

Tanami v LaSala

2012 NY Slip Op 33483(U)

June 8, 2012

Sup Ct, Bronx County

Docket Number: 304711/2008

Judge: Betty Owen Stinson

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NEW YORK SUPREME COURT - COUNTY OF BRONX
IAS PART 08

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KIMBERLY TANAMI, Administrator of the Estate of
LAURA GERACI (deceased),

Plaintiff,

INDEX No. 304711/2008

-against-

PATRICK LASALA, M.D.; CHRISTINE O'DELL,
R.N., M.S.N., and CYBERONICS, INC.,

Defendants.

Present:

HON. BETTY OWEN STINSON

J.S.C.

-----X
The following papers numbered 1 to 6 and 1A to 9A read on these two motions and three cross-motions for DISMISSAL, noticed on January 21, 2011 and August 18, 2011, respectively, and submitted as No. 70 and "Add On" on the Motion Calendars of February 25, 2011 and September 28, 2011, respectively.

PAPERS NUMBERED

Notice of Motion -Exhibits and Affidavits Annexed.....	1, 2, 1A-3A, 8A
Order to Show Cause.....	
Answering Affidavits and Exhibits.....	3, 4, 4A, 5A,
Reply Affidavits and Exhibits.....	5, 6, 6A, 7A, 9A
Stipulations.....	
Memorandum of Law.....	

Upon the foregoing papers this first motion for dismissal of the complaint as having been filed past the statute of limitations as to one cause of action and for failure to state a cause of action as to the second cause of action, and one cross-motion for the same relief, and the second motion for dismissal of the complaint for plaintiff's inability to represent others *pro se*, and two cross-motions for that same relief, are consolidated for disposition and decided per annexed memorandum decision.

This constitutes the decision and order of the court.

Dated: June 7, 2012
Bronx, New York

BETTY OWEN STINSON, J. S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 8

-----X
KIMBERLY TANAMI, Administrator of the Estate of
LAURA GERACI (deceased),

Plaintiff,

INDEX № 304711/2008

-against-

DECISION/ORDER

PATRICK LASALA, M.D.; CHRISTINE O'DELL, R.N.,
M.S.N., and CYBERONICS, INC.,

Defendants.

-----X

HON. BETTY OWEN STINSON:

This motion by defendant Patrick LaSala, M.D., ("LaSala") and cross-motion by defendant Christine O'Dell, R.N., M.S.N., ("O'Dell"), for dismissal of the complaint against them, are consolidated for disposition with LaSala's and O'Dell's motion and cross-motion and a cross-motion by defendant Cyberonics, Inc., ("Cyberonics") for dismissal of the complaint pursuant to the requirements of Judiciary Law § 478, and decided as follows:

Plaintiff's deceased, Laura Geraci, ("Geraci") died on June 6, 2006 at the age of thirty. She had suffered from intractable seizures from age four and various combinations of medications over the years had proved inadequate to treat her symptoms. In 2000 she was fitted by Dr. LaSala with an implanted device manufactured by defendant Cyberonics to help control her seizures. According to the plaintiff's affidavit, Geraci finally became seizure-free for about a one-year period beginning near the end of 2002. When it was determined the battery powering the device had ceased functioning, it was surgically replaced by Dr. LaSala on February 19, 2004. According to the complaint, the device never functioned properly after that point. Geraci's seizures were not

abated and she often felt an itching sensation. She did not see Dr. LaSala again after replacement of the battery. Nurse O'Dell monitored Geraci's condition and the functioning of the device, often adjusting its settings, and medical records show she last saw Geraci on November 17, 2005.

After Geraci died of an "[u]ndetermined" cause, according to plaintiff's bill of particulars, the device was found to have a small cut in the insulation on the wire lead to the battery. Plaintiff believed that the device had an inherent design defect related to the lead, or that Dr. LaSala inadvertently cut it when replacing the battery, but the lead should have been replaced along with the battery in any event, and that either a manufacturing defect or a negligent act or omission on someone's part, caused Geraci's suffering and death. It was determined that the device itself could not be tested for its functional capability after it was removed.

Plaintiff, Geraci's sister, obtained limited letters of administration and commenced suit on June 5, 2008 alleging causes of action including medical malpractice and wrongful death against defendants LaSala and O'Dell and product liability against Cyberonics. By order dated May 31, 2012, this court dismissed the complaint against the manufacturer of the device, Cyberonics, for plaintiff's failure to move for a default judgment within one year of the manufacturer's failure to answer. The remaining two defendants moved and cross-moved for dismissal of the complaint, in part, as it relates to medical malpractice because the action was commenced after the applicable limitations period had expired. They also moved for dismissal of the wrongful death action, arguing plaintiff had alleged no pecuniary loss. In addition, all three defendants moved to dismiss the action pursuant to Judiciary Law § 478, which prohibits the unauthorized practice of law, because plaintiff is appearing *pro se* and representing the estate.

An action may be dismissed on the motion of any party upon a showing, among other

things, that the action was commenced after the limitations period had expired (Civil Practice Law and Rules ["CPLR"] § 3211[a][5], a disability of the moving party (*id.*), or the pleading fails to state a cause of action (CPLR § 3211[a][7]). On a motion to dismiss a complaint, the court must take all allegations in the complaint as true and resolve all inferences which reasonably flow therefrom in favor of the pleader (*Cron v Hargro Fabrics, Inc.*, 91 NY2d 362 [1968]). The purpose of the court's inquiry is "to determine simply whether the facts alleged fit within any cognizable legal theory" (*Morone v Morone*, 50 NY2d 481 [1980]). If evidentiary material submitted on a motion to dismiss, however, shows that a fact alleged by plaintiff as true is not a fact at all, the cause of action may be dismissed (*Williams v NYCHA*, 238 AD2d 413 [2nd Dept 1997]).

The time limited for commencement of an action for pain and suffering due to medical malpractice begins to run on the date of the "act, omission or failure complained of or last treatment where there is continuous treatment for the same illness" (CPLR § 214-a). Actions for wrongful death, on the other hand, must be commenced by a personal representative within two years of the decedent's death (Estates, Powers and Trusts Law ["EPTL"] § 5-4.1). Actions for pain and suffering and actions for wrongful death are separate and distinct in that the action for pain and suffering belongs to the estate, while the action for wrongful death belongs only to the distributees who suffered pecuniary loss as a result of decedent's wrongful death (EPTL § 5-4.3; *Ruiz v NYCHHC*, 165 AD2d 75 [1st Dept 1991]). The same "wrongful act", however, can serve as the basis for both actions.

THE MEDICAL MALPRACTICE CAUSE OF ACTION

The last time plaintiff was seen by Dr. LaSala was on February 19, 2004. Plaintiff's action

was commenced on June 5, 2008, more than four years later and well past the two-and-one-half year statutory limit for a medical malpractice action. Plaintiff did not oppose this part of Dr. LaSala's motion and conceded in her opposition papers that she does not have a cause of action against him for medical malpractice, which includes allegations of failure to provide informed consent.

Plaintiff did not so concede with regard to Nurse O'Dell, but medical records and O'Dell's affidavit further support her cross-motion to the extent of demonstrating that she last saw plaintiff's decedent on November 17, 2005. Plaintiff commenced her action eighteen days after expiration of the statutory limitations period for medical malpractice, ending on May 17, 2008 for O'Dell.

In opposition to that part of O'Dell's cross-motion concerning medical malpractice, plaintiff offered only a theory that O'Dell's medical records should have included diagnostic testing history that plaintiff found lacking in those records, as evidence the records were not complete and Geraci might have seen her after November 17, 2005. She also offered the affidavit of Mihai D. Dimancescu, M.D., who stated that diagnostic testing history should be a part of any practitioner's detailed record of care for a patient. Dr. Dimancescu did not say he had reviewed the medical records in question, or deny that they contained diagnostic testing history. Plaintiff is not herself a medical professional.

Plaintiff's unsupported theory and the affidavit of Dr. Dimancescu are not enough to show a question of insufficiency in the medical records suggesting O'Dell saw Geraci at a later date than the records currently demonstrate. The estate's cause of action as to medical malpractice against both Dr. LaSala and Nurse O'Dell must, therefore, be dismissed.

THE WRONGFUL DEATH CAUSE OF ACTION

The elements of a cause of action for wrongful death are (1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the decedent's death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the death of decedent, and (4) the appointment of a personal representative of the decedent (*Chong v NYCTA*, 83 AD2d 546 [2nd Dept 1981]).

The damages for a wrongful death action consist of compensation to the distributees for *pecuniary injuries* resulting from the decedent's death and include the reasonable expenses of medical aid, nursing and attention *incident to the injury causing death* and the reasonable funeral expenses *paid by the distributees*, or for which any distributee is responsible (EPTL § 5-4.3).

Plaintiff's bills of particulars identify Geraci's mother as the decedent's next of kin or distributee. It is undisputed that Geraci was unmarried, had no children and was unemployed at the time of her death. Consequently, no financial dependence or loss of support to her mother is claimed by plaintiff as a result of Geraci's death. Funeral expenses of \$11,980.50 are listed, but the person who paid those expenses, if they were paid, is not identified. Geraci's medical treatment for her on-going seizures was provided by Medicare. At paragraph 16 of both bills of particulars, plaintiff states that she is making no claim for special damages, but reserves the right to supplement this response up until the time of trial. She explained in her opposition to the motions that she has yet to receive information from Medicare showing what medical expenses throughout Geraci's treatment were unpaid by Medicare, and thus presumably the responsibility of a distributee. At paragraph 31, plaintiff stated that she, as plaintiff, "wishes only to be reimbursed for the prosecution of this case".

Medicare is no longer a potential creditor of the estate, since the medical malpractice claim, the only asset of the estate from which Medicare could recover on its lien, is dismissed herewith. Medicare does not have a lien on pecuniary losses suffered by distributees, as they had no personal obligation to reimburse Medicare for Geraci's treatment; only the estate would have had such an obligation. Furthermore, Geraci's treatment by Medicare was for her seizures, not for the presently undetermined cause of her death, unless her death was actually caused by her pre-existing seizure condition or some other natural cause, in which case there could be no sustainable cause of action for wrongful death in any event.

Plaintiff has pleading problems with elements (2) and (4) of her wrongful death cause of action. Since the cause of Geraci's death is not known, it cannot be attributed to anything done or not done by the defendants. Plaintiff has alleged as damages funeral expenses, the costs of medical treatments not covered by Medicare and reimbursement for prosecution of the case. Plaintiff has not alleged the funeral costs were "paid by the distributees", in this case, her mother. Since the cause of Geraci's death is not known, out-of-pocket medical costs "incident to the injury causing death", whatever they may be, are undiscoverable at this point. Plaintiff has not identified how much those costs might have been or how they were connected to treatment occasioned by the alleged wrongdoing that caused Geraci's death. She has offered no evidence or even allegation that Geraci received any type of medical treatment other than that rendered for her pre-existing seizure condition. The costs of medical treatments not covered by Medicare are, therefore, not recoverable in this wrongful death action. Although the costs of an unsuccessful wrongful death action may be reimbursed to a personal representative by the estate, it may not be an element of damages in a wrongful death suit. It does not appear the estate had any asset other

than its causes of action. But, even if there are funds from other sources in Geraci's estate, plaintiff, as a *pro se* litigant, may not be paid for prosecuting a wrongful death action as though she were an attorney. To reiterate, damages from a wrongful death suit go only to distributees, and only to reimburse them for the statutorily allowed payments made by the distributees or other economic losses suffered by them due to the decedent's death.

JUDICIARY LAW § 478

In their additional motions and cross-motions, defendants moved for dismissal of the complaint arguing that plaintiff may not appear *pro se* to represent other beneficiaries of the estate, Medicare is a creditor of the estate, and plaintiff must either retain an attorney or the entire complaint must be dismissed.

It is unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in the State of New York (Judiciary Law § 478). An administrator of an estate, however, may appear *pro se* on behalf of an estate with no creditors, providing he is the sole beneficiary of the estate (*Guest v Hansen*, 603 F.3d 15 [2d Cir. 2010]).

Any beneficiary of a disposition may renounce all or part of such beneficiary's interest in the disposition (EPTL § 2-1.11[c][1]). The term "disposition" includes a distributive share under EPTL § 4-1.1 (EPTL § 2-1.11[b][1]). A renunciation of that distributive share must be in writing, signed by the person renouncing, and filed in the surrogate's court that is the place of administration of the estate, within nine months after the effective date of the disposition (EPTL § 2-1.11[c][2]). The "effective date" is the date a person becomes a distributee, ordinarily the date of death of the decedent. In a case where renunciation by one distributee automatically moves

another person into the position of a distributee, the effective date is the date of filing of that renunciation in the surrogate's court (*id.*; EPTL § 2-1.11[b][2][B]). The nine-month time to file and serve a renunciation may be extended, in the discretion of the court, on a petition showing reasonable cause (EPTL § 2-1.11[c][2]; *Matter of Sittler*, NYLJ, July 24, 2008 at 38, col. 5 [Surrogate's Court, Suffolk County][grief and shock of petitioner who lost both parents within six weeks of each other constituted reasonable cause]). A renunciation filed with the surrogate's court is irrevocable (EPTL § 2-1.11[h]).

In opposition to the motions regarding her ability to represent the estate *pro se*, plaintiff responded with affidavits by Geraci's mother and plaintiff's brothers and sisters renouncing their rights to any claims of the estate, ostensibly making plaintiff, as Geraci's sister, the sole beneficiary of the estate and sole distributee of this wrongful death cause of action (*see* EPTL § 4-1.1[a][5] [distributees of decedent with no spouse, children or parents are decedent's siblings]). Plaintiff provided a receipt showing that "1" renunciation and a petition for an extension of the time to renounce, has been filed with Queens Surrogate Court. It is not clear whether that means one petition and all the renunciations, or one renunciation accompanied by one petition. Assuming all renunciations were filed, plaintiff has conceded she could not represent others *pro se*, but argued that, due to the renunciations, she is now the sole beneficiary of the estate and sole distributee for purposes of the wrongful death action and may now lawfully represent the estate *pro se*. Plaintiff also made an invalid argument concerning Medicare as a creditor, that is moot in any event, since the medical malpractice cause of action, the only potential asset of the estate on which Medicare could have had a lien, is herewith dismissed and Medicare cannot be a creditor of the distributees on whose behalf the wrongful death action is brought.

The problems with this approach are that (1) the renunciations were filed more than three years late and there is no evidence the Queens Surrogate has granted the petition to extend time, and (2) even if plaintiff is the sole distributee, if she did not pay the funeral expenses herself as well as any medical expenses specifically connected to the injury causing death, she may not recover for those items of wrongful death damages, nor may she collect on behalf of other distributees who may have paid and then renounced their rights to distribution. As stated previously, all of Geraci's medical treatment appears to have been for her pre-existing seizure condition. Without a cause of death, it is impossible to show she was treated for the "injury causing death" or even that there was a wrongful act causing her death.

The motions and cross-motions, therefore, are granted to the extent that plaintiff's medical malpractice cause of action against LaSala and O'Dell is dismissed with prejudice and the remaining cause of action for wrongful death is dismissed as against LaSala and O'Dell unless,

(1) if Queens Surrogate Court grants plaintiff's petition allowing late renunciations by the decedent's mother and siblings, then within sixty (60) days of service of a copy of that Order issued by the Queens Surrogate with notice of entry, plaintiff, the sole distributee in that case, amends the bill of particulars to list with particularity the legitimate items of damage for a wrongful death action in accordance with this decision, that she paid them, or is responsible for paying them, and (c) provides the corresponding receipts or bills to the attorneys for defendants LaSala and O'Dell, or

(2) if Queens Surrogate Court does not grant plaintiff's petition for an extension of time to file the renunciations, then within sixty (60) days of service of a copy of that Order issued by the Queens Surrogate with notice of entry, plaintiff (a) retains an attorney to represent the estate

and (b) amends the bill of particulars to show that Geraci's mother, the sole distributee in that case, paid the legitimate items of damage for a wrongful death action, or is responsible for their payment, in accordance with this decision, and (c) provides the corresponding receipts or bills to the attorneys for defendants LaSala and O'Dell.

The cross-motion by Cyberonics for dismissal of the complaint against it for plaintiff's failure to comply with the requirements of Judiciary Law § 478 is denied as moot since the complaint against Cyberonics has already been dismissed.

All proceedings in the action are stayed until sixty (60) days after service of a copy of the Queens Surrogate's Order on all parties. If the bills of particulars are not amended during that sixty-day period, then defendants LaSala and O'Dell may present affidavits to this court to that effect and request an order of dismissal of plaintiff's only remaining cause of action for wrongful death at that time.

Plaintiff is reminded that, in any event, she cannot prevail in her wrongful death action if, before the note of issue is filed, she is not able to allege, and be prepared to prove with admissible evidence, the decedent's cause of death. In addition, plaintiff will have to request permission of the court to amend her bill of particulars and support her request to make that change.

Movants are directed to serve a copy of this order on the Clerk of Court who shall amend the caption to delete the name of Cyberonics, Inc., as a party defendant.

This constitutes the decision and order of the court.

Dated: June 8, 2012
Bronx, New York


BETTY OWEN STINSON, J. S.C.