

Sturdavant v Kateri Residence
2013 NY Slip Op 31071(U)
May 13, 2013
Supreme Court, New York County
Docket Number: 101395/07
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

Index Number : 101395/2007
STURDAVANT, TRACEY
vs.
KATERI RESIDENCE
SEQUENCE NUMBER : 008
DISMISS

INDEX NO. _____
MOTION DATE 3/12/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to 41, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

No(s) 1-31
No(s) see MS 30, 7-35; 32-34, 35-
No(s) 40-41 39

Upon the foregoing papers, it is ordered that this motion is

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION, ORDER + JUDGMENT

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/13/13

[Signature] J.S.C.
JOAN B. LOBIS

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
TRACEY STURDAVANT, as Administratrix of the
Estate of William Charles Sturdavant,

Plaintiff,

Index No. 101395/07

-against-

**Decision, Order and
Judgment**

KATERI RESIDENCE, THE CATHOLIC HEALTH
CARE SYSTEM OF THE ARCHDIOCESE OF NEW
YORK, LENOX HILL HOSPITAL, TERENCE
CARDINAL COOKE HEALTH CARE CENTER, ST.
LUKE'S-ROOSEVELT HOSPITAL CENTER-
ROOSEVELT HOSPITAL DIVISION, NORTHERN
MANHATTAN REHABILITATION AND NURSING
CENTER, NORTHERN MANHATTAN NURSING
HOME, INC., and NORTH GENERAL HOSPITAL,

Defendants.

-----X
JOAN B. LOBIS, J.S.C.:

This negligence, medical malpractice and wrongful death case arises out of falls by the decedent, William Charles Sturdavant, at the nursing home, Kateri Residence, and subsequent treatment by Lenox Hill Hospital and Terence Cardinal Cooke Health Care Center. Defendants move respectively in motion sequence numbers 8, 9, and 10 for relief including dismissal and summary judgment pursuant to Rules 3211 and 3212 of the Civil Practice Law and Rules. For purposes of this decision, order, and judgment, those motions have been consolidated.

The decedent, William Charles Sturdavant, had resided at Kateri Residence (Kateri) since 2001. In November 2003, Sturdavant fell several times. Following his third fall, he was admitted to Lenox Hill Hospital (LHH), where he was diagnosed with a fractured left hip. He underwent a hip replacement and returned to Kateri in early December. Twice that same month he

returned to LHH for hip complications and a blood clot. When he was discharged from LHH in January 2004, he did not return to Kateri but went to another nursing home, Terence Cardinal Cooke Health Care Center (TCCH). He was last treated by LHH on March 6, 2004, and by TCCH on March 15, 2004.

Upon leaving TCCH, Sturdavant was admitted to St. Luke's Roosevelt Hospital. During that stay his leg was amputated below the left knee following a gangrenous left heel infection. He then was admitted to Northern Manhattan Nursing and Rehabilitation, and he died on January 9, 2005.¹

Plaintiff's former counsel, Robert A. Hyman, P.C., filed a summons and complaint on behalf of Plaintiff in August 2006 naming Tracey Sturdavant as proposed administratrix of the decedent's estate. The action alleged negligence, medical malpractice, failure to provide informed consent, and wrongful death. Defendants moved to dismiss for lack of standing to sue. On January 11, 2007, Judge Stanley L. Sklar granted the motions, which were unopposed, but directed the parties to settle the orders. The orders were settled on March 2, 2007, and April 16, 2007.

Prior to those dismissals, Plaintiff commenced this action in February 2007, as administratrix of the decedent's estate, after she obtained letters of administration in November 2006. Plaintiff raised the same claims that had been raised previously. On February 10, 2007,

¹This Court discontinued Defendants Northern Manhattan Nursing Home, North General Hospital and St. Luke's Roosevelt Hospital Center - Roosevelt Hospital Division, in an order dated May 1, 2009.

Plaintiff's then-counsel mailed the summons and complaint in the new action to the Defendants by regular mail in care of their respective defense counsels from the prior action. By March, both LHH and TCCH had answered and asserted, among their affirmative defenses, a statute of limitations defense. They did not raise any cross-claims, however, against Kateri or any other defendants.

Kateri did not respond to Plaintiff's mailing of the summons and complaint. In May 2007, Plaintiff's current counsel filed its notice of appearance. That September, Kateri responded to Plaintiff's inquiry seeking a response informing all parties that it would not be answering since it considered Plaintiff's service of process to have been deficient. In her opposition before this Court, Plaintiff does not offer any affidavit of service regarding Kateri. LHH and TCCH subsequently moved to dismiss the complaint based on the defense of statute of limitations, but they withdrew those motions by stipulation as so ordered by this Court in early 2009.

In late 2011 LHH filed a third-party action against Defendant Kateri seeking indemnification and contribution. TCCH followed suit shortly thereafter. Defendant Kateri answered the third-party actions as third-party Defendant by asserting, among other defenses, failure to state a cause of action.

Plaintiff Sturdavant in turn filed her own third-party summons and complaint against Defendant Kateri on January 24, 2012. In that action she realleged her original claims. In June 2012, third-party Defendant Kateri answered Plaintiff's third-party complaint, asserting the affirmative defense of statute of limitations, failure to state a cause of action and prior action pending.

On December 22, 2011, Plaintiff filed her note of issue. On February 7, 2012, LHH and TCCH stipulated that the time to move for summary judgment had expired.

In July 2012, Plaintiff served her bill of particulars against third-party Defendant Kateri for the third-party action. On September 11, 2012, Plaintiff served her note of issue for that action. Kateri now moves to dismiss Plaintiff's first action, the third-party actions filed by Plaintiff and Defendants LHH and TCCH, and alternatively seeks summary judgment on Plaintiff's third-party action. Defendants LHH and TCCH move to dismiss Plaintiff's first action based on the expiration of the statute of limitations. Defendant TCCH also contends that Plaintiff failed to comply with disclosure.

A party may move to dismiss one or more causes of action asserted against him on grounds set forth in Rule 3211(a) of the Civil Practice Law and Rules. These grounds include, among others, expiration of the statute of limitations and failure to state a cause of action. Id. §§ 3211(a)(5), (7). A party may assert the grounds set forth in Rule 3211(a) at any time before service of the responsive pleading is required and may move no more than once. Id. § 3211(e). Grounds under Rule 3211(a)(5) are waived unless raised either by motion before service of the responsive pleading or in the responsive pleading. Id. § 3211(e). A motion based on Rule 3211(a)(7) for failure to state a cause of action may be made at any subsequent time. Id. § 3211(e).

This Court first considers Defendant Kateri's motion to dismiss the first action by Plaintiff against it on the grounds that the statute of limitations has run. Plaintiff opposes the motion

as untimely. Plaintiff's opposition is unsustainable. The record shows that this Defendant has not filed a responsive pleading in the first action. Accordingly, the motion is timely. C.P.L.R. 3211(e). This Court further notes that as a third-party defendant to the actions brought by Defendants LHH and TCCH, Kateri may assert defenses against the Plaintiff that the third-party Plaintiffs have. C.P.L.R. § 1008.

Addressing the merits of Defendant Kateri's motion to dismiss the first action, this Court finds that the record shows that the statute of limitations has run on all claims involving this Defendant. Plaintiff concedes that the last date of treatment for the decedent by Kateri was in December 2003. Based upon the causes of actions asserted, Plaintiff's medical malpractice claims would have to have been brought by June 2006. See C.P.L.R. § 214-a (establishing a two and 1/2 year statute of limitations after final treatment). Any negligence claim would have to have been brought by December 2006. See C.P.L.R. § 214(5) (three year statute of limitations for negligence claims). A claim of wrongful death would have been due within two years of the decedent's death, that is, by January 9, 2007. See E.P.T.L. § 5-4.1. Absent any tolling, the statutes of limitations on all claims expired by the beginning of January 2007. This action was not commenced, however, until the index number was purchased in February 2007. See C.P.L.R. § 304(a), (c).

Plaintiff claims, nevertheless, that Section 205 of the Civil Practice Law and Rules renders her causes of action timely. Section 205 states in pertinent part that a timely commenced action that is terminated may be commenced as a new action within six months after the termination, provided the new action would have been timely commenced at the time of commencement of the prior action, and service upon the defendant is effected within the six month period. C.P.L.R. §

205(a). In this case, however, the record shows that Plaintiff's new action, which was brought in February 2007, was not commenced after the prior action that was filed in August 2006 had terminated. Rather, it was begun pending that prior action, which was terminated against the various defendants in March and April of 2007. For this Court to overlook the pendency of Plaintiff's earlier action in contravention of the express language of Section 205 would effectively toll the statute of limitations on Plaintiff's claims while her petition for letters of administration were pending. See Cancel v. Posner, 82 A.D.3d 575 (1st Dep't 2011) (medical malpractice cause of action not tolled while petition pending for letters of administration). Nor is there any proof that Plaintiff served Defendant Kateri in the new action filed in 2007 within any period, let alone the six-month statutory period required under Section 205.

This Court next considers Kateri's motion to dismiss the third-party actions that were brought by LHH and TCCH for indemnification and contribution on the grounds that those third-party complaints fail to state a proper cause of action. The record shows that, rather than filing any cross-claims against Defendant Kateri in their answers filed in 2007, these Defendants sued Kateri more than four years after the action was commenced while Kateri was still a defendant in this action. Rule 1007 of the Civil Practice Law and Rules allows third-party actions to be commenced "against a person not a party." Defendants fail to cite any authority showing that third-party actions are proper against a defendant in the original action. Accordingly those actions similarly fail and are dismissed.

This Court next addresses Defendant Kateri's motion to dismiss Plaintiff's third-party action against it. Nothing in the Civil Practice Law and Rules contemplates such an end run around

properly suing a defendant within the statute of limitations. Compare C.P.L.R. 1007 (allowing a defendant to sue a non-party who may be liable to a defendant for any part of plaintiff's claim against that defendant) with C.P.L.R. 1009 (setting forth parameters in which a plaintiff may amend the existing complaint to assert any claim raised by a defendant against a third-party defendant). As discussed, any statute of limitations against Kateri had expired by January 9, 2007, prior to the filing of this action, and nothing tolled that expiration. Even were Plaintiff to have amended her complaint under Rule 1009, that amendment would not relieve the Plaintiff from the operation of any statute of limitations. E.g., Liverpool v. Arverne Houses, 67 N.Y.2d 878, 879 (1986). This Court accordingly dismisses Plaintiff's third-party action against Defendant Kateri. Based on the foregoing, this Court need not consider Kateri's claim in the alternative that it is entitled to summary judgment on the third-party Plaintiffs' claims.

Finally, this Court considers the motions filed by the Defendants LHH and TCCH to dismiss Plaintiff's first action. Each Defendant claims that the statute of limitations has run.² Plaintiff claims that Defendants' motions are untimely because these Defendants already moved to dismiss in 2008, and under Rule 3211(e) of the Civil Practice Law and Rules, no more than one motion is permitted. Plaintiff's contention misstates this record. As mentioned, the prior motions to dismiss were withdrawn by stipulations so ordered by this Court in early 2009. Defendants' motions to dismiss, therefore, are properly before this Court for consideration on their merits.

Plaintiff alternatively asserts that this Court cannot consider the motions to dismiss

²TCCH also claims, without more, that Plaintiff failed to comply with disclosure, accordingly, this Court finds that TCCH has abandoned that claim.

filed by LHH and TCCH because each of these Defendants filed answers in this action. But that argument overlooks the plain language of Rule 3211(e) that permits statute of limitations defenses to be raised in a responsive pleading. This record shows that both LHH and TCCH included those defenses in their answers, and, therefore, Plaintiff's contention is without merit.

Turning to the substance of the motions to dismiss by Defendants LHH and TCHH, this Court considers whether the statute of limitations has run on all claims against LHH and TCCH. This action was commenced in February 2007. The last dates of treatment for the decedent by these Defendants were in March 2004. Medical malpractice actions must be brought within two and one half years of the last treatment, C.P.L.R. § 214-a, and, therefore, those claims are untimely. Wrongful death actions must be brought within two years after the decedent's death, which in this case was in January 2005. E.P.T.L. § 5-4.1(1). Therefore, those claims are also untimely.

Claims of negligence, in contrast, may be brought within three years of the alleged wrongful acts. C.P.L.R. § 214. Plaintiff's complaint and bills of particular, for example, allege negligent hiring by these Defendants. While I find that Plaintiff has stated a cause of action for negligence against these Defendants, see, for example, Barreras v. Goldweber, No. 116107/07, 2012 N.Y. Misc. LEXIS 4850 (NY Sup. Ct. NY County October 12, 2012), I express no opinion on the merits of those claims. Defendants are not seeking summary judgment on those claims, having

previously waived their right to file those motions in February 2012. Accordingly, it is

ORDERED that Defendant Kateri's motion to dismiss Plaintiff's first action against Kateri is granted; it is further

ORDERED that Defendant Kateri's motion to dismiss Plaintiff's third-party action against Kateri is granted; it is further

ORDERED that Defendant Kateri's motion to dismiss Defendant LHH's third-party action against Kateri is granted; it is further

ORDERED that Defendant Kateri's motion to dismiss Defendant TCCH's third-party action against Kateri is granted; and it is ordered and adjudged that the Clerk is directed to enter judgment dismissing all claims against Kateri; it is further

ORDERED that Defendant LHH's motion to dismiss Plaintiff's case is granted in part as to all causes of action except for negligence; it is further

ORDERED that Defendant TCCH's motion to dismiss Plaintiff's case is granted in part as to all causes of action except for negligence.

Dated: May 13, 2013

ENTER:



JOAN B. LOBIS, J.S.C.