

**Martin v Ruditser**

2021 NY Slip Op 33161(U)

November 9, 2021

Supreme Court, Queens County

Docket Number: Index No. 720660 2019

Judge: Peter J. O'Donoghue

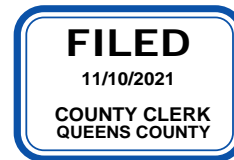
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part MDP  
Justice



DEATRA MARTIN, as the Administratrix  
of the Estate of YOLANDA DUNOVANT,  
Deceased,

Index  
Number 720660 2019

Plaintiff,

Motion  
Date March 24, 2021

-v-

DENNIS J. RUDITSER, M.D., NIGEL VERASAMI,  
M.D. THE PAVILION AT QUEENS FOR Motion Seq. No. 1  
REHABILITATION & NURSING, BERNARD A.  
ABRAMOVICI, M.D., SALIM A. KHOURY, M.D.,  
RAJ JAIN, M.D., JAVIER P. BURGOS, M.D.,  
and NEW YORK PRESBYTERIAN QUEENS HOSPITAL  
a/k/a NEW YORK PRESBYTERIAN QUEENS,

Defendants

x

The following numbered papers were read on this motion by defendant Dennis J. Ruditser, M.D. (Ruditser) seeking to dismiss the complaint against him due to lack of personal jurisdiction and the expiration of the applicable statute of limitations, pursuant to CPLR §§ 3211 (a) (5), (8), (9), 308, 306-b and Business Corporation Law § 306, and cross motion by plaintiff seeking to strike the first and fifth statutory defenses in Ruditser's answer, asserting lack of personal jurisdiction and that the claim is time barred.

Papers  
Numbered

Notice of Motion-Affidavits-Exhibits..... EF 51-60  
Notice of Cross Motion-Affidavits-Exhibits..... EF 92-102  
Reply Affidavits-Exhibits..... EF 116, 118-120

Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

On December 10, 2019, plaintiff commenced this action

against defendants, alleging claims of negligence and medical malpractice against Ruditser, arising out of his care of decedent, Yolanda Dunovant, during her admission at co-defendant facility, the Pavillion at Queens Rehabilitation & Nursing (the Pavillion) from March 28, 2017 through June 27, 2017. Pursuant to the affidavits of service on file, Ruditser was served at his actual place of business on December 16, 2019 as well as personally served on November 13, 2020. Ruditser interposed an answer on November 20, 2020 wherein he asserted as a first statutory defense, that the court lacks personal jurisdiction over him and as a fifth statutory defense, that the action is time barred.

Ruditser seeks to dismiss this action contending that the action is time barred and that the purported service upon him was not valid. According to Ruditser, the December 16, 2019 service was not proper as he was served at the Pavillion, which was not his "actual place of business" (CPLR 308 (2)), but merely a facility at which he had privileges. As such, he contends that the action was not commenced against him until he was personally served with the summons and complaint on November 16, 2020<sup>1</sup>, which was beyond the two and a half year statute of limitations period prescribed in CPLR 214-a for medical malpractice actions, and was not subject to tolling. Ruditser argues that Governor Cuomo's Executive Order 202.8 and its subsequent extensions as a result of the COVID-19 pandemic served to suspend, not toll, the statute of limitations, rendering the personal service untimely. Unlike a toll, a suspension delays the expiration of a time period until its end date, rather than suspends the running of an applicable statute of limitations for a certain amount of time.

Plaintiff opposes the application and cross moves, seeking to strike Ruditser's first and fifth statutory defenses, or in the alternative, to extend the time to serve the summons and complaint on Ruditser. Plaintiff maintains that both the December 16, 2019 service on Ruditser at his "actual place of business" as well as the subsequent November 16, 2020<sup>2</sup> personal service on defendant were timely and proper. Plaintiff submits that the aforesaid executive orders tolled the one hundred twenty days time limit to serve the defendant (CPLR 306-b). In support, inter alia, plaintiff submits the affidavits of service of Husam Al-

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<sup>1</sup>According to the affidavit of service, dated November 16, 2020, he was personally served on November 13, 2020.

<sup>2</sup> Throughout the papers, both plaintiff and Ruditser appear to mistakenly refer to the date of personal service upon Ruditser as November 16, 2020, contravening the affidavit of service, which states he was served on November 13, 2020.

Atrash (Al-Atrash), dated December 17, 2019 and filed December 18, 2019, and Jan Lowdermilk (Lowdermilk), dated November 16, 2020 and filed on December 2, 2020.

At the outset, the court notes that contrary to defendant's contention, this action was timely commenced by the filing of a summons and complaint on December 10, 2019, which was within two and a half years from the alleged last continuous treatment date of June 27, 2017. The court shall now consider whether defendant has been properly served within 120 days from the date of the action's commencement (CPLR 306-b).

Initially, plaintiff bears the burden of proving that personal jurisdiction was acquired over a defendant. (See *HSBC Bank USA, N.A. v Assouline*, 177 AD3d 603 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Decesare*, 154 AD3d 717 [2d Dept 2017]; *Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588 [2009]). "A process server's affidavit of service constitutes prima facie evidence of valid service." (*Wells Fargo, N.A.*, 154 AD3d at 717; see *Flanagan v Delaney*, 194 AD3d 694 [2d Dept 2021]; *HSBC Bank USA, N.A.*, 177 AD3d 603; *U.S. Bank, N.A. v Tauber*, 140 AD3d 1154 [2d Dept 2016]; *Wachovia Bank, N.A. v Greenberg*, 138 AD3d 984 [2d Dept 2016].) A defendant may rebut the presumption of proper service established by a process server's affidavit of service, by a sworn denial of service addressing the specific facts contained in the affidavit. (See *HSBC Bank USA, N.A.*, 177 AD3d 603; *U.S. Bank, N.A.*, 140 AD3d 1154; *Bank of N.Y. v Samuels*, 107 AD3d 653 [2d Dept 2013]; *Scarano v Scarano*, 63 AD3d 716 [2d Dept 2009].)

Here, plaintiff's affidavit of service by Al-Atrash constituted prima facie evidence of proper service upon the defendant pursuant to CPLR 308 (2). Al-Atrash averred that he served Ruditser "on 12/16/2019, at 1:22 PM at 36-17 Parsons Blvd, Flushing, NY 11354" by substituted service upon "Francis Dozier a person of suitable age and discretion" at Ruditser's "actual place of business/employment", and subsequently mailed the papers to defendant at the same address on December 17, 2019. Ruditser failed to rebut the presumption of proper service by submission of an affidavit, addressing the facts contained in the affidavit of service. The submission of an attorney's affirmation and Ruditser's curriculum vitae are insufficient to rebut the presumption of proper service. (See *Deutsche Bank Natl. Trust Co. v Quinones*, 114 AD3d 719 [2d Dept 2014]; *ACT Props., LLC v Garcia*, 102 AD3d 712 [2d Dept 1013]; *Scarano*, 63 AD3d 716.)

Moreover, Ruditser does not refute service of the summons and complaint, set forth in Lowdermilk's affidavit of service, but rather contests the timeliness of such service. Contrary to plaintiff's contention, in *Brash v Richards* (195 AD3d 582 [2d Dept 2021]), the Second Department has determined that Governor

Cuomo's Executive Order 202.8 and its subsequent extensions constituted a toll, as opposed to a suspension, of filing deadlines. Here, plaintiff's time to serve the summons and complaint upon defendants would have ended on April 9, 2020. However, in light of the tolling provisions of the executive orders, which went into effect on March 20, 2020 and ended on November 3, 2020, plaintiff had until November 23, 2020 to serve defendants. As such the subsequent personal service upon Ruditser was also valid. In light of this determination, plaintiff's cross motion seeking an order striking the first and fifth statutory defenses contained in Ruditser's answer is granted.

Accordingly, defendant's motion is denied and plaintiff's cross motion is granted.

Dated: November 9, 2021

  
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J.S.O.

