

Zapata v Culotta
2024 NY Slip Op 35435(U)
April 30, 2024
Supreme Court, Queens County
Docket Number: Index No. 700976/2022
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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NOEMI ZAPATA,

Index No. 700976/2022

Plaintiff,

Part MDP

Motion Date: April 10, 2024

-against-

Calendar No. 24

Sequence No. 3

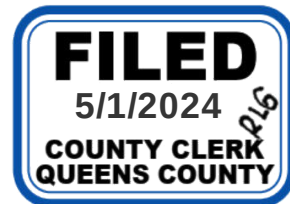
MARIA G. CULOTTA, M.D., KAITLYN OLIVERI,
PA-C, ILAN REDER, M.D., TAMLA HAGAN, CT,
BETHPAGE MEDICAL, PLLC, GARDEN OB/GYN
GARDEN CITY, LONG ISLAND JEWISH MEDICAL
CENTER, CENTER FOR ADVANCED MEDICINE –
CANCER INSTITUTE, NORTHWELL HEALTH
CORE LABORATORIES,

Defendants.
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The following papers numbered EF-121 to EF-178 read on this motion by defendants ILAN REDER, MD, TAMLA HAGAN, CT, LONG ISLAND JEWISH MEDICAL CENTER, CENTER FOR ADVANCED MEDICINE – CANCER INSTITUTE, and NORTHWELL HEALTH CORE LABORATORIES for an Order dismissing the action as to defendant Long Island Jewish Medical Center pursuant to CPLR §3211, change venue pursuant to CPLR §503(a), §503(c), §510(1), §510(3), and §511(b), and dismissing this action for failing to timely move for default judgment pursuant to CPLR §3215(c), dismissing plaintiff’s negligence claim pursuant to CPLR §3211(a)(7), dismissing plaintiff’s claims that are beyond the statute of limitations pursuant to CPLR §214(a), §205, and §3211(a)(5), striking “reckless” from plaintiff’s Complaint pursuant to CPLR §2004, §3024, and §3042, and this cross-motion by plaintiff for an Order striking defendants’ Answers and granting a default judgment against them pursuant to CPLR §3126, or alternatively compelling defendants to provide outstanding discovery, or alternatively granting plaintiff leave to move for a default judgment against defendants pursuant to CPLR §2005.

Papers
Numbered

Notice of Motion, Affirmation, Exhibits.....EF121-EF126
Notice of Cross-Motion, Affirmation, Exhibits.....EF130-EF166
Reply Affirmation.....EF167-EF168



Reply Affirmation.....EF178

Upon the foregoing papers, it is ordered that these motions are determined as follows:

Defendants Ilan Reder, MD, Tamla Hagan, CT, Long Island Jewish Medical Center, Center for Advanced Medicine – Cancer Institute, and Northwell Health Core Laboratories’ motion to dismiss defendant Long Island Jewish Medical Center pursuant to CPLR §3211 is denied. Defendants’ motion to change venue pursuant to CPLR §503(a), §503(c), §510(1), §510(3), and §511(b) is denied. Defendants’ motion to dismiss pursuant to CPLR §3215(c) is denied. Defendants’ motion to dismiss plaintiff’s negligence claims pursuant to CPLR §3211(a)(7) is denied. Defendants’ motion to dismiss plaintiff’s claims as beyond the statute of limitations pursuant to CPLR §214(a), §205, and §3211(a)(5) is denied. Defendants’ motion to strike “reckless” from plaintiff’s Complaint pursuant to CPLR §2004, §3024, and §3042 is denied. Plaintiff’s motion to strike defendants’ Answers and grant a default judgment against them pursuant to CPLR §3126 and §3215 or alternatively for leave to move for a default judgment against defendants is denied.

Plaintiff commenced this medical malpractice action by filing the Summons and Complaint on July 12, 2021 in a related action under Index No. 715722/2021. Issue was joined by the moving defendants. Plaintiff later filed a Summons and Complaint in the instant action on January 14, 2022, adding negligence claims. By Court Order dated July 11, 2023, the Honorable Peter J. O’Donoghue consolidated both actions into one case under Index No. 700976/2022 but at the time of consolidation, no defendants had appeared or Answered in the second action. Defendants Dr. Culotta and Bethpage Medical filed a Verified Answer on October 26, 2023. The moving defendants filed a Verified Answer on November 2, 2023 and a Verified Answer to the Amended Complaint on February 13, 2024. Defendant Oliveri filed an Answer on January 18, 2024, and an Answer to the Amended Complaint on January 22, 2024.

Defendants argue that plaintiff’s Complaint should be dismissed as to defendant Long Island Jewish Medical Center (hereinafter referred to as “LIJMC”) as it performed no medical services for plaintiff related to this action. Defendants present the affidavit of Samantha Almonte, a supervisor of LIJMC, who attested that based upon a search of plaintiff’s medical records, plaintiff did not treat at defendant LIJMC from February 12, 2019 through September 18, 2019.

Defendants also argue that venue must be transferred to Nassau County pursuant to CPLR §503. They argue that this action was improperly commenced in Queens County and plaintiff engaged in “forum shopping” by commencing this action in Queens County solely on the business address of LIJMC. Defendants further argue that Nassau County is the proper venue because all of plaintiff’s treatment was rendered in Nassau County and plaintiff resides in Nassau County. Defendants argue that in the alternative, they should be granted leave to renew the instant application following the completion of discovery.

Defendants also argue that this action should be dismissed based upon plaintiff's failure to timely move for a default judgment against defendants pursuant to CPLR §3125(c), rendering this case a nullity. Defendants also argue that plaintiff's cause of action for negligence must be dismissed as a matter of law pursuant to CPLR §3211(a)(7) for failure to state a cause of action. Defendants argue that the allegations are merely reassertions of plaintiff's medical malpractice claims and are therefore duplicative and should be dismissed. Defendants also argue that plaintiff's action must be partially dismissed as untimely. Defendants argue that plaintiff commenced the second action on January 14, 2022 and based upon the two-and-one-half year statute of limitations, any claims that arise from treatment prior to July 12, 2019 must be barred. Defendants also argue that "reckless and "recklessness" must be stricken from plaintiff's Complaint as improper. They argue that plaintiff may not recover for punitive damages in the instant action and therefore the language is prejudicial and must be stricken from plaintiff's pleadings.

Plaintiff opposes defendants' motion and cross-moves for an Order striking defendants' Answers and granting a default judgment against them. Plaintiff argues that she was not required to move for a default judgment in this action as all defendants have appeared as previously directed by the Court. Plaintiff further argues that although defendant Garden OB/GYN Garden City did not file an Answer in this action, it previously filed an Answer in the related action that was consolidated into this one and therefore essentially appeared in this action through the consolidation. Plaintiff further argues that defendant Bethpage Medical PLLC is an entity that does business as defendant Garden City and has appeared by counsel and answered. Plaintiff argues that alternatively, she should be granted leave to move for a default judgment because the staff charged with overseeing this case was inundated with medical issues and the previous handling attorney left the firm during that time. Plaintiff also argues that this action is meritorious and was timely commenced based upon then-Governor Cuomo's Executive Orders, the continuous treatment doctrine, and Lavern's Law.

Plaintiff also argues that defendants' motion to change venue should be denied, as Queens County is the proper venue for this action based upon the location of defendant LIJMC's principal office. Plaintiff argues that defendants' motion is untimely as they failed to move to change venue within fifteen (15) days after service and defendants failed to present sufficient proof to change venue. Plaintiff further argues that she received treatment in medical facilities that are divisions of LIJMC which is headquartered in Queens County and therefore venue is proper.

Plaintiff also argues that the language from plaintiff's pleadings should not be stricken. Plaintiff argues that defendants failed to show good cause sufficient to warrant an extension of time to move to strike this language and should have moved for that relief within twenty (20) days after service of the challenged pleading.

Pursuant to CPLR §503(a), the place of trial "shall be in the county in which one of the

parties resided when it was commenced.” To prevail on a motion to change venue, a defendant must show that plaintiff’s choice of venue is improper and defendant’s choice of venue is proper. (*See Deas v. Ahmed*, 120 A.D.3d 750, 750 [2d Dept. 2014]; *see also CPLR §510[1]*; *see also CPLR §511[b]*.)

To prevail on a motion for a default judgment against a defendant, a plaintiff must submit proof of service of the Summons and Complaint, proof of the facts constituting the claim, and proof of the defaulting defendant’s failure to appear or answer. (*CPLR §3215[f]*; *HSBC Bank USA, Nat’l Assn. v Thorne*, 189 A.D.3d 1193 [2d Dept. 2020].)

Pursuant to CPLR §3215(c), if a plaintiff fails to take proceedings for the entry of judgment within one year after a defendant’s default, “the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion.” (*HSBC Bank USA, N.A. v. Slone*, 174 A.D.3d 866, 867 [2d Dept. 2019].) The language of CPLR §3215(c) is not discretionary, but rather is mandatory “inasmuch as courts shall dismiss claims [f]or which default judgments are not sought within the requisite one-year period, as those claims are deemed abandoned. (*Id.*)

On a motion to dismiss pursuant to CPLR §3211(a)(5), a defendant bears the initial burden of demonstrating prima facie that the time in which to commence the action has expired. (*Lyles v. County of Nassau*, 213 A.D.3d 921, 922 [2d Dept. 2023].) The burden then shifts to the plaintiff “to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period.” (*HSBC Bank USA, N.A. v. Francis*, 214 A.D.3d 58, 61 [2d Dept. 2023].)

A medical malpractice action must be commenced “within two years and six months of the act, omission, or failure complained of, or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission, or failure.” (*See Haddad*, 215 A.D.3d 641, 643 [2d Dept. 2023]; *see also CPLR §214-a.*) The continuous treatment doctrine “tolls the statute of limitations when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint.” (*Cohen v. Gold*, 165 A.D.3d 879, 882 [2d Dept. 2018].) A plaintiff relying on the continuous treatment doctrine must demonstrate that there has been a course of treatment established with respect to the relevant condition, so that a mere continuing relation between physician and patient or the continuing nature of a diagnosis is insufficient to invoke the doctrine. (*Id.*) The continuous treatment doctrine rests on the premises that the doctor-patient relationship is marked by “continuing trust and confidence and that the patient should not be put to the disadvantage of questioning the doctor’s skill in the midst of treatment, since the commencement of litigation during ongoing treatment necessarily interrupts the course of treatment. (*Massie v. Crawford*, 78 N.Y.2d 516, 519 [1991].)

The nature and decree of a penalty to be imposed pursuant to CPLR §3126 lies within the trial court's discretion. (*Lucas v. Stam*, 147 A.D.3d 921, 925 [2d Dept. 2017]. However, the striking of a pleading is a drastic remedy that may only be warranted upon a clear showing that the failure to comply with discovery demands was wilful and contumacious. (*Id.*; see also *Lazar, Sanders, Thaler & Assoc. LLP v. Lazar*, 131 A.D.3d 1133 [2d Dept. 2015].)

Defendants' motion to dismiss plaintiff's Complaint as to defendant LIJMC pursuant to CPLR §3211(a)(7) is denied as premature, as there is significant discovery outstanding that must be exchanged by the parties prior to determination. (See generally *Family-Friendly Media, Inc. v. Recorder Tel. Network*, 74 A.D.3d 738 [2d Dept. 2010].) At this early stage, defendants failed to demonstrate that plaintiff's Complaint failed to sufficiently state a cause of action. Defendants' motion to dismiss plaintiff's cause of action sounding in negligence pursuant to CPLR §3211(a)(7) is similarly denied as premature.

Defendants' motion to change venue pursuant to CPLR §503 is also denied, as they failed to demonstrate that Queens County is not a proper venue. (See *Bostick v. Safa*, 173 A.D.3d 823 [2d Dept. 2019].) Plaintiff demonstrated that defendant LIJMC's principal office is in Queens County and the medical facilities wherein plaintiff received treatment are divisions of LIJMC. As defendant LIJMC is a party to this action and maintains its principal office in Queens County, Queens County is a proper venue. Defendants' argument that venue should be in Nassau County because all of plaintiff's treatment took place in Nassau County and plaintiff resides in Nassau County is without merit, as it merely demonstrates that venue could be in either Nassau County or Queens County. Therefore, while defendants demonstrated that Nassau County also would have been a proper venue, they failed to demonstrate that Queens County is not a proper venue and the motion to change venue is denied.

Defendants' motion to dismiss plaintiff's Complaint for failure to timely move for a default judgment against defendants pursuant to CPLR §3215(c) is also denied. All defendants filed Answers in the related action which was consolidated into the instant action, and all defendants subsequently filed Answers in the instant action. The only defendant to not Answer is Garden OB/GYN but defendant Bethpage previously Answered in the related action as doing business as defendant Garden OB/GYN. Further, this was discussed before the Court on April 10, 2024 and defendant Bethpage was directed to serve plaintiff with correspondence regarding representation of defendant Garden OB/GYN with the understanding that a stipulation to amend the caption will follow the Preliminary Conference Order.

Defendants' motion to dismiss part of plaintiff's claims as untimely is also denied, as plaintiff demonstrated that the claims are not time-barred based upon then-Governor Cuomo's Executive Orders tolling the applicable statute of limitations during the COVID-19 pandemic between March 20, 2020 and November 3, 2020. (*McLaughlin v. Snowlift, Inc.*, 214 A.D.3d 720,

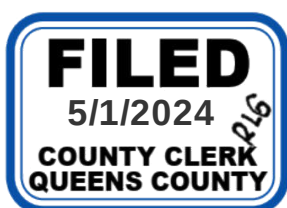
720-721 [2d Dept. 2023].) The toll does not add 228 days to a plaintiff's applicable statute of limitations, but rather the time left on the statute of limitations on March 20, 2020 begins to run again on November 3, 2020. (*Ruiz v. Sanchez*, 219 A.D.3d 1363, 1364 [2d Dept. 2023].) Here, plaintiff's claims arise out of defendants' alleged malpractice beginning on February 12, 2019 when plaintiff saw defendant Oliveri at Garden OB/GYN. Based upon then-Governor Cuomo's Executive Orders, plaintiff's time to commence this action was tolled to on or about March 21, 2022. As plaintiff filed the Summons and Complaint on January 14, 2022, defendants' motion to dismiss is denied.

Plaintiff's cross-motion to strike defendants' Answers is denied, as plaintiff failed to demonstrate that defendants acted in a wilful and contumacious manner with respect to discovery. Plaintiff's motion to compel defendants to provide discovery is also denied, as the parties agreed to disclose discovery at the April 10, 2024 conference pursuant to the Preliminary Conference Order. Additionally, the parties have been directed to appear for a further discovery conference on Tuesday, June 11, 2024. Plaintiff's cross-motion for leave to move for a default judgment is also denied, as every defendant other than Garden Answered in the second action after the consolidation, and the parties are taking measures regarding Garden's representation as delineated at the April 10, 2024 conference and the Preliminary Conference Order.

Accordingly, defendants Ilan Reder, MD, Tamla Hagan, CT, Long Island Jewish Medical Center, Center for Advanced Medicine – Cancer Institute, and Northwell Health Core Laboratories' motion to dismiss defendant Long Island Jewish Medical Center pursuant to CPLR §3211 is denied. Defendants' motion to change venue pursuant to CPLR §503(a), §503(c), §510(1), §510(3), and §511(b) is denied. Defendants' motion to dismiss pursuant to CPLR §3215(c) is denied. Defendants' motion to dismiss plaintiff's negligence claims pursuant to CPLR §3211(a)(7) is denied. Defendants' motion to dismiss plaintiff's claims as beyond the statute of limitations pursuant to CPLR §214(a), §205, and §3211(a)(5) is denied. Defendants' motion to strike "reckless" from plaintiff's Complaint pursuant to CPLR §2004, §3024, and §3042 is denied. Plaintiff's motion to strike defendants' Answers and grant a default judgment against them pursuant to CPLR §3126 and §3215 or alternatively for leave to move for a default judgment against defendants is denied.

This constitutes the decision and Order of the Court.

Dated: April 30, 2024



A handwritten signature in black ink, reading "Tracy Catapano-Fox".

Hon. Tracy Catapano-Fox, J.S.C.