

Tolkoff v Goldstein

2015 NY Slip Op 32212(U)

November 18, 2015

Supreme Court, Suffolk County

Docket Number: 06-11319

Judge: Daniel Martin

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COPY
SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 12-1-14 (004, 005, 011)
MOTION DATE 12-8-14 (006, 007, 008)
MOTION DATE 12-16-14 (009, 010)
MOTION DATE 2-2-15 (012)
ADJ. DATE 5-22-15
Mot. Seq. #004- MG; CASEDISP
#005- MG #009- MG
#006- MG #010- MG
#007- MG #011- MG
#008- MG #012- MD

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DONNA TOLKOFF, as Administratrix of the
Estate of JAYMEE TOLKOFF,

Plaintiff,

NAPOLI, BERN & RIPKA, LLP
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- against -

FUMUSO, KELLY, DeVERNA, SNYDER,
SWART & FARRELL, LLP
Attorney for Margaret M. Goldstein
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Hauppauge, New York 11788

MARGARET M. GOLDSTEIN, as
Administratrix of the Estate of DAVID
GOLDSTEIN, M.D., JAGPREET DHILLON,
M.D., LONG ISLAND DIAGNOSTIC
IMAGING, JOHN T. MATHER MEMORIAL
HOSPITAL, DIMITRI PYRROS, M.D., ZELEN
& PYRROS, M.D., P.C., NORTH SHORE
PULMONARY ASSOCIATES, JAY M.
BARBAKOFF, M.D., WALTER SZCUPAK,
MD., ANTHONY C. THEODORIS, M.D., and
LONG ISLAND MEDICAL IMAGING,

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Roslyn, New York 11576

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Defendant.

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Upon the following papers numbered 1 to 94 read on these motions to dismiss/extend time; Notice of Motion/ Order to Show Cause and supporting papers 1-9, 18-27, 28-33, 34-42, 55-65; Notice of Cross Motion and supporting papers 10-17, 43-54, 66-70, 71-82; Answering Affidavits and supporting papers 83-84, 85-86, 87-88, 89-90; Replying Affidavits and supporting papers 91-92, 93-94; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Margaret Goldstein, as administratrix of the estate of Jaymee Tolkoff ("Goldstein") for an order pursuant to CPLR §3124 and §3126 dismissing the complaint in its entirety for plaintiff's failure to comply with an order of this Court is granted; and it is further

ORDERED that the cross motion by defendants North Shore Pulmonary Associates, Walter Szczupak, M.D., and Anthony C. Theodoris, M.D., for an order pursuant to §3126 dismissing the complaint in its entirety for plaintiff's failure to comply with an order of this Court is granted; and it is further

ORDERED that the motion by defendant Jagpreet Dhillonn, M.D., for an order pursuant to CPLR §3124 and §3126 dismissing the complaint in its entirety for failure to comply with an order of this Court is granted; and it is further

ORDERED that the motion by defendant Jay M. Barbakoff, M.D., for an order pursuant to CPLR §3124 and §3126 dismissing the complaint in its entirety for failure to comply with an order of this Court is granted; and it is further

ORDERED that the motion by defendants Dimitri Pyrros, M.D., and Zelen & Pyrros, M.D., P.C., for an order pursuant to CPLR §3124 and §3126 dismissing the complaint in its entirety for lack of prosecution is granted; and it is further

ORDERED that the cross motion by defendant Long Island Diagnostic Imaging for an order pursuant to CPLR §3124 and §3126 dismissing the complaint in its entirety for failure to comply with an order of this Court is granted; and it is further

ORDERED that the motion by defendant John T. Mather Memorial Hospital, Inc. for an order pursuant to CPLR §3124 and §3126 dismissing the complaint in its entirety for failure to comply with an order of this Court is granted; and it is further

ORDERED that the cross motion by defendant Long Island Medical Imaging, P.C., s/h/a Long Island Medical Imaging, for an order pursuant to CPLR §3124 and §3126 dismissing the complaint in its entirety for failure to comply with an order of this Court is granted; and it is further

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ORDERED that the cross motion by plaintiff for an order pursuant to §2004 extending plaintiff's time to file a note of issue until thirty (30) days following the notice of entry of the order addressing this cross motion is denied.

Plaintiff commenced this action by service of a summons and verified complaint in April of 2006, seeking to recover damages for medical malpractice and alleging that the various defendants failed to timely diagnose and treat an unspecified cancer. Less than a month later, the plaintiff passed away, allegedly from a type of lung cancer. All proceedings were then stayed until a representative for the estate of the deceased was appointed. Following the appointment of an administratrix for the estate, an amended verified complaint was served dated May of 2008. The action was then further stayed by the death of defendant David Goldstein, M.D. After a representative for his estate was appointed, plaintiff served a second amended verified complaint.

After extensive discovery was completed, a compliance conference was held on July 17, 2012, after which this Court issued a certification order, dated July 17, 2012, directing the plaintiff to serve a note of issue within 90 days. Plaintiff failed to serve a note within the 90 day period, allegedly due to a law office calendaring oversight. Plaintiff thereafter circulated a stipulation extending the time to file the note of issue until December 5, 2012. The stipulation was so-ordered by this Court on February 8, 2013. Plaintiff still did not file the note of issue, but rather sought a second time to obtain a stipulation extending the time to file, which the other parties herein declined to sign. Plaintiff thereafter requested a conference with this Court, which was held on December 10, 2013. It is undisputed that at the conference, the Court declined plaintiff's request for permission to file the note of issue. Instead, the Court orally directed the plaintiff to make a written motion seeking permission to file and serve a late note of issue. Plaintiff was required to make a showing of a meritorious cause of action and a reasonable excuse for the delay in timely filing the note of issue.

Eleven months then passed without plaintiff making the required motion, at which time the first of the defendants' motions to dismiss was served and filed. In fact, it was not until all of the defendants had moved for dismissal that the plaintiff made a cross motion to serve a late notice of claim.

Plaintiff, to avoid dismissal, was required to demonstrate a justifiable excuse for the delay as well as a potentially meritorious cause of action (*see* CPLR §2004; CPLR §3126; *Bischoff v Hoffman*, 112 AD3d 659, 976 NYS2d 406 [2d Dept 2013]; *Furrukh v Forest Hills Hosp.*, 107 AD3d 668, 966 NYS2d 497 [2d Dept 2013]; *Jedraszak v County of Westchester*, 102 AD3d 924, 958 NYS2d 490 [2d Dept 2013]; *Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503, 655 NYS2d 848 [1997]). The Court has broad discretion to grant appropriate relief (*see Baczkowski v Collins Constr. Co.*, *supra*). Conclusory and unsubstantiated claims of law office failure do not rise to the level of a reasonable excuse (*see Petersen v Lysaght, Lysaght & Kramer, P.C.*, 47 AD3d at 784, 851 NYS2d 209 [2d Dept 2008]; *Matter of Bloom v Lubow*, 45 AD3d 680, 845 NYS2d 439 [2d Dept 2008]; *Lugauer v Forest City Ratner Co.*, 44 AD3d 829, 830, 843 NYS2d 456 [2d Dept 2007]; *Stallone v Richard*, 95 AD3d at 876, 943 NYS2d 225 [2d Dept 2013]; *Byers v Winthrop Univ. Hosp.*, 100 AD3d 817, 819, 955 NYS2d 105 [2d Dept 2012]). Here, plaintiff has failed to provide either a justifiable excuse for the delay or proof of a meritorious cause of action. Plaintiff's reliance on *Hilliard v Highland Hosp.*, 88 AD3d 1291, 930 NYS2d 390 [4th Dept 2011], is without merit and misplaced. That matter involved an order

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that did not advise the plaintiff of the consequences of his failure to file a note of issue. Herein, the plaintiff was directed by this Court to make a written motion seeking permission to file and serve a late notice of issue. A natural consequence of the denial of such motion would be the dismissal of the complaint. Thus, plaintiff cannot claim to be unaware that dismissal was a possibility. Furthermore, plaintiff, as already noted, in addition to being dilatory by waiting more than a year to make the directed motion, has ignored the Court's instructions and utterly failed to provide either a justifiable excuse for the delays or any proof of a meritorious cause of action.

Plaintiff having failed to establish a justifiable excuse for her failure to timely file a note of issue and a meritorious cause of action, the motion to extend plaintiff's time to file a late note of issue is denied (*see Furrakh v Forest Hills Hosp., supra; Umeze v Fidelis Care N.Y.*, 17 NY3d 751, 929 NYS2d 67 [2011]). Accordingly, each of the defendants' motions to dismiss are granted in all respects.

Dated: November 18, 2015


A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION

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