

Borek v Seidman

2023 NY Slip Op 30189(U)

January 5, 2023

Supreme Court, New York County

Docket Number: Index No. 805351/2021

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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

Justice

-----X

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 01/03/2023

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 183, 184, 185, 208, 209, 210, 211

were read on this motion to/for AMEND NOTICE OF MOTION/MISCELLANEOUS .

In this action to recover damages for medical malpractice, the plaintiff moves for leave to amend the notice of motion that he initially uploaded to the New York State Court Electronic Filing (NYSCEF) system as Docket Entry No. 128. Specifically, he seeks to add provisions thereto indicating, among other things, that that motion encompassed a request to renew his opposition to the motion of the defendants New York Presbyterian/Weill Cornell Medical Center and Payne Whitney Psychiatric Center (the NYPH defendants) to dismiss the complaint insofar as asserted against them, which had been granted by order dated July 25, 2022 (MOT SEQ 001). The plaintiff also seeks to vacate this court’s directive that scheduled oral argument on MOTION SEQUENCE 006 to be conducted simultaneously with the motion that he had initiated pursuant to the notice filed under Docket Entry No. 128, and to annul the court’s consolidation of those two motions under MOTION SEQUENCE 006. No party opposed the motion. The motion is granted to the extent that the notice of motion filed under Docket Entry No. 128 is amended, that notice of motion is deemed to have been served and filed in the form uploaded to NYSCEF

as page two of Docket Entry No. 183, and the notice now is deemed explicitly to include a request for renewal. The plaintiff's motion is otherwise denied.

By order dated July 14, 2022, the court denied the plaintiff's motion to compel the defendant Dr. Elizabeth Sublette to produce all records in her possession that were referable to the plaintiff's treatment with her (MOT SEQ 002). The court concluded that the plaintiff was collaterally estopped from seeking these records. In particular, the court held that he was estopped by an order and judgment of the Supreme Court, Albany County, that denied his CPLR article 78 petition to review a determination of the New York State Department of Health Office of Medical Professional Responsibility that, due to the nature of the plaintiff's treatment, Sublette was fully justified in withholding most of his records pursuant to Public Health Law § 18 (3)(d). On August 11, 2022, the plaintiff, under MOTION SEQUENCE 006, moved for an order "vacating the aspect of the Court's 7/14/2022 Order regarding collateral estoppel, that precluded Plaintiff from relitigating the issue and any other limitations to obtaining evidence from Defendant Sublette that may be included in the order." The plaintiff noticed that motion to be heard on October 31, 2022. The court scheduled a remote oral argument on that motion, first for November 21, 2022, and then for November 22, 2022.

By order dated July 25, 2022, the court granted the NYPH defendants' motion to dismiss the complaint insofar as asserted against them, concluding that the action against them was time-barred, and that the plaintiff failed to establish that the limitations period was tolled by virtue of his alleged insanity (MOT SEQ 001). On September 13, 2022, the plaintiff uploaded a notice of motion to NYSCEF as Docket Entry No. 128, pursuant to which he sought to "vacate the decision to dismiss the Complaint against Defendants NYPH based on the fact that equitable tolling/ estoppel applies," and "to vacate" the same decision and order,

"based on its consideration of whether the newly submitted psychiatric records and other evidence, and newly alleged facts, in addition to prior information, at least raise a question of fact, or firmly establishes, that the statute of limitations should be tolled."

He noticed the motion to be heard on March 8, 2023, or almost six months after uploading that paper. The motion support office thus has yet to assign it a motion sequence number, even though it was uploaded more than three months ago. In the instant motion, the plaintiff seeks leave to amend the notice of motion uploaded as Docket Entry No. 128 to clarify and specify that his motion for reconsideration included a request to renew his opposition to the NYPH defendants' dismissal motion, based on new facts not previously submitted to the court.

At the November 22, 2022 appearance, the court heard partial argument with respect to MOTION SEQUENCE 006, referable to the medical records issue, but suspended argument when it was apparent that there was confusion as to whether the parties also were ready to argue the motion addressed to the statute of limitations issue. The court also inquired as to whether Sublette intended to seek dismissal of the complaint insofar as against her as time-barred, as had the NYPH defendants, to which Sublette's counsel indicated that he intended to do so shortly after the November 22, 2022 appearance. Immediately after the conference, the court emailed the parties and counsel with the following directive:

"the court will deem MOTION SEQUENCE 006 to cover the plaintiff's renewal requests with respect to both the statute of limitations issue and the medical records issue, without the necessity of filing a separate notice of motion.

"To assure that the court has all relevant papers before it, (a) the plaintiff, on or before December 27, 2022, shall, if he elects to do so, upload under MOTION SEQUENCE 006 any additional affirmations or supporting papers that support his request for renewal in connection with the statute of limitations issue, (b) the defendants NYPH/Weill Cornell and Payne Whitney shall upload opposition papers under MOTION SEQUENCE 006 with respect to the statute of limitations issue on or before January 10, 2023, and (c) the plaintiff may upload reply papers under MOTION SEQUENCE 006 with respect to the statute of limitations issue on or before January 23, 2023.

As the court directed during today's conference, Dr. Sublette shall separately move for summary judgment, with said motion returnable on January 25, 2023, so that it may be considered at the same time as the plaintiff's consolidated renewal motion under MOTION SEQUENCE 006. . . . Dr. Sublette shall upload her notice of motion and supporting papers on or before December 20, 2022, the plaintiff shall upload his opposition papers on or before January 17, 2023, and Dr. Sublette may upload a reply on or before January 24, 2023."

On December 14, 2022, Sublette, in accordance with the court's directives, served and filed a motion to dismiss the complaint insofar as asserted against her as time-barred, and noticed the motion to be heard on January 25, 2022. Although the motion support office has yet to assign a sequence number to Sublette's motion, the court has scheduled a remote oral argument for January 25, 2022, at 9:30 a.m. on both MOTION SEQUENCE 006, inclusive of the statute of limitations issue, and Sublette's motion. On December 26, 2022 and December 27, 2022, and in accordance with the court's directive, the plaintiff uploaded additional documentation in support of his motion under MOTION SEQUENCE 006.

The court grants the plaintiff's request to amend the notice of motion uploaded under NYSCEF Docket Entry No. 128 to clarify that he is seeking renewal. There will be no prejudice to any party and, in any event, the plaintiff had made it clear when he initially filed that notice of motion on September 13, 2022 that he intended to rely on new facts as a basis for his request for reconsideration, which is the very definition of a renewal motion (*see* CPLR 2221[e][2]; *Melcher v Apollo Med. Fund Mgt., LLC*, 105 AD3d 15, 23 [1st Dept 2013]).

The court denies that branch of the plaintiff's motion seeking to vacate the court's scheduling directive. "Courts have an inherent power to control their calendars . . . and the timing of the court's consideration of the motions" will not prejudice the plaintiff here (*JPMorgan Chase Bank, Natl. Assn. v Newton*, 203 AD3d 902, 906 [2d Dept 2022]; *see Tirado v Miller*, 75 AD3d 153, 161 [2d Dept 2010]; *Schreiber-Cross v State of New York*, 57 AD3d 881, 884 [2d Dept 2008]; *Matter of Flanigan v Smyth*, 148 AD3d 1249, 1253 [3d Dept 2017]; *Catalane v Plaza 400 Owners Corp.*, 124 AD2d 478, 480 [1st Dept 1986]). The Supreme Court's authority in this regard extends to the establishment of schedules and timetables (*see Harrington v Palmer Mobile Homes, Inc.*, 71 AD3d 1274, 1274 [3d Dept 2010]) and the granting of adjournments (*see Cuevas v Cuevas*, 110 AD2d 873, 878 [2d Dept 1985]). In fact, "[t]he granting of an adjournment for any purpose rests within the sound discretion of the Supreme Court" (*Adotey v British Airways, PLC*, 145 AD3d 748, 749-750 [2d Dept 2016]), as does the

related determination to accelerate the return date of a motion (*see Visconti v Paino*, 137 Misc 2d 1, 6 [Sup Ct, Dutchess County 1987]), as long as the court gives the parties adequate notice of the acceleration (*see Freed v Best*, 175 AD3d 1494, 1495 [2d Dept 2019]; *see generally Matter of Staten Is. War Memorial Assn. v Barnes*, 286 App Div 966, 966 [2d Dept 1955]). Here, the court informed the parties on November 22, 2022 that it was accelerating the return date of the renewal motion addressed to the statute of limitations issue to January 25, 2023 from March 8, 2023, as it determined that the plaintiff noticed the motion to be heard too far in the future. The court concludes that this is adequate notice. The plaintiff not only failed to show how he would be prejudiced by the acceleration, but provided no plausible reason as to why the statute of limitations renewal motion must await until March 2023 to be considered.

Moreover, it is within this court's discretion to consolidate, for consideration and disposition, MOTION SEQUENCE 006 with the statute of limitations renewal motion (*see Matter of Herskowitz v Tompkins*, 184 AD2d 402, 402 [1st Dept 1992]; *Harsanyi v Extell 4110, LLC*, 2022 NY Slip Op 34392[U], *1, 2022 NY Misc LEXIS 8344, *1 [Sup Ct, N.Y. County, Dec. 23, 2022]; *E.A. v J.A.*, 76 Misc 3d 1206[A], 2022 NY Slip Op 50833[U], *2, 2022 NY Misc LEXIS 4475, *3 [Sup Ct, N.Y. County, Aug. 18, 2022]). The plaintiff has not shown that he will be prejudiced were the court to consider those two motions together under SEQUENCE 006 and, as with his request to vacate the acceleration of the statute of limitations renewal motion, has provided no plausible reason as to why the two applications must be considered separately, on different dates.


Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent that the notice of motion uploaded to the New York State Court Electronic Filing system under Docket Entry No. 128 is amended as requested by the plaintiff, and is deemed to have been served and filed in the form uploaded to the New York State Court Electronic Filing system as page two of Docket Entry No.

183, so that it now includes an explicit request for renewal, and the plaintiff's motion is otherwise denied.

This constitutes the Decision and Order of the court.

1/5/2023
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE