

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

INDEX NO.: 33683-12

PRESENT:

HON. DANIEL MARTIN

Motion Date: 1/30/13

Submitted: 5/4/13

Motion Sequence No.: 01 -motD

**ESTATE OF SHANNA GILBERT BY
MARI GILBERT, ADMINISTRATRIX,
and MARI GILBERT,**

Plaintiffs,

-against-

**CHARLES PETER HACKETT, D.O.,
a/k/a C. PETER HACKETT, D.O.,**

Defendants.

PLAINTIFFS' ATTY:

John Ray, Esq.

122 N. Country Road

P.O. Box 5440

Miller Place, NY 11764

DEFENDANTS' ATTY:

O'Rourke & Hansen, PLLC

235 Brookside Drive

Hauppauge, NY 11788

The following named papers have been read on this motion:

Notice of Motion/Order to Show Cause	X
Cross-Motion	
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendant's motion to dismiss the complaint herein pursuant to CPLR 3211(a) as set forth in his notice of motion is decided as follows.

Plaintiff commenced the instant action seeking damages with respect to some 15 causes of action. Defendant now moves to dismiss the complaint pursuant to CPLR 3211(a) setting forth various reasons for that section's application to the causes of action alleged. The court will adopt the order in which the defendant addressed his requests and will address the plaintiffs' opposition thereto.

Defendant initially moves pursuant to 3211(a) 5 with respect to causes of action numbered 1,3,4,5 and 6 on the ground that those causes of action sound in medical malpractice and the filing of the complaint was outside the applicable statute of limitations. Similarly, he argues that causes of action numbered 2 and 8 are derivative actions arising from the medical malpractice and are thus also time barred. In opposition plaintiffs contend that the matter was commenced by the filing of a summons with notice which was within the statute of limitations, in fact, on the last day to file same and if there be any question as to the calculation, the filing occurred during the time that our governor had declared a tolling of such statutes due to super storm Sandy. The complaint was filed later and the date stamp used by defendant in his argument was the day that document was filed but

not the day the action was commenced. Thus, plaintiffs have shown that the lawsuit was timely served and defendant's motion on those grounds is denied.

Defendant argues that causes of action numbered 10,11,12,13,14 and 15 sound in intentional tort and are thus controlled by a one (1) year statute of limitations and are again are time barred. Plaintiffs argue in opposition that with respect to those causes of action (and as related later, to the cause or causes of action for wrongful death) that the time of death is not determined, there being only a time of discovery of the deceased's body, and thus there is no time period from which to calculate the time restrictions in question. This, however, is belied by his own complaint wherein the only time period alleged with regard to contact between the deceased and the defendant is on or about May 1, 2010 and further by paragraph 19 wherein it is stated, "upon information and belief, on or about May 1, 2010.....Shannon Gilbert met her death." As that is the case, the court will determine that the wrongful intentional acts occurred prior thereto. Further, once the movant has come forward with evidence sufficient to support his assertion, it is incumbent upon the plaintiffs to set forth facts sufficient to defeat his motion. Thus, causes of action numbered 10,11,12,13,14 and 15 are dismissed.

Defendant next asks that causes of action numbered 5 and 6 be dismissed based on the assertion that defendant's acts were grossly negligent and intentional and at least as to the choice of the concept of intentional actions any such actions are time barred. Opposition does not specifically address that application except as noted above with regard to other intentional torts and thus as to the concept and allegation of intentional acts contained therein the motion is granted and the court directs that the complaint be amended to reflect only gross negligence.

After arguing that the 7th cause of action should be dismissed presumably for failure to state a cause of action, defendant next moves, in the alternative, under that subdivision to dismiss various causes of action for that failure. Here unfortunately his argument seems to devolve into one more appropriately made under CPLR 3212. With regard to the 7th cause of action, while correctly stating in paragraph 12 of his attorney's affirmation that "in a breach of fiduciary duty cause of action it must be alleged that Plaintiff(sic) is a fiduciary of the deceased.", he then goes on to argue that he has evidence that no such relationship existed and same cannot be proven. In fact, a review of the complaint indicates that such a relationship was alleged and thus the complaint is sufficient.

Thereafter he formally alleges that the motion is directed at 3211(a)5 but again seems to make an argument more appropriately made pursuant to CPLR 3212. Even though plaintiffs would appear to relish the opportunity to argue same and submit papers replete with facts to dispute the factual allegations made in the defendant's supporting papers, as an answer has not been served such a motion is premature and is denied with leave to resubmit pursuant to CPLR 3212 at a more appropriate time. The court will then reserve for a later time its determination of whether "plaintiff's entire complaint is a series of bald allegations without a scintilla of support.". However baseless the defendant believes they are, the allegations are made and thus defeat a motion made pursuant to 3211(a)5.

Defendant does however thereafter move as against plaintiffs' 9th cause of action on more traditional 3211 grounds. His attorney argues that the false representations are not pleaded specifically enough to meet the legal requirements for such a cause of action. Although to meet such a requirement dictates a review of the entire complaint and the specific misrepresentations are not found within the paragraphs delineated as the 9th cause of action, the court finds that, taking the complaint as a whole, the allegations found therein are sufficiently specific to meet the pleading requirements established by legal precedent.

Next, defendant moves as against the cause or causes of action for wrongful death on two grounds: temporal and statute of limitations. The court readily acknowledges it does not understand what defendant means when his attorney states "plaintiff does not meet the temporal requirement for asserting a wrongful death claim" as it is used in the context of the sentence. If it is meant to suggest the requirement of time then the court wonders how the statute of limitations argument could be worse. In any event, as to the application of the statute of limitations, defendant does properly assert that the action was commenced outside of the two year limitation. Plaintiffs' argument in opposition, as previously noted, that the time of death is not determined, there being only a time of discovery of the deceased's body, and thus there is no time period from which to calculate the time period in question, is belied by his own complaint which in paragraph 19 states "upon information and belief, on or about May 1, 2010.....Shannon Gilbert met her death." Thus, those causes of action are dismissed.

Accordingly, based upon the foregoing, defendant's motion is granted to the extent herein noted and is otherwise denied. Defendants shall answer plaintiff's complaint by January 15, 2014. The matter is hereby set down for a preliminary conference on March 18, 2014.

So Ordered.

Dated: December 10, 2013
Riverhead, NY


HON. DANIEL MARTIN, A.J.S.C.