

**Hillary v Gerstein**

2018 NY Slip Op 33653(U)

February 14, 2018

Supreme Court, Nassau County

Docket Number: 604747-17

Judge: Jerome C. Murphy

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**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. JEROME C. MURPHY,  
Justice.**

**JOHN HILLARY and ROBERT HILLARY, minor incompetents by ROBERT HILLARY as Guardian; and ROBERT HILLARY, Individually and as Administrator of the Estate of TALESHA TAMARSHA HILLARY and on behalf of distributees therein,**

**TRIAL/IAS PART 14  
Index No.: 604747-17  
Motion Date: 11/29/17  
Sequence Nos.: 003, 005**

*MG, MD*

**Plaintiffs,**

**-against-**

**EDGAR GERSTEIN, M.D., VIJAY CHAND, M.D., RAJVEE VORA, M.D., DIMPLE SODHI, M.D., SEEMA HASHMI, M.D., ROBERT BARRIS, M.D., NASSAU UNIVERSITY MEDICAL CENTER, STEPPING STONES, NUHEALTH'S ADULT AMBULATORY MENTAL HEALTH SERVICES, RAHUL KODALI, M.D., NIDHI SHAROHA, D.O., DAVID WAXMAN, P.H.D., MARIA-VICTORIA PAZ, M.D., BELEN MARTINEZ and "JOHN DOE No. 1" through "JANE DOE No. 50," inclusive, the name of the last 50 defendants being fictitious, intended to designate persons, presently unknown to Plaintiff, having involvement in the action alleged herein,**

**Defendants.**

The following papers were read on this motion:

Sequence No. 003:

Notice of Motion, Affirmation, Affidavit of Edgar Gerstein, M.D. and Exhibits..... 1

Sequence No. 005:

Notice of Cross Motion, Affirmation and Exhibits..... 2

Reply Affirmation in Further Support of Cross-Motion..... 3

Affirmation in Opposition to Cross Motion and in Reply to Main Motion..... 4

## PRELIMINARY STATEMENT

In Sequence No. 003, defendant, Edgar Gerstein, M.D., brings this application for an order dismissing this action, in whole or in part, due to the expiration of the applicable statutes of limitations before the commencement of this action, and for such other and further relief as to the Court may deem just and proper.

In Sequence No. 005, plaintiffs bring this application for an order pursuant to CPLR § 3025(b), granting plaintiffs' cross-motion for leave to amend, and for such other and further relief as this Court may deem just and proper. Defendant, Edgar Gerstein, M.D., has submitted opposition to this application.

## BACKGROUND

Talesha Tamarsha Hillary died on November 24, 2014. She last saw Dr. Gerstein on November 20, 2014. Plaintiffs filed a Summons and Verified Complaint on May 24, 2017, 2 years, 6 months, and 4 days after seeing Dr. Gerstein. Dr. Gerstein asserts that November 20, 2014 was the only day on which he provided medical treatment to decedent. Plaintiff contends that on November 21, 2014, Dr. Gerstein reached out to patient to schedule a further appointment for December 11, 2014, and that, under the doctrine of "continuous treatment", the statute did not begin to run until that date, and the Complaint is timely.

The plaintiffs are the husband, and two infant children, both born on December 8, 2009. By Order dated August 6, 2015, Surrogate's Court of Nassau County appointed Robert Hillary as guardian of the plaintiffs. The Complaint, filed on May 24, 2017, alleges three Causes of Action against Dr. Gerstein. The First Cause of Action, on behalf of all plaintiffs, alleges medical malpractice against all defendants. The Fourth Cause of Action, on behalf of all plaintiffs alleges that defendants who are professionals and/or psychologists breached the applicable standard of care, while the Fifth Cause of Action, on behalf of the two infant sons of decedent, alleges wrongful death as against all defendants.

## DISCUSSION

" 'A defendant who seeks dismissal of a complaint pursuant to CPLR § 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired" (*Benjamin v. Keyspan Corp.*, 104 A.D.3d 891 [2d Dept. 2013], quoting *LaRocca v. DeRicco*, 39 A.D.3d 486 [2d Dept. 2007]). The burden then shifts to the nonmoving party to raise an issue of fact as to the applicability of an exception to the

statute (*Id.*).

Defendants here argue that the Fifth Cause of Action, for wrongful death, must be dismissed as untimely pursuant to EPTL § 5-4.1, which provides that the personal representative may commence an action for wrongful death within 2 years of the date of death. Decedent died on November 24, 2014, and a claim for wrongful death was required to be commenced not later than November 24, 2016. A Summons and Verified Complaint was filed on May 24, 2017, and is *prima facie* barred by the Statute of Limitations. Plaintiff, however, claims that the 2-year Statute of Limitations was tolled as to the two minor children in accordance with CPLR § 208. But, this tolling provision is inapplicable where there is another distributee who, is a qualified individual under no disability to receive letters of administration (*Hernandez v. New York City Health and Hospitals Corp.*, 78 N.Y.2d 687 [1991]).

In this case, decedent was survived by her husband, who was not under any disability, and two infant children. While plaintiff claims that decedent disinherited her husband prior to her death, there is no writing to effectuate such disinheritance, and, therefore, as her husband at the time of her death, he is entitled to receive \$50,000 and one-half of the residue (EPTL § 4-1.1 (a)). A distributee is defined in EPTL § 1-2.5 as “. . . a person entitled to take or share in the property of a decedent under the statutes governing descent and distribution”. Robert Hillary was a distributee and the two year statute of limitations is applicable, and the tolling provision of CPLR § 208 is inapplicable (*Ratka v. St. Francis Hosp.*, 44 N.Y.2d 604, 608 [1978]).

Defendants argue that the statute of limitations expired on May 20, 2017, two and one-half years after the date of last treatment. They contend that the last date of medical treatment by Dr. Gerstein was November 20, 2014. Defendant has established *prima facie*, that the action is barred by the statute of limitations. In response, plaintiffs argue that Dr. Gerstein spoke to decedent on November 21, 2014, and scheduled an appointment for December 11, 2014. Decedent did not appear on December 11, 2014, and plaintiff contends that this is the last day of continual treatment, and is the starting point for the two and one-half years for the expiration of the statute of limitations, resulting in an expiration date of June 11, 2017, after the filing of the Summons and Complaint on May 24, 2017.

The issue presented is whether or not the application of the two and one-half year statute of limitations began to run on November 20, 2014, the date Dr. Gerstein last saw the patient, or on December 11, 2014, the date upon which decedent was scheduled to return for an

appointment. Of course, decedent died on November 24, 2014, and did not appear for the subsequent appointment. “To establish that the continuous treatment doctrine applies, a plaintiff is ‘required to demonstrate that there was a course of treatment, that it was continuous, and that it was in respect to the same condition or complaint underlying the claim of malpractice’ ” (*Ceglio v. BAB Nuclear Radiology, P.C.*, 120 A.D.3d 1376, 1377, [2d Dept. 2014] quoting *Baptiste v. Harding–Marin*, 88 A.D.3d 752, 753, [2d Dept. 2011]).

The doctrine of continuous treatment for the commencement of the statute of limitations may be extended beyond the last date of actual treatment (*Richardson v. Orentreich*, 64 N.Y.2d 896 [1985]). In that case, plaintiff had come under defendant’s medical care in January 1973, and received periodic treatments through October 8, 1974, the date of her last visit. Plaintiff commenced a medical malpractice on November 30, 1977. Defendant moved to dismiss the action as barred by the then 3-year statute of limitations. Plaintiff opposed the motion, contending that she had remained under the continuous care and treatment after the October 8 visit when she scheduled a return visit for December 4, 1974. She did not appear for this appointment because she was bedridden with illness on that date.

The “ ‘continuing trust and confidence’ ” which underlies the “ ‘continuous treatment doctrine’ ” does not necessarily come to an end upon a patient’s last personal visit with his or her physician (*McDermott v. Torre*, 56 N.Y.2d 399 [1982]). According to the Amended Verified Complaint, Exh. “B” to Cross-motion at ¶ 34, Dr. Gerstein rendered care and treatment to Taleisha Hillary between November 20 and November 24, 2014. She had been involuntarily confined to the psychiatric unit at Nassau University Medical Center beginning August 6, 2014. She was discharged on August 15, 2014, with instructions to attend group counseling. She was first seen by Dr. Gerstein in his private practice on November 20, 2014. On the following day, Dr. Gerstein spoke to the patient and scheduled a follow-up visit for December 11, 2014.

The Statute of Limitations may begin to run “ ‘once a hospital or physician considers the patient’s treatment to be completed and does not request the patient to return for further examination’ ” (*Weinstein-Korn-Miller*, NY Civ. Prac., par. 214-a03, p. 2-321; cf. *Davis v. City of New York*, 38 N.Y.2d 151, 155 [1962]). It is clear that Dr. Gerstein did not believe that her treatment had concluded, since he called her to schedule an appointment for December 11.

In *Richardson v. Orentreich*, 64 N.Y.2d 896, 898-899 (1985), the Court applied the

continuous treatment doctrine to the situation in which “further treatment was explicitly anticipated 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 immediate past”.

Decedent had not seen Dr. Gerstein other than on November 20, 2014. There is no history of periodic appointments, and no appointment was scheduled during the November 20, 2014 visit. Dr. Gerstein acknowledges in his affidavit that he telephoned decedent on November 21, 2014, at which time he scheduled a December 11, 2014 return visit. Whether or not decedent shared the intention of returning for the scheduled visit, is unknown. This is not a situation in which the patient initiates a return for additional care after being discharged from care. Plaintiff has not offered any indication that she intended to keep the December 11 appointment, and, tragically, died on November 24.

*Allende v. New York City Health & Hosps. Corp.* involved a plaintiff who lost two gangrenous fingers but verbally and by conduct indicated an intention not to return to the hospital, including saying that she “did not have faith anymore in that hospital”.

Under the circumstances where there is no prior history of decedent appearing for regularly scheduled visits, and having been seen by Dr. Gerstein on one occasion, there is no basis to conclude that there was any “continuing trust and confidence” upon which the Court could conclude that decedent had an intention to return for additional treatment. Needless to say, her suicide was more likely to reflect her lack of trust and confidence that further treatment would alleviate her problems.

The Court therefore concludes that the statute of limitations expired on May 20, 2017, and that the action is barred by the Statute of Limitations. The motion by Dr. Gerstein to dismiss the Complaint as untimely commenced, is granted.

Plaintiff’s motion to serve a Second Amended Complaint which extends the statute of limitations by extending the period of continuous treatment by Dr. Gerstein, is denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
February 14, 2018

**ENTER:**

**ENTERED**

FEB 16 2018

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

*Jerome C. Murphy*  
HON. JEROME C. MURPHY  
J.S.C.