

Sanchez v City of New York

2024 NY Slip Op 32272(U)

July 2, 2024

Supreme Court, Kings County

Docket Number: Index No. 507009/2022

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 15 of the Supreme Court of the State of NY,
held in and for the County of Kings, at the Courthouse, at 360
Adams Street, Brooklyn, New York, on the 2nd day of July 2024.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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AIXA COLLADO SANCHEZ aka AIXA SANCHEZ, as
administrator of the estate of ERICA REYES, deceased, and
AIXA COLLADO SANCHEZ aka AIXA SANCHEZ,
individually,

Plaintiff,

DECISION & ORDER

Index No. 507009/2022

Mo. Seq. 1 & 2

-against-

CITY OF NEW YORK, THE NEW YORK CITY POLICE
DEPARTMENT, STEPHANIE TACOPINA, PH.D, POLICE
OFFICERS, OFFICIALS AND EMPLOYEES JOHN/JANE
DOES #1-15, whose names are presently unknown, THE NEW
YORK AND PRESBYTERIAN HOSPITAL and EMPLOYEES
JOHN/JANE DOES #1-5, SILVIA SLOAN, M.D.,
NORTHWELL HEALTH, STATEN ISLAND UNIVERSITY
HOSPITAL and EMPLOYEES JOHN/JANE DOES #1-5 ,

Defendants.

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HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review:

NYSCEF #s: 41-46; 54-61

Plaintiffs, Aixa Collado Sanchez (“Sanchez”), as administrator of the estate of Erica Reyes, deceased, and Sanchez individually, move (Seq. No. 1) for an Order, pursuant to CPLR 2004, granting leave to file a late Certificate of Merit and Notice of Medical Malpractice Action pursuant to CPLR 3012-a and 3406.

Defendants The New York and Presbyterian Hospital (“NYPH”) and Silvia Sloan, M.D. (“Dr. Sloan”), cross move (Seq. No. 2) for an Order, pursuant to CPLR 3012-a and 3406, to dismiss Plaintiff’s Complaint as to

the moving defendants for failure to timely serve a Notice of Medical Malpractice Action and a Certificate of Merit.

On March 9, 2022, Plaintiff commenced this action to recover for the wrongful death of Erica Reyes, alleging the Defendants' wrongful conduct related to medical and psychiatric treatment was a cause of her death on March 13, 2020. Plaintiff filed a Certificate of Merit on July 20, 2022, approximately four months after the Complaint, before receiving treatment records pertaining to the decedent's care with NYPH and Dr. Sloan.

On May 17, 2022 and August 2, 2022, NYPH and Sloan filed their respective answers. The period to file a Notice of Medical Malpractice Action expired on October 1, 2022, sixty days after the issue was joined.

On January 10, 2023, plaintiff filed a notice to produce copies of the relevant NYPH medical records. On July 11, 2023, defense counsel emailed a link to the records to the plaintiff's counsel. However, the plaintiff's counsel claims he could not open the file and thus did not receive the complete records.

On May 25, 2023, plaintiff filed the instant motion, seeking an order permitting the filing of a late Certificate of Merit and Notice of Medical Malpractice Action. This motion was initially erroneously assigned and was placed on the undersigned justice's calendar for the first time on June 17, 2024.

CPLR 3012–a (a) provides that,

“[i]n any action for medical, dental, or podiatric malpractice, the complaint shall be accompanied by a certificate executed by the attorney for the plaintiff, declaring that . . . the attorney has reviewed the facts of the case and consulted with at least one licensed [physician, dentist, or podiatrist] who is licensed to practice in this state or any other state and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is reasonable basis for the commencement of such action.”

“The purpose behind CPLR 3012–a, as stated when the statute was enacted in 1986, is to deter the commencement of frivolous actions by counsel on behalf of their clients, and to thereby reduce the cost of medical malpractice litigation and medical malpractice insurance premiums” (*Rabinovich v. Maimonides Medical Center*, 179 AD3d 88, 91 [2d Dept. 2019]). The certificate that the attorney consulted with a licensed medical professional must accompany the Complaint, or if the attorney is unable

to timely obtain the required consultation, they may submit a certificate declaring so under CPLR 3012-a(a)(2) or (3).

Additionally, in cases sounding in medical malpractice, plaintiffs must file a Notice of Medical Malpractice Action pursuant to CPLR 3406(a). The notice requirement is a rule of calendar practice that initiates the pre-calendar conference required by CPLR 3406(b) (*see generally Tewari v. Tsoutsouras*, 75 NY2d 1 [1989]). The notice must be filed no more than sixty days after the issue is joined. Failure to timely file the CPLR 3406(a) notice is not analogous to a pleading default, and the time period may be extended under CPLR 2004 “upon such terms as may be just and upon good cause shown” (*id.*, at 8). “In considering the motion, the court may properly consider factors such as the length of the delay, whether the opposing party has been prejudiced by the delay, the reason given for the delay, whether the moving party was in default before seeking the extension, and, if so, the presence or absence of an affidavit of merit” (*id.*, at 11-12).

Plaintiff submits an attorney affirmation stating that the complaint was filed without a Certificate of Merit because the plaintiff’s requests for medical records were ignored by defendants. Plaintiff’s counsel also states he consulted a psychiatrist to ascertain whether the action was meritorious before filing the Complaint, but the psychiatrist was forced to infer negligence based on the factual setting provided given the lack of relevant medical records.

The defendants counter that the medical record authorization attached to plaintiff’s notice to produce records filed on January 10, 2023, was incomplete, and could not be processed until July 11, 2023, after the correct authorization was received on June 6, 2023. The defendants ask to the court to deny plaintiff’s motion because the plaintiff did not provide a reasonable excuse for failing to file a Certificate of Merit with the Summons and Complaint, and this case does not fall within any exception to the general rule provided in CPLR 3012-a. Defendants place blame for the delay in obtaining the medical records on the part of Plaintiff’s counsel and deny ignoring the demand or stonewalling the plaintiff. Additionally, the defendants assert that Plaintiff’s counsel failed to review the facts of the case before consulting a physician because counsel did not have the proper medical records, and Defendants claim this as evidence that Plaintiff’s counsel did not have the proper basis to file a Certificate of Merit.

Moreover, moving defendants argue they would be prejudiced if forced to proceed with depositions regarding medical care and treatment of the plaintiff, because they claim plaintiff continues to deny the allegations in this matter sound in medical malpractice or plaintiff failed to provide the requisite proof to assert such claims.

After a thorough review of the statutes and rules, this court discerns no authority to dismiss the plaintiff's complaint for a failure to comply with the notice component under CPLR 3406(a). This court has the power to "grant the sanction of dismissal only when it has been authorized either by the Legislature or by court rules consistent with existing legislation" (*Tewari*, at 7). "The statute merely confers discretion upon the courts to either grant or deny a motion to extend time limits set in the CPLR, including the 60-day time period set forth in CPLR 3406(a)" (*id.*, at 9). In *Tewari*, the Court of Appeals held that an unexcused eight-month delay in filing the Notice of Medical Malpractice Action does not require dismissal of the Complaint. Here, Plaintiff sought to file the notice approximately seven months late. Like in *Tewari*, dismissing the Complaint on these grounds would act as a severe and unauthorized sanction on the plaintiff (*id.*, at 7).

The Second Department has similarly held that CPLR 3012-a "does not contain any language authorizing the dismissal of an action for failure of the plaintiff's attorney to file a certificate of merit" (*Rabinovich*, at 95). Further, the Court accepts the Plaintiff's reasons for the delay in filing a Certificate of Merit and rejects the moving defendants' argument that they will be prejudiced if forced to proceed with depositions regarding medical care and treatment of the plaintiff. The statute does not mandate dismissal of the Complaint, but vests discretion in the court to extend the time fixed by any statute under CPLR 2004. Law office failure on the part of the plaintiff's counsel can stand alone as good cause for granting a motion for an extension (*see* CPLR 2005; *Rabinovich*, at 96).

Notwithstanding, the Court finds that a proper Certificate of Merit has not yet been filed, because Plaintiff's counsel admitted they did not have sufficient medical records in July 2022, and the Certificate of Merit submitted at that time is therefore deficient.

Since the moving defendant had also sought in their underlying motion, "such other and further relief as this court may deem just, proper and reasonable," the proper remedy at this stage is for this Court to deem the Notice of Medical Malpractice Action, filed as an exhibit to this motion, timely (*see Tirado v. Miller*, 75 AD3d

153, 158 [2d Dept 2010]) and further directs Plaintiff to file a new Certificate of Merit within 60 days of the entry of this decision in NYSCEF.

Accordingly, it is hereby:

ORDERED that Plaintiff's motion (Seq. No. 1) is **GRANTED TO THE EXTENT** that the Notice of Medical Malpractice Action pursuant to CPLR 3406 is deemed filed nunc pro tunc; and it is further

ORDERED that Plaintiff shall file a Certificate of Merit pursuant to CPLR 3012-a within 60 days of entry of this Order to NYSCEF, and that Certificate of Merit shall be deemed timely; and it is further

ORDERED that the moving defendants' cross-motion (Seq. No. 2) to dismiss Plaintiff's Complaint for failure to serve a Notice of Medical Malpractice Action or accompanying Certificate of Merit pursuant to CPLR 3406(a) and 3012-a is **DENIED**.

This action shall be scheduled for a compliance conference in the Central Compliance Part on Thursday, September 26, 2024.

This constitutes the decision and order of this Court.¹

ENTER.



Hon. Consuelo Mallafré Meléndez

J.S.C.

¹ This decision was drafted with the assistance of legal intern Nicholas D'Amato, Brooklyn Law School.