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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EA 11/28/12 E

PRESENT: ALICE SCHLESINGER Justice

PART PART 16

Index Number : 403150/2011
VAIL, ANDREW
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is granted and the action is dismissed in accordance with the accompanying memorandum decision.

FILED
NOV 28 2012
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
NOV 27 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: NOV 20 2012

Alice Schlesinger, J.S.C.
ALICE SCHLESINGER

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ANDREW VAIL,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

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Index No. 403150/11
Motion Seq. No. 001

SCHLESINGER, J.:

Plaintiff Andrew Vail, an incarcerated person representing himself, commenced this medical malpractice action by filing a summons and complaint with the County Clerk on December 7, 2011. He alleges in his complaint that the medical personnel at Riker's Island were negligent in that on September 2, 2010 they gave him medication intended for another patient, which allegedly caused Mr. Vail to suffer an immediate hospitalization and permanent heart damage. Before the Court at this time is a motion by the defendant City of New York to dismiss on the ground that Mr. Vail has failed to timely file a Notice of Claim or request leave to file the Notice late. The City also urges dismissal because Mr. Vail has failed to timely commence the action. Mr. Vail has opposed the motion, offering reasons for his filing delays and asking that all papers be treated as timely filed.

Discussion

The General Municipal Law sets forth strict time limits for the commencement of an action or special proceeding against the City of New York. General Municipal Law §50-i (1) requires that any negligence action "shall be commenced within one year and ninety days after the happening of the event upon which the claim is based." That same section also requires that the plaintiff serve a Notice of Claim in compliance with § 50-e

of the law. General Municipal Law § 50-e further elaborates on that requirement, describing the Notice as a "condition precedent" to suit and mandating that the City be served with the Notice of Claim "within ninety days after the claim arises." The Notice of Claim must include information such as the name and address of the claimant, the nature of the claim, the time and place when the events occurred, and the claimed injury. The purpose of the law is to enable the City to obtain sufficient information to promptly investigate the claim and gather evidence. *See, Portillo v New York City Transit Authority,* 84 AD3d 535 (1st Dep't 2011).

Upon application, the court in its discretion, may extend the time to serve a Notice of Claim, but the "extension shall not exceed the time limit for commencement of an action," which, as noted above, is one year and ninety days from the happening of the event that caused the claimed injury. Gen. Munic. Law § 50-e(5). A party seeking such an extension must establish three points: (1) that the City acquired actual knowledge of the essential facts constituting the claim within a reasonable time; (2) a reasonable excuse for the delay in serving the Notice; and (3) that the delay did not prejudice the defendant. *See, Kelley v New York City Health and Hospitals Corp.,* 76 AD3d 824 (1st Dept 2010).

The first question presented here is whether Mr. Vail timely commenced this medical malpractice action within a year and ninety days of the claimed injury on September 2, 2010 when he was given the wrong medication, or by December 1, 2011. Pursuant to CPLR §304, an action is commenced by filing a Summons and Complaint with the County Clerk. Court records indicate that the Summons and Complaint were filed with the County Clerk on December 7, 2011 (Exh B to Motion). Therefore, the City claims that the action is time-barred because it was commenced six days late.

Mr. Vail argues that the action should be deemed timely commenced because he gave the Summons and Complaint to the facility where he is incarcerated on November 29, 2011 for mailing to the courthouse, and the facility mailed the papers on December 1, 2011. He asks the Court to treat the November 29 request or the December 1 mailing date as the filing date, which would make the action timely.

The Court of Appeals, which is the highest court in New York State, expressly rejected a similar argument by an inmate urging that his delivery of papers to the facility for mailing should suffice as a filing. In *Matter of Grant v Senkowski,* 95 NY2d 605, 608 (2001), the court reviewed CPLR §304 and stated that:

> Here, the Legislature's intent to treat papers commencing litigation as "filed" upon the actual receipt of those papers by the clerk of the court — rather than upon delivery to prison authorities for forwarding to the court — is manifest from the statute's language and purpose.

Where, as here, the filing was completed beyond the one year and ninety day statute of limitations period, the filing on its face is untimely. *Matter of Bonez v New York State Department of Correction, et al.,* 290 AD2d 325 (1st Dep't 2002). A dismissal is required even though Mr. Vail delivered the papers to the facility for mailing before the expiration of the statute of limitations, as the prison did not delay unreasonably in completing the mailing. *Matter of Blanche v Selsky,* 13 AD3d 681 (3rd Dep't 2004), *app dismissed,* 4 NY2d 844 (2005). The two day delay in mailing in this case is not at all unreasonable.

But the inquiry does not end there. Mr. Vail also urges this Court to extend the statute of limitations pursuant to the "continuous treatment" doctrine codified in CPLR §214-a. That doctrine provides for the tolling of the limitations period governing claims for medical malpractice where the allegedly negligent medical treatment provided by the

defendant continues for a period of time. The alleged negligent treatment here was a dose of incorrect medication on September 2, 2010, which caused Mr. Vail to suffer heart palpitations that required a three-day hospitalization and follow-up care.

Because the full extent of Mr. Vail's treatment for the injury was not spelled out in his papers, the Court asked Mr. Vail to supply a copy of his medical records; he then provided what he was able to obtain. Those records confirm that Mr. Vail was taken by ambulance from Riker's Island to Elmhurst Hospital on September 2, 2010 for complaints of a racing heart and tremors. The Discharge Summary completed by Dr. Robert Thompson on September 4, 2010 confirms a diagnosis of tachycardia.

It does appear, as Mr. Vail has alleged, that treatment continued thereafter for a period of time. Dr. Thompson in the Discharge Summary indicated that Mr. Vail was to be discharged back to Riker's under the care of Dr. Gruben and that he was to "follow up at MPC and Cardiology at EHC within 2-4 weeks." Additionally, the records show that Mr. Vail in the interim followed up with the NYC Correctional Health Services with appointments on September 5 and 6 of 2010. The September 6 note appears at page 90 of 171 of the records. Based on these records, an issue of fact exists whether Mr. Vail's treatment continued through at least September 7, 2010, which would make the December 7 commencement of this action timely. Therefore, the City's motion to dismiss this action as barred by the statute of limitations is denied.

The next question is whether Mr. Vail satisfied the condition precedent to suit, which was the timely filing of a Notice of Claim within ninety days of the September 2 injury, or by December 1, 2010. Although Mr. Vail did not serve a formal Notice of Claim, he mailed a letter dated August 23, 2011, which the City apparently treated as a

Notice of Claim. (Exh A). In that letter, Mr. Vail explains about his three-day hospitalization for heart palpitations allegedly due to the administration of improper medication on September 2, 2010. Recognizing that he was writing well beyond the 90-day period set by law, Mr. Vail explained in his Notice the reason for the delay in filing and he asked that the delay be excused due to "extenuating circumstances;" that is, the difficulty in ascertaining the names of the medical personnel and Correction Officers who had been involved or had witnessed the events, and to obtain legal advice.

This letter does not satisfy the requirements of law. As the City asserts in Reply, Mr. Vail was required to seek permission from the Court for leave to file a late Notice of Claim by commencing a special proceeding or by making a motion in the context of this action before the statute of limitations expired. Neither was done.

Mr. Vail's omission is fatal. The facts here are very similar to those in *Pierson v City of New York,* 56 NY2d 950 (1982). The plaintiff in *Pierson* had served his Notice of Claim on the City 142 days after his accident, without seeking prior judicial approval for the late filing. The action was timely commenced, and the City in its answer included a defense that the Notice was untimely. Thereafter, the plaintiff moved to strike the defense, but the motion was filed well beyond the statute of limitations for the commencement of the action. Both the Supreme Court and the Appellate Division held that the motion should be granted due to the plaintiff's delay of only a few months in serving the Notice of Claim and the lack of prejudice to the City. However, the Court of Appeals reversed the appellate court and held that the motion to dismiss the City's affirmative defense should have been denied; even though the Notice of Claim had been served before the statute of limitations for commencement of the action had

expired, the Notice had not been timely filed within ninety days of the injury and no application for an extension had been made prior to the expiration of the statute of limitations. Thus, despite the minimal delay and the lack of prejudice to the City, "the court lacked the power to authorize late filing of the notice." 56 NY2d at 955-56.

The First Department has repeatedly applied that rule to the detriment of tardy claimants. For example, in *Turner v City of New York,* 94 AD3d 635 (1st Dep't 2012), the Appellate Division reversed the trial court, which had granted petitioner's motion to deem the Notice of Claim timely filed. Finding that the application had been made one day after the expiration of the statute of limitations for the commencement of the action, the court denied the petitioner's motion, citing *Pierson* and stating (at p 636) that:

> The court is without power to consider an application to file a late notice of claim after expiration of that limitations period.

Similarly, in *Bobko v The City of New York*, 2012 WL 5440172(1st Dep't 2012), the appellate court reversed the trial court and granted the City's motion to dismiss the action because the Notice of Claim was untimely by three days. Again citing *Pierson,* the court stated:

> This late service, without leave of court, was a nullity ... Further, the court lacked the authority to deem the notice timely served nunc pro tunc, as the one-year and 90-day statute of limitations period had expired.

These cases and the principle of law are directly applicable here. The Notice of Claim served by Mr. Vail was untimely by nearly a year. At no point did Mr. Vail move for permission to have the Notice deemed timely filed nunc pro tunc. Now that the statute of limitations for commencement of the action has expired, the Court is without power to grant such an application should Mr. Vail file it at this point in time. Therefore,

since Mr. Vail has not satisfied the requirements of the General Municipal Law relating to the Notice of Claim, this action must be dismissed.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted, and the Clerk is directed to enter judgment in favor of the defendant without costs or disbursements.

Dated: November 20, 2012

NOV 20 2012

J.S.C.
ALICE SCHLESINGER

FILED
NOV 28 2012
COUNTY CLERK'S OFFICE
NEW YORK