

Clark v New York City Health & Hosp. Corp.
2012 NY Slip Op 33041(U)
December 19, 2012
Sup Ct, New York County
Docket Number: 800080/11
Judge: Judy H. Kluger
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUDY H. KLUGER
Justice

PART 38

Index Number : 800080/2011
CLARK, VANESSA
vs.
NEW YORK CITY HEALTH
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 800080/11
MOTION DATE _____
MOTION SEQ. NO. (001)

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 in part as per this
Court's written decision dated
December 19, 2012.*

FILED
DEC 21 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/19/12

Judy H. Kluger
J.S.C.
JUDY HARRIS KLUGER

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 38

CC COPY

-----X
VANESSA CLARK, as Administratrix of the goods,
chattels and credits that were of DORRELL CLARK,
deceased, and VANESSA CLARK, individually,
Plaintiffs,

DECISION AND ORDER

December 19, 2012
Index No. 800080/11

- against -

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, ELISABETH NICOLE DASCY, M.D.
and CHAITALI BAGCHI, M.D.,
Defendants

FILED

DEC 21 2012

-----X
Judy Harris Kluger, J.:

Defendant, New York City Health and Hospitals Corporation, moves for an Order pursuant to CPLR § 3211 (a)(7) dismissing those causes of action which are time barred and/or for which plaintiff cannot make out a prima facie case.¹ Plaintiff, Vanessa Clark, as administratrix and individually, opposes the relief requested and cross-moves to extend plaintiff's time within which to serve a notice of claim, *nunc pro tunc*, upon defendant with respect to the claim for decedent's conscious pain and suffering, pursuant to General Municipal Law (GML) § 50-e(5).

The court has reviewed the defendant's notice of motion, affirmation in support and exhibits dated May 29, 2012; the plaintiff's affirmation in opposition to the motion to dismiss together with her cross-motion, affirmation in support and exhibits dated July 10, 2012; the defendant's reply affirmation in support of the motion to dismiss together with its affirmation in opposition to the cross-motion and exhibits dated August 6, 2012; and, plaintiff's reply affirmation in further support of her cross-motion dated August 24, 2012. For the reasons stated below, the defendant's motion is granted in part and the plaintiff's cross-motion is denied.

Based upon the submissions before this court, it is undisputed that decedent, Dorrell Clark, was born on September 2, 1993 at St. Lukes-Roosevelt Hospital (a non-HHC facility). Thereafter, he began receiving treatment at HHC facilities on May 5, 1995 at the St. Nicholas Child Health Clinic of the Renaissance Health Care Network (Renaissance) when he was 20 months old. Dr. Elisabeth Nicole Dascy became his primary pediatrician at that first visit and saw him regularly for the next 14 years. She last saw the decedent at Renaissance on November 9, 2009.

The decedent was diagnosed with asthma when he was approximately three years old and received treatment for that condition at both the pediatric and asthma clinics at Renaissance for the next 13 years. His treatment included daily doses of Albuterol. He was never diagnosed or treated for the cardiac anomaly that, according

¹The cases against the individually-named defendant doctors were previously discontinued with prejudice.

to the New York City Coroner in an autopsy report dated June 29, 2010, caused his death.

Regarding hospital and clinic visits, it is undisputed that on July 27, 2009, the decedent was transported by ambulance to Harlem Hospital Emergency Department after being discovered unresponsive and with labored breathing. After treatment, the decedent's condition improved.² Despite his improved condition, the records show that he was kept overnight in the pediatric ICU and discharged to his grandmother the following day. The defendants contend that Dr. Dascy was not contacted during this admission. Approximately two months after his July 2009 ER visit, the decedent visited Dr. Dascy at Renaissance on November 9, 2009. By all accounts, including a review of the decedent's medical chart, this November visit was a routine well-care visit.

Based upon the submissions of both the plaintiff and defendant, the decedent was brought to Harlem Hospital by ambulance on April 17, 2010 after having collapsed while playing basketball. He received treatment from EMS workers while on route to the hospital and additional treatment upon arrival at Harlem Hospital. However, he was pronounced dead shortly after his arrival on April 17, 2010. There are no claims by the plaintiff regarding negligent care on the date of decedent's death.

A notice of claim was served on July 16, 2010 and the within action was commenced with the filing of a summons and complaint on March 11, 2011. Issue was joined by the service of an answer on behalf of the three named defendants on July 11, 2011.

Defendant's Motion

In the motion dated May 29, 2012, the defendant seeks an order from this court "dismissing those causes of action which are time barred and/or for which plaintiff cannot make out a prima facie case." The defendant contends that plaintiff's cause of action for the conscious pain and suffering of decedent and her individual derivative claim must be dismissed as time barred. Additionally, defendant maintains that the claim for violation of EMTALA must be dismissed as time barred and for failure to state a cause of action under the federal statute.³ Finally, defendant contends that the wrongful death claim must also be dismissed as there are no pecuniary damages to support it.

With respect to the pain and suffering claim, the defendant maintains that the plaintiff failed to timely serve the notice of claim. While the plaintiff's notice of claim (filed on July 16, 2010) alleges treatment from September 2, 1993 through the decedent's date of death on April 17, 2010, the defendant maintains that "the last date

²The plaintiff, through her expert, contends that a chest x-ray which was interpreted as normal by defendant Dr. Bagchi during this ER visit was misread and actually depicted an enlarged heart requiring further study.

³The EMTALA claim need not be considered by this court inasmuch as it has been discontinued by plaintiff.

of any actual treatment by the defendant, and the latest date on which the cause of action could have accrued, was November 9, 2009, when he was last seen at the clinic."⁴

Defendant HHC maintains that not only was the notice untimely but, it was a nullity since it was filed without leave of court. See, De La Cruz v. City of New York, 221 AD 2d 168 (1st Dept. 1995). Further, the defendant maintains that the court has no discretion in deeming the late notice of claim timely since the plaintiff's July 10, 2012 cross-motion seeking such relief was filed after the expiration of the statute of limitations. Pierson v. City of New York, 56 NY 2d 950 (1982). The defendants argue that any such action by the court would thwart the purpose of General Municipal Law §50-e.

The plaintiff contends that the defendant's motion to dismiss with respect to the decedent's conscious pain and suffering is without merit based upon tolling provisions associated with the decedent's infancy, his continuous treatment until his date of death by an HHC employee and HHC's knowledge of the underlying claim.

Regarding the infancy toll, plaintiff argues that the provisions of CPLR §§ 208 and 210 toll both the period in which the plaintiff may commence the instant action and the period within which the notice of claim is required to be filed. Specifically, plaintiff maintains that CPLR § 208 provides a tolling period until the decedent's death and CPLR § 210 provides a further tolling period of one year from the date of death for commencement of the action and a concomitant tolling of the time during which a late notice of claim may be served. See, Cohen v. Pearl River Union Free School District, 51 NY 2d 256 (1980).

Regarding the continuous treatment of the decedent, plaintiff argues that decedent's status as an "active patient . . . being evaluated with respect to his asthma and general health" evidences an ongoing doctor-patient relationship that continued until the date of his death. Thus, his treatment dates of July 27, 2009 and November 9, 2009 are irrelevant to the time calculations herein.

Finally, plaintiff argues that appellate courts have often permitted the service of late notices of claim relating to patient care and treatment when the hospital or provider is in possession of medical records and thus has actual notice of the facts underlying the claim. Specifically, plaintiff avers that HHC maintained a long history of medical records relating to the decedent and his asthmatic condition and would not be unfairly prejudiced by the instant notice of claim which was filed within 90 days from his date of death.

⁴Although there is a chart reference to February 9, 2010, it does not appear that the decedent received any treatment on that date and the plaintiff has not made any claims to the contrary. Even assuming treatment on that occasion, the notice of claim filed without leave of court on July 16, 2010 is still beyond the 90 days required by statute.

Plaintiff's Cross-Motion

In the plaintiff's response and cross-motion, in addition to opposing the relief requested by the defendant as outlined above, the plaintiff seeks the alternative relief of leave to extend the time within which to serve a notice of claim, *nunc pro tunc*, for decedent's pain and suffering. In support of the cross-motion, plaintiff sets forth the factors to be considered as outlined in General Municipal Law §50-e(5). Plaintiff also reaffirms many of the same arguments made in opposition to the defendant's original motion including a lack of prejudice to defendant, actual notice of the facts and circumstances by virtue of the decedent's medical records, decedent's infancy at the time of death, reasonable excuse for the delay, continuous treatment by the defendant until the time of death and finally, that the action was timely commenced within one year from the date of death.

In response to the cross-motion, defendant, citing CPLR § 214-a, reasserts that in a medical malpractice action, the accrual date is the date when the negligent acts or omissions complained of occurred. And, as in the instant case, when a claim involves a failure to diagnose, the cause of action accrues on the date of the omission. The defendant maintains that the possible accrual dates herein are July 27, 2009 and November 9, 2009. Defendant maintains that counting from either date, the notice of claim served on July 16, 2010 is untimely.

Defendant further maintains that plaintiff's failure to timely file the notice of claim or move for leave to serve a late of claim within the applicable statute of limitations is not cured or excused by application of the continuous treatment doctrine, infancy tolls in CPLR §§ 208 and 210, or any of the factors to be considered in General Municipal Law §50-e(5).

Timeliness of a Notice of Claim

General Municipal Law §50-e(1) requires that a notice of claim must be served on a public corporation within 90 days after the claim arises. A court, in its discretion and upon application by the plaintiff, may extend the time to serve said notice. See, General Municipal Law §50-e(5); Williams v. Nassau County Med. Ctr., *supra*. However, such discretion may not be exercised beyond the "time limited for commencement of an action by the claimant against the public corporation." *Id.*; see also, Hochberg v. City of New York, 99 AD 2d 1028 (1st Dept. 1984) *aff'd* 63 NY 2d 665 (1984); McGarty v. City of New York, 44 AD 3d 447 (1st Dept. 2007)(plaintiff's service of a late notice of claim, without leave of court, served 91 days after his claim arose was a nullity and his failure to seek an order excusing such lateness within one year and 90 days required dismissal of the action). The statute of limitations in this matter is one year and ninety days. General Municipal Law §50-k(6).

Barring application of the continuous treatment doctrine which will be discussed *infra* at p. 6, the cause of action in the instant case accrued on either July 27, 2009 or November 9, 2009. Thus, the notice of claim was required to be filed no later than February 9, 2009. Thus, the notice of claim served on July 16, 2010 was untimely.

With respect to the statute of limitations, again, absent the applicability of any

appropriate tolling provisions, the statute expired, at the latest, on or about January 9, 2011. That is one year and ninety days from the last possible accrual date, the November 9, 2009 clinic visit. Given that, this court is without discretion to even consider excusing the late notice of claim filing by weighing the factors set forth in General Municipal Law §50-e(5) and Williams, supra. The plaintiff's cross-motion seeking leave to extend the time to serve the notice of claim, *nunc pro tunc*, albeit made in the alternative, was made well more than a year after the statute of limitations expired.

Infancy

Regarding the application of the tolling provisions offered by the plaintiff, CPLR § 208 provides for an extension of time "within which the action must be commenced" where the "person entitled to commence the action is under a disability because of infancy or insanity. . . ." And, CPLR § 210 further provides that where the claimant dies before the expiration of that time, the "action may be commenced by his representative within one year after his death."

In the instant case, plaintiff argues that these tolling provisions apply to the time in which the *notice of claim* must be filed. The plaintiff filed the notice of claim on July 16, 2010, which is within one year of decedent's death. However, there is ample case law to support the fact that an injured party's disability does not extend the 90-day notice of claim period but only tolls the time in which to *apply for leave* to serve a late notice of claim. See, Mullins v. East Haven Nursing and Rehabilitation Center, LLC, 66 AD 3d 578 (1st Dept. 2009)(decedent's disability did not toll the necessity of filing a timely notice of claim; it tolled only the time in which a leave application may have been filed). Thus, plaintiff's reliance on CPLR §§ 208 and 210 is misplaced.

Continuous Treatment Doctrine

Plaintiff's reliance on the continuous treatment doctrine is also unavailing. The Court of Appeals decision in Young v. New York City Health and Hospitals Corporation, 91 NY 2d 291 (1998), is particularly instructive. Initially, the Court of Appeals noted that to maintain an action against HHC, an injured plaintiff must timely file a notice of claim within 90 days of the date the claim arises or the cause of action accrues. *Id.* at 295 (emphasis added). The Court further reiterated well established precedent that the cause of action accrues when the alleged negligent act or omission occurred. *Id.* (citations omitted).

In a medical malpractice action, CPLR § 214-a provides that the action must be commenced within two and a half years from the date "of the act, omission or failure complained of or *last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to said act, omission or failure*. Young, supra at 295 (citing CPLR § 214-a [emphasis added]). This tolling provision has equal application in cases filed against HHC wherein the statute of limitations is one year and 90 days and the notice of claim period is 90 days.

In Young, the Court of Appeals noted that "treatment does not necessarily terminate upon a patient's last visit if further care or monitoring is 'explicitly anticipated

[* 7]

by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during the last visit, in conformance with the periodic appointments which characterized the treatment in the past.” *Id.* at 296 (emphasis added)(internal citations omitted).

In the instant case, based upon plaintiff's allegations and the notice of claim, it appears undisputed that the cause of action accrued on either July 27, 2009 or, at the latest, on November 9, 2009 when HHC allegedly failed to diagnose the cardiac condition that was deemed decedent's cause of death. There is no negligence alleged with respect to the care and treatment on the date of death, April 17, 2010. Thus, as in Young, *supra*, unless plaintiff can establish that the toll of the continuous treatment doctrine applies, the notice of claim is untimely.

Plaintiff further asserts that defendant HHC had been treating decedent continuously for the same condition for over 14 years and was never discharged from there care. While that may be true with respect to the decedent's asthma and general pediatric health, the Court of Appeals has held that “[a] patient's continuing general relationship with a physician, or routine, periodic health examinations will not satisfy the . . . requirement of continuous treatment of the condition upon which the allegations of medical malpractice are predicated.” Young, *supra* at 296 (citations omitted). The malpractice herein is the defendant's failure to diagnose and treat the congenital coronary artery anomaly that the NYC Medical Examiner determined to be the cause of death. The decedent's periodic visits to Renaissance for treatment of unrelated conditions do not establish a course of treatment for the cardiac condition. In fact, the plaintiff's assertions set forth a failure to diagnose a cardiac condition. Such omissions do not amount to a “course of treatment.” Young, at 297 (citations omitted). “[T]he passive failure to disclose the existence of a condition warranting further medical treatment is not a continuing wrong.” Young at 294.

Based upon the foregoing, the court finds that the notice of claim filed on July 17, 2010 without leave of court is a nullity and it has no discretion to consider the plaintiff's subsequent motion attempting to correct this procedural error filed after the one year and ninety day statute of limitation expired.⁵ General Municipal Law §50-e(5); Hochberg, *supra*. Moreover, as noted above, neither the claim of infancy nor the continuous treatment doctrine have application to the facts in this matter.

With respect to the wrongful death action, as defendant concedes, the notice of claim filed exactly 90 days from the decedent's death was timely filed. The defendant avers that there were no services that the decedent provided to his mother or father that had a pecuniary value and, inasmuch as the recovery in a wrongful death action is limited to pecuniary damages suffered by the estate, this action must fail. While the plaintiff has not set forth any factual allegations to the contrary, plaintiff correctly notes that the instant motion is not a summary judgment motion. Thus, plaintiff need not meet that burden at this time.

⁵The fact that the summons and complaint were timely filed and defendants participated in preliminary discovery proceedings are also not sufficient grounds to overcome the statutory mandate of GML § 50-e(5).

Accordingly, the defendant's motion is granted to the extent of dismissing as time-barred plaintiff's claims for decedent's conscious pain and suffering and lack of informed consent and plaintiff's cross-motion to deem the notice of claim filed timely *nunc pro tunc* is therefore denied. However, the defendant's motion to dismiss the wrongful death claim is denied inasmuch as defendant concedes that the notice of claim as to that cause of action was timely filed.

The clerk of the court is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of this court.

Dated: New York, New York
December 19, 2012



Judy Harris Kluger, J.S.C.

FILED
DEC 21 2012
NEW YORK
COUNTY CLERK'S OFFICE