

Cedeno v Diwan

2018 NY Slip Op 33966(U)

November 19, 2018

Supreme Court, Bronx County

Docket Number: 22690/2018E

Judge: George J. Silver

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 19-A**

-----X
JASON CEDENO

Index No.: 22690/2018E

-against-

Hon. GEORGE J. SILVER

AMNA DIWAN, M.D.,

Justice Supreme Court

-----X
The following papers numbered 1 to 3 were read on this motion to dismiss (Seq. 001):

| | | |
|--|--------|---|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | No(s) | 1 |
| Answering Affidavit and Exhibits | No(s). | 2 |
| Replying Affidavit and Exhibits | No(s). | 3 |

In this medical malpractice action, defendant AMNA DIWAN, M.D. ("Dr. Diwan"), moves for an order dismissing plaintiff JASON CEDENO's ("plaintiff") summons and complaint on statute of limitations grounds. Plaintiff opposes the motion.

BACKGROUND AND ARGUMENTS

This action is premised on care and treatment rendered by Dr. Diwan at Lincoln Medical Center ("Lincoln"), a New York City Health and Hospitals Corporation facility, from January 7, 2013 to May 16, 2013. Plaintiff alleges, in relevant part, that his injuries occurred while he was an infant, thus entitling him to a toll of the relevant statute of limitations. Dr. Diwan was an employee of Lincoln at the time of plaintiff's treatment. She left her employment at Lincoln in October 2015 and has been practicing in Massachusetts since November 2015. The summons and complaint in this action was filed on March 7, 2018, and served on Dr. Diwan in Massachusetts through her office staff on March 19, 2018. The relevant statute of limitations for a personal action against an employee of the New York City Health and Hospitals Corporation, where Dr. Diwan worked at the time of the alleged malpractice in this action, is one (1) year and ninety (90) days (*see* Unconsolidated Laws §7401(2); General Municipal Law §50-k).

Since plaintiff's last date of treatment was on May 16, 2013, defendant states that the statute of limitations would have ordinarily expired in August 2014. In this case, however, defendant concedes that since plaintiff was a minor at the time of the alleged malpractice, the statute of limitations was tolled. Plaintiff was 15-years-old at the time of Dr. Diwan's treatment. Even if plaintiff is afforded the benefit of the infancy toll, defendant argues in support of the instant motion that plaintiff's infancy toll ended when plaintiff turned 18 on September 24, 2015 (*see* CPLR §105[j]). Accordingly, defendant argues that plaintiff's time to file an action against Dr. Diwan was extended to December 23, 2016, or 1 year and 90 days after the infancy toll ended (CPLR §208; Unconsolidated Laws Section §7401[2]). Since plaintiff did not commence this action until March 7, 2018, defendant contends that this action is barred by the states of limitations even if plaintiff is afforded the benefit of the infancy toll.

In opposition, plaintiff highlights that plaintiff commenced a separate lawsuit under Index No 20971/2015E ("separate action") against New York City Health and Hospitals Corporation based on

Motion is Respectfully Referred to Justice: _____
Dated: _____

the same malpractice alleged in the instant lawsuit. In that separate action, plaintiff states that he was unable to depose Dr. Diwan, because New York City Health and Hospitals Corporation refused to produce Dr. Diwan on account of the fact that she was no longer in their employ and thus, not under their control, at the time of plaintiff's request. In light of New York City Health and Hospitals Corporation's representation, plaintiff decided to commence the instant lawsuit solely against Dr. Diwan. Plaintiff states that he did so for the expressed purpose of deposing Dr. Diwan. Dr. Diwan has retained the same counsel as counsel for New York City Health and Hospitals Corporation in the separate action. In light of this, plaintiff argues that Dr. Diwan is under New York City Health and Hospitals Corporation's control, and should be produced for a deposition in the separate action. If Dr. Diwan is produced in connection with the separate action, plaintiff states that he will dismiss the instant action without prejudice. In the event that Dr. Diwan refuses to appear for a deposition in connection with the separate action, plaintiff submits that the instant motion should be denied. Notably, plaintiff does not advance a legal rationale for why denial of the instant motion would be warranted if Dr. Diwan does not appear for a deposition in the separate action.

In reply, Dr. Diwan states that plaintiff's opposition neglects to mention the fact that the statute of limitations in this action expired on December 23, 2016, prior to his request for a non-party deposition. Dr. Diwan further states that plaintiff also does not mention that he was aware of her role in his treatment from the inception of the separately filed lawsuit. In light of these facts, Dr. Diwan contends that plaintiff's request for a non-party deposition is irrelevant to the issue pending before the court because plaintiff's time to serve Dr. Diwan with a summons and complaint expired on December 23, 2016, 1 year and 90 days after his infancy ended (*see* CPLR§ 208; Unconsolidated Laws Section § 7401[2]; CPLR§ 105[j]). In Dr. Diwan's view, plaintiff's present request for her deposition in connection with the separate action does not extend his time to serve a timely summons and complaint in connection with the instant action. Dr. Diwan also takes issue with plaintiff's argument that she has now come under the control of New York City Health and Hospitals Corporation because the same attorneys represent her in connection with this motion. To be sure, counsel for both Dr. Diwan and New York City Health and Hospitals Corporation states that its representation of Dr. Diwan in this action is to dismiss the complaint on the ground that the statute of limitations expired, not to produce her for a deposition. Indeed, counsel for both Dr. Diwan and New York City Health and Hospitals Corporation submits that plaintiff's request for a non-party deposition of Dr. Diwan in connection with the separate action, is an abstracted issue from the grounds for dismissal advanced in connection with this action. As such, Dr. Diwan reiterates her position that dismissal of the instant action is warranted.

DISCUSSION

General Municipal Law § 50-i requires that any cause of action for negligence committed by a municipal defendant, such as New York City Health and Hospitals Corporation, must be commenced within one year and ninety days after the happening of the event upon which the claim is based. "Under this section the period runs not from the accrual of the cause of action but rather from the happening of the event" (*see Doyle v 800 INC.*, 72 AD2d 761, 762 [1979]).

Moreover, section 7401(2) of New York's Unconsolidated Laws provides that "[e]xcept in an

action for wrongful death, an action against the [New York City Health and Hospitals Corporation] for ... personal injuries, alleged to have been sustained, shall not be commenced more than one year and ninety days after the cause of action thereof shall have accrued ...” A cause of action accrues when a plaintiff first may successfully maintain a suit based on that cause of action (*see Witherbee v Republic Steel Corp.*, 106 AD2d 734, 735 [1984]).

Generally, the aforementioned principles can be applied without a caveat (*see Plummer v. New York City Health & Hosps. Corp.*, 98 NY2d 263 [2002], *citing Nykorchuck v. Henriques*, 78 NY2d 255, 258-259 [1991]). However, CPLR § 208 provides that where the “person entitled to commence an action is under a disability because of infancy ... at the time the cause of action accrues,” the statute of limitation is tolled for the period of disability.

Additionally, the one-year and ninety day statutory period applies also to actions against the municipality's employees (*see Alessi v Nassau Co.*, 100 AD2d 561, 562 [2d Dept. 1984]).

In the instant action, it is undisputed that plaintiff was a minor at the time of the alleged malpractice, thus tolling the applicable statute of limitations. However, since plaintiff was 15-years-old at the time of Dr. Diwan's treatment, plaintiff could only avail himself of the infancy toll for three years or until plaintiff turned 18 on September 24, 2015 (*see CPLR §105[j]*). Accordingly, any action by plaintiff brought against Dr. Diwan should have been brought no later than December 23, 2016, which was 1 year and 90 days after the infancy toll expired (CPLR §208; Unconsolidated Laws Section §7401[2]). Since plaintiff did not commence this action until March 7, 2018, it is axiomatic that this action is time-barred (*see Bosone v County of Suffolk*, 274 AD2d 532, 533 [2d Dept. 2000]; *Wright v City of Newburgh*, 259 AD2d 485, 486 [2d Dept. 1999]).

Furthermore, it is undisputed that Dr. Diwan was an employees of New York City Health and Hospitals Corporation at all relevant times and, as such, is entitled to the protections of the provisions of General Municipal Law § 50-i and Unconsolidated Laws § 7401(2).

Notwithstanding the posture of the instant action, it is worth noting that despite the fact that this action is time-barred, plaintiff can still pursue a deposition of Dr. Diwan in the separate action, and make any applications that may be appropriate if New York City Health and Hospitals Corporation refuses to produce Dr. Diwan or if Dr. Diwan decides not to appear for a deposition on her own volition following service or a subpoena or other request to appear.

Accordingly, it is hereby

ORDERED that Dr. Diwan's instant motion is granted insofar as this action is dismissed as time-barred; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly dismissing this case; and it is further

ORDERED that the separate action filed under Index № 20971/2015E remains pending.

The foregoing constitutes the decision and order of the court.

Dated: 11/19/18

Hon. *George J. Silver*
GEORGE J. SILVER, J.S.C.

- 1. CHECK ONE.....
- 2. MOTION IS.....
- 3. CHECK IF APPROPRIATE.....

- CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- GRANTED DENIED CROSS-MOTION DENIED OTHER
- SETTLE ORDER SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT