

<b>Ardizzone v Del Signore</b>
2022 NY Slip Op 31517(U)
April 12, 2022
Supreme Court, Kings County
Docket Number: Index No. 504695/2021
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

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ANNA MAY ARDIZZONE, as Administrator of the  
Goods, chattels and credits which were of MARIO  
ARDIZZONE, deceased and ANNA MAY ARDIZZONE,  
Individually,

Index No.: 504695/2021

Plaintiff(s),

**DECISION/ORDER**

-against-

ANTHONY DEL SIGNORE, M.D., MATTHEW  
SCHAIKEWITZ, M.D., CONSTANTINOS  
HADJIPANAYIS, M.D., SONG YANG YUAN, M.D.,  
SAMUEL ACQUAH, M.D., MOUNT SINAI BETH  
ISRAEL and BENSONHURST CENTER FOR  
REHABILITATION AND HEALTHCARE,

Hon. Bernard J. Graham  
Supreme Court Justice

Defendants.

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KFG OPERATING TWO, LLC s/h/a BENSONHURST  
CENTER FOR REHABILITATION AND HEALTH CARE,

Third-Party Plaintiff,

-against-

KANCHAN KATAPADI, M.D., KENNY CHEN, NP, and  
JOHN LUCENTE, NP

Third-Party Defendants,

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**Recitation, as required by CPLR 2219(a), of the papers considered on the review of  
this motion to:** dismiss the complaint pursuant to CPLR § 3211(a)(5) and (a)(7) and  
3126.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1-2, 3-4, 5-6, 7-8, 9-10
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits & Cross-motion.....	11
Replying Affidavits.....	12, 13, 14, 15,
Exhibits.....	
Other: ..... (memo).....	16, 17

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

Counsel for the Defendant/Third party Plaintiff KFG Operating Two, LLC s/h/a Bensonhurst Center for Rehabilitation and Health Care (KFG), (seq. #1), has moved for an Order, pursuant to CPLR § 3211(a)(5) and (a)(7), seeking a dismissal of the plaintiff's Verified Complaint, as well as the third party complaint, with prejudice upon the grounds that this action ("Second Action") is barred by the statute of limitations and the doctrine of res judicata.

Counsel for Third-Party defendant John Lucente, N.P. (seq. #2), Third-Party defendant Kenny Chen NP (seq. #3), defendants, Anthony Del Signore, M.D. ("Dr. Del Signore"), Song Yang Yuan, M.D. ("Dr. Yuan"), Samuel Acquah, M.D. ("Dr. Acquah"), Constantinos Hadjipanayis, M.D. ("Dr. Hadjipanayis") and Beth Israel Medical Center s/h/a Mount Sinai Beth Israel ("Beth Israel") (seq. #4), have likewise moved to dismiss plaintiff's Verified Complaint ("Second Action"), pursuant to CPLR § 3211(a)(5) and (a)(7). In addition, defendant Kanchanmala Katapadi, M.D. s/h/a Kanchan Katapadi, M.D. ("Dr. Katapadi") have moved for a dismissal of plaintiff's Verified Complaint ("Second Action"), pursuant to CPLR § 3126.

Counsel for the plaintiff has opposed each of the motions by the defendants and third-party defendants, and in doing so allege that this Second Action should not be dismissed as they have satisfied the requirements of CPLR § 205(a). Additionally, counsel for plaintiff maintains that their failure to timely respond to discovery requests was not willful or in bad faith and as such a dismissal is not warranted based upon the neglect to prosecute.

*Background:*

The First Action (Index # 502659/2018) was commenced on or about February 8, 2018, by the filing of a summons and Verified Complaint with the Clerk of the Supreme Court, Kings County. The plaintiff alleged that the defendants were negligent and departed from accepted medical practice and standards between October 2015-February

2016. Verified answers were filed by the defendants on July 18, 2018 and December 4, 2018.

Thereafter, on or about December 12, 2018, a Stipulation of Discontinuance was entered into which resulted in the dismissal of the actions as against defendants, Drs. Stern, Zhang, Khan, Avolio, Vu, Shariff, Malik, Harris, Redd and Gilad.

On February 7, 2019, Judge Colon issued a Preliminary Conference order which provided for the scheduling of depositions, authorizations, and the response to Bill of Particulars and other discovery requests (see NYSCEF Doc. 49).

On March 19, 2019, defendants KFG and Beth Israel filed Motions to Dismiss plaintiff's complaint due to the failure of the plaintiff to respond to discovery demands. On April 12, 2019, an order was issued (Judge Ash) in which the plaintiff was directed to respond to defendant's Demand for a Bill of Particulars and discovery demands by May 2, 2019 (see NYSCEF Doc. 49).

On June 11, 2019, defendants KFG and Beth Israel filed Motions to Dismiss based upon the failure of the plaintiff to comply with multiple Court orders which included responding to discovery demands.

After oral argument on June 28, 2019, the Court (Judge Montelione) issued an order in which the plaintiff was to provide a Verified Bill of Particulars by July 29<sup>th</sup>, or may be precluded upon further motion. On or about September 24, 2019, the plaintiff responded to the Demand of defendant KFG by serving a verified Bill of Particulars.

On December 30, 2019, defendant KFG filed a third-party Summons and Complaint against third-party defendants, Dr. Katapadi, Kenny Chen, NP and John Lucente, NP.

On January 9, 2020, Judge Colon issued a Central Compliance Part Conference Order which addressed outstanding items of discovery that were to be provided by plaintiff by January 29<sup>th</sup>, as well as a deposition schedule (see NYSCEF Doc. 49).

In February, 2020, the third-party defendants filed their verified answers and defendant KFG filed a reply to the counterclaims of the third-party defendants.

On May 27, 2020, defendant KFG and third-party defendant Dr, Lucente filed Motions to Dismiss due to the failure of the plaintiff to comply with the Court's prior order and respond to outstanding demands, including authorizations.

In an Order dated July 21, 2020, the Court (J. Knipel) directed the plaintiff to respond to all discovery requests (outstanding demands and lien information) by September 10, 2020 or be precluded, unless good cause was shown (see NYSCEF Doc. 80).

By Order dated October 5, 2020, the Court (J. Knipel) precluded the plaintiff from testifying at trial or submitting an affidavit in any dispositive motion, for having failed to provide the discovery sought (see NYSCEF Doc. 81). Thereafter, the Court in a Decision/Order dated December 21, 2020, granted the defendants' Motions to Dismiss plaintiff's complaint in which it was noted that there had been a violation of multiple court orders as there were significant responses and authorizations from the plaintiff which remain outstanding. The Court further noted that the plaintiff had failed to submit an affidavit of merit from a medical expert on this case which was commenced nearly three years prior thereto. Additionally, the plaintiff did not move for reconsideration of the Court's October 5, 2020 preclusion order nor advise the Court that outstanding authorizations, (which were the subject of defendants' Motion to Dismiss) were sent to defendant's counsel (see NYSCEF Doc. 82).

Default judgments were entered in favor of Dr. Lucente on January 27, 2021 and Dr. Katapadi and Beth Israel on February 4, 2021. On August 4, 2021, a judgment was entered in favor of KFG as against the plaintiff, dismissing the complaint. Notices of Appeal were filed by the plaintiff as against the judgments entered in favor of Dr. Lucente, Dr. Katapadi, Beth Israel and KFG.

This Second Action was commenced on behalf of the plaintiff by the filing of a Summons and Complaint on or about February 26, 2021. This Second Action is based on the same transactions and occurrences as those alleged in the First Action. On April 30, 2021, KFG filed a third-Party Summons and third-Party Complaint against Dr. Katapadi,

Kenny Chen NP and John Lucente NP. Verified answers, which included affirmative defenses, were filed by the defendants and the third-party defendants.

Facts:

It is alleged that Mario Ardizzone, deceased (“decedent”) was a patient at Beth Israel from approximately October 6, 2015 through October 30, 2015 and from November 19, 2015 through February 4, 2016. During said period of time the decedent was allegedly a patient of defendants Dr. Del Signore, Dr. Schaikewitz, Dr. Hadjipanayis, Dr. Yuan and Dr. Acquah. It is further alleged that the decedent was a patient at KFG from October 30, 2015 through November 19, 2015.

During the aforementioned periods of time, it is alleged that the defendants were negligent and departed from accepted medical practice and standards in failing to: monitor and treat a fluid accumulation in the brain following surgery; anticipate and prevent falls post surgically; prevent the development of decubitus ulcers; timely and properly react to symptoms of stroke. As a result of the aforementioned departures, negligence and malpractice, the plaintiff is alleged to have sustained pain and suffering; an aggravation, exacerbation and acceleration of medical conditions and resulting injuries; and his wrongful death on February 13, 2016.

The plaintiff, Anna May Ardizzone was appointed the administrator of the Estate of the decedent by the Order of the Surrogate’s Court dated October 14, 2016.

Parties’ Contentions:

Here, the Court is presented with the issue as to whether the instant action is barred by the statute of limitations and/or *res judicata*.

In support of defendant/third-party plaintiff KFG’s motion to dismiss plaintiff’s complaint, KFG argues that the allegations made against KFG are barred due to the statute of limitations and *res judicata*. KFG asserts that the Court’s order in the First Action precluding plaintiff from testifying at trial or submitting an affidavit on any dispositive motion, which resulted in the First Action’s dismissal (without prejudice), was in effect a dismissal for neglect to prosecute, and as such the six-month tolling period

under CPLR §205(a) is unavailable. In addition, KFG argues that *res judicata* bars the subsequent action because it is identical and involves the same parties, transactions, and occurrences.

The subsequent motions, filed on behalf of third-party defendant John Lucente, N.P., third-party defendant Kenny Chen, N.P., defendants Anthony Del Signore, M.D., Song Yang Yuan, M.D., Samuel Acquah, M.D., Constantinos Hadjipanayis, M.D., and Beth Israel Medical Center s/h/a Mount Sinai Beth Israel, and defendants Kanchanmala Katapadi, M.D. s/h/a Kanchan Katapadi, M.D., follow the motion brought on behalf of defendant/third-party plaintiff KFG and seek the same relief.

Plaintiff, by her attorneys, opposes the relief sought in defendants' and third-party defendants' motions, arguing that the March 2021 Order clearly states the dismissal of the First Action was "not on the merits nor was it for failure to prosecute," and as such, plaintiff should be afforded the six-month tolling provision provided by CPLR §205(a). Plaintiff also asserts that the Orders issued pertaining to the First Action have no *res judicata* effect because this is a new action brought pursuant to CPLR §205(a).

Discussion:

CPLR §3211(a)(5) provides 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...*res judicata*, [or the] statute of limitations." "On a motion to dismiss a complaint pursuant to CPLR §3211(a)(5) on statute of limitations grounds, the moving defendant must establish, *prima facie*, 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." Ross v Jamaica Hosp. Medical Center, 122 AD3d 607 [2d Dept 2014]; Baptiste v Harding-Marin, 88 AD3d 752 [2d Dept 2011].

This Court finds that the defendants and third-party defendants have established a *prima facie* entitlement to dismissal of plaintiff's complaint by establishing that the Second Action was commenced after the applicable statutes of limitation had expired.

The statute of limitations for plaintiff's cause of action for wrongful death expired on February 13, 2018, which is two years after the decedent's death (February 13, 2016).<sup>1</sup> As the wrongful death cause of action was first pled in the Second Action and was not initially brought within the applicable statutory period, that cause of action is barred regardless of whether the statute of limitations is tolled pursuant to CPLR §205(a). Plaintiff's medical malpractice claims also expired on or about May 19, 2018.<sup>2</sup>

Plaintiff has raised an issue of fact as to whether the statute of limitations is tolled pursuant to CPLR §205(a), as the medical malpractice claims were timely alleged in the First Action. CPLR §205(a) provides that when an action is dismissed on grounds other than voluntary discontinuance, lack of personal jurisdiction, neglect to prosecute, or a final judgment on the merits, the plaintiff may bring a new action within six months of the dismissal, even though the action would otherwise be barred by the statute of limitations. Ross v Jamaica Hosp. Medical Center, 122 AD3d 607 [2d Dept 2014]; *citing* Marrero v Crystal Nails, 114 AD3d 101 [2d Dept 2013].

The specific issue plaintiff has raised is whether the dismissal of the First Action was for neglect to prosecute. When the dismissal is for neglect to prosecute, CPLR §205(a) requires that "the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the action." It is clear from the previous Orders issued by Judge Knipel that plaintiff had a prolonged history of non-compliance. The July 2020 Order stated that "plaintiff [was] to respond to all discovery demands...on or before September 10, 2020," and that "in the event plaintiff fails to comply with the above, without good cause shown, plaintiff will be precluded." The October 2020 Order stated that "no responses were served by the 9/10/2020 deadline," and although plaintiff filed opposition seeking more time to respond to the discovery requests as "an unnamed paralegal left on maternity leave at an unstated time..." plaintiff provided "no indication of any effort whatsoever having been made to have obtained any of the discovery required. Nor was any

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<sup>1</sup> The statute of limitations for wrongful death actions is two years after the decedent's death. EPTL §5-4.1.

<sup>2</sup> The statute of limitations for medical malpractice actions is two years and six months. CPLR §214-a.

explanation tendered as to why none of the discovery demands were provided since the motions were filed in May.” The effect of the October 2020 Order was that plaintiff was precluded from “testifying at trial or submitting affidavit in any dispositive motion yet to be filed, for failing to have provided discovery sought in motion seq. 5 (or 6, 7, and 8) by this date.” The December 2020 Order stated that although some responses and authorizations were provided, “to date no affidavit of merit from a medical expert has been provided, and significant responses and authorizations remain outstanding” and also addressed plaintiff’s failure to make a motion to vacate or reconsider the October 2020 preclusion order, and for these reasons the Court dismissed plaintiff’s case. The March 2021 Order reiterates the chronology of plaintiff’s lack of compliance:

“Plaintiff has violated preliminary conference, compliance conference and orders of 7/7/20; 7/21/20 and 10/5/20, resolving multiple motions made by each defendant seeking dismissal of the action for plaintiff’s non-compliance with dismissal finally granted on 12/21/20. Each of these motion orders provided that plaintiff would be precluded if she failed to provide the discovery ordered. Only now, after defendants submitted a judgment dismissing the action based on the order of 12/21/20, granted upon consideration of an irrefutable pattern of non-compliance by plaintiff, has plaintiff finally provided authorizations and affirmation of a physician attesting there is merit to the action.

As the defendants point out in their opposition to the motion, these belated submissions do not provide a sufficient basis to vacate the judgment here.”

The Court then addresses the plaintiff’s argument for reconsideration:

“Plaintiff asserts law office failure as the basis for reconsideration, asserting that their law office was impacted by Covid-19. This explanation had been considered by the court in the order of 10/5/20 and found insufficiently pleaded. The current motion also only generally explained the failure to comply by stating a paralegal was inattentive due to Covid concerns and many in the office were impacted by Covid, never explaining why no supervising attorney was responsible to ensure court orders were responded to, or why, although the court in each order gave plaintiff the opportunity to move for relief needed, no such motion was made. “The determination of what constitutes a reasonable excuse lies within the Supreme Court’s discretion, and the court has discretion to accept law office failure as a reasonable excuse (see CPLR 2005) where that claim is supported by a

detailed and credible explanation of the default at issue.” Ki Tae Kim v Bishop, 156 AD3d at 777; Chowdhury v Weldon, 185 AD3d 649, 124 NYS3d 863 [2020].

Here, plaintiff has not demonstrated that this court misinterpreted or failed to consider any law or facts, and as such, has not established a basis to renew or reargue this court’s determination pursuant to CPLR 2221.”

Plaintiff contends that an issue of fact as to whether the statute of limitations is tolled pursuant to CPLR §205(a) lies in the final paragraph of the March 2021 Order, which states:

“Accordingly, plaintiff’s motion is denied. The dismissal of plaintiff’s case was not on the merits nor was it for failure to prosecute. Accordingly, plaintiff may avail herself of the remedies of CPLR 205(a) to reinstitute this action.”

This Court disagrees with plaintiff’s assertion that this statement enables the Second Action to be rescued by CPLR §205(a). Dismissal of an action for failure to comply with discovery orders is a dismissal “for neglect to prosecute the action” within the meaning of CPLR §205(a). Andrea v Arnone, Hedin, Casker, Kennedy & Drake, 5 NY3d 514, 518 [2005]. “The “neglect to prosecute” exception in CPLR §205(a) applies not only where the dismissal of the prior action is for “[w]ant of prosecution” pursuant to CPLR §3216, but whenever neglect to prosecute is in fact the basis for dismissal.” Andrea v Arnone, Hedin, Casker, Kennedy & Drake, 5 NY3d at 519; *see* Carven Assoc. v American Home Assur. Corp., 84 NY2d 927 [1994]. In Andrea, the Court of Appeals considered a Supreme Court decision that stated “it was never this Court’s intention to dismiss the prior actions for failure to prosecute,” and held that, despite this statement, the Supreme Court’s dismissal order referred to “plaintiff’s failure to comply with discovery deadlines,” “delays”, and their lack of diligence, and therefore the correct description of the basis of dismissal of plaintiff’s prior action was “neglect to prosecute.” Andrea v Arnone, Hedin, Casker, Kennedy & Drake, 5 NY3d at 521. This set of facts is very similar to the case at bar. This Court notes that the March 2021 Order is not the Order that dismissed the case, but rather the Order that denied reargument. The

December 2020 Order did not contain the language at issue in the March 2021 Order, and both Orders provided a detailed recitation of plaintiff's non-compliance. The purpose of CPLR §205(a) is to prevent a Statute of Limitations "from barring recovery where the action, at first timely commenced, has been dismissed due to a technical defect which can be remedied in a new action." United States Fid. & Guar. Co. v Smith Co., 46 NY2d 498, 505 [1979]; Hyowon Kim v Cruz, 94 AD3d 820, 821 [2d Dept 2012]. Here, this case was not dismissed due to a technical defect, but due to the plaintiff's failure to comply with court-ordered deadlines. Although perhaps an undesirable outcome, parties, where necessary, will be held responsible for the failure of their lawyers to meet court-ordered deadlines and provide meaningful responses to discovery demands and preliminary conference orders. Arpino v F.J.F. & Sons Elec. Co., Inc., 102 AD3d 201, 207-08 [2d Dept 2012]; Andrea v Arnone, Hedin, Casker, Kennedy & Drake, 5 NY3d at 521.

This Court finds that the basis for the dismissal of the Second Action was for neglect to prosecute, as plaintiff's failure to comply with court-ordered discovery demands and dilatory prosecution of the matter resulted in plaintiff's preclusion from offering evidence on any dispositive motion or testifying at trial and the court determined plaintiff's excuse of law office failure was not reasonable or credible. As such, the Second Action cannot utilize the tolling provision of CPLR §205(a), the Second Action is barred by the statute of limitations, and plaintiff's complaint must be dismissed.

This Court need not address defendant's further arguments regarding *res judicata*, as they are rendered moot.

Conclusion:

The defendants have met their burden for establishing that the Second Action is barred by the statute of limitations as the First Action was dismissed for neglect to prosecute and cannot be rescued by the tolling provision of CPLR §205(a).

Accordingly, the motions by defendant/third-party plaintiff KFG, third-party defendant John Lucente, N.P., third-party defendant Kenny Chen, N.P., defendants Anthony Del Signore, M.D., Song Yang Yuan, M.D., Samuel Acquah, M.D.,


Constantinos Hadjipanayis, M.D., and Beth Israel Medical Center s/h/a Mount Sinai Beth Israel, and defendants Kanchanmala Katapadi, M.D. s/h/a Kanchan Katapadi, M.D., for dismissal of plaintiff's complaint, pursuant to CPLR §3211(a)(5) and (a)(7), are granted.

Accordingly, the plaintiff's complaint is dismissed.

This shall constitute the decision and order of this Court.

Dated: April 12, 2022  
Brooklyn, NY

ENTER



Hon. Bernard J. Graham, Justice  
Supreme Court, Kings County

HON. BERNARD J. GRAHAM