

Iwachiw v City of New York

2016 NY Slip Op 30394(U)

February 24, 2016

Supreme Court, New York County

Docket Number: 100463/14

Judge: Martin Schoenfeld

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100463/2014

MARTIN SCHOENFELD
J.S.C.

PART 28

IWACHIW R.N., WALTER

INDEX NO. 100463/14

vs
CITY OF NEW YORK

MOTION DATE

Sequence Number : 002

MOTION SEQ. NO. (02)

DISMISS

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits X-motion | No(s) 1-7

Answering Affidavits — Exhibits _____ | No(s) 5

Replying Affidavits _____ | No(s) 6-7

Upon the foregoing papers, it is ordered that this motion is to dismiss is consolidated with motions sequences numbers 003 and 001 and is decided in accordance with the memorandum decision accompanying motion sequence number 001.

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

FILED
FEB 26 2016
COUNTY CLERK'S OFFICE
NEW YORK
RECEIVED
FEB 26 2016
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

February 24, 2016

Dated: [Signature]

[Signature]
MARTIN SCHOENFELD J.S.C.
J.S.C.

- 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: PART 28

-----X
WALTER IWACHIW, R.N., JOSEFA IWACHIW,

Plaintiffs,
-against-

DECISION AND ORDER
Index No.: 100463/14

CITY OF NEW YORK, MAYOR MICHAEL BLOOMBERG, NYC EMS, NYC DEPARTMENT OF SANITATION, NYC DEPARTMENT OF TRANSPORTATION, NYC DEPARTMENT OF ENVIRONMENTAL PROTECTION, NYC DEPARTMENT OF PARKS AND RECREATION, NYPD, NYC OFFICE OF EMERGENCY MANAGEMENT, NYC DEPT OF SOCIAL SERVICES, NYC DEPT OF AGING, SUNNYSIDE COMMUNITY SERVICES, INC., IRA GREENBERG, MTA, MT. SINAI ELMHURST, MT. SINAI ELMHURST FACULTY PRACTICE, ASSEMBLYWOMAN CATHERINE NOLAN, PAUL KERSON, MARC LEVITT, NYCHHC, ELMHURST HOSPITAL, VISITING NURSE SERVICE, JOE DOE, MARY DOE, JOHN DOE, PAUL DOE, ACORPORATE DOE, BCORPORATE DOE, GARY DOE, DR AL DOE, DR BEN DOE, NURSE ANN DOE, DR. SUNIL MEHRA, M.D., NYS DOH, DR. SHAH,

Defendants,

-----X **FILED**

HON. MARTIN SCHOENFELD, J.:

FEB 26 2016

**COUNTY CLERK'S OFFICE
NEW YORK**

Before the Court are seven separate motions by defendants, six of which are motions to dismiss pursuant to CPLR 3211. For the ease of the Court these motions, designated as motion sequences 001, 002 and 003, are hereby consolidated, and, for the reasons set forth below, defendants' motions to dismiss are granted.¹

¹ The Court finds that the seventh motion, brought by defendant Metropolitan Transit Authority, for a more definite statement pursuant to CPLR § 3013 is moot because, as set forth in the decision below, all of the claims brought by Mr. Iwachiw are dismissed.

BACKGROUND

Pro se plaintiff, Walter Iwachiw, brings this case on behalf of himself and Josefa Iwachiw² claiming the wrongful death of Ms. Iwachiw, medical malpractice, personal injury, defective products, fraud and RICO violations. He seeks damages in the amount of, in his words, "\$11.4 Billion/trillion Dollars." [Summons and Complaint at ¶ 16]. According to Mr. Iwachiw's Summons and Complaint and other lengthy and often difficult to decipher filings, the causes of action stem from December 26, 2010 when, because of a snow storm that occurred that day, EMS was allegedly delayed in assisting Ms. Iwachiw. [*Id.* at ¶¶ 1, 8-14]. Mr. Iwachiw contends that this delay and the negligent administration of excess morphine at Elmhurst Hospital were the causes of Ms. Iwachiw's death on January 1, 2011. [*Id.* at ¶ 6]. He also believes that the administration of morphine was a "deliberate and intentional" act related to his offer "to purchase all NYC HHC operations." [*Id.*]. In addition, he asserts that Ms. Iwachiw was provided improper care by defendants Visiting Nurse Service, the Department of Health and Dr. Shah as part of a scheme to retaliate against him for exposing Medicaid fraud. [*Id.* at ¶ ¶ 5,16]. Other claims include breach in standard of care by defendant Dr. Sunil Mehra for prescribing antibiotics to Ms. Iwachiw on December 22, 2010, fraud and contract rigging by the MTA, attorneys Ira Greenberg, Marc Leavitt, Paul Kerson, Assemblywoman Catherine Nolan, Visiting Nurse Service and Sunnyside Community Services. [*Id.* at ¶¶ 2-5]. Plaintiff also alleges claims for defective products and RICO violations "as to all defendants." [*Id.* at ¶ 16].

² Plaintiff does not disclose his relationship to Ms. Iwachiw in his papers, but, according to at least one defendant, Ms. Iwachiw was plaintiff's mother. See Reply Affirmation in Support of Defendant HHC's motion to dismiss at ¶5.

PROCEDURAL HISTORY

The record indicates that Mr. Iwachiw filed the Summons and Complaint with the New York County Clerk's office on January 2, 2014 but that service was not made on at least some defendants until April 23, 2014.³ Nevertheless, for the purposes of this decision, the Court will consider the earlier of the two dates, January 2, 2014, the day on which the complaint was commenced.

DISCUSSION

Defendants have set forth many credible arguments in support of their motions to dismiss the complaint. After careful consideration of these arguments and Mr. Iwachiw's counter arguments, the Court dismisses all of plaintiff's claims for the following reasons.

Mr. Iwachiw Lacks the Capacity to Sue On Behalf of Ms. Iwachiw

Only the duly appointed personal representative of an estate who has received letters of administration may sue on behalf of a decedent for personal injuries and wrongful death. EPTL §§ 5-4.1(1); 1-2.13; see *Mingone v. State of New York*, 100 A.D.2d 897,899 (2d Dept. 1984); *George v. Mt. Sinai Hosp.*, 47 N.Y.2d 170, 176-177 (1979). Mr. Iwachiw does not claim to have received this appointment. Instead, he argues that the Court should consider him the "de facto" administrator of Ms. Iwachiw's estate with capacity to sue. However, the state's issuance of letters of administration is

³ Defendants Dr. Mehra, and Assemblywoman Catherine Nolan argue that they were not served. The Court need not address this issue, however, because as set forth below it dismisses the complaint on other grounds.

a condition precedent to sue on behalf of a decedent. See *Snodgrass v. Professional Radiology*, 50 A.D.3d 883, 883-884 (2d Dept. 2008); *George*, 47 N.Y.2d at 176-177.

Moreover, even if a “defacto” representative were allowed to sue, Mr. Iwachiw points to no facts to support his contention that he has such authority. Therefore, the Court finds that Mr. Iwachiw lacks the capacity to bring personal injury claims, including the claims of medical malpractice, on behalf of Ms. Iwachiw and wrongful death claims on behalf of her distributees.

Plaintiff's Claims of Wrongful Death, Medical Malpractice and Negligence are Time Barred

Even if Mr. Iwachiw had the capacity to sue, many of his claims are barred by the statute of limitations.

Wrongful Death

Claims of wrongful death “must be commenced within two years after decedent’s death.” EPTL § 5-4.1(1). Ms. Iwachiw died on January 1, 2011; yet Mr. Iwachiw commenced his suit on January 2, 2014, a year after the statute of limitations had run. Thus, this claim is time barred.

Medical Malpractice

The statute of limitations for an action for medical malpractice is two years and six month from the time of the act or omission in question. CPLR § 214-a. Any instance of malpractice that Mr. Iwachiw alleges would have had to occur on or before the day Ms. Iwachiw died, January 1, 2011. Under these circumstances, at the latest, Mr. Iwachiw would have had to file his medical malpractice claims two and a half years

after her death, or by July 1, 2013, which he failed to do. Therefore, all of the medical malpractice claims are time barred.

Negligence Claims Against the City of New York

The statute of limitations to bring negligence claims against the city, its agents and employees is “one year and ninety days after the happening of the event upon which the claim is based.” G.M.L § 50-i(1); see *Klein v. City of Yonkers*, 53 N.Y.2d 1011, 1012-13 (1981). Here, Mr. Iwachiw suggests that the city was negligent in responding to an EMS call for Ms. Iwachiw on December 26, 2010 due to delays caused by a snow storm. This event occurred far more than one year and ninety days before the commencement of Mr. Iwachiw’s complaint. Therefore, the negligence claim is time barred, as would be any other tort claims against the City of New York and its employees that Mr. Iwachiw might have intended to bring here.

The Court notes that Mr. Iwachiw’s argument that the statute of limitations should be tolled because he was incapacitated is wholly without merit. “Extensions granted by tolling the Statute of Limitations are personal ones and do not apply to derivative claims.” *Wenthen v. Metropolitan Transportation Authority*, 95 A.D.2d 852, 853 (2d Dept. 1983) (citing *Rivera v. Berkeley Super Wash, Inc.*, 44 A.D.2d 316, 326 (2d Dept. 1974)). Moreover, Mr. Iwachiw offers no credible evidence of incapacitation.

The Court also rejects Mr. Iwachiw’s contentions that the statute of limitations should be extended because of “fraud and holiday schedules.” [Plaintiff’s Opposition at 10]. Plaintiff fails to set forth any facts that, if proven, would establish that fraud prevented him from timely filing his claims. See *Cellupica v. Bruce*, 48 A.D.3d 1020, 1021 (3d Dept. 2008); *Bayuk v. Gilbert*, 57 A.D.3d 227, 227-28 (1st Dept. 2008). Nor,

under the circumstances here, where plaintiff missed the statute of limitations deadlines by many months, does Mr. Iwachiw have a valid argument that crediting holidays would change the outcome.

Plaintiff Fails to State a Cause of Action For Fraud, RICO Violations, and Defective Products

In deciding whether plaintiff has failed to state a cause of action under CPLR 3211, “the court will ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.’” *Nonnon v. City of New York*, 9 N.Y.3d 825, 827 (2007) (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994)). The court may also “freely consider” plaintiff’s affidavits “to remedy any defects in the complaint.” *Leon*, 84 N.Y.2d at 88. Even under this liberal standard, the Court finds that Mr. Iwachiw has failed to state a cause of action for his fraud, RICO and defective products claims.

Fraud

The elements of a cause of action for fraud are: “a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.” *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009) (citations omitted). Under CPLR 3016(b) these elements must be “stated in detail.” Although there is “no requirement of ‘unassailable proof’ at the pleading stage, the complaint must allege the basic facts to establish the elements of the cause of action.” *Eurycleia*, 12 N.Y. at 559 (quoting *Pludeman v. Northern Leasing Sys., Inc.*, 10

N.Y.3d 486, 492 (2008)). The facts must be sufficient “to permit a ‘reasonable inference’ of the alleged misconduct.” *Id.*

Here, even giving Mr. Iwachiw every possible favorable consideration, the complaint and his accompanying pleadings do not sufficiently set forth facts that raise a reasonable inference of fraud. Mr. Iwachiw’s pleadings frankly are confusing and difficult to follow. For example, in the complaint he claims:

Ira Greenberg, his law firm Kerson Leavitt with partners Paul Kerson, Marc Leavitt and Joe Doe, Mary Doe and John Doe and Paul Doe created many frauds on the court for the benefit of MTA, MTA committee assembly member Catherine Nolan, and the rigging of the MTA cellular wifi contract and other MTA bid rigging of contracts. They enrolled individuals and filed false affidavits in court to injurer [sic] Walter Iwachiw for the purposes of evading discovery in the bid rigging of MTA contracts by a corporate doe, b corporate doe, gary doe.

[Summons and Complaint at ¶ 2].

In fact, Mr. Iwachiw’s pleadings are rife with such allegations, ranging from Medicaid fraud to fraud on the court. Yet, nowhere does he provide specific facts that would support or even explain his contentions, let alone establish the elements of fraud.

Under these circumstances, Mr. Iwachiw has failed to state a cause of action for fraud against any and all of the defendants.

RICO Violations

Similarly, Mr. Iwachiw does not make out a claim for RICO violations. To establish a violation of the RICO statute, “the plaintiff must prove, *inter alia*, a ‘pattern of racketeering activity’ which includes violations of certain state and federal crimes such as mail and wire fraud. *Pinnacle Consultants, Ltd. v. Leucadia National Corp.*, 101 F.3d 900, 904 (2d Cir. 1996) (*quoting* 18 U.S.C. § 1962). Here, Mr. Iwachiw’s does not plead any such violations, let alone a pattern of activity which is required by the statute. The

closest he comes is an unexplained allegation of “bid rigging” by the MTA and other defendants concerning “wifi contracts.” [Summons and Complaint at ¶ 2].

This unspecified and unsupported allegation is not enough to sustain a RICO cause of action. Thus, this cause of action is dismissed as well.

Defective Products

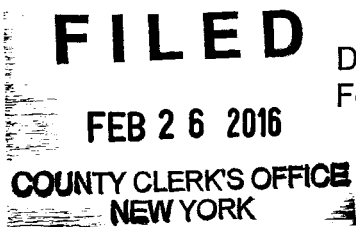
Finally, the Court dismisses Mr. Iwachiw’s defective products claim. The only mention of this claim is in the last sentence of the complaint. There is no description of the “defective product” to which Mr. Iwachiw refers, the manufacturer of the products, or the injury Mr. Iwachiw is claiming was caused by the products. *See Amatulli v. Delhi Construction Corp.*, 77 N.Y.2d 525, 532 (1991). Thus, he has failed to plead sufficient facts to make out any cognizable legal theory of a defective products claim.

For all the above stated reasons, it is

ORDERED that defendants’ motions and cross-motions to dismiss the complaint, as consolidated by this Court, are granted; and it is further

ORDERED that all claims brought by plaintiff are dismissed as to each and every defendant; and it is further

ORDERED that the Judgment Clerk may enter judgment accordingly, in favor of all the defendants.



Dated: New York, New York
 February 24, 2016



Martin Schoenfeld, J.S.C