

Marcotrigano v Dental Specialty Assoc., P.C.

2021 NY Slip Op 33698(U)

August 16, 2021

Supreme Court, Kings County

Docket Number: Index No. 523224/2016

Judge: Bernard J. Graham

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 KINGS

KINGS COUNTY CLERK
FILED
2021 AUG 18 AM 9:28

MELISSA MARCOTRIGANO,

Index No.: 523224/2016

Plaintiffs,

DECISION/ORDER

-against-

DENTAL SPECIALTY ASSOCIATES, P.C. and
SCOTT HOWARD MAURER, as Administrator
Of the Estate of WAYNE MAURER, D.D.S., Deceased,

Hon. Bernard J. Graham
Supreme Court Justice

Defendants.

**Recitation, as required by CPLR 2219(a), of the papers considered on the review of
this motion to: dismiss the action, pursuant to CPLR sec. 306-b as well as CPLR sec.
3211(a)(5) & (8).**

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	____ 1-2 ____
Order to Show cause and Affidavits Annexed.....	____
Answering Affidavits.....	____ 3 ____
Replying Affidavits.....	____ 4 ____
Exhibits.....	____
Other: (memo).....	____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant, Scott Howard Maurer, as Administrator of the Estate of Wayne Maurer, D.D.S. (“Estate of Dr. Maurer”), has moved (seq. 1), pursuant to CPLR §306-b, for an Order to dismiss the within action due to the failure of the plaintiff Melissa Marcotrigiano (“plaintiff”) to timely serve the Amended Complaint¹ upon the defendant, the Estate of Dr. Maurer. In addition, the movant also seeks to dismiss the Amended

¹ The Amended Complaint was filed on NYSEF on July 20, 2020.

Complaint due to the failure of the plaintiff to comply with the applicable Statute of Limitations, pursuant to CPLR § 3211(a)(5) and (8).

Counsel for the plaintiff, has opposed the relief sought in the motion upon the grounds that the initial summons and complaint should be deemed a nullity with respect to Dr. Wayne Maurer (“Dr. Maurer”) as it named a deceased party, Dr. Maurer as a defendant, who unbeknownst to the plaintiff passed away in November 2015, which was prior to the initiation of this action. Thereafter, following the vacatur of any stays, it is alleged that service of the Supplemental Summons and Amended Complaint, which named the administrator of the Estate of Dr. Maurer as a defendant instead of Dr. Wayne Maurer, was properly effectuated.

Background:

The within action sounding in medical malpractice was commenced by the filing of a Summons and Complaint with the Clerk of this Court, on or about December 19, 2016. Issue was joined, on or about March 16, 2017, by the service of the Verified Answer of the defendant, Dental Specialty Associates, P.C. (“Dental Specialty”).

The plaintiff alleged that the defendants departed from the accepted standards of medical/dental practice on August 13, 2015, during the course of Dr. Maurer’s extraction of tooth #32 (the lower right third molar) at the offices of Dental Specialty, and there is a claim by the plaintiff of continuous treatment with the defendants through November 7, 2015. It is alleged that the defendants failed to protect nerve structure including the plaintiff’s right lingual nerve. Additionally, the plaintiff has alleged that there was a lack of proper and informed consent, which departure was a proximate cause of the injuries and damages that plaintiff seeks to recover. Further, it is alleged that Dental Specialty is vicariously liable for the acts of negligence on the part of its dental personnel and staff members, as well as Dr. Maurer.

On November 3, 2015, Dr. Maurer passed away. Pursuant to an Order of this Court dated October 31, 2017, a stay was issued in this matter since a personal representative of the Estate of Dr. Maurer had not been appointed. Thereafter, pursuant to

a stipulation by the attorneys for the respective parties, it was agreed that the stay that was imposed by this Court be vacated, as the Surrogate's Court, Queens County, had appointed Scott Howard Maurer as the administrator of the Estate of Dr. Maurer and issued limited letters of administration.

On July 20, 2020, the plaintiff filed a Supplemental Summons and Amended Complaint. The administrator of the Estate of Dr. Maurer as well as Dental Specialty were allegedly personally served with the Supplemental Summons and Amended Complaint on or about August 20, 2020, to which Dental Specialty filed an answer on or about August 27, 2020.

In lieu of filing an answer to the Amended Complaint, defendant, the Estate of Dr. Maurer, filed the underlying motion.

Parties' Contentions:

Here, the Court is presented with the issue as to whether service of either Complaint was properly effectuated upon the Estate of Dr. Maurer in compliance with CPLR §306-b, the Statute of Limitations, and CPLR §210(b).

In support of the motion by the Estate of Dr. Maurer, counsel argues that this Court does not have jurisdiction over this defendant because the plaintiff failed to serve the original summons and complaint within 120 days of the commencement of the action, as required by CPLR §306-b. As the defendant was never served with the original Complaint, counsel asserts that the Amended Complaint should be considered the original Complaint. Defendant further argues that plaintiff's Amended Complaint was filed after the applicable time limitation, which includes the two and a half (2½) year statute of limitations period, which was extended pursuant to CPLR §210(b) by a period of eighteen (18) months after the death of Dr. Maurer (November 3, 2019).

Plaintiff, by their attorneys, opposes the motion, arguing that the action was commenced timely, as the Supplemental Summons and Amended Complaint was served within 120 days of its filing on July 20, 2020. Plaintiff asserts that the "relation back" doctrine is applicable, as the cause of action in the original Complaint and Amended

Complaint arise out of the same dental treatment rendered to the plaintiff; the defendants are “united in interest” due to Dental Specialty’s alleged vicarious liability for Dr. Maurer; and Dr. Maurer’s insurance representative was aware of the malpractice claim in 2017, but due to plaintiff’s inability to obtain the death certificate and lack of knowledge of the estate representative’s status and identity, the Estate of Dr. Maurer could not be served until August of 2020.

Co-defendant Dental Specialty, by their attorneys, also opposes the motion, adopting plaintiff’s arguments that the original Summons and Complaint was a nullity and the Supplemental Summons and Amended Complaint was timely served. However, Dental Specialty objects to plaintiff’s assertion that Dental Specialty is vicariously liable for any alleged malpractice of Dr. Maurer, as well as the characterization of Dental Specialty and Dr. Maurer as “united in interest” for the purposes of the “relation back” doctrine.

Discussion:

An action for medical or dental malpractice must be commenced within two (2) years and six (6) months of the act or omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission, or failure. *See* CPLR §214-a. Treatment is deemed continuous, with respect to a medical malpractice action, when the plaintiff continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period, the treatment provided was for the same conditions or complaints underlying the plaintiff’s medical malpractice claim, and the treatment was in fact continuous. Gomez v Katz, 61 AD3d 108, 109 [2d Dep’t 2009]; Nykorchuck v Henriques, 78 NY2d 255, 259 [1991]; Stahl v Smud, 210 AD2d 770, 771 [1994]; Polizzano v Weiner, 179 AD2d 803, 804 [1992]; Richardson v Orentreich, 64 NY2d 896, 898-899 [1985].

Here, the date of the alleged malpractice is August 13, 2015, and plaintiff claims continuous treatment through November 7, 2015. The Court notes, however, that Dr.

Maurer died on November 3, 2015 and the reference to treatment through November 7, 2015 is likely an error. Accordingly, the Court will consider the end of the treatment to be November 3, 2015. In order to comply with the statute of limitations, plaintiff would have been required to file the Summons and Complaint by May 3, 2018. CPLR §210(b) provides that “the period of eighteen (18) months after the death of a person against whom a cause of action exists is not a part of the time within which the action must be commenced against their executor or administrator.” This would have the effect of extending the plaintiff’s time to file the Summons and Complaint until November 3, 2019. However, plaintiff did not file the Supplemental Summons and Amended Complaint until July 20, 2020, and the administrator of the Estate of Dr. Maurer was not served with the Supplemental Summons and Amended Complaint until August of 2020, which is nine (9) months after the expiration of the Statute of Limitations.

Defendant argues that this matter should be dismissed based upon the plaintiff not complying with the statute of limitations, as plaintiff’s counsel has failed to provide any evidence that a diligent effort was made to obtain a copy of Dr. Maurer’s death certificate, discover the identity of the representative of the Estate of Dr. Maurer, and timely serve that Estate representative.

However, in this case the admissible facts show that plaintiff had commenced the malpractice action by filing a summons and complaint on or about December 19, 2016. Service of the Summons and Complaint was timely made upon co-defendant Dental Specialty and issue was joined by co-defendant Dental Specialty on March 16, 2017.

Plaintiff, upon learning of the death of defendant Dr. Maurer, filed the Amended Complaint (on July 20, 2020) after an Estate representative had been appointed.

It also appears that Dr. Maurer’s insurance carrier had received, within the limitations period, the original Summons and Complaint, as well as the Verified Bill of Particulars responsive to co-defendant’s demand, the Answer interposed by Dental Specialty, and responses to discovery demands posed by counsel for Dental Specialty with copies of plaintiff’s dental records.

It is a permissible use of this Court's discretion that the plaintiff's Amended Complaint be deemed to have been timely served within the applicable statute of limitations. The Estate of Dr. Maurer was effectively put on notice of the claims against Dr. Maurer and the timely filing of this action against Dental Specialty allowing for the application of the "relation back" doctrine in this instance.

The relation back doctrine is applicable because the claims against Dr. Maurer and Dental Specialty arose from the same conduct, transaction or occurrence; Dr Maurer is "united in interest" with Dental Specialty, albeit only as to vicarious liability; and the Estate of Dr. Maurer should have know that, but for the mistake made by plaintiff (of not learning of Dr. Maurer's death), the action would have been brought against the Estate of Dr. Maurer as well. (See Buran v Coupal, 87 NY2d 173 [1995]; Rivera v Wyckoff Heights Medical Center, 175 AD3d 522 [2d Dept 2019]; Sally v Keyspan Energy Corp., 106 AD3d 894 [2d Dept 2013]; Alvarado v Beth Israel Medical Center, 60 aD3d 981 [2d Dept 2009]; Porter v Annabi, 38 AD3d 869 [2d Dept 2007].

In the final analysis, it would not be reasonable for the Estate of Dr. Maurer to conclude that the plaintiff would proceed only as to Dental Specialty. The medical records indicate Dr. Maurer had performed the dental procedure (the extraction of tooth #32) and Dr. Maurer's insurance carrier had been put on notice of the lawsuit. The Court also fails to find any prejudice to the Estate of Dr. Maurer by deeming the Amended Complaint to be timely.

Conclusion:

This Court finds that, in the interest of justice, plaintiff's time to serve the Estate of Dr. Maurer with the Supplemental Summons and Amended Complaint is timely pursuant to CPLR §306-b and the applicable statute of limitations. Accordingly, defendant's motion to dismiss, pursuant to CPLR §306-b, for failure to timely serve the complaint is denied.

Defendant, Estate of Dr. Maurer, is directed to serve an answer to plaintiff's

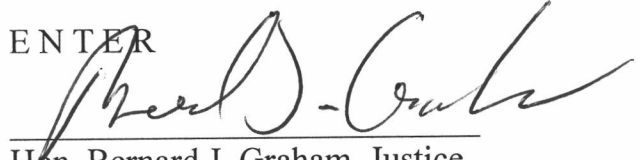
KINGS COUNTY CLERK
FILED
AUG 18 10 49 AM '21
MP

Amended Complaint within sixty (60) days of entry of this decision.

This shall constitute the decision and order of this Court.

Dated: August 16, 2021
Brooklyn, NY

ENTER



Hon. Bernard J. Graham, Justice

HON. BERNARD J. GRAHAM

HON. BERNARD J. GRAHAM