

Chen v New York Hosp. Med. Ctr. of Queens

2020 NY Slip Op 30366(U)

February 7, 2020

Supreme Court, New York County

Docket Number: 805057/2018

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Alex Chen as Administrator of the Estate of
CHUIHENG CHEN,
Plaintiff,

Index No.
805057/2018

Decision and
Order

-against-

Mot. Seq. 5

NEW YORK HOSPITAL MEDICAL CENTER OF
QUEENS, FRANK PALUMBO, M.D.,
ANTHONY NICI, M.D., AND DEEPALI
A. MUDE, M.D.,
Defendants

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Defendant Deepali A. Mude, M.D. (“Mude”) moves to dismiss the Amended Complaint pursuant to CPLR § 3211(a)(5) as time-barred by the respective statute of limitations as set forth in CPLR § 214-a and EPTL § 5-4.1. Plaintiff opposes the motion.

Prior to this case, a medical malpractice action was commenced by Chuiheng Chen under Index No. 805058/2015. Chuiheng Chen’s son Alex Chen, the Plaintiff in this action, commenced a guardianship proceeding seeking to be appointed as his father Chuiheng’s guardian due to his incompetency. Prior to the conclusion of the guardianship proceeding, Chuiheng Chen (hereinafter referred to as “the Decedent”) died on August 4, 2016. By Order dated September 20, 2016, Hon. Joan B. Lobis, J.S.C., dismissed the medical malpractice action without prejudice pursuant to CPLR § 1015.

This action was commenced by the filing of a Summons and Complaint on or about February 27, 2018 (“the Complaint”) by Alex Chen (hereinafter referred to as “Plaintiff”), as the administrator of the Decedent’s estate, against New York Hospital Medical Center of Queens (“the Hospital”), Frank Palumbo, M.D. (“Palumbo”), Anthony Nici, M.D. (“Nici”), and John Doe.

The initial Complaint asserts causes of action for medical malpractice, lack of informed consent, negligent hiring/supervision; and wrongful death arising from medical care provided to the Decedent on March 29, 2013 at the Hospital. The Complaint defines "John Doe" as "the anesthesiologist in this case, whose identity has yet been ascertained." The Complaint states, "That plaintiff's counsel had attempted to obtain the name or identity of the JOHN DOE (the anesthesiologist) from defendant New York Hospital Medical Center of Queens, but due to the instant litigation it was indicated that the records would have to be provided through said defendant's counsel herein."

Thereafter, the Hospital, Nici, and Palumbo filed motions to dismiss the Complaint pursuant to CPLR § 3211(a)(5) based upon the statute of limitations (Motions Seq. 1, 2, and 3, respectively). Plaintiff cross moved to apply the tolling benefits of CPLR §§ 208 and 1015(a). Plaintiff submitted the affirmation of Alexander E. Weingarten, MD ("Dr. Weingarten"). Dr. Weingarten stated that the Decedent remained physically and cognitively impaired from the time he suffered a stroke on March 29, 2013 until his death on August 4, 2016.

On September 4, 2018, Plaintiff filed a Supplemental Summons and Amended Complaint. The Amended Complaint identified Mude as the "John Doe." The Complaint stated that Mude's "identity was not, at that point, known to plaintiff," and "that plaintiff's counsel had attempted to obtain the name or identity of 'JOHN DOE', i.e., the anesthesiologist, from defendant New York Hospital Medical Center of Queens, but due to the instant litigation it was indicated that the records would have to be provided through said defendant's counsel herein." The Amended Complaint contains the same causes of action as contained in the initial pleading. As against Mude, the causes of action are medical malpractice, lack of informed consent, and wrongful death.

On September 24, 2018, December 11, 2018 and February 21, 2019, Palumbo, the Hospital, and Nici filed answers to the Amended Complaint.

On March 22, 2019, Plaintiff moved pursuant to CPLR § 306-b for an extension of time to serve the Amended Complaint on Mude. Plaintiff detailed the efforts to serve Mude. By Decision and Order dated May 3, 2019, Plaintiff was given an additional sixty days to serve the Amended Complaint on Mude.

On June 24, 2019, Plaintiff filed an Affidavit of Service attesting to service of the Amended Complaint on Mude on June 19, 2019 at 9145 Springbrooke Drive NW, Suite 300, Coon Rapids, County of Anoka, Minnesota.

Parties' Contentions

Mude argues that Plaintiff's claims are time-barred. Mude argues that Plaintiff failed to diligently identify her and therefore Plaintiff cannot use the "John Doe" procedural mechanism to avoid dismissal of the claims as against her.

Plaintiff argues that he was diligent in trying to ascertain the identity of Mude, and the use of "John Doe" in the caption was proper initially pursuant to CPLR § 1024. Plaintiff also argues that the Court's decision of May 3, 2019 granting Plaintiff an extension of time to serve Mude is now the law of the case and Plaintiff was diligent in trying to locate Mude for service.

Relevant Legal Standard

CPLR § 3211 (a) (5), states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . statute of limitations."

"A party moving a complaint as barred by the applicable statute of limitations must establish, prima facie, that the period in which to commence the action has expired." (*Murray v. Charap*, 150 AD3d 752, 753 [2d Dept 2017]). "The burden then shifts to the nonmoving party to raise a question of fact as to the applicability of an exception to the statute of limitations, as to whether the statute of limitations was tolled, or as to whether the action was actually commenced within the applicable limitations period." (*Murray*, 150 AD3d at 753).

A wrongful death action must be commenced within two years after the decedent's death, and a medical malpractice claim must be commenced within two and a half years (NY EPTL § 5-4.1, and CPLR § 214-a respectively). An action based on lack of informed consent has a statute of limitations of two and a half years. (*Wilson v Southampton Urgent Med.-Care, P.C.*, 112 AD3d 499, 499 [1st Dept 2013]). "CPLR 208 affords an insanity toll to an individual who, at the time of the accrual of the cause of action . . . was 'unable to protect [his or her] legal rights because of an over-all inability to function in society.'" (*Hoops v Director, Bellevue Hosp. Ctr.*, 28 Misc 3d 61, 63 [App Term 2010]).

After filing a complaint within the procedurally allotted time, a plaintiff then has "one hundred and twenty days after filing the summons and complaint" with which to serve the parties (CPLR § 306-b). This Court may exercise its discretion to

extend the 120-day period in CPLR § 306-b to enable a plaintiff to properly serve the defendants. Pursuant to CPLR § 306-b, an extension of time for service can be granted “upon good cause shown” or “in the interest of justice.”

A “good cause” extension requires a showing of reasonable diligence in trying to effect proper service upon a defendant. (*Henneberry v. Borstein*, 91 AD3d 493, 496 [1st Dept 2012]). Good cause has been found where “the plaintiff’s failure to timely serve process is a result of circumstances beyond its control.” (*Bumpus v. New York City Tr. Auth.*, 66 AD3d 26, 32 [2d Dept 2009]).

An extension “in the interest of justice” is broader and more flexible than a “good cause” extension and can include law office failures as long as there is no prejudice to the defendant. (*Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 105 [2001]). A court “may consider [plaintiff’s] diligence, or lack thereof, along with any other relevant factor . . ., including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant.” (*Henneberry*, 91 AD3d at 496, citing *Leader*, 97 NY2d at 105-106).

CPLR § 1024 provides, “A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known.” CPLR § 1024 further provides, “If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly.”

“To use the John Doe method of CPLR 1024 it must be shown that plaintiff made ‘genuine efforts to ascertain the defendants’ identities prior to the running of the Statute of Limitations.’” (*Tucker v Lorieo*, 291 AD2d 261, 261 [1st Dept 2002]).

“[W]hen an originally-named defendant and an unknown ‘Jane Doe’ [or ‘John Doe’] party are united in interest, i.e. employer and employee, the later-identified party may, in some instances, be added to the suit after the statute of limitations has expired pursuant to the ‘relation-back’ doctrine of CPLR 203(f), based upon postlimitations disclosure of the unknown party’s identity.” (*Bumpus*, 66 AD3d at 34-35). “The relation-back doctrine allows a party to be added to an action after the expiration of the statute of limitations, and the claim is deemed timely interposed, if (1) the claim arises out of the same conduct, transaction, or occurrence, (2) the additional party is united in interest with the original party, and (3) the additional party knew or should have known that but for a mistake by the plaintiff as to the

identity of the proper parties, the action would have been brought against the additional party as well.” (*Id.*).

“The moving party seeking to apply the relation-back doctrine to a later-identified ‘Jane Doe’ defendant has the added burden of establishing that diligent efforts were made to ascertain the unknown party’s identity prior to the expiration of the statute of limitations.” (*Id.*).

Discussion

Here, Mude does not dispute that CPLR’s 208’s insanity toll allowed Plaintiff to extend the time to bring his claims for wrongful death, medical malpractice, and informed consent from the time of the Decedent’s death on August 4, 2016.

Applying the CPLR § 208 toll, Plaintiff had until August 4, 2018 to commence a claim for wrongful death (two years from Decedent’s death) against Mude and until February 4, 2019 (two and a half years from Decedent’s death) to commence claims for medical malpractice and lack of informed consents against her. On September 4, 2018, Plaintiff filed a Supplemental Summons and Amended Complaint which identified Mude as the “John Doe.” Mude was served with the Supplemental Summons and Amended Complaint on June 19, 2019.

When Plaintiff filed the Amended Complaint on September 4, 2018 which specifically identified Mude as a defendant, the two year statute of limitations for the wrongful death claim had already run as against her. Furthermore, Plaintiff has not met its burden of establishing that the relation back doctrine applies here. Plaintiff has failed to show that Mude and the co-defendants were united in interest or that Mude could have or “should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the additional party as well.” (*Bumpus*, 66 AD3d at 34-35). Furthermore, as stated above, “[t]he moving party seeking to apply the relation-back doctrine to a later-identified ‘Jane Doe’ defendant has the added burden of establishing that diligent efforts were made to ascertain the unknown party’s identity prior to the expiration of the statute of limitations.” (*Id.*). Here, Plaintiff has failed to establish that he exercised due diligence to discover Mude’s identity prior to the expiration of the statute of limitations. Mude’s identity was not learned until after an August 14, 2018 email exchange between Plaintiff’s counsel and counsel for the Hospital. This

exchange did not occur until after the statute of limitations on the wrongful death claim had already run.

Turning to the medical malpractice and informed consent claims, as previously stated, Plaintiff had until February 4, 2019 to file these claims against Mude. Accordingly, at the time that Plaintiff filed the Amended Complaint on September 4, 2018, the applicable two and a year statute of limitations had not passed with respect to the medical malpractice and informed consent claims. However, Plaintiff did not serve the Amended Complaint on Mude until June 19, 2019, which was beyond the 120 day limit prescribed by CPLR § 306-b and after the two and a half year statute of limitations had run. Plaintiff argues that the Court's prior Order permitting an extension of time to serve Mude should control; however, that decision was made without all the relevant facts. As Defendants' point out, Plaintiff's motion to extend the time to serve "omits the entire chronology of events recounting the extensive delays on the part of the plaintiff, nor mentions of the fact that both applicable statutes of limitation had passed" or "that an additional 120-day period (from the time of the Complaint was amended) plus two more months had passed before he attempted to contact Dr. Mude's insurance carrier."

Wherefore it is hereby

ORDERED that Defendant Deepali A. Mude, M.D.'s motion is granted and the action is dismissed as against Deepali A. Mude, M.D., and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: FEBRUARY 7, 2020



Eileen A. Rakower, J.S.C