Freydel v New York Hosp.
2012 NY Slip Op 32632(U)
October 11, 2012
Supreme Court, New York County
Docket Number: 121414/2000
Judge: Debra A. James
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SCANNED ON 10/17/2012
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

SEYMON FREYDEL, as Administrator of the Estate of DINA FREYDEL, ROMELIA FREYDEL, and SEYMON FREYDEL, individually,

Plaintiffs,

- v -

NEW YORK HOSPITAL a/k/a NEW YORK WEILL CORNELL MEDICAL CENTER,

Defendant.

Index No.: 121414/2000

Motion Date: 05/11/2012

Motion Seq. No.: 02

Motion Cal. No.:

FILED
OCT 17 2012
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 2 were read on this motion to substitute plaintiff Seymon Freydel as Administrator of the Estate of Dina Freydel as plaintiff, dismiss Lyudmila's cause of action

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Notice of Cross Motion/Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	

Cross-Motion: ☐ **Yes** ☒ **No**

Upon the foregoing papers, it is

Defendant New York Hospital a/k/a New York Weill Cornell Medical Center (NYH) moves for dismissal on the grounds of laches and plaintiffs' failure to timely substitute a representative of decedent Dina Freydel's estate. Alternatively, NYH moves to enforce a purported settlement and to dismiss the action. Alternatively, NYH moves to strike the note of issue and set the action down for a preliminary conference so that the parties may

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

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commence discovery.

Plaintiff Seymon Freydel is the son of the decedent Dina Freydel (Mrs. Freydel) and the administrator of her estate. Plaintiff Romelia Freydel (Romelia) is Seymon Freydel's daughter. Mrs. Freydel was an immigrant from the former Soviet Union with limited English skills. Her primary language was Russian and she was deaf and speech impaired, as are her children and grandchildren, except for granddaughter Romelia.

When she was 78 years old, Mrs. Freydel suffered a heart attack and was taken to NYH on October 17, 1997. She and her family repeatedly requested Russian sign language interpretation services. In the meantime, Mrs. Freydel communicated by lip reading the speech of her Russian speaking doctor and through Romelia, who was 12 years old at the time. On October 24, 1997, Mrs. Freydel moved by order to show cause in the United States District Court, Southern District of New York, for a preliminary injunction requiring that NYH provide a Russian sign language interpreter. Several hours afterward, NYH began providing the requested services to Mrs. Freydel. The interpreter services continued until October 31, 1997, when she was discharged from NYH.

In 1997, Mrs. Freydel commenced a federal action against NYH in the Southern District. She alleged that NYH's failure to provide her with an interpreter violated her rights under the

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Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and New York State and New York City human rights laws. The suit sought injunctive relief and compensatory damages. In January 2000, the District Court dismissed the federal claims on summary judgment, and declined to exercise supplemental jurisdiction over the state claims. The dismissal was upheld on appeal in a decision dated December 13, 2000 (Freydel v New York Hosp., 2000 WL 10264, 2000 US Dist LEXIS 9 [SD NY], *affd* 242 F3d 365 [2d Cir 2000]). The Second Circuit agreed with the lower court that there was not enough evidence to conclude that NYH acted with deliberate indifference to Mrs. Freydel's needs.

While the federal appeal was pending, Mrs. Freydel, Romelia (as represented by her father), Seymon Freydel, and Lyudmila Freydel (Seymon's wife and Romelia's mother), commenced this action on October 16, 2000. The suit seeks injunctive relief and compensatory and punitive damages based on New York State and New York City human rights and civil rights laws, and negligence. The complaint alleges that NYH's refusal to provide Russian language deaf services for seven days caused emotional distress and trauma to Mrs. Freydel's family members, especially to Romelia who, though a child, was forced to take on life and death responsibilities while interpreting for her seriously ill grandmother in the hospital.

In January 2001, Roy Breitenbach, NYH's counsel at that

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time, and Alan Rich, plaintiff's counsel, exchanged several letters about settling the action and about NYH's costs in the federal action. On January 25, Breitenbach wrote to Rich that, if plaintiffs would discontinue the federal and state actions and sign releases, NYH would settle for $10,000 and would waive its right to obtain a bill of costs. On January 29, Rich wrote to Breitenbach, as follows.

> Pursuant to our discussion, plaintiffs accept $18,000 in full settlement of the above matter. As I indicated, I must file an Order to Show Cause with client affidavits to withdraw or discontinue the state action which I will move on promptly. However, I cannot guarantee when the Court will act on same. Accordingly, as per our discussion, I am annexing a stipulation which withdraws the Bill of Costs until further notice without prejudice. At the appropriate time, we can file any documents necessary to conclude the matter in its entirety

On January 30, Breitenbach returned to Rich a stipulation signed by NYH withdrawing NYH's bill of costs in the federal action. Breitenbach's cover letter stated that

> New York Hospital will fund the settlement upon its receipt of: (i) a general release signed by Mrs. Freydel and all other Plaintiffs who are of the age of majority; (ii) a signed stipulation discontinuing the federal action with prejudice; and (iii) an order of the Supreme Court, New York County, permitting the state court lawsuit to be settled or discontinued. I look forward to hearing from you regarding this matter

In his affirmation supporting NYH's motion, Breitenbach states that Rich has not mentioned this case to him since 2001, although they have had many interactions while litigating other cases.

Mrs. Freydel died on November 9, 2003. On July 9, 2010, Seymon Freydel was appointed administrator of his mother's estate. On August 18, 2011, Seymon Freydel moved in this action to be substituted for his mother, to withdraw the claims of Lyudmila Freydel, and to amend the caption accordingly. The motion papers did not include anything about a settlement. NYH's response to the motion claimed that the action was settled in January 2001. However, NYH did not object to the motion, which was granted on November 25, 2011.

On December 2, 2011, plaintiffs filed a note of issue stating that the case was ready for trial. NYH contends that the matter is not ready for trial because there has been no bill of particulars or disclosure. Plaintiffs state that there was extensive disclosure in the federal action. Plaintiffs raise a threshold issue regarding the standing of NYH's counsel to bring the instant motion. Plaintiffs argue that NYH's present attorney, Daniel Ratner, was not properly substituted for Breitenbach, NYH's previous attorney, as the change of attorney form was not filed until after this motion was made, the form was not filed with the clerk, and NYH's acknowledgment is not on the form. Under CPLR 321 (b), "an attorney of record may be changed by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party." CPLR 105 (e) defines clerk as county clerk.

NYH made this motion on December 22, 2011. The return date was January 12, 2012. NYH filed a form, "Consent to Change Attorneys," with the trial support office on January 9, 2012. NYH and its former and present attorneys signed the consent form. NYH also notes that the court's website lists Ratner as its counsel, so the change has been officially acknowledged.

Although the change of counsel was not done precisely as CPLR 321 (b) requires, that is no reason to deem this motion a nullity. The time between the date of making this motion and the subsequent filing of the consent form was brief, and plaintiffs do not show that the slight delay was prejudicial (see Bevilacqua v Bloomberg, L.P., 70 AD3d 411, 412 [1st Dept 2010] [although plaintiffs violated CPLR 321 (b) in not filing the consent to change form, it was a mere formality under the circumstances and did not prejudice defendant]; EIFS, Inc. v Morie Co., 298 AD2d 548, 550 [2d Dept 2002] [the court directed the plaintiff to file a consent to change form; failure to do so beforehand did not prejudice defendant]). That NYH signed the consent to change form without an acknowledgment and filed the form with the trial support office, rather than the county clerk, are errors that do not nullify the change of attorney. The statute has been substantially complied with; nonetheless, NYH should file the consent to change form with the clerk.

NYH contends that this action cannot continue because the

parties made an enforceable settlement in 2001, evidenced by the letters between Breitenbach and Rich. Plaintiffs' attorney sent a letter with his signature to NYH's attorney stating that plaintiffs accepted $18,000 as a settlement. NYH's attorney wrote back agreeing.

Under CPLR 2104, a stipulation in an action is not binding upon a party unless it is in a writing subscribed by the party or its attorney or reduced to the form of an order and entered or made by counsel in open court. To be enforceable as a contract, the settlement must be expressed in concrete and specific terms (Sterling Fifth Assoc. v Carpentille Corp., 10 AD3d 282, 283 [1st Dept 2004]), and must incorporate all the material terms of the purported settlement (Bonnette v Long Is. Coll. Hosp., 3 NY3d 281, 285 [2004]). Formalities are not necessarily required. E-mails exchanged between counsel setting forth the terms of a settlement and containing counsels' printed names at the end were sufficiently clear to constitute an enforceable agreement under CPLR 2104 (see Williamson v Delsener, 59 AD3d 291, 291 [1st Dept 2009], *revg* 2007 WL 4101623 [Sup Ct, NY County 2007]).

In this case, the parties did not reach an enforceable settlement because one of the parties was in her minority when the attorneys exchanged their letters. A person under the age of 18 is an infant, under CPLR 105 (j). "The claim of an infant may not be compromised without the approval of the court pursuant to

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CPLR 1207 and 1208" (Edionwe v Hussain, 7 AD3d 751, 753 [2d Dept 2004]; Shao v Fugazy Express, Inc., 177 AD2d 422, 422-423 [1st Dept 1991]). CPLR 1207 provides that the infant's guardian must make a motion to have the court approve a settlement. CPLR 1208 provides that the infant's guardian must make an affidavit setting forth, among other things, the extent of the damages sustained by the infant, the terms and proposed distribution of the settlement and the guardian's approval of both, whether the guardian or any member of its family has claimed damages allegedly sustained as a result of the same event giving rise to the infant's damages, and, if so, the amount to be paid in settlement of such claim. The court must approve the amount allocated for the child (see Matter of W.D. v Aliaga, 35 Misc 3d 1207[A], 2012 NY Slip Op 50600[U], *2 [Sup Ct, Orange County 2012]). A purported settlement of the claims of an infant can be set aside, since a settlement is tentative until approved by court (Rivers v Genesis Holding LLC, 11 Misc 3d 647, 649 [Sup Ct, NY County 2006]).

The purported settlement in this case did not distinguish between Romelia and the other plaintiffs. It did not specify how much of the settlement was for Romelia. It thus failed to incorporate material terms. Even if the settlement had incorporated those terms or if the family had agreed on what sum to allocate to Romelia, the court's approval would still be

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needed for enforcement.

NYH argues that laches bars this action. Laches is an equitable doctrine based upon fairness (Continental Cas. Co. v Employers Ins. Co. of Wausau, 60 AD3d 128, 137 [1st Dept 2008]). Laches prevents the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to an opposing party (Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 816 [2003], *cert denied* 540 US 1017 [2003]; Dante v 310 Assoc., 121 AD2d 332, 333 [1st Dept 1986]). The mere lapse of time is not enough to establish laches; there must also be prejudice to the adverse party (Saratoga County, 100 NY2d at 816).

"Prejudice may be established by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay" (Skrodelis v Norbergs, 272 AD2d 316, 316-317 [2d Dept 2000]; Matter of Vickery v Village of Saugerties, 106 AD2d 721, 723 [3d Dept 1984], *affd* 64 NY2d 1161 [1985]).

NYH states that Romelia is probably unrecognizable to witnesses, that Seymon Freydel was not deposed in the federal action, and that Romelia was deposed but she was not a party in that action. The main witness, Mrs. Freydel, died in 2003. In the federal action, plaintiffs took the depositions of six witnesses who, at that time, were employees of NYH. Two of them

are no longer employed there. In addition, NYH states that relevant documents are probably lost or destroyed. Copies of records were exchanged during the federal action, but the originals probably do not exist. Records held by NYH are subject to a six-year retention policy, pursuant to 10 NYCRR 405.10 (a) (4). Romelia's school records or other evidence that may show emotional distress may not exist any more. For all these reasons, NYH was allegedly prejudiced by the long period of inaction in this case, from 2001 until 2011.

Plaintiffs respond that the disclosure in the federal action may be used in this action. There were 11 depositions in the federal action. Of the six NYH personnel deposed, only two allegedly cannot be located. According to plaintiffs, one of them, Mrs. Freydel's NYH Russian speaking doctor, still has an office in New York City. Plaintiffs provided NYH with two expert reports, which NYH has had for 14 years. Also, plaintiffs point out that there was extensive disclosure of documents in the federal action.

The court agrees with plaintiffs that NYH fails to show a degree of prejudice that makes it unfair to continue with this action. There is no reason that the evidence in the federal action cannot be used. NYH does not show that crucial evidence no longer exists. In addition, the parties may conduct more disclosure. As NYH states, upon Mrs. Freydel's death the action

was automatically stayed and the court was divested of jurisdiction to act until a personal representative was appointed for her estate and substituted in the action (see Abley Props., Inc. v Reid, 52 AD3d 442, 443 [2d Dept 2008]). But the action was not concluded. Both sides had a responsibility to save evidence.

In addition, the laches argument may fail where the party asserting it could have but did not act to avoid the alleged prejudice. In Ryan v Borg (201 AD2d 550 [2d Dept 1994]), the plaintiff moved for a hearing pursuant to a court order nine years old. The court rejected the defendant's contention that laches barred the continuation of the action, inasmuch as the defendant could have moved the action forward by asking the court to schedule a hearing pursuant to the order, thus avoiding any prejudice. In Mancuso v Levitt (154 Misc 2d 252 [Sup Ct, NY County 1992], *affd on other grounds,* 201 AD2d 386 [1st Dept 1994]), the defendants failed to show any real prejudice to support dismissal on the ground of laches. The court determined that if the defendants felt they were being prejudiced by the plaintiff's inaction and the passage of time, they were always free to take action themselves. The same applies to NYH, which could have moved to dismiss, pursuant to CPLR 1021, because plaintiffs failed to substitute a representative for the decedent (see Washington v Min Chung Hwan, 20 AD3d 303 [1st Dept 2005]).

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NYH cites cases in which laches succeeded in barring actions and in which prejudice existed, but all those actions involved attempts to rejuvenate actions that had been dismissed or set down as inactive by the court (Rodriguez v Mitchell, 81 AD3d 624 [2d Dept 2011] [plaintiff moved to restore an action to active status 10 years after it was marked inactive due to plaintiff's failure to appear at a status conference]; Pickett v Federated Dept. Stores, Inc., 79 AD3d 1116 [2d Dept 2010] [plaintiff moved to vacate dismissal after eight years]; Rosenstrauss v Women's Imaging Ctr. of Orange County, 56 AD3d 454 [2d Dept 2008] [plaintiff moved to vacate 11-year-old dismissal]; Lewis v New York City Tr. Auth., 38 AD3d 201 [1st Dept 2007] [plaintiff moved to vacate dismissal 10 years after dismissal pursuant to 22 NYCRR 202.27]; Arroyo v Board of Educ. of the City of N.Y., 25 Misc 3d 1229[A], 2009 NY Slip Op 52337[U] [Sup Ct, Kings County 2009] [plaintiff moved to restore action 13 years after it was "marked off" because plaintiff failed to attend a status conference]). In this case, there was never a dismissal or marking off. NYH could not have believed that the action was concluded.

NYH argues that the action should be dismissed because plaintiffs failed to timely substitute a representative for Mrs. Freydel's estate. It is too late to make this argument. The court already determined, in another motion, that a representative could be appointed.

As this action will not be dismissed, NYH's request for disclosure is granted. The parties will proceed as they should have several years ago. The note of issue is vacated, since it incorrectly states that discovery is completed (see Nielsen v New York State Dormitory Auth., 84 AD3d 519, 520 [1st Dept 2011]).

To conclude, it is

ORDERED that defendant's motion is denied to the extent that this action is not dismissed and is granted to the extent that the note of issue is vacated; and it is further

ORDERED that the parties are directed to appear for a compliance conference before this court on November 27, 2012, at 11:00 a.m. in Part 59, Room 103, 71 Thomas Street, New York, New York 10013.

This is the order of the court.

Dated: October 11, 2012 ENTER:

J.S.C.

DEBRA A. JAMES

FILED
OCT 17 2012
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NEW YORK