

<b>Eulau v Finger</b>
2014 NY Slip Op 30265(U)
January 27, 2014
Sup Ct, NY County
Docket Number: 805265/13
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTYPRESENT: ALICE SCHLESINGER

Justice

PART A PART 16

Index Number : 805265/2013  
 BUITENKANT EULAU, RONNIE  
 vs.  
 FINGER, MD, MARK  
 SEQUENCE NUMBER : 001  
 DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
 Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
 Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is granted and the Clerk is directed to enter judgment in favor of the defendants dismissing this action in accordance with the accompanying memorandum decision. Although only Dr. Finger moved, there is no evidence that the other defendants were served or that the claims against them are timely.

 MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
 FOR THE FOLLOWING REASON(S):
Dated: JAN 27 2014

 J.S.C.  
**ALICE SCHLESINGER**

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  
COUNTY OF NEW YORK

-----X

RONNIE BUITENKANT EULAU AND  
HENRY D. EULAU

Plaintiffs,

Index No. 805265/13  
Motion Seq. No.001

-against-

MARK FINGER, M.D., MICHALIS VITELLAS, M.D.,  
AND LENOX HILL HOSPITAL,

Defendants:

-----X

SCHLESINGER, J.:

Before the Court is a pre-Answer motion to dismiss the complaint by the first named defendant of three, Dr. Mark Finger. The motion is made on a variety of grounds. The first, pursuant to CPLR §3211(a)(8), claims that Dr. Finger was not properly served in accordance with CPLR §308. The second, pursuant to §3211(a)(5), claims that the complaint is untimely. The third, pursuant to §3211(a)(3), claims that the primary plaintiff, Ronnie Buitenkant Eulau, lacks the capacity to sue and seeks to strike the name of her husband, Henry D. Eulau, from the caption because he does not have a cause of action. The fourth, pursuant to CPLR §3012(a), points out that the complaint fails to include a Certificate of Merit. Finally, the fifth, seeks to dismiss plaintiffs' request for costs, expenses and attorney's fees pursuant to 42 USC §1988.

The complaint is dated June 26, 2013, but according to the moving defendant, it was not filed until July 24, 2013. It contains three causes of action sounding in medical malpractice. The movant Dr. Finger is described as a psychiatrist who treated Mrs. Eulau as a patient beginning in 1991. The complaint also state, in ¶9 that "on or about April 30, 2009, Mrs. Eulau was transferred from the Lenox Hill Hospital to the Jewish Home Lifecare Manhattan for further and longterm care."

With regard to the professional negligence allegedly committed by Dr. Finger, that claim concerns his prescribing the drug Stelazine. According to the complaint, Mrs. Eulau was, in June 2009, "suffering from severe drug induced Parkinson's Disease as a direct result of the prescription to Stelazine" (¶10).

The moving papers, on the personal jurisdiction issue, contain as Exhibit B an affidavit from the defendant, Mark Finger. There, he states that he was never personally served with this Summons and Complaint. He adds that on September 3, 2013, when he arrived at his office at 19 West 34<sup>th</sup> Street, he found an envelope in the mailbox which contained those documents. He also states that at no time did he authorize anyone to accept service for him. This was the only Summons and Complaint related to this case that he ever received.<sup>1</sup>

Predicated on the above assertions, counsel argues that the service here was not proper as it failed to comply with CPLR §308. In other words, the Summons and Complaint were never served personally on Dr. Finger. Nor were they given to him by one authorized to accept service. Rather, the sole notice he received was found by him in his mailbox. He never received another set through the mail.

On the untimeliness issue, counsel urges that the two and a half year statute of limitation applied in medical malpractice cases has clearly not been complied with. As stated by Dr. Finger in his affidavit, his last contact with Mrs. Eulau, his patient, was on March 12, 2009. Two and a half years after the alleged malpractice would require filing by September 12, 2012. However, the complaint was filed on July 24, 2013, ten months later.

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<sup>1</sup>With regard to that aspect of this motion made pursuant to §3211(a)(5) and §214-a alleging untimeliness of the action, Dr. Finger says that the plaintiff Ronnie Buitenkant Eulau was his patient from 1983 to 2009. He adds: "The last time I treated her was on March 12, 2009. I have not seen the patient since then" (¶4).

The next ground for dismissal, pursuant to CPLR §3211(a)(3), is that the plaintiff appears here not to be competent, thereby lacking the capacity to sue. Paragraph 1 in the complaint asserts that Mrs. Eulau currently is in a managed care facility "and is no longer competent to manage her affairs". Further, with regard to the Verification, which is signed by Henry D. Eulau, Mrs. Eulau's husband and the second named plaintiff, it is explained therein that "this verification (was made) on the grounds that my wife Ronnie Buitenkant Eulau, is not competent to do so."

The argument made by the defendant is that since Mrs. Eulau is described as no longer competent, she lacks the legal capacity to sue. Finally, moving counsel points out that since no Certificate of Merit was served by the plaintiffs here, but pursuant to CPLR §3012-a, subd. (a)(1) was required, the action should be dismissed.<sup>2</sup>

The opposition papers consist solely of an affirmation from counsel, together with an affidavit of service concerning alleged substituted service on a female employee of Dr. Finger. The papers are inadequate, both factually and legally. I also do not understand why I am expected to accept the truth of the complaint's allegations, when the motion is not made pursuant to §3211(a)(7) and the plaintiffs' allegations are not the subject matter of the motion, except perhaps for claims of incompetency.

Solely on the jurisdictional issue is the opposition sufficient to create an issue of fact on service and so entitle plaintiffs to a traverse. This would be the case if the complaint

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<sup>2</sup>The moving papers also argue that while the plaintiff asks for costs, expenses and attorney fees, there is no right to these in New York pursuant to state law. Finally, counsel points out that the *ad damnum* clause makes a specific monetary demand, which in a New York medical malpractice case, is not allowed pursuant to CPLR §3017.

survived this motion. But it does not. Counsel either ignores the other grounds put forth by defendant or inadequately responds to them.

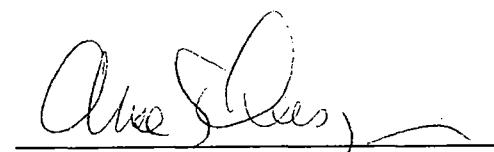
Regarding the charge that the complaint is untimely, by giving the several relevant dates, the defendant has made out a *prima facie* case. In response, opposing counsel contends that the statute was tolled because of Mrs. Eulau's incompetency. However, that statement by counsel has no probative value. It is not accompanied by any affidavit from a qualified physician as to the details of plaintiff's alleged incompetency. Therefore, it insufficiently counters the *prima facie* case. Counsel refers to a finding allegedly made in June 2009, by a Dr. Alexander as to Mrs. Eulau's mental state but that adds nothing.

Finally, the plaintiff ignores the arguments made, regarding the plaintiff lacking the capacity to sue or bring an action in her own right and the argument regarding the failure to include a Certificate of Merit.

Therefore, for all of the reasons stated above, it is hereby  
ORDERED that the motion by Dr. Mark Finger is granted. The complaint is dismissed as it is time barred, pursuant to CPLR §3211(a)(5), lacks a Certificate of Merit pursuant to §3012(a) and appears to be brought by one lacking capacity to sue pursuant to §3211(a)(3).

Dated: January 27, 2014

JAN 27 2014

  
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J.S.C.  
ALICE SCHLESINGER