid dismissal because in opposition to this motion, he failed to provide a coherent, reasonable excuse for not providing the certificate of merit and failed to proffer an affidavit of merit from an expert (*Id*).

Accordingly, defendants' motion to dismiss the complaint based on CPLR § 3012-a is granted. The action is dismissed in its entirety and the Clerk is directed to enter judgment accordingly. The remaining branches of the motion are deemed moot as the action has been dismissed. The defendants are directed to serve a copy of this decision/order with notice of entry by first class mail upon plaintiff within 20 days of receipt of copy of same.

This constitutes the decision/order of this court.

September 3, 2019
Dated

Hon.
Joseph E. Capella, J.S.C.