

Ciancarelli v Timmins
2022 NY Slip Op 35240(U)
January 24, 2022
Supreme Court, Suffolk County
Docket Number: Index No. 624222/2019
Judge: David T. Reilly
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SUPREME COURT OF THE STATE OF NEW YORK

I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:**INDEX NO.: 624222-2019****HON. DAVID T. REILLY, JSC**

JENNIFER CIANCARELLI,**Plaintiff,****- against -****EDWARD M. TIMMINS, D.O., GREAT SOUTH BAY
SURGICAL ASSOCIATES AND VASCULAR LAB
LLP, GOOD SAMARITAN HOSPITAL MEDICAL
CENTER, MINDY S. SCHEER, DO, JOHN E.
STEWART, M.D., ZHI-WEI MA, M.D., PATHOLOGY
and LABORATORY CONSULTANTS OF LONG
ISLAND, PLLC,****Defendants.**

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MOTION DATE: 02/13/20
SUBMITTED: 02/19/20
MOTION SEQ. NO.: 4 & 5
MOTION DEC.: 004 MD
005 MotD

Upon the reading and filing of the following papers under Suffolk County Supreme Court Index No. 606083-2020 [consolidated under Suffolk County Supreme Court Index No. 624222-2019]; (1) Defendant Stewart's Notice of Motion to Dismiss (003) efiled on April 28, 2021 and Supporting Papers; (2) Plaintiff's Affirmation in Opposition (003) efiled on June 2, 2021 and Supporting Papers; (3) Plaintiff's Notice of Cross-Motion (004) efiled on June 2, 2021 and supporting papers; and (4) Defendant Stewart's Affirmation in Reply (003) efiled on June 8, 2021 and Supporting Papers (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the applications (Motion Seq. Nos. 003 and 004) are consolidated for the purposes of this determination and are determined as follows.

Upon consolidation of the instant matter, (Action #1) under Suffolk County Supreme Court Index No. 624222-2019, and Suffolk County Supreme Court Index No. 606083-2020, an action entitled *Ciancarelli v Scheer, et al.* (Action #2) for all purposes based upon the "So-Ordered" stipulation dated December 16, 2021, this Court obtained jurisdiction over two motions which were pending under Action #2. Motion Seq. No. 003 in that action is a motion by defendant John Stewart M.D. to dismiss the plaintiff Jennifer Ciancarelli's, complaint pursuant to CPLR 3211(a)(5) based upon the expiration of the statute of limitations and, pursuant to CPLR 3211(8), based on the failure to effectuate proper service. Plaintiff opposes the motion and has also cross-moved (Mot. Seq. No. 003) for an Order pursuant to CPLR 306-b and CPLR 2001 granting plaintiff an extension of time to properly effectuate proper service upon defendant Stewart.

According to the defendant Stewart, he provided medical services to the plaintiff at one appointment. He claims he provided a radiology report on June 22, 2017. While plaintiff pleads continuous treatment in her amended complaint, she does not contest that Stewart only provided services on that one day. All parties to that motion agree that the action was commenced on May 29, 2020 by the filing of a summons and complaint. Defendant argues that, pursuant to CPLR 214-a, the action was required to be commenced on or before December 22, 2019 to incorporate his service within the two and one-half year statute of limitation. Defendant's computation is correct.

Plaintiff counters that "Lavern's Law," which was enacted on January 31, 2018, created a "discovery: statute of limitation rule for cancer claims (*see* CPLR 214-a(b)). The statute states:

(b) where the action is based upon the alleged negligent failure to diagnose cancer or a malignant tumor, whether by act or omission, the action may be commenced within two years and six months of the later of either: (I) when the person knows or reasonably should have known of such alleged negligent act or omission and knows or reasonably should have known that such alleged negligent act or omission has caused injury, provided, that such action shall be

commenced no later than seven years from such alleged negligent act or omission, or (ii) the date of the last treatment when there is continuous treatment for such injury, illness or condition.

Plaintiff focuses on Dr. Stewart's sole treatment date of June 22, 2017 and argues that the earliest plaintiff became aware of the defendant(s) failure to diagnose cancer was October 14, 2017. Plaintiff claims that "Lavern's Law" is applicable to this case and that her action as against Dr. Stewart was timely commenced¹ (see *Mula v Sasson*, 181 AD3d 686, 687, 121 NYS3d 143 [2d Dept. 2020]). In support of her claim plaintiff has submitted the uncertified medical records which reflect the discovery of her breast cancer on October 14, 2017.² While there is a paucity of support for plaintiff's discovery claim, considered within a motion to dismiss, the Court finds that she has a meritorious cause of action which was timely commenced.

Accordingly, it is

ORDERED defendant's motion (004) is denied without prejudice and with leave to renew following statutory discovery; and it is

ORDERED that plaintiff's application (005) is granted to the extent indicated below.

For the Unified Court System in Suffolk County, Covid-19 first impacted judicial administration in mid-March 2020 and has continued to the present time. The pandemic caused a major upheaval in the manner in which litigation was commenced and effectuated. It is from this perspective that the Court next considers defendant Stewart's claim that he was not served with the summons and complaint. Defendant is correct that plaintiff did not receive approval from the Court to mail the summons and complaint to Stewart and that service is null and void.

Plaintiff, seemingly acknowledging the error in service, has cross-moved to extend her time to serve the complaint on Stewart. Defendant catalogues numerous alleged missteps by plaintiff's counsel in the initiation of her lawsuit, but has failed to convince this Court that she should not be given the opportunity to have case brought before a jury of her peers. The Court's focus is on the interests of justice and, therefore, grants plaintiff's application and finds that she has a potentially meritorious cause of action notwithstanding the motion to dismiss; and it is therefore

ORDERED that plaintiff's time to serve her pleadings on defendant Stewart is extended for

¹Lavern's Law would allow that action to be commenced on or before April 14, 2020. The Governor's Executive Orders provide the bridge to enable plaintiffs to state that the filing of the action on May 29, 2020 was timely.

²The Court's patience was tested by the opposition papers failing to locate the relevant page(s) in the medical record to support plaintiff's October 2014 discovery claim (see Timmins Progress Note dated October 14, 2017, see also NYSCEF DOC. 64).

an additional 120 days from notice of entry of this decision and Order.

This constitutes the decision and Order of the Court.

Dated:

January 24, 2022
Riverhead, New York



A handwritten signature in black ink, appearing to read "D. T. Reilly", written over a horizontal line.

DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

 FINAL DISPOSITION

 X NON-FINAL DISPOSITION