NY CLS CPLR § 3012-a

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Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 30 Remedies and Pleading (§§ 3001 — 3045)

§ 3012-a. Certificate of merit in medical, dental and podiatric malpractice actions.

(a) In 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:

(1) the attorney has reviewed the facts of the case and has consulted with at least one physician in medical malpractice actions, at least one dentist in dental malpractice actions or at least one podiatrist in podiatric malpractice actions 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 a reasonable basis for the commencement of such action; or

(2) the attorney was unable to obtain the consultation required by paragraph one of this subdivision because a limitation of time, established by article two of this chapter, would bar the action and that the certificate required by paragraph one of this subdivision could not reasonably be obtained before such time expired. If a certificate is executed pursuant to this subdivision, the certificate required by this section shall be filed within ninety days after service of the complaint; or

(3) the attorney was unable to obtain the consultation required by paragraph one of this subdivision because the attorney had made three separate good faith attempts

with three separate physicians, dentists or podiatrists, in accordance with the provisions of paragraph one of this subdivision to obtain such consultation and none of those contacted would agree to such a consultation.

(b) Where a certificate is required pursuant to this section, a single certificate shall be filed for each action, even if more than one defendant has been named in the complaint or is subsequently named.

(c) Where the attorney intends to rely solely on the doctrine of “res ipsa loquitur”, this section shall be inapplicable. In such cases, the complaint shall be accompanied by a certificate, executed by the attorney, declaring that the attorney is solely relying on such doctrine and, for that reason, is not filing a certificate required by this section.

(d) If a request by the plaintiff for the records of the plaintiff’s medical or dental treatment by the defendants has been made and such records have not been produced, the plaintiff shall not be required to serve the certificate required by this section until ninety days after such records have been produced.

(e) For purposes of this section, and subject to the provisions of section thirty-one hundred one of this chapter, an attorney who submits a certificate as required by paragraph one or two of subdivision (a) of this section and the physician, dentist or podiatrist with whom the attorney consulted shall not be required to disclose the identity of the physician, dentist or podiatrist consulted and the contents of such consultation; provided, however, that when the attorney makes a claim under paragraph three of subdivision (a) of this section that he was unable to obtain the required consultation with the physician, dentist or podiatrist, the court may, upon the request of a defendant made prior to compliance by the plaintiff with the provisions of section thirty-one hundred of this chapter, require the attorney to divulge to the court the names of physicians, dentists or podiatrists refusing such consultation.

(f) The provisions of this section shall not be applicable to a plaintiff who is not represented by an attorney.

(g) The plaintiff may, in lieu of serving the certificate required by this section, provide the defendant or defendants with the information required by paragraph one of subdivision (d) of section thirty-one hundred one of this chapter within the period of time prescribed by this section.

History

Add, L 1986, ch 266, § 2, eff July 8, 1986; amd, L 1987, ch 507, § 1, eff July 30, 1987.

Annotations

Notes

Editor's Notes

Laws 1986, ch 266, § 1, provides:

Section 1. Legislative findings and declaration. The legislature hereby finds and declares that reforms have been enacted to restrain increases in medical and dental malpractice premiums and related costs and to prevent medical and dental malpractice. These reforms include those enacted by chapter two hundred ninety-four of the laws of nineteen hundred eighty-five and further reforms enacted by chapters of the laws of nineteen hundred eighty-six applicable to all actions for personal injury. The legislature finds, for example, that the former standard for appellate adjustment of damages in personal injury actions — i.e., whether the award is so excessive or inadequate as to shock the conscience of the court — provided for insufficient review of awards and that the new standard, enacted by a chapter of the laws of nineteen hundred eighty-six, will invite more careful appellate scrutiny.

The complete effect of some of these reforms cannot be fully measured for some time, however, due to the considerable delay currently between the malpractice event and its final determination.

In the meantime, the legislature finds and declares that upward pressures on already high malpractice premiums continue to threaten the public health by discouraging physicians and dentists from initiating or continuing their practice in New York and by contributing to the rising cost of health care as premium costs are passed along to health care consumers.

The legislature finds and declares, therefore, that additional steps must be taken in the public interest to reduce the cost of malpractice insurance, such as providing the superintendent of insurance with the authority to establish rates for medical malpractice insurance and gradually requiring the issuance of only claims-made policies which will significantly reduce physician and health care system costs in the short-run and substantially enhance the reliability and predictability of malpractice insurance rate regulation in the future.

The legislature further finds that reducing lost earnings awards to reflect the effect of income taxation will reduce the costs of the dental and medical malpractice system.

The legislature further finds that the arbitration of malpractice claims should expedite the resolution of malpractice claims and reduce costs associated with their adjudication. Accordingly, the legislature finds that statutorily authorizing health maintenance organizations to offer the alternative of arbitration to their subscribers and requiring health care professionals and entities to participate in such arbitrations will provide a significant opportunity to assess the efficacy of arbitration in the malpractice context.

The legislature further finds that establishing a mechanism for the arbitration of damages when liability is not contested and streamlining the medical malpractice panels will result in the more timely resolution of claims.

The legislature further finds that requiring certificates of merit in medical and dental malpractice actions, together with similar reforms enacted previously, will improve the quality of medical malpractice adjudications and deter the commencement of frivolous cases.

Further, the legislature finds and declares that physicians responsible for acts of professional misconduct should be subject to effective discipline and that improvements in the disciplinary

process will contribute to the protection of the public health and the reduction of the incidence of malpractice.

Commentary

PRACTICE INSIGHTS:

CERTIFICATE OF MERIT IN MEDICAL MALPRACTICE ACTIONS IS NOT GENERALLY JURISDICTIONAL

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INSIGHT

The CPLR 3012-a requirement that a plaintiff alleging medical, dental, or podiatric malpractice "shall" file a certificate of merit accompanying the complaint, with certain statutory exceptions, has generally been held not to be jurisdictional. Despite the mandatory language of CPLR 3012-a, the statutory exceptions and the absence of a statutory remedy for failure to comply make the provision relatively toothless.

ANALYSIS

Plaintiff alleging medical, dental, or podiatric malpractice shall file certificate of merit, unless statutory exception applies.

A certificate of merit must include the plaintiff's attorney's declaration that the attorney has reviewed the facts of the case and has consulted at least one licensed physician, who concluded that there is a reasonable basis for commencing the action. *See Duvernoy v. CNY Fertility, PLLC*, 202 A.D.3d 1342, 162 N.Y.S.3d 547 (3d Dep't 2022). The statute sets forth circumstances when a certificate of merit is not required, such as when the complaint relies

solely on the doctrine of *res ipsa loquitur*, when the plaintiff is proceeding *pro se*, when diligent attempts have been made to obtain a physician review but they have been unsuccessful, or when there has not been sufficient time to obtain such a review.

General consensus is that compliance with certificate of merit requirement is not a jurisdictional defect.

Some of the earliest cases construing CPLR 3012-a held that the failure to serve a certificate of merit with a malpractice complaint was grounds for dismissal. *See, e.g., Santangelo v. Raskin*, 137 A.D.2d 74, 528 N.Y.S.2d 90 (2d Dep't 1988). Today, however, it now appears that all four judicial departments are in agreement that the mere failure to serve a certificate of merit is not alone grounds for dismissal. The rationale is that procedural defaults are punishable only by means specifically authorized by statute or rule, and there is no authority to dismiss a malpractice claim for failure to serve a certificate of merit. Instead, the typical procedure is that the trial court issues an order for the plaintiff to comply with the statute within a particular time period, and if the plaintiff fails to do so the court then imposes sanctions, potentially including dismissal. *Duvernoy v. CNY Fertility, PLLC*, 202 A.D.3d 1342, 162 N.Y.S.3d 547 (3d Dep't 2022); *Rabinovich v. Maimonides Med. Ctr.*, 179 A.D.3d 88, 113 N.Y.S.3d 198 (2d Dep't 2019); *Horn v. Boyle*, 260 A.D.2d 76, 699 N.Y.S.2d 572 (3d Dep't 1999); *Bowles v. State*, 208 A.D.2d 440, 617 N.Y.S.2d 712 (1st Dep't 1994); *Dye v. Leve*, 181 A.D.2d 89, 586 N.Y.S.2d 69 (4th Dep't 1992); *Kolb v. Strogh*, 158 A.D.2d 15, 558 N.Y.S.2d 549 (2d Dep't 1990). The First Department recently joined the other Departments in not permitting automatic dismissal upon failure to serve a certificate of merit. *Fortune v. New York City Health & Hosps. Corp.*, 193 A.D.3d 138, 142 N.Y.S.3d 54 (1st Dep't 2021) (Addresses prior case law in this area and expressly overrules prior First Department precedent to the contrary. "The issues on appeal in this medical malpractice action are whether plaintiffs' noncompliance with CPLR 3012-a warrants dismissal and whether such noncompliance constitutes a pleading default, requiring the showing of a meritorious claim through the submission of an affidavit of merit and a reasonable excuse for the delay in order to obtain an extension of time to comply with the

statute. For the reasons set forth below, dismissal is not appropriate, and a plaintiff is not required to make such a showing."). *See* David L. Ferstendig, *Conflict Resolved . . . I Hope,* 727 N.Y.S.L.D. 2-3 (2021). .

Exceptions and lack of sanctions for failure to comply weaken force of requirement.

The certificate of merit requirement is a prophylactic provision that in theory helps to prevent frivolous actions from being filed. The exceptions to the requirement and lack of a statutory sanction for failing to comply weaken its force. Further, the CPLR 3012-a certificate of merit is not a substantive disclosure, and has no bearing on who will testify for the plaintiff or the theories on which the malpractice claim will be premised. In most circumstances the plaintiff's counsel will not have difficulty obtaining a certificate of merit, assuming there is a basis for the action and that it is timely. Also, there should not be a significant fee for the limited consultation contemplated by CPLR 3012-a.

Certificate of merit has little practical significance.

No tactical reason supports not filing a certificate of merit when it is required. At the same time, there is little reason to move to compel filing a certificate of merit, now that the requirement has been confirmed to be non-jurisdictional. Any later challenge to the sufficiency of the expert support for the plaintiff's case will be in the context of a summary judgment motion or a motion addressed to the sufficiency of expert disclosure under CPLR 3101(d)(1), as opposed to the basis for the certificate of merit or its presence. Consequently, the certificate of merit has little practical significance. The requirement should be followed and then ignored, but if it is not followed, the most that will come of it is a modest amount of extra work for both sides and the possibility of a sanction on the recalcitrant plaintiff's lawyer, which is reason enough to follow the requirement in the first place.

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1. Generally

Neither certificate of merit served pursuant to CLS CPLR § 3012-a nor verified bill of particulars obviates need to provide affidavit of merit from medical expert in medical malpractice action since certificate of merit merely ensures that counsel has satisfied himself that there is reasonable basis for commencement of action and bill of particulars does nothing more than amplify pleadings. George v Sastic, 166 A.D.2d 838, 563 N.Y.S.2d 178, 1990 N.Y. App. Div. LEXIS 12788 (N.Y. App. Div. 3d Dep't 1990).

In a medical or dental malpractice action, a plaintiff is required to submit a certificate along with his complaint that a medical or dental professional has reviewed the claim, and that it has merit; although the failure to include such a certificate was not independently grounds for summary judgment, the refusal of a client to adequately answer a law firm's allegation of such a failure in its motion for summary judgment regarding an underlying medical malpractice lawsuit was grounds to grant the motion. DeLeon v Sonin & Genis, 303 A.D.2d 291, 757 N.Y.S.2d 263, 2003 N.Y. App. Div. LEXIS 3197 (N.Y. App. Div. 1st Dep't 2003).

When a plaintiff has failed to comply with this section, the appropriate course for a defendant in a medical malpractice action is to request a conditional order compelling compliance, which can result in dismissal of the action at the discretion of the court. Fortune v New York City Health & Hosps. Corps., 193 A.D.3d 138, 142 N.Y.S.3d 54, 2021 N.Y. App. Div. LEXIS 1118 (N.Y. App. Div. 1st Dep't 2021).

In medical malpractice action, court would not grant physician's request for order directing plaintiff to submit medical affidavit substantiating proximate cause between her alleged mental anguish and treatment provided by physician (on ground that she had history of psychiatric problems predating treatment provided by him) since (1) physician failed to provide any authority pursuant to which requested order might be issued, and (2) CLS CPLR § 3012-a, which sets forth requirements concerning certificate of merit in malpractice actions, was not in effect at time action was commenced. Martell v St. Charles Hospital, 137 Misc. 2d 980, 523 N.Y.S.2d 342, 1987 N.Y. Misc. LEXIS 2749 (N.Y. Sup. Ct. 1987).

2. Constitutionality

CLS CPLR § 3012-a does not violate equal protection clause of either state or federal constitution since (1) purported objective in enacting statute (which was to address problems faced by health care industry as result of high medical malpractice insurance premiums) was perfectly legitimate, and requirement of certificate of merit was rationally related to goal of reducing premiums by attempting to reduce number of frivolous suits, and (2) it was rational for

statute to include only some professions on basis that they were most affected and threatened by increasing insurance premiums. Sisario v Amsterdam Memorial Hosp., 159 A.D.2d 843, 552 N.Y.S.2d 989, 1990 N.Y. App. Div. LEXIS 2937 (N.Y. App. Div. 3d Dep't), app. dismissed, 76 N.Y.2d 844, 560 N.Y.S.2d 128, 559 N.E.2d 1287, 1990 N.Y. LEXIS 2015 (N.Y. 1990).

Where plaintiff in medical malpractice action challenged validity of CLS CPLR § 3012-a under equal protection clauses of state and federal constitutions, statute would be subjected to rational basis standard of review rather than strict scrutiny since those in plaintiff's class did not constitute suspect class and statute did not interfere with exercise of fundamental right. Sisario v Amsterdam Memorial Hosp., 159 A.D.2d 843, 552 N.Y.S.2d 989, 1990 N.Y. App. Div. LEXIS 2937 (N.Y. App. Div. 3d Dep't), app. dismissed, 76 N.Y.2d 844, 560 N.Y.S.2d 128, 559 N.E.2d 1287, 1990 N.Y. LEXIS 2015 (N.Y. 1990).

CLS CPLR § 3012-a does not violate due process clause of either state or federal constitution, notwithstanding contention that plaintiff was denied access to courts because certificate of merit requirement interfered with discretion in deciding to sue, as attorney was required to first find physician who agreed that case had merit, since (1) plaintiff did not assert fundamental right, (2) there was reasonable relationship between certificate of merit requirement and objective of decreasing frivolous malpractice suits, and (3) statute was enacted to aid in goal of encouraging targeted health care providers to practice their professions in state. Sisario v Amsterdam Memorial Hosp., 159 A.D.2d 843, 552 N.Y.S.2d 989, 1990 N.Y. App. Div. LEXIS 2937 (N.Y. App. Div. 3d Dep't), app. dismissed, 76 N.Y.2d 844, 560 N.Y.S.2d 128, 559 N.E.2d 1287, 1990 N.Y. LEXIS 2015 (N.Y. 1990).

3. Actions within scope of statute

Cause of action sounded in medical malpractice, rather than in negligence, where plaintiff alleged that she was burned on forehead by lamp which was being used while she was being treated for forehead laceration; thus, plaintiff was required to serve certificate of merit under CLS

CPLR § 3012-a. Rice v Vandenebossche, 185 A.D.2d 336, 586 N.Y.S.2d 303, 1992 N.Y. App. Div. LEXIS 9385 (N.Y. App. Div. 2d Dep't 1992).

In this case where plaintiff went missing from the hospital and allegedly sustained injuries before she was found five days later, the complaint contained allegations of medical malpractice. Contrary to plaintiff's contentions, the allegations at issue essentially challenged the hospital's assessment of plaintiff's supervisory and treatment needs; thus, the conduct at issue derived from the duty owed to plaintiff as a result of a physician-patient relationship and was substantially related to her medical treatment. Jeter v New York Presbyt. Hosp., 172 A.D.3d 1338, 101 N.Y.S.3d 411, 2019 N.Y. App. Div. LEXIS 4166 (N.Y. App. Div. 2d Dep't 2019).

Requirement of CLS CPLR § 3012-a that all medical, dental and podiatric malpractice complaints be accompanied by certificate of merit executed by plaintiff's attorney based on attorney's review of facts and consultation with at least one licensed and knowledgeable physician, applies to actions in Court of Claims. Brown v State, 139 Misc. 2d 1020, 528 N.Y.S.2d 981, 1988 N.Y. Misc. LEXIS 293 (N.Y. Ct. Cl. 1988).

3.5. Applicability

Since this matter required the consideration of the professional skill and knowledge of the practitioner or the medical facility, the more specialized theory of medical malpractice applied. The issues of whether the blood donor needed additional screening, monitoring, or supervision, and whether she was at risk of falling due to a medical condition, involved the exercise of medical judgments beyond the common knowledge of ordinary persons. Rabinovich v Maimonides Med. Ctr., 179 A.D.3d 88, 113 N.Y.S.3d 198, 2019 N.Y. App. Div. LEXIS 8687 (N.Y. App. Div. 2d Dep't 2019).

4. Application to pro se plaintiffs

Pro se plaintiff is not required to serve certificate of merit under CLS CPLR § 3012-a, even if such plaintiff is attorney. Harmon v Huntington Hosp., 163 Misc. 2d 150, 619 N.Y.S.2d 492, 1994 N.Y. Misc. LEXIS 525 (N.Y. Sup. Ct. 1994).

5. Application to third party claims and counbterclaims

In action by dentist to recover fees for treatment allegedly provided to patient, court would not dismiss patient's counterclaim alleging that dentist improperly fitted her dentures so that she lost "supporting tooth structure" and suffered "serious periodontal problems" and "extreme mobility in her anterior teeth" since (1) such allegations stated claim for malpractice, and (2) requirement of attorney's certificate of merit in malpractice action does not apply to counterclaims. Koplik v Arnott, 137 Misc. 2d 944, 522 N.Y.S.2d 770, 1987 N.Y. Misc. LEXIS 2741 (N.Y. Civ. Ct. 1987).

Third-party plaintiff in medical malpractice action is not required to serve certificate of merit under CLS CPLR § 3012-a since statute was enacted to insure that plaintiff has valid cause of action; moreover, third party plaintiff's cause of action is not for malpractice but for contribution, and statute makes no reference to certificate requirement for such cause of action. White v Brookdale Hosp. Medical Center, 142 Misc. 2d 234, 536 N.Y.S.2d 963, 1989 N.Y. Misc. LEXIS 4 (N.Y. Sup. Ct. 1989).

Certificate of merit requirements of CLS CPLR § 3012-a are applicable to defendant who commences third-party complaint sounding in medical malpractice, even though plaintiff's underlying action against defendant is not premised on theory of medical malpractice. Marsicano v West Coast Co., 148 Misc. 2d 651, 561 N.Y.S.2d 528, 1990 N.Y. Misc. LEXIS 534 (N.Y. Sup. Ct. 1990).

6. Sufficiency of certificate

In action alleging that defendants breached their contract with plaintiff to perform surgical breast augmentation procedures by using smaller than agreed-on implants, court properly denied

plaintiff's motion to amend her complaint to add medical malpractice cause of action where her attorney's certificate of merit did not provide proof of medical malpractice and was insufficient to show meritorious claim. Sober v Kalina, 208 A.D.2d 1140, 617 N.Y.S.2d 590, 1994 N.Y. App. Div. LEXIS 10540 (N.Y. App. Div. 3d Dep't 1994).

Physician was entitled to summary judgment in medical malpractice action alleging that he negligently read and interpreted X-rays of plaintiff's decedent where physician submitted affidavit of medical expert stating that physician's examination of X-rays was in accordance with good and accepted radiology practice, and sole medical proof submitted by plaintiff was unsworn report from medical expert, which was not proof in admissible form. Doyle v Health Care Plan, 245 A.D.2d 1018, 666 N.Y.S.2d 60, 1997 N.Y. App. Div. LEXIS 13757 (N.Y. App. Div. 4th Dep't 1997).

In personal injury action based on lack of informed consent, plaintiffs were not entitled to amend complaint to add cause of action for medical malpractice where they failed to submit affidavit of merit by physician, and their "attorney's certificate of merit" was insufficient to show meritorious claim. Lucido v Vitolo, 251 A.D.2d 383, 672 N.Y.S.2d 818, 1998 N.Y. App. Div. LEXIS 6581 (N.Y. App. Div. 2d Dep't 1998).

Medical malpractice action was properly dismissed, despite plaintiff's request that case be restored to calendar, because neurosurgeon's letter submitted by plaintiff did not satisfy court's order requiring expert's "affidavit of merit," where letter was not sworn to, was not in admissible evidentiary form, and did not include author's expert opinion either that defendants deviated from accepted medical practice in their treatment of plaintiff or that their actions proximately caused plaintiff's injuries. Papineau v Powell, 251 A.D.2d 924, 675 N.Y.S.2d 169, 1998 N.Y. App. Div. LEXIS 7747 (N.Y. App. Div. 3d Dep't 1998).

Doctor who assisted in medical malpractice plaintiff's bilateral breast reduction was not entitled to summary judgment where he professed complete lack of any specific recollection of that surgery, and his expert's affidavit contained conclusory statements that although doctor "may have performed deepithelization," "may have made some incisions," and possibly sutured

plaintiff's breasts, he did not deviate from accepted standards of surgical practice in his role of assisting in surgery and did not proximately cause any of plaintiff's injuries. Modzelewski v Herman, 255 A.D.2d 299, 679 N.Y.S.2d 421, 1998 N.Y. App. Div. LEXIS 11557 (N.Y. App. Div. 2d Dep't 1998).

Certificate of merit filed by attorney in medical malpractice action was sufficient, despite lack of substantive information concerning attorney's consultation with reviewing physician, where certificate used very language of subsection (a)(1) of CLS CPLR § 3012-a. Steinberg v Brookdale Hospital Medical Center, 134 Misc. 2d 268, 510 N.Y.S.2d 797, 1986 N.Y. Misc. LEXIS 3097 (N.Y. Sup. Ct. 1986).

7. Late service; generally

Medical malpractice complaint was properly dismissed where plaintiff failed to show good cause for extension of time to file late certificate of merit almost 3 years after certificate should have been filed, especially where defendant showed prejudice if extension were granted; further, court properly decline to extend plaintiff's time to file certificate of merit under CLS CPLR § 2004 in view of significant time that had elapsed between commencement of action and plaintiff's present motion, resulting prejudice to defendant, lack of reasonable excuse for delay in obtaining medical consultation on which certificate of merit could be based, and fact that medical opinion finally obtained was insufficient to show meritorious claim. Horn v Boyle, 260 A.D.2d 76, 699 N.Y.S.2d 572, 1999 N.Y. App. Div. LEXIS 12729 (N.Y. App. Div. 3d Dep't 1999), app. denied, 94 N.Y.2d 762, 708 N.Y.S.2d 51, 729 N.E.2d 708, 2000 N.Y. LEXIS 578 (N.Y. 2000).

Defendants in medical malpractice action would be denied summary judgment, although plaintiff violated CLS CPLR § 3012-a by failing to serve certificate of merit until 30 days after service of summons and complaint, since such failure was non-jurisdictional because statute requires certificate to be served with complaint rather than with summons; however, plaintiff's late service would be deemed nullity and he would be required to reserve complaint together with requisite

certificate. Steinberg v Brookdale Hospital Medical Center, 134 Misc. 2d 268, 510 N.Y.S.2d 797, 1986 N.Y. Misc. LEXIS 3097 (N.Y. Sup. Ct. 1986).

Defendant's motion to dismiss malpractice action, due to plaintiffs' failure to submit attorney's certificate of merit as required by CLS CPLR § 3012-a, would be held in abeyance for 45 days to allow plaintiffs to submit affidavit from qualified medical expert attesting to merits of their case so as to justify granting them leave to serve late certificate of merit; while requirement of § 3012-a is not jurisdictional, absence of certificate renders pleading defective and susceptible to motion to dismiss, although court may allow late service rather than dismiss complaint if it is satisfied that plaintiff has good ground to support his cause of action. Sullivan v H.I.P. Hospital, Inc., 138 Misc. 2d 711, 524 N.Y.S.2d 1022, 1988 N.Y. Misc. LEXIS 157 (N.Y. Sup. Ct. 1988).

8. —Excuse for delay

In medical malpractice action, court erred in granting plaintiff's motion for permission to make late service of certificate of merit and in denying defendants' motion to dismiss for failure to serve certificate of merit with complaint as required by CLS CPLR § 3012-a since plaintiff failed to establish reasonable excuse for delay or that claim was meritorious. Kerns v Panahon, 158 A.D.2d 936, 551 N.Y.S.2d 98, 1990 N.Y. App. Div. LEXIS 1445 (N.Y. App. Div. 4th Dep't 1990), overruled, Dye v Leve, 181 A.D.2d 89, 586 N.Y.S.2d 69, 1992 N.Y. App. Div. LEXIS 9273 (N.Y. App. Div. 4th Dep't 1992).

Court properly denied hospital's motion to dismiss medical malpractice action, even though plaintiff did not initially file certificate of merit as required by CLS CPLR § 3012-a, where (1) plaintiff commenced her action in good-faith belief that claim was for negligence, based on hospital personnel's lack of supervision after administering medication which made plaintiff drowsy, not on medical treatment rendered, and thus involved matters within ordinary experience and knowledge of laypersons, (2) plaintiff later filed certificate of merit, and (3) hospital had not been prejudiced by initial absence of certificate. Perez v Lenox Hill Hosp., 159 A.D.2d 251, 552 N.Y.S.2d 244, 1990 N.Y. App. Div. LEXIS 2368 (N.Y. App. Div. 1st Dep't 1990).

Defendants were entitled to dismissal of medical malpractice action for patient's failure to comply with CLS CPLR § 3012-a where patient's attorney gave no indication as to why he could not obtain timely consultation and opinion from medical expert, and patient failed to timely submit affidavit of merit; moreover, letter by physician which was submitted in opposition to motion to dismiss revealed that no meritorious cause of action existed, in that patient insisted, against medical advice, on going home same day that she had miscarriage, she was told further procedure (dilatation and curettage) might be necessary, date when such procedure was performed was not given in letter, and letter simply concluded that defendants "departed from good and acceptable care by failing to perform a simple pelvic exam after delivery of the fetus and placenta." George v St. John's Riverside Hosp., 162 A.D.2d 140, 556 N.Y.S.2d 85, 1990 N.Y. App. Div. LEXIS 6985 (N.Y. App. Div. 1st Dep't 1990), but see Frisina v Jones, 167 A.D.2d 598, 562 N.Y.S.2d 846, 1990 N.Y. App. Div. LEXIS 13077 (N.Y. App. Div. 3d Dep't 1990).

Plantiff was properly granted permission to file late certificate of merit required by CLS CPLR § 3012-a and late notice of medical malpractice action mandated by CLS CPLR § 3406(a) where omissions were due to inadvertence, plaintiff established legal merit to his complaint, and defendants made no claim of prejudice. Frisina v Jones, 167 A.D.2d 598, 562 N.Y.S.2d 846, 1990 N.Y. App. Div. LEXIS 13077 (N.Y. App. Div. 3d Dep't 1990).

Physical therapist was entitled to summary judgment in patient's action for professional malpractice where patient's attorney did not set forth any reasonable excuse for his failure to obtain expert's affidavit of merit even though he had 6 months to do so. Michaels v Wetsell, 255 A.D.2d 298, 679 N.Y.S.2d 325, 1998 N.Y. App. Div. LEXIS 11594 (N.Y. App. Div. 2d Dep't 1998).

Trial court erred in dismissing a patient's medical malpractice action against a fertility clinic because the patient promptly provided a bill of particulars and a discovery response after receiving the clinic's 90-day demand, the clinic raised no objections as to the adequacy of the responsive documents and failed to respond in any fashion, the patient's attorney—who had serious health issues throughout the year preceding clinic's motion to dismiss—filed an

alternative certificate with the complaint that he was unable to timely procure the required consultation in view of the impending statute of limitations, and there was no basis to dismiss the complaint based on the certificate of merit issue. Duvernoy v CNY Fertility, PLLC, 202 A.D.3d 1342, 162 N.Y.S.3d 547, 2022 N.Y. App. Div. LEXIS 1061 (N.Y. App. Div. 3d Dep't 2022).

Defendants were not entitled to dismissal of malpractice action on ground that complaint was not accompanied by certificate of merit as required by CLS CPLR § 3012-a, since statute is not jurisdictional, there was no showing of prejudice, potential meritorious nature of action was demonstrated by service (though late) of required certificate, delay in service was due to law office failure, and relief requested would summarily dispose of plaintiff's claim by virtue of intervening expiration of statute of limitations; under these circumstances, court would relieve plaintiff of default pursuant to CLS CPLR § 2005, and would consider certificate as timely. Cirigliano v De Perio, 134 Misc. 2d 1065, 514 N.Y.S.2d 321, 1987 N.Y. Misc. LEXIS 2160 (N.Y. Sup. Ct. 1987).

In medical malpractice action brought against state, confusion of claimant's counsel as to applicability of CLS CPLR § 3012-a to Court of Claims actions constituted reasonable excuse for failure to provide certificate of merit; however, in order to avoid dismissal, claimant would be required to submit proper certificate as well as affidavit by physician establishing evidentiary basis for claim. Brown v State, 139 Misc. 2d 1020, 528 N.Y.S.2d 981, 1988 N.Y. Misc. LEXIS 293 (N.Y. Ct. Cl. 1988).

Defendants bringing third-party complaint sounding in medical malpractice, who initially asserted intention to rely solely on doctrine of res ipsa loquitur, would be permitted to serve expert witness statement in satisfaction of CLS CPLR § 3012-a(g), so as to allow proof of specific acts of negligence as well as proof regarding res ipsa loquitur, since they were uncertain as to applicability of CLS CPLR § 3012-a, and third-party defendants would not be prejudiced by permitting such additional evidence. Marsicano v West Coast Co., 148 Misc. 2d 651, 561 N.Y.S.2d 528, 1990 N.Y. Misc. LEXIS 534 (N.Y. Sup. Ct. 1990).

8.5. Extension to file certificate

Although the complaint was not accompanied by a certificate of merit as required by the statute, dismissal of the complaint was not warranted as the donor's attorney should have been provided with an opportunity to comply with the statute now that it had been determined that the statute applied to the action. There was no reason to believe that the attorney's failure to file a certificate of merit was motivated by anything other than a good faith assessment that the statute did not apply to the action. Rabinovich v Maimonides Med. Ctr., 179 A.D.3d 88, 113 N.Y.S.3d 198, 2019 N.Y. App. Div. LEXIS 8687 (N.Y. App. Div. 2d Dep't 2019).

In a medical malpractice action, motion court was within its authority pursuant to CPLR 2004 to extend plaintiff's time to file the certificate under this section without the submission of a physician's affirmation because a showing of a meritorious action through the submission of an affidavit of merit and a reasonable excuse for failing to comply with the section was not required to obtain an extension of time to comply with the statute. Fortune v New York City Health & Hosps. Corps., 193 A.D.3d 138, 142 N.Y.S.3d 54, 2021 N.Y. App. Div. LEXIS 1118 (N.Y. App. Div. 1st Dep't 2021).

9. Noncompliance; propriety of dismissal

Court had subject matter jurisdiction over medical malpractice action despite plaintiffs' failure to supply certificate of merit as required by CLS CPLR § 3012-a, since nowhere in statute does word "jurisdiction" appear, and statute does not contain any explicit limitation on court's competence to entertain action if certificate is not annexed to pleadings. Santangelo v Raskin, 137 A.D.2d 74, 528 N.Y.S.2d 90, 1988 N.Y. App. Div. LEXIS 4973 (N.Y. App. Div. 2d Dep't 1988).

In malpractice action, defendants were properly granted conditional order of dismissal requiring plaintiff to file certificate of merit and pay each moving defendant $250 where certificate of merit

was not attached to complaint as required by CLS CPLR § 3012-a and plaintiff opposed motion instead of providing certificate, relying solely on meritless contention that his response to defendants' discovery demand constituted adequate compliance. Sisario v Amsterdam Memorial Hospital, 146 A.D.2d 837, 536 N.Y.S.2d 242, 1989 N.Y. App. Div. LEXIS 18 (N.Y. App. Div. 3d Dep't 1989).

Dental malpractice defendant was not entitled to dismissal of complaint for plaintiff's failure to serve certificate of merit under CLS CPLR § 3012-a since no such sanction is authorized thereunder; statute may only be enforced indirectly by court, on defendant's motion, ordering plaintiff to comply with statute, and if dilatory plaintiff is so neglectful as to disobey such order, then sanctions, including dismissal, may be imposed on theory that plaintiff has violated order respecting discovery. Kolb v Strogh, 158 A.D.2d 15, 558 N.Y.S.2d 549, 1990 N.Y. App. Div. LEXIS 7288 (N.Y. App. Div. 2d Dep't 1990).

It was error to dismiss medical malpractice complaint for failure to comply with CLS CPLR § 3012-a; there is no authority to dismiss such action as sanction for violation of statute. Jones v Bodian, 172 A.D.2d 495, 568 N.Y.S.2d 697, 1991 N.Y. App. Div. LEXIS 4406 (N.Y. App. Div. 2d Dep't 1991).

Court properly denied medical malpractice defendant's motion to dismiss based on plaintiff's failure to serve certificate of merit; failure to comply with § 3012-a is analogous to noncompliance with CLS CPLR § 3406(a) requirement of malpractice notice, and there is no authority for imposing sanction of dismissal for plaintiff's failure to file malpractice notice required by § 3406(a). Dye v Leve, 181 A.D.2d 89, 586 N.Y.S.2d 69, 1992 N.Y. App. Div. LEXIS 9273 (N.Y. App. Div. 4th Dep't 1992).

In action against motor vehicle operator, physician and hospital for injuries sustained in accident and subsequent injuries sustained while being treated at hospital, proper sanction for failure to serve certificate of merit as required by CLS CPLR § 3012-a was not dismissal but was order to require service of such certificate. Rice v Vandenebossche, 185 A.D.2d 336, 586 N.Y.S.2d 303, 1992 N.Y. App. Div. LEXIS 9385 (N.Y. App. Div. 2d Dep't 1992).

Although plaintiffs failed to comply with CLS CPLR § 3012-a in commencing medical malpractice action without certificate of merit, dismissal was not warranted where (1) defendant hospital's discharge summary itself established reasonable basis for commencement of action, and (2) procedural posture of case included prior unappealed order granting plaintiff leave to serve amended complainant omitting any reference to medical malpractice. Boothe v Lawrence Hosp., 188 A.D.2d 435, 591 N.Y.S.2d 412, 1992 N.Y. App. Div. LEXIS 14736 (N.Y. App. Div. 1st Dep't 1992).

Trial court properly precluded the patient from claiming medical malpractice where the complaint did not set forth such a cause of action; the complaint was not accompanied by a certificate of merit under N.Y. C.P.L.R. 3012-a until several years after the action was commenced. Berrios v Our Lady of Mercy Med. Ctr., 20 A.D.3d 361, 799 N.Y.S.2d 452, 2005 N.Y. App. Div. LEXIS 7990 (N.Y. App. Div. 1st Dep't 2005).

Order granting State's cross motion for summary judgment dismissing an inmate's psychiatric malpractice based on the inmate's failure to file and serve the certificate of merit required by N.Y. C.P.L.R. 3012-a was modified to deny the motion and reinstate the claim because, in light of the stage of the litigation, the trial court should have directed the inmate to file and serve that certificate. Markowitz v State of New York, 37 A.D.3d 1106, 831 N.Y.S.2d 302, 2007 N.Y. App. Div. LEXIS 1147 (N.Y. App. Div. 4th Dep't 2007).

Trial court properly dismissed a patient's complaint for medical malpractice because his physical therapist could not diagnose and was incompetent to attest to the standard of care applicable to physicians and surgeons, medical review was clearly necessary to establish whether there was any departure from good and accepted medical practice in the performance of the surgical procedure and whether specific testing was properly warranted or indicated, which were not matters within the knowledge of the average juror or the realm of common sense, and, having failed to provide a reasonable excuse for the delay and to reveal a reasonable basis for the action, the patient was not entitled to an extension of time. Calcagno v Orthopedic Assoc. of

Dutchess County, PC, 148 A.D.3d 1279, 48 N.Y.S.3d 832, 2017 N.Y. App. Div. LEXIS 1578 (N.Y. App. Div. 3d Dep't 2017).

In a medical malpractice action, defendants' cross motion to dismiss the complaint for failure to timely file a certificate of merit pursuant to this section was properly denied because the failure to comply with this statute was analogous to noncompliance with CPLR 3406; the sanction of dismissal was not authorized. Fortune v New York City Health & Hosps. Corps., 193 A.D.3d 138, 142 N.Y.S.3d 54, 2021 N.Y. App. Div. LEXIS 1118 (N.Y. App. Div. 1st Dep't 2021).

Failure to file certificate of merit in medical malpractice action does not warrant dismissal of complaint unless plaintiff has failed to comply with court order requiring service of certificate. Koppel v Smith, 147 Misc. 2d 1039, 559 N.Y.S.2d 107, 1990 N.Y. Misc. LEXIS 348 (N.Y. Sup. Ct. 1990).

10. Reliance on res ipsa loquitur

Medical malpractice plaintiff, who initially asserted his intention to rely solely on doctrine of res ipsa loquitur, was not precluded from presenting proof of specific acts of negligence because he did not timely serve certificates of merit as to such specific acts. Marsicano v West Coast Co., 148 Misc. 2d 651, 561 N.Y.S.2d 528, 1990 N.Y. Misc. LEXIS 534 (N.Y. Sup. Ct. 1990).

11. Request for records

Plaintiff's claim that her medical malpractice claim was filed outside of the limitations period because of defendants' delay in providing her with medical records was belied by the fact that counsel for plaintiff was able to produce a certificate of merit for the claim. McGuire v Sterling Doubleday Enters., L.P., 19 A.D.3d 660, 799 N.Y.S.2d 65, 2005 N.Y. App. Div. LEXIS 7269 (N.Y. App. Div. 2d Dep't 2005), app. denied, 7 N.Y.3d 701, 818 N.Y.S.2d 191, 850 N.E.2d 1166, 2006 N.Y. LEXIS 1472 (N.Y. 2006).

Service of dental malpractice complaint without certificate of merit as required by CLS CPLR § 3012-a constituted jurisdictional defect, rendering action subject to dismissal, and plaintiff's demand for bill for defendant's services did not qualify as request for records of plaintiff's treatment within meaning of § 3012-a which would permit plaintiff to serve certificate of merit within 90 days after such records were produced. Hannah v McLaughlin, 137 Misc. 2d 277, 520 N.Y.S.2d 494, 1987 N.Y. Misc. LEXIS 2686 (N.Y. Sup. Ct. 1987).

Request by plaintiff for records of plaintiff's medical or dental treatment by defendant must precede filing of complaint in order to come within CLS CPLR § 3012-a(d) since, were it otherwise, plaintiff could interpose request at any time during proceeding, thereby thwarting purpose of enactment. Jacoby v Veloso, 141 Misc. 2d 958, 535 N.Y.S.2d 333, 1988 N.Y. Misc. LEXIS 733 (N.Y. Sup. Ct. 1988), rev'd, 162 A.D.2d 501, 558 N.Y.S.2d 833, 1990 N.Y. App. Div. LEXIS 7299 (N.Y. App. Div. 2d Dep't 1990).

12. Optional submission of § 3101(d) material

Submission by plaintiff of material required by CLS CPLR § 3101(d) to defendant must occur at institution of lawsuit in order to come within CLS CPLR 3012-a(g) so that determination can be made concerning whether or not suit is frivolous. Jacoby v Veloso, 141 Misc. 2d 958, 535 N.Y.S.2d 333, 1988 N.Y. Misc. LEXIS 733 (N.Y. Sup. Ct. 1988), rev'd, 162 A.D.2d 501, 558 N.Y.S.2d 833, 1990 N.Y. App. Div. LEXIS 7299 (N.Y. App. Div. 2d Dep't 1990).

Research References & Practice Aids

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 3012-a, Certificate of Merit in Medical, Dental and Podiatric Malpractice Actions.

Matthew Bender’s New York CPLR Manual:

CPLR Manual § 19.09-a. Certificates of merit in medical, dental or podiatric malpractice actions.

CPLR Manual § 19.09-b. Notice of medical, dental or podiatric malpractice actions.

Matthew Bender’s New York AnswerGuides:

LexisNexis AnswerGuide New York Negligence § 2.11. Identifying Appropriate Defendants in Motor Vehicle Cases.

LexisNexis AnswerGuide New York Negligence § 2.15. Preparing Appropriate Pleadings.

LexisNexis AnswerGuide New York Negligence § 7.03. Conducting Initial Client Interview.

LexisNexis AnswerGuide New York Negligence § 7.21. Raising Defense of Lack of Certificate of Merit.

LexisNexis AnswerGuide New York Negligence § 7.27. Preparing and Filing Certificate of Merit.

Matthew Bender’s New York Checklists:

Checklist for Preparing Initial Pleadings LexisNexis AnswerGuide New York Civil Litigation § 1.08.

Forms:

Bender’s Forms for the Civil Practice Form No. CPLR 3012:1 et seq.

LexisNexis Forms FORM 75-CPLR 3012-a:1.— Certificate of Merit in Medical, Dental and Podiatric Malpractice Actions.

LexisNexis Forms FORM 75-CPLR 3012-a:2.— Statement of Attorney Of Inability to Obtain Certificate of Merit in Medical, Dental and Podiatric Malpractice Because of Statute of Limitations.

LexisNexis Forms FORM 75-CPLR 3012-a:2A.— Statement of Attorney of Inability to Obtain Certificate of Merit Where Administratrix Appointed Days Before Statute of Limitations Would Expire.

LexisNexis Forms FORM 75-CPLR 3012-a:3.— Statement of Attorney Of Inability to Obtain Certificate of Merit in Medical, Dental and Podiatric Malpractice Despite Good Faith Attempt to Comply.

LexisNexis Forms FORM 75-CPLR 3012-a:4.— Statement of Attorney of Reliance on Res Ipsa Loquitor in Lieu of Certificate of Merit.

LexisNexis Forms FORM 75-CPLR 3012-a:5.— Notice of Cross-Motion to Dismiss Action for Legal Malpractice in Prosecution of Action for Medical Malpractice for Failure to Obtain Certificate of Merit.

LexisNexis Forms FORM 75-CPLR 3012-a:6.— Affirmation in Support of Cross-Motion to Dismiss Action for Legal Malpractice in Prosecution of Action for Medical Malpractice for Failure to Obtain Certificate of Merit.

1 Medina’s Bostwick Practice Manual (Matthew Bender), Forms 14:101 et seq. (remedies and pleadings).

Texts:

Warren’s Negligence in the New York Courts Ch. 7 .Notice of claim practice.

Hierarchy Notes:

NY CLS CPLR, Art. 30

Forms

Forms

Certificate of Merit Pursuant to CPLR 3012-a with Reliance on Res Ipsa Loquitur

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

_____ and _____,

Plaintiffs,

-against-

_____ HOSPITAL and

_____, M.D.,

Defendants.

CERTIFICATE OF

MERIT PURSUANT TO CPLR 3012-a (c)

I, _____, an attorney duly admitted to practice before all the courts of the State of New York, hereby declare in accordance with the provisions of CPLR 3012-a(c) that I am the attorney for the plaintiff(s) herein and that the plaintiff(s) intends to rely solely on the doctrine of res ipsa loquitur and as such, no certificate of merit is required.

DATED: _____, New York

_____, 20_____

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