

No. 21-894

IN THE

Supreme Court of the United States

HELEN GARDNER,

Petitioner,

v.

NEW YORK PRESBYTERIAN BROOKLYN METHODIST HOSPITAL,

Respondent,

and

KARINA M. DSOUZA, M.D., LIEN KHANG P. TRAN, M.D.,

THOMAS CHEN, M.D., JOSIF SHOLOMON, M.D.,

ALANA SHOLOMON, D.O., DR. JORDAN, ET AL.,

Defendants.

*On Petition for a Writ of Certiorari to the
Supreme Court of the State of New York*

**BRIEF OF RESPONDENT NEW YORK
PRESBYTERIAN BROOKLYN METHODIST
HOSPITAL IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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January 18, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the Respondent, New York Presbyterian Brooklyn Methodist Hospital, certifies that, New York-Presbyterian Brooklyn Methodist Hospital, discloses that it is a New York not-for-profit corporation and is licensed by the State of New York pursuant to Article 28 of the Public Health Law.

The sole corporate member of New York-Presbyterian Brooklyn Methodist Hospital is NYP Community Programs, Inc. The sole corporate member of NYP Community Programs Inc. is The New York and Presbyterian Hospital

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COUNTER STATEMENT OF QUESTIONS PRESENTED

No aspect of the issues involved in this case warrant Writ of Certiorari, as the matter does not involve any federal question addressed to Respondent. The real questions presented here are as follows:

- i. Whether Writ of Certiorari criteria is met, sufficient to warrant this Court's review of the Supreme Court of the State of New York's application of New York State practice rules, Civil Practice Law and Rules, in dismissing Petitioner's action for failure to meet the procedural and jurisdictional requirements, including untimely commencement and service of process.
- ii. Whether Writ of Certiorari considerations are implicated, where Petitioner's application is based issues that were never before the courts below, and are only addressed to entities that are not parties to the within action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional provisions that apply to this matter involving state-based claims against a state-based Respondent.

INTRODUCTION

Petitioner, Helen Gardner (hereinafter “Petitioner”) commenced this action seeking monetary damages for alleged wrongful death relative to alleged medical treatment rendered by Respondent, New York Presbyterian Brooklyn Methodist Hospital (hereinafter “Respondent” or “Hospital”), in the Supreme Court of the State of New York, Kings County. Petitioner made numerous statutory errors in her filing, which rendered her attempts jurisdictionally defective, including failing to properly commence the action and failure timely effectuate service of process, followed by failure to appear at mandatory court appearances, and subsequent failures in attempts to appeal to the Appellate Division. Petitioner’s multiple failures to meet the state-based procedural and jurisdictional requirements resulted in dismissal of the action. No aspect of the defects that led to dismissal implicates any federal question or any aspect of the Constitution of the United States.

It is respectfully submitted that Petitioner has failed to articulate a single issue that warrant’s this Courts’ review. There is no compelling reason why this honorable Court should review the multiple

procedural and jurisdictional defects that resulted in the dismissal of this matter, which involves solely and exclusively matters of New York State procedural and jurisdictional rules. The dismissal by the Supreme Court of the State of New York, the state's trial court level, was pursuant to New York State's Civil Practice Law and Rules (CPLR), rules that are well-established in New York State's jurisdiction and which are the subject of conflict within the state. No aspect of this matter involves a conflict with other courts of the United States, or any important federal question.

To the extent Petitioner asserts claims of violation of her constitutional due process rights, and rights afforded under Section 1981 of the Civil Rights Act, said arguments are entirely misplaced in this action. First, said claims were never raised and/or articulated before the New York State courts. Secondly, the claims appear to be addressed to the New York State Courts, New York State's Office of Court Administration, or Justice Marsha L. Steinhardt, non-parties to the within action. Petitioner did not name the New York State Courts, Office of Court Administration or Justice Steinhardt, as a party defendant. Finally, to the extent the claims are addressed to the New York State Courts or New York State's Office of Court Administration, the courts and the justices of the court are subject to judicial immunity, and thus, any potential claim against them are barred.

STATEMENT OF THE CASE

This action was purportedly commenced by the filing of Summons & Complaint at an unknown date in 2017, with the Clerk of the Court, Kings County. Petitioner never paid the requisite filing fee. Instead, she made an application for a waiver of the filing fee, and same was denied by Order of the Supreme Court, Kings County, dated November 20, 2017. Petitioner failed to pay the requisite filing fee following the denial of her application and the matter was marked administratively disposed for failure to complete the filing with the applicable fees.

Thereafter, Petitioner served a copy of the Summons and Complaint of the disposed matter upon Respondent on or about June 25, 2018. The Summons was not dated, and the Complaint was dated November 17, 2017. Upon information and belief, service was never effectuated upon any other defendant.

In her Complaint, Petitioner asserted claims sounding in wrongful death and medical malpractice. Petitioner alleged that Respondent was negligent in misdiagnosing Petitioner's decedent, daughter Sharae Gardner, causing a delayed treatment of septic shock, ultimately causing her death. The Complaint alleged dates of admission of November 12 through November 15, 2015.

Respondent moved, pursuant to Rule 3211 of New York Civil Procedures Law and Rules, permitting pre-answer motions to dismiss, and pursuant to Rule 306-b of the CPLR, requiring service of a summons and complaint within 120 days from commencement of an action, for an order dismissing the complaint as

untimely/improperly commenced and failure to timely effectuate service. It was demonstrated that the action was not properly commenced in conformity with the requisite filing fee, pursuant to CPLR 304 and 306-a. (New York Court of Appeals precedent establishes that the procedural deficiency in failing to file the requisite filing fee warranted dismissal. *See, e.g. Frye v. Village of Tarrytown*, 89 N.Y.2d 714 (1997); *Harris v. Niagara Falls Board of Education*, 6 A.D.3d 155 (2006).

Petitioner submitted no opposition to Respondent's motion to dismiss, nor appeared on the return date and oral argument on the motion to dismiss, and the action was dismissed by Justice Debra Silber by Order dated September 13, 2018.

Petitioner thereafter moved to vacate the judgment entered on default, but failed to include the requisite showing of merit. The motion was assigned to Justice Marsha L. Steinhardt, who gave Petitioner multiple opportunities to provide an affidavit of merit in support of her motion to vacate. However, Petitioner never provided the court with an affidavit of merit. As demonstrated below, in New York, a motion to vacate a dismissal must be accompanied by a showing of merit, which requires an affidavit of a physician in the case of claims sounding in medical practice. *See, e.g., Mosberg v. Elahi*, 80 N.Y.3d 941 (1992). The trial Court, (Justice Steinhardt), therefore, denied Petitioner's motion to vacate the dismissal, by Decision and Order dated July 15, 2019.¹

¹ See Petitioner's Appendix "D."

Petitioner's papers cite to Rule 3012-a (f) of the CPLR, arguing that it serves as an exception to the CPLR 3012-a requirement that an action for medical malpractice be accompanied by a certificate of merit, due to her *pro se* status. Said New York State Rule is not a proper basis for Certiorari, but in any event, Petitioner is citing to a Rule that had no role in the dismissal of her claims by the New York State Courts.

In New York, a motion to vacate a dismissal must be accompanied by a showing of merit. In an action for alleged medical malpractice, a showing of merit must be based on the statement of a medical expert. *See, Mosberg v. Elahi*, 80 N.Y.3d 941 (1992) (Court of Appeals of the State of New York held that a party opposing a motion to dismiss for failure to prosecute is obligated to make an evidentiary showing sufficient to demonstrate a meritorious cause of action, which in a medical malpractice action requires an affidavit of a physician); *King v. Dobriner*, 106 A.D.3d 1053 (2d Dept. 2013); *Dominguez v. Jamaica Medical Center*, 72 A.D. 3d 876 (2010).

Instead, Petitioner has consistently mistaken the CPLR 3012-a(a) certificate of merit requirement (and its exception -CPLR 3012-a(f)) with the requisite showing of merit *via* the use of an affidavit of merit, that is required, pursuant to the common law, in support of a motion to vacate a prior dismissal on default. The failure to include an affidavit of merit was the basis of the trial Court's denial of Petitioner's motion to vacate the dismissal. *See* Petitioner's Appendix "D"; *see also Mosberg v. Elahi, supra; King v. Dobriner, supra; Dominguez v. Jamaica Medical Center, supra.*

Petitioner appealed Judge Steinhardt's order, by Notice of Appeal dated October 1, 2019 and thereafter moved before the Appellate Division, Second Department, for leave to proceed as a poor person in perfecting her appeal. Petitioner's motion for poor person relief was granted by the Appellate Division, Second Department, by Decision and Order dated July 31, 2020. Appendix "D".

Petitioner thereafter sought to perfect her appeal by filing of improper papers with the Appellate Division, and same were rejected by the court, with instructions to re-file with proper papers. Petitioner failed to cure the defects of her filing, and the matter was deemed dismissed pursuant to 22 NYCRR 1250.10(a), for failure to timely perfect. Petitioner thereafter moved to vacate the dismissal, and same was denied by the Appellate Division, Second Department, by Decision and Order dated October 30, 2020. Appendix "C".

Petitioner sought leave to appeal to the Court of Appeals of the State of New York, and leave was denied by Decision and Order entered March 30, 2021. Appendix "B".

Petitioner moved for reargument of the motion for leave to appeal to the Court of Appeals, and said motion was denied by Decision and Order entered September 15, 2021. Appendix "A."

The within Petition for Writ of Certiorari ensued.

ARGUMENTS

I. THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI, WHERE THE QUESTION PRESENTED DOES NOT MEET THIS COURT'S CRITERIA GOVERNING REVIEW ON CERTIORARI

The Petition does not meet this Court's criteria for consideration governing review on Certiorari, as required by Court Rule 10. No aspect of the issues involved in this matter are in the character of the reasons the Court considers in granting petitions for Writ of Certiorari.

The only real issue in this matter is whether it was proper for the trial court to dismiss the action as procedurally and jurisdictionally defective, followed by denial of Petitioner's motion for vacatur of the dismissal, where Petitioner failed to submit an affidavit of merit, despite being given multiple opportunities to do so. Petitioner's failure to oppose the motion to dismiss the action as untimely, followed by her failure to submit any proof of merit to her claims, does not involve any matter an important federal question, in any respect.

What is clear from the history of this matter is that Petitioner has failed to properly prosecute her claims by initially failing to properly commence her action, by failing to complete the filing by filing the requisite filing fee. This resulted in administrative disposition of the matter.

It was not until Petitioner attempted to effectuate service of process, after the expiration of the applicable

time period for service of process under the CPLR 306-b, that the matter was again place before the trial court for review. Rule 306-b of the CPLR provides, in relevant part:

Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding

Petitioner initiated the filing of the action by the defective filing in the Office of the Kings County Clerk on November 17, 2017. Petitioner did not attempt service of process until June 26, 2018, more than one hundred and twenty days after attempted filing.

Petitioner then proceeded with additional procedural and jurisdictional deficiencies, by failing to timely serve the Summons and Complaint, and failing to oppose Respondent's pre-answer motion to dismiss.

After Respondent's unopposed motion to dismiss was granted, Petitioner's motion to vacate the dismissal was deficient, by lacking substantiate her motion for vacatur of the dismissal with the requisite affidavit of merit.

Petitioner's attempt to challenge the denial of her motion to vacate the dismissal was again riddled with procedural errors. Petitioner failed to timely and properly perfect her appeal.

Clearly, no aspect of the procedural and jurisdictional defects that led to dismissal and affirmance of the dismissal, involve any federal question that warrants this Court's review.

All four departments of the Appellate Division of the State of New York adhere to the rule that a motion to vacate a default, in addition to establishing a reasonable excuse for the default, must be accompanied by an affidavit of merit. *See, e.g., Capital One N.A. v. McCormack*, 183 A.D.3d 644 (2d Dept. 2020); *Jackson v. Kothuru*, 183 A.D.3d 707 (2d Dept. 2020); *U.S. Bank N.A. v. Thompson*, 179 A.D.3d 497 (1st Dept. 2020); *Desuze v. Johnson*, 154 A.D.3d 736 (2d Dept. 2017); *Loucks v. Klimek*, 108 A.D.3d 1037 (4th Dept. 2013); *DeRosario v. New York City Health & Hosps. Corp.*, 22 A.D.3d 270 (1st Dept. 2005).

Petitioner, in a clear misunderstanding of the law, argues that Judge Steinhart violated her rights as a *pro se* plaintiff by affirming the dismissal due to her failure to include a certificate a merit. Petitioner relies on CPLR 3012-a(f), which applies to commencement of an action. That rule was not at issue in this matter, nor played any role in the dismissal and affirmance of the dismissal.

Instead, the denial of Petitioner's motion to vacate the dismissal was based on her failure to meet the common law requirement of a showing of merit. Petitioner makes no reference to the rule relied on by Judge Steinhart, requiring a showing of merit in support of a motion to vacate a default.

Regardless, the entirety of Petitioner's argument involves (erroneously) the alleged misapplication of a New York State Rule. No federal question has been articulated relative to the New York State court's dismissal of the action, for failure to properly and timely commenced, followed by the denial of Petitioner's deficient motion to vacate the default.

This court should, therefore, deny the Petition for Writ of Certiorari to this Court in its entirety, as there is no federal question before this Court that necessitates Certiorari review.

II. TO THE EXTENT PETITIONER'S ARGUMENTS ARE ADDRESSED AGAINST NEW YORK STATE COURTS, NEW YORK OFFICE OF COURT ADMINISTRATION, AND/OR NEW YORK JUSTICES, THOSE ENTITIES ARE NOT PARTIES TO THE WITHIN ACTION; THE ISSUES RAISED ARE MISPLACED AND NOT BEFORE THIS COURT

Petitioner seems to assert claims against the New York State Courts/ Office of Court Administration and/or Judge Marsha L. Steinhardt, for alleged violation of her First Amendment and Fourteenth Amendment rights. These claims are not currently articulated against the Respondent, nor were they ever raised before the New York State Courts. None of the purported constitutional arguments, therefore, are properly raised on the within Petition.

Petitioner commenced an action in state court for state-based claims against Respondent.² The only causes of action articulated in the Complaint purportedly filed with the Office of the Kings County Clerk, and subsequently untimely served upon

² Plaintiff's Complaint named several individual defendants, but upon information and belief, no person or entity other than the Respondent herein, were ever served.

Respondent asserted claims sounding in medical malpractice and wrongful death.

No action has been commenced against Respondent raising the new arguments articulated for the first time on the current Petition before this Court. The alleged constitutional claims are not properly asserted in the within Petition as against Respondent.

Moreover, the claims of violations of her constitutional rights are addressed against the New York State Court and Judge Steinhardt, neither of which were ever named in the action at any point. There is no indication that the New York State Courts, Office of Court Administration, or Judge Marsha L. Steinhardt have ever been served on any action by Petitioner, much less relative to the within action.

Respondent cannot, therefore, respond to claims that are apparently addressed against other entities (non-parties) and which are not addressed against Respondent.

CONCLUSION

It is respectfully submitted that, for the
aforementioned reasons, the petition for Writ of
Certiorari should be denied.

Dated: New York, New York
January 18, 2022

Yours, etc.

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