Rodriguez v NYC Healthcare Staffing LLC.
2016 NY Slip Op 33146(U)
March 23, 2016
Supreme Court, Bronx County
Docket Number: Index No. 21114/2015E
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti

X

ANGELA RODRIGUEZ,

DECISION/ORDER

Plaintiff,

-against- Index No.: 21114/2015E

NYC HEALTHCARE STAFFING LLC., et als.

Defendants.

X

The following papers numbered 1 to 7 read on the below motion noticed on January 5, 2016, and duly submitted on the Part IA15 Motion calendar of **January 5, 2016**:

Papers Submitted	Numbered
Defs.' Notice of Motion, Exh.	1,2
Pl.'s Cross-Motion, Exh.	3,4
Defs.' Aff. In Opp. To Cross-Motion, Exh., Reply Aff.	5,6
Pl.'s Reply Aff.	7

Upon the foregoing papers, defendants NYC Healthcare Staffing, LLC. and Akshata Ullal (collectively, "Defendants") moves for an Order (1) pursuant to CPLR 3012, compelling plaintiff Angela Rodriguez ("Plaintiff") to accept Defendants' answer, and (2) pursuant to CPLR 3211(a)(5), or in the alternative, CPLR 3212, dismissing Plaintiff's complaint as against defendant Akshata Ullal (individually, "Ullal"). Plaintiff opposes the motion and cross-moves for an order entering a default judgment against Defendants for failure to timely interpose an answer, and to set this matter down for an inquest and assessment of damages against the defaulting Defendants. Defendants oppose the cross-motion. Plaintiff's sur-reply affirmation, served two weeks after the motion was marked fully submitted and without leave of court, was not considered.

For the following reasons, Defendants' motion is granted, and Plaintiff's cross-motion is denied.

CPLR 3012(d) provides: "Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." In this matter, Defendants NYC and Ullal were served personally on May 18 and June 3, 2015, respectively. On June 3, 2015, Defendants' counsel attempted to seek a stipulation from Plaintiff's counsel extending their time to answer. Plaintiff's counsel would only stipulate to such an extension if Defendants agreed to waive all jurisdictional defenses and admit proper service of process. Defendants never gave this consent, and instead of signing a stipulation to that effect, they filed and served an answer to the complaint on July 2, 2015. On September 22, 2015, Defendant's counsel sent correspondence to Plaintiff's counsel formally rejecting any request to waive jurisdictional defenses. On October 21, 2015, over 3 ½ months after Defendants' served their answer, Plaintiff's counsel sent correspondence rejecting the answer as untimely.

Under these circumstances, and contrary to Plaintiff's contentions, Defendants have provided a reasonable excuse for its minimal delay in answering the complaint, as counsel has asserted that he had been attempting to obtain an extension of time from Plaintiff's counsel, but counsel would not agree absent a waiver of jurisdictional defenses. While the Defendants' excuse is not "overwhelming," it nevertheless is sufficient to excuse Defendants' short delay in service of their pleadings (*see Cirillo v. Macy's, Inc.*, 61 A.D.3d 538 [1st Dept. 2009]). A court has "broad discretion in gauging the sufficiency of an excuse proffered by a defendant who failed to serve timely an answer" (*id.* [internal citations omitted]). Further, there is no evidence that the delay was the product of wilful neglect (*see Interboro Ins. Co. v. Perez*, 112 A.D.3d 483 [1st Dept. 2013]). Finally, New York's public policy strongly favors litigating matters on their merits (*Lamar v. City of New York*, 68 A.D.3d 449 [1st Dept. 2009]). Since no default judgment had been entered, Defendants were not required to set forth a meritorious defense to the action (*id.*, *Metropolitan Property and Cas. Ins. Co. v. Braun*, 120 A.D.3d 1128 [1st Dept. 2014]; *Marine v. Montefiore Health Systems, Inc.*, 129 A.D.3d 428 [1st Dept. 2015]). Defendants' motion to compel Plaintiff's acceptance of their answer will therefore be granted, and Plaintiff's cross-motion for a default judgment is denied.

Defendants also move for an order pursuant to CPLR 3211(a)(5) or 3212, dismissing the

complaint as asserted against defendant Ullal, because the action was commenced after the expiration of the statute of limitations. In moving to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations, the defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired (*see City of Yonkers v. 58A JVD Indus., Ltd.*, 115 A.D.3d 635 [2d Dep't 2014]) "The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period." (*Id.*). Under CPLR 214-a, an action for medical malpractice must be commenced within two years and six months after the complained-of act or omission, or after the last treatment where there is continuous treatment for the same illness, injury, or condition which gave rise to the act, omission, or failure.

Defendants here argue that Plaintiff's cause of action against Ullal sounds in medical malpractice, and is thus subject to the two-year, six month statute of limitations. According to the complaint, Plaintiff was allegedly injured on March 6, 2012, when Ullal, who was a licensed physical therapist, placed "an extremely hot towel on Plaintiff's back after applying electrodes on said back." Plaintiff's action was not commenced until February 19, 2015, over 2 ½ years later. Defendants allege that Plaintiff knew Ullal was a physical therapist as the complaint alleges that she was acting in the scope of her duties at the time of the occurrence. Defendants argue that the action sounds in medical malpractice, and not negligence, therefore it was subject to the 2 ½ year statute of limitations. In opposition to this branch of the motion, Plaintiff argues that her complaint against Ullal sounds in negligence rather than medical malpractice, and Defendants have failed to conclusively establish that the conduct of Ullal bore a substantial relationship to the rendition of medical treatment by a licensed physician.

It is true, as alleged by Defendants, that CPLR 214-a applies to malpractice claims against physical therapists (*see Wahler v. Lockport Physical Therapy*, 275 A.D.2d 906 [4th Dept. 2000], *lv. den.*, 96 N.Y.2d 701 [2001]). As confirmed by the First Department, claims against health care providers claims fall within the ambit of the statute "where the treatment rendered by the health care providers was performed at the direction of a physician or pursuant to a hospital protocol which was part and parcel of patient care" (*see Perez v. Fitzgerald*, 115 A.D.3d 117,

182 [1st Dept. 2014][citing cases]). Or, where the alleged injury "bore a substantial relationship to treatment that was provided pursuant to a referral or prescription from a physician" (*id*).

Ryan v. Korn involved a fact pattern substantially similar to the instant case (57 A.D.3d 507 [2nd Dept. 2008]). In *Ryan*, the plaintiff allegedly received burns on her arm as a result of moist heating pads applied by a physical therapist who worked at the defendant-doctors' office. The Appellate Division, Second Department, reversed the lower court and determined that the plaintiff's complaint was untimely because it was commenced after expiration of the 2 ½ month statute of limitations. In determining that the action sounded in medical malpractice, and not negligence, the Court held that "the gravamen of the plaintiff's complaint challenges the treatment she received during physical therapy at the defendants' office. The alleged conduct derived from the duty owed to the plaintiff as a result of the physician-patient relationship and was substantially related to her medical treatment" (*id.* [internal citations omitted]). The First Department in *Levinson v. Health S. Manhattan* similarly found that an action against a physical therapist sounded in medical malpractice since the allegedly negligent conduct of the therapist "constitut[ed] medical treatment or b[ore] a substantial relationship to the rendition of medical treatment" (17 A.D.3d 247 [1st Dept. 2005]).

In this matter, Plaintiff's allegations against defendant Ullal, a physical therapist, sound in medical malpractice and are therefore time-barred. The complaint asserts that Ullal, under the direction and permission of co-defendants, including Dr. Yardley Charles, rendered medical care including the application of an extremely hot towel on Plaintiff's back after applying electrodes to her back (Complaint at Par. 49-52). This conduct, as alleged, bears the necessary "substantial relationship to the rendition of medical treatment" (*Levinson,* citing *Bleiler v. Bodnar*, 65 N.Y.2d 65, 72 [1985]). In opposition to the motion, Plaintiff argues that there may be issues of fact regarding Ullal's negligent maintenance of the electrical stimulation machine used during her treatment. However, the malpractice statute of limitations applies to the use of such machinery, since its use constitutes "an integral part of the rendering of professional medical treatment" (*Levinson, supra*, 17 A.D.3d 247 [internal citations omitted]). Furthermore, in applying the statute of limitations, courts must "look to the 'reality' of the 'essence' of the action and not its form" (*see Matter of Paver v. Wildforester (Catholic High School Ass'n)*, 38 N.Y.2d 669, 674

[1976][internal citations omitted]). Here, the "reality" of Plaintiff's action is one of medical malpractice against Ulall. The complaint against that defendant, commenced more than 2 ½ years after the occurrence, therefore must be dismissed as untimely.

Accordingly, it is hereby

ORDERED, that Defendants' motion to compel Plaintiff to accept its late answer is granted, and it is further,

ORDERED, that Defendants' answer, dated July 2, 2015, is deemed served upon Plaintiff as of the date of this Order, and it is further,

ORDERED, that defendant Ullal's motion seeking dismissal of the complaint pursuant to CPLR 3211(a)(5) is granted, and the complaint and all cross-claims asserted against defendant Ullal are dismissed with prejudice, and it is further,

ORDERED, that Plaintiff' cross-motion for a default judgment against Defendants is denied.

This constitutes the Decision and Order of this Court.

Dated: 3/23, 2016

Hon. Mary Ann Brigantti, J.S.C.