

Schrager v Henry J. Carter Specialty Hosp. & Nursing Facility
2022 NY Slip Op 32478(U)
July 26, 2022
Supreme Court, New York County
Docket Number: Index No. 160340/2018
Judge: Judith McMahon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH MCMAHON PART 30M

Justice

ALAN SCHRAGER,

Plaintiff,

- v -

HENRY J. CARTER SPECIALTY HOSPITAL & NURSING FACILITY, THE MOUNT SINAI HOSPITAL

Defendant.

INDEX NO. 160340/2018

MOTION DATE 07/22/2022

MOTION SEQ. NO. 002 003¹

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 70, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126 were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 88 were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ordered that the motion of defendant New York City Health and Hospitals Corporation, s/h/a Henry J. Carter Specialty Hospital & Nursing Facility (hereinafter "NYCHH"; Motion Seq. No. 002) for judgment dismissing plaintiff's complaint pursuant to CPLR 3211(a)(5) and 3211(a)(7) is granted in its entirety and the complaint is dismissed. Plaintiff's cross motion (filed under Motion Seq. No. 002) for an order allowing service of a Second Amended Complaint is denied as moot.

Plaintiff commenced this action against NYCHH by filing a summons and complaint on November 6, 2018, followed by an amended complaint on January 30, 2019 adding a claim for medical malpractice against defendant the Mount Sinai Hospital. Plaintiff alleges that

1 Plaintiff filed a Stipulation of Discontinuance in favor of defendant, The Mount Sinai Hospital (see NYSCEF Doc. No. 128), and Motion Seq. No. 003 was thereafter withdrawn by counsel for Mount Sinai.

defendants failed to properly monitor and treat plaintiff's decedent, Glenn Victor, between December 2, 2016 and January 15, 2017, which led to the development and worsening of Mr. Victor's pressure ulcers, urinary tract infection, colon distension, fecal impaction, pneumonia, sepsis and untimely death.

In support of its motion to dismiss the negligence cause of action pursuant to CPLR 3211(a)(5) (*i.e.*, expiration of the one year and ninety days statute of limitations) NYCHH points out that since plaintiff's last day of treatment at Henry J. Carter nursing home was January 13, 2017, then the complaint needed to be filed by April 13, 2018. Here, plaintiff had been awarded additional time to file the Notice of Claim (*see* August 20, 2019 Decision and Order of Hon. George Silver, NYSCEF Doc. No. 40), thereby extending plaintiff's filing date for the summons and complaint to September 24, 2018, at the latest. Plaintiff concededly did not meet this deadline.

As for that branch of its motion to dismiss plaintiff's wrongful death cause of action pursuant to CPLR 3211(a)(7) (*i.e.*, failure to state a claim upon which relief may be granted), NYCHH maintains that since plaintiff has failed to set forth in his complaint or bill of particulars, pecuniary loss to persons other than the decedent, then no basis exists for a cause of action for wrongful death.

In opposition to the motion plaintiff argues that NYCHH is equitably estopped from asserting a statute of limitations defense here, where NYCHH's predecessor counsel induced plaintiff, through false promises of negotiations and requests, to refrain from filing a complaint. In support, plaintiff's counsel submits, *inter alia*, the affidavit of its former employee/associate, Kayla Barger, Esq. (*see* NYSCEF Doc. No. 102), who claims that she delayed filing an already drafted complaint based upon defense counsel's representations that fruitful settlement

negotiations required her to refrain from such filing. It should be noted that during oral argument Plaintiff's attorney did not argue that the complaint was timely and indicated that defendant never made an offer of money to settle this matter during pre-suit negotiations.

Equitable estoppel "is only applicable in circumstances where there is evidence that plaintiff was lulled into inaction by defendant in order to allow the statute of limitations to lapse" (*East Midtown Plaza Hous. Co. v. City of N. Y.*, 218 AD2d 628, 628 [1st Dept. 1995]). "In order for equitable estoppel to apply, plaintiff bears the burden of showing: (1) plaintiffs were induced by fraud, misrepresentation or deception to refrain from filing a timely action; and (2) plaintiff reasonably relied on defendant's misrepresentations" (*MBI Intern Holdings Inc. v. Barclays Bank PLC*, 151 AD3d 108, 117 [1st Dept. 2017], *lv to appeal denied*, 29 NY3d 919 [2017] [internal quotations and citation omitted]). However, "the doctrine of equitable estoppel 'will not toll a limitations statute where plaintiffs possessed timely knowledge sufficient to have placed them under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable statute of limitations'" (*Brean Murray, Carret & Co. v. Morrison & Foerster LLP*, 165 AD3d 582, 582 [1st Dept. 2018], *quoting Rite Aid Corp. v. Grass*, 48 AD3d363, 364-365 [1st Dept. 2008]; *see also Simcuski v. Saeli*, 44 NY2d 442, 450 [1978])[¹"due diligence on the part of the plaintiff in bringing his action is an essential element for the applicability of the doctrine of equitable estoppel"]. The *uncommon remedy* of equitable estoppel "is triggered by some conduct on the part of the defendant after the initial wrongdoing; mere silence or failure to disclose the wrongdoing is insufficient" (*Zoe G. v. Frederick F.G.*, 208 AD2d 675, 675-676 [2d Dept. 1994]; *emphasis supplied*).

Equitable estoppel is inapplicable under these facts, where the record demonstrates that counsel for each party were engaged in pre-suit arms-length settlement discussions, with

plaintiff's counsel fully cognizant of the time constraints faced by her client (*see* NYSCEF Doc. No. 102 para. 13, where counsel calculates expiration of the statute of limitations as January of 2020; *see also* NYSCEF Doc. No. 119; affirmation of defense counsel during negotiations, Karen Williams, Esq.). Engaging plaintiffs in preliminary settlement negotiations through its insurance company (or through defendant's attorneys as alleged herein) does not estop defendants from asserting the defense of statute of limitations (*see Brauner v. Metro-North Commuter R. Co.*, 227 AD2d 306 [1st Dept. 1996]). Accordingly, NYCHH's motion pursuant to CPLR 3211(a)(5) to dismiss the plaintiff's causes of action for negligence and for violation of the Public Health Law as time barred under Unconsolidated Laws of N.Y 7401(2) is granted.

Inasmuch as the negligence claims against defendant NYCHH are dismissed, plaintiff's allegation of wrongful death cannot survive (*see, e.g., Melendez v. Figler*, 2018 WL 1305342 [Sup. Ct. NY County, 2018]; [internal citations omitted]).

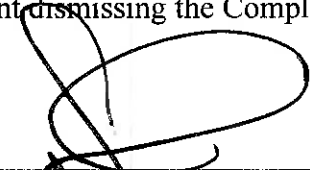
Despite this Court's briefing schedule and repeated warnings that it would not entertain supplemental opposition papers to NYCHH's motion, plaintiff requested permission to submit a "Sur-Reply" affirmation in further opposition to Motion Seq. No. 002. When that request was denied, plaintiff submitted a late (July 7, 2022) pleading entitled "Reply Affirmation in Further Support of Leave to File Second Amended Complaint" (*see* NYSCEF Doc. No. 124), purportedly as part of his cross motion to amend the complaint's "*ad damnum*". The Court has not considered the belatedly filed reply affirmation, but notes that despite its label, it is apparently further opposition to NYCHH's dismissal motion.

Accordingly, it is hereby

ORDERED that the motion of defendant New York City Health and Hospitals Corporation s/h/a Henry J. Carter Specialty Hospital and Nursing Facility, for dismissal of plaintiff's complaint pursuant to CPLR 3211(a)(5) is granted in its entirety; and it is further

ORDERED that the Clerk of the Court enter judgment dismissing the Complaint.

7/26/2022
DATE



JUDITH MCMAHON, J.S.C.
Hon. Judith N. McMahon
J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE