SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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NACHUM BOREK,

Plaintiff,

- v -

DR. STUART SEIDMAN, DR. ELIZABETH SUBLETTE, NEW YORK PRESBYTERIAN/WEILL CORNELL MEDICAL CENTER, and PAYNE WHITNEY PSYCHIATRIC CLINIC,

Defendants.

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INDEX NO. 805351/2021

MOTION DATE 05/20/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 41, 46, 47, 53, 54, 55, 56, 57, 58, 62, 63

were read on this motion to/for DISMISS.

In this action to recover damages for medical malpractice, the defendants New York Presbyterian/Weill Cornell Medical Center and Payne Whitney Psychiatric Clinic (together the NYPH defendants) move pursuant to CPLR 3211(a) to dismiss the amended complaint insofar as asserted against them on the grounds that the action is time-barred (CPLR 3211[a][5]) and the plaintiff lacks mental capacity to maintain the action on his own behalf (CPLR 3211[a][3]). The plaintiff opposes the motion, asserting that the limitations period was tolled by virtue of his temporary insanity, but that he now has the capacity to prosecute the action in his own name. The motion is granted. Although the NYPH defendants failed to demonstrate that the plaintiff lacks capacity to maintain this action, the amended complaint is dismissed insofar as asserted against them on the ground that the action is time-barred, inasmuch as the plaintiff failed to establish that he was insane during the time that the limitations period was running.

In his amended complaint, the plaintiff alleged, in effect, that the NYPH defendants committed medical malpractice by improperly prescribing certain psychiatric medications and that, as a consequence, he is currently has mild cognitive impairment from the long-term effects

of medication and the lingering effects of past, severe medication withdrawal breakdowns. He asserted that he suffers from fluctuations in the quality of his mental health due to continuous withdrawal from medications, and that he has become extremely sensitive to such administrations and withdrawals. Specifically, he alleged that, beginning in early 2011, while he was in Israel, he had been misdiagnosed with multiple mental disorders, including "insanity," that continued through September 2011, when he suffered a panic attack while in Flatbush, Brooklyn. The plaintiff further alleged that, at the time, his mother, who is not a health-care professional, disagreed with the diagnosis made by his physicians and, despite the fact that she presented multiple physicians and other medical professionals with alleged evidence of a misdiagnosis, none, including the defendant, agreed with those opinions. In addition, the plaintiff alleged that, due to this alleged misdiagnosis, he was administered medication that "poisoned" him, and that his psychiatrist prescribed medications that caused him to develop a mental illness. With respect to the NYPH defendants, the plaintiff alleged in his amended complaint that he was hospitalized at NYPH from December 10, 2015 through January 16, 2016, and that the NYPH defendants committed medical malpractice by disregarding his mother's purported evidence of misdiagnosis and failing to discuss the plaintiff's care with her, despite the fact that he directed NYPH staff not to speak with her.

The plaintiff commenced this action pro se on November 4, 2021 (*see* CPLR 304[a]). His complaint was apparently drafted by his mother, who is not an attorney-at-law. He annexed three affidavits to his complaint, one from his brother David Borek and sister-in-law Gitty Borek (together the Boreks), one from his sister Baila Sussman and brother-in-law Moshe Sussman (together the Sussmans), and one from his sister Chava Peryl Maryl and brother-in-law Avroham Aba Maryl (together the Maryls), all of whom alleged that he was "insane" for some period of time after his discharge from NYPH on January 16, 2016. He served an amended complaint on December 22, 2021, also apparently drafted by his mother, that repeated all of the allegations in the complaint, and added new allegations.

The Boreks asserted in their affidavit that the plaintiff is

> "not fully sane, and has not been fully sane, ever since he went back home to his mother, and has not been sane for a number of years before that. We've been seeing Nachum approximately every third week since he moved back to Lakewood. Different things were going on with him at different times, but none of it was normal. He talks inappropriately to our children. We don't allow him to be in a room with our children unsupervised because of inappropriate touching. In conversation, he doesn't always make sense, and he often spaces out, and is not able to concentrate. He would not have been able to function independently at any time. Our mother/mother-in-law blames his insanity on withdrawal from medication."

The Sussmans asserted in their affidavit that the plaintiff

> "was sick with mental illness for quite a few years. Our mother-in-law/mother is convinced that Nachum is misdiagnosed and should be off all medicine. Ever since Nachum came to Lakewood to live with his mother, she was taking him off medications. But it wasn't working out. Nachum never got his mind back and at times he was mentally sicker than he ever had been. Our mother-in-law/mother still feels he needs another year and he will be back to normal. But so far, at all times since Nachum came home, he was never fully sane. He could not function independently at any time, and his interactions with our children is irregular."

The Maryls averred in their affidavit that

> "[s]ince Nachum Borek came to Lakewood three years ago, we have been spending an occasional weekend[ ] with him, on average once in three months. Unfortunately, Nachum has not been fully sane at any time during any of the weekends we spent with him; to the extent that our eleven year old daughter realized Nachum was dysfunctional and asked Nachum's mother what was wrong."

None of the affiants upon whom the plaintiff relied asserted that he or she was a physician, a psychologist, a social worker, or any sort of mental-health professional.

In connection with a motion to dismiss a complaint as time-barred, "a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made," the burden shifts to the plaintiff to raise a question of fact as to "whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period" (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020], quoting *Quinn v McCabe, Collins, McGeough & Fowler, LLP*, 138 AD3d 1085, 1085-1086 [2d Dept

2016]; *see Murray v Charap*, 150 AD3d 752 [2d Dept 2017]; *Williams v New York City Health & Hosps. Corp.*, 84 AD3d 1358 [2d Dept 2011]; *Rakusin v Miano*, 84 AD3d 1051 [2d Dept 2011]).

The statute of limitations applicable to actions to recover for medical malpractice against a private health-care provider is 2½ years, measured from "the act, omission or failure complained of or last treatment where there is a continuous treatment for the same illness, injury or condition which gave rise to the said act omission or failure" (CPLR 214-a). Likewise, the statute of limitations applicable to a cause of action sounding in lack of informed consent is 2½ years from the date of the alleged failure to provide the patient with information concerning the risks and benefits of a particular treatment or procedure (*see Wilson v Southampton Urgent Med-Care, P.C.*, 112 AD3d 499 [1st Dept 2013]). Consequently, unless the limitations period was tolled on account of the plaintiff's insanity, the limitations period applicable to his claims against the NYPH defendants would have expired on July 16, 2018, and the commencement of the action on November 4, 2021 rendered the action untimely.

CPLR 208(a) provides, in relevant part, that

> "[i]f a person entitled to commence an action is under a disability because of . . . insanity at the time the cause of action accrues, and . . . the time otherwise limited [for commencing the action] is less than three years, the time [within which the action must be commenced] shall be extended by the period of disability."

The burden of establishing insanity in on the plaintiff (*see Scifo v Taibi*, 198 AD3d 704, 705 [2d Dept 2021]). The term 'insanity' is not defined in CPLR 208 (*see id.*), and the toll of the statute applies 'to only those individuals who are unable to protect their legal rights because of an overall inability to function in society'" (*Kelly v Solvay Union Free School Dist.*, 116 AD2d 1006, 1006 [4th Dept 1986], quoting *McCarthy v Volkswagen of Am.*, 55 NY2d 543, 548 [1982]). CPLR 208 is subject to narrow interpretation (*see Matter of Goussetis v Young Adults with Special Abilities, Inc.*, 198 AD3d 761, 762 [2d Dept 2021]; *Scifo v Taibi*, 198 AD3d at 705; *Thompson v Metropolitan Transp. Auth.*, 112 AD3d 912, 914 [2d Dept 2013]; *Simon v Bryski*, 278 AD2d 224 [2d Dept 2000]).

"The task of determining whether the tolling provision applies 'is a pragmatic one, which necessarily involves consideration of all surrounding facts and circumstances relevant to the claimant's ability to safeguard his or her legal rights'" (*Matter of Goussetis v Young Adults with Special Abilities, Inc.*, 198 AD3d at 762, quoting *Matter of Cerami v City of Rochester School Dist.*, 82 NY2d 809, 812 [1993]). A showing in this regard must be supported by medical evidence, such as a physician's affidavit or affirmation documenting the severity of the plaintiff's condition (*see Jemima O. v Schwartzapfel, P.C.*, 178 AD3d 474, 475 [1st Dept 2019]; *D'Onofrio v Mother of God With Eternal Life*, 60 Misc 3d 910, 916 [Sup Ct, Westchester County 2018]; *cf. Matter of Brigade v Olatoye*, 167 AD3d 462, 462 [1st Dept 2018] [medical records submitted by petitioner were sufficient to trigger a hearing of the issue of her sanity for purposes of applying toll to limitations period]; *Santana v Union Hosp. of Bronx*, 300 AD2d 56, 58 [1st Dept 2002] [affirmation of plaintiff's medical expert is sufficient to warrant a hearing on the issue of insanity]). Even a judicial finding that a guardian had been appointed for a person because he or she was "intellectually disabled" within the meaning of SCPA 1750 or "incapacitated" within the meaning of Mental Hygiene Law article 81 would not be sufficient, in and of itself, to establish that the person was "insane" within the meaning of CPLR 208(a), or that the person otherwise was unable to pursue or safeguard his or her right in an action (*see Pieternelle v Smiley & Smiley, LLP [Matter of Verdugo]*, _____AD3d_____, 2022 NY Slip Op 04138, *2 [1st Dept, Jun. 28, 2022] [appointment of article 81 guardian is "not conclusive as to insanity"]; *Matter of Goussetis v Young Adults with Special Abilities, Inc.*, 198 AD3d at 762).

Here, the plaintiff did not provide any medical evidence, such as a physician's affirmation, that he was unable to function in society at the time that the action accrued. The only evidence that he presented consisted of conclusory statements from his siblings and siblings-in-law that merely tracked the language of various appellate decisions by reciting that he was "insane," "not fully sane," "mentally sick," or "unable to function" during an unspecified period of time when the 2½-year limitations period was running, based only on subjective

observations of behavior that, in and of themselves, did not establish insanity. Specifically, they established only that they thought that the plaintiff spoke and interacted physically with his nieces and nephews in an inappropriate manner, and that he occasionally spaced out, didn't make sense, and could not concentrate. All of these statements further rely on the subjective, non-expert, non-medical opinions of the plaintiff's mother as to his condition during certain periods of time.

Even if the plaintiff suffered from the conditions or engaged in the behaviors described by his siblings and siblings-in-law, none of those conditions and behaviors, whether alone or together, established that he was legally "insane" at any time. As the NYPH defendants correctly argue, being depressed, apathetic, and dysfunctional are not sufficient grounds upon which the plaintiff may invoke the insanity toll (*see Sanders v Rosen*, 159 Misc 2d 563, 577 [Sup Ct, N.Y. County 1993]; *La Russo v St. George's Univ. Sch. of Med.*, 747 F3d 90, 99 [2d Cir 2014] [applying New York law]; *see also Khalil v Pratt Inst.*, 818 Fed Appx 115, 117 [2d Cir 2020]; *De Los Santos v Fingerson*, 1998 US Dist LEXIS 16657, 1998 WL 740851, *4 [SD NY, Oct. 23, 1998] ["apathy, depression, posttraumatic neurosis, psychological trauma and repression therefrom or mental illness alone" are insufficient to invoke the insanity toll]; *Wenzel v Nassau County Police Dept*, 1995 US Dist LEXIS 22067, 1995 WL 836056, *4 [ED NY, Aug. 5, 1995]). "Difficulty in functioning is not sufficient to establish insanity for purposes of § 208; rather, the plaintiff must be totally unable to function as a result of a 'severe and incapacitating' disability" (*Swartz v Berkshire Life Ins. Co.*, 2000 US Dist LEXIS 14039, 2000 WL 1448627, *5 [SD NY. Sept. 28, 2000] [citation omitted]). The statute applies only if the plaintiff had a disability "which prevents [him] from recognizing a legal wrong and from engaging an attorney to rectify it" (*Sanders v Rosen*, 159 Misc 2d at 577). There is no such proof included in the plaintiff's submissions.

Moreover, the NYPH defendants correctly argued that the plaintiff impermissibly was "trying to have it both ways," as, on the one hand, he persuasively demonstrated that he did not

lack capacity to commence the action on his own behalf, while on the other hand, he simultaneously argued that he was "insane" for the purposes of tolling the statute of limitations (*Vasilatos v Dzamba*, 148 AD3d 1278, 1278 [3d Dept 2017]).

Although the amended complaint must be dismissed insofar as asserted against the NYPH defendants as time-barred, the court rejects their contention that the amended complaint should be dismissed on the additional ground that the plaintiff lacks the mental capacity to represent himself here.

Even if the court to accept the plaintiff's contention that he suffered or suffers from problems with his mental health, he nonetheless has not been judicially declared to be incapacitated or incompetent. "In the absence of a judicial declaration of incompetence made in accordance with the statutory processes provided therefor, a person suffering from acknowledged mental defects may sue or be sued in his or her own name" (*Mitsinicos v New Rochelle Nursing Home*, 258 AD2d 630, 631 [2d Dept 1999]; *see Sengstack v Sengstack*, 4 NY2d 502, 509-510 [1958]; *Bryant v Riddle*, 259 AD2d 399, 399 [1st Dept 1999]; *Lawrence v Kennedy*, 34 Misc 3d 711, 717 [Sup Ct, Nassau County 2011]; *see also Matter of Vellios v Vellios*, 200 AD3d 967, 968 [2d Dept 2021]; *Linghua Li v Xiao*, 175 AD3d 672, 673-674 [2d Dept 2019]; *Redstone v Herzer*, 162 AD3d 583, 584 [1st Dept 2018] [expedited mental examination of plaintiff was unwarranted]; *Vasilatos v Dzamba*, 148 AD3d at 1279; *Rivera v New York City Tr. Auth.*, 141 AD3d 441, 441 [1st Dept 2016]; *Rau v Tannenbaum*, 85 AD2d 522, 522 [1st Dept 1981]). The burden is on the NYPH defendants to establish that the plaintiff is incompetent or lacks the mental capacity to maintain this action (*see Vasilatos v Dzamba*, 148 AD3d at 1276; *Brunner v Estate of Lax*, 137 AD3d 553, 553 [1st Dept 2016]; *Pruden v Bruce*, 129 AD3d 506, 507 [1st Dept 2015]; *Feiden v Feiden*, 151 AD2d 889, 890 [3d Dept 1989]). Even where medical records show that a person had moments of confusion, such confusion does not create a presumption of incompetence or otherwise rebut the presumption of competence (*see Durkin v Petrie*, 200 AD3d 1701, 1701 [4th Dept 2021]). The NYPH defendants failed to satisfy their

burden with respect to the issues of competency and capacity and, hence, the amended complaint may not be dismissed on the ground that the plaintiff lacks the mental capacity to prosecute the action on his own behalf.

The plaintiff's remaining contention are without merit.

Accordingly, it is

ORDERED that the motion of the defendants New York Presbyterian/Weill Cornell Medical Center and Payne Whitney Psychiatric Clinic to dismiss the amended complaint insofar as asserted against them is granted, and the amended complaint is dismissed insofar as asserted against the defendants New York Presbyterian/Weill Cornell Medical Center and Payne Whitney Psychiatric Clinic; and it is further,

ORDERED that the action is severed against the defendants New York Presbyterian/Weill Cornell Medical Center and Payne Whitney Psychiatric Clinic; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the amended complaint insofar as asserted against the defendants New York Presbyterian/Weill Cornell Medical Center and Payne Whitney Psychiatric Clinic.

This constitutes the Decision and Order of the court.

7/25/2022
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE