SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY **PART** 56M

Justice

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BURTON ARONOFF, M.D.,

Plaintiff,

- v -

DEWITT REHABILITATION AND NURSING CENTER, INC., UPPER EAST SIDE REHABILITATION AND NURSING CENTER, DANIEL KELIN, M.D., NORMAN MOORE, M.D., DR. FORD, JOHN/JANE DOE and XYZ CORPORATION (fictitious names of persons and entities presently unknown,

Defendants.

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INDEX NO. 805115/2022

MOTION DATE 07/08/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this motion to/for DISMISS.

In this action, inter alia, to recover damages for medical malpractice and common-law negligence, the defendants Dewitt Rehabilitation and Nursing Center, Inc., and Upper East Side Rehabilitation and Nursing Center together move pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against them as time-barred. The plaintiff opposes the motion. The motion is denied.

The plaintiff commenced this action on April 1, 2022 by filing a summons and complaint on that date (*see* CPLR 304[a]). In his complaint, he alleged that he treated with the moving defendants from January 31, 2019 through February 14, 2019, and that they should be held liable both for common-law negligence and medical malpractice, as well as for violation of statutes governing nursing home facilities.

In connection with a motion to dismiss a complaint as time-barred, "'a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made," the burden shifts to the plaintiff to raise a question of fact as to "whether the statute

of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the action within the applicable limitations period'" (*Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman, LLP*, 188 AD3d 530, 531 [1st Dept 2020], quoting *Quinn v McCabe, Collins, McGeough & Fowler, LLP,* 138 AD3d 1085, 1085-1086 [2d Dept 2016]; *see Murray v Charap*, 150 AD3d 752 [2d Dept 2017]; *Williams v New York City Health & Hosps. Corp.*, 84 AD3d 1358 [2d Dept 2011]; *Rakusin v Miano*, 84 AD3d 1051 [2d Dept 2011]).

The statute of limitations applicable to actions to recover for medical malpractice against a private health-care provider is 2½ years, measured from "the act, omission or failure complained of or last treatment where there is a continuous treatment for the same illness, injury or condition which gave rise to the said act omission or failure" (CPLR 214-a). An action to recover damages for personal injuries, arising from alleged common-law negligence or violation of a statute, must be commenced within three years of the accrual of the cause of action (*see* CPLR 214[2], [5]).

Under most circumstances, the medical malpractice causes of action sought to be asserted here against the moving defendants would have been time-barred if they were not interposed by August 16, 2021, the first business date after August 14, 2022 (*see* General Construction Law §§ 20, 25-a), and the common-law negligence and statutory causes of action would have been time-barred if they were not interposed by February 22, 2022. In accordance with L 2020, ch 23, § 2 (eff Mar. 3, 2020), however, the Legislature amended Executive Law § 29-a to authorize the Governor to issue, by executive order, any directive necessary to respond to the state disaster emergency arising from the COVID-19 pandemic, including a declaration that all statutory periods for the service and filing of papers in legal actions were tolled. On March 20, 2020, the Governor, pursuant to that authority, issued Executive Order (EO) 202.8, which provided, in relevant part:

> "In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, *any specific time limit for the commencement, filing, or service of any legal*

> *action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules* . . . , or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, *is hereby tolled from the date of this executive order until April 19, 2020."*

(emphasis added). The terms of that EO, including the tolling deadlines set forth therein, were extended 13 times between March 20, 2020 and October 4, 2020. On October 4, 2020, the Governor issued EO 202.67, providing for a final extension of the tolling deadline until November 3, 2020, and reciting that the "toll would no longer be in effect" as of November 4, 2020 (*Brash v Richards,* 195 AD3d 582, 584 [2d Dept 2021]).

"A toll suspends the running of the applicable period of limitation for a finite time period, and '[t]he period of the toll is excluded from the calculation of the [relevant time period]'" (*Brash v Richards,* 195 AD3d at 582, quoting *Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 505 n 8 [2020]). Here, that period was 228 days. "'Unlike a toll, a suspension does not exclude its effective duration from the calculation of the relevant time period. Rather, it simply delays expiration of the time period until the end date of the suspension'" (*Brash v Richards,* 195 AD3d at 582, quoting *Foy v State of New York*, 71 Misc 3d 605, 608 [Ct Claims 2021]).

As the Appellate Division, Second Department, explained in *Brash*, the EOs effectuated a true tolling of the limitation periods applicable to any claim that had accrued prior thereto, and not a mere suspension of the limitations period, as asserted by the moving defendants. In this regard, the Second Department unequivocally asserted that "we conclude that the subject executive orders constitute a toll of such filing deadlines" (*Brash v Richards,* 195 AD3d at 582).

> "[A]lthough the seven executive orders issued after Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8) did not use the word 'toll,' those executive orders all either stated that the Governor 'hereby continue[s] the suspensions, and modifications of law, and any directives, not superseded by a subsequent directive,' made in the prior executive orders (Executive Order [A. Cuomo] Nos. 202.14, 202.28, 202.38, 202.48 [9 NYCRR 8.202.14, 8.202.28, 8.202.38, 8.202.48]) or contained nearly identical language to that effect (*see* Executive Order [A. Cuomo] Nos. 202.55, 202.55.1, 202.60 [9 NYCRR 8.202.55, 8.202.55.1, 8.202.60]). Since the tolling of a time limitation contained in a statute constitutes a modification of the requirements of such statute within the meaning of Executive Law § 29-a(2)(d), *these subsequent executive orders continued the*

> *toll that was put in place by Executive Order (A. Cuomo) No. 202.8* (9 NYCRR 8.202.8)"

(*id.* at 585 [emphasis added]).

Contrary to the moving defendants' interpretation, the EO provision reciting that the toll was no longer in effect as of November 4, 2020 cannot be construed to mean that the toll was intended to inure only to the benefit of litigants who were obligated to commence an action or file papers between March 20, 2020 and November 3, 2020. Such an interpretation makes no logical sense, as it would require a litigant who was subject to a limitations deadline of November 5, 2020 strictly to comply with that deadline, as if the toll simply didn't exist for that litigant. Such a construction would both defeat the purpose of creating a true "tolling period" and contradict the Court of Appeals' definition of a "tolling period." The subject language means only that the length of the tolling period terminated at 228 days, and would not be extended any further. To the extent that the moving defendants rely upon *McLaughlin v Snowlift, Inc.* (2021 NY Slip Op 50503[U], 71 Misc 3d 1226[A], 2021 NY Misc LEXIS 2794 [Sup Ct, Kings County, May 20, 2021]) to support their contention that the EOs effectuated a mere suspension of the limitations period, the Second Department's decision in *Brash* clearly overruled *McLaughlin*, as the appellate decision was issued on June 2, 2021, or 13 days after the decision in *McLaughlin* was rendered.

Applying the applicable tolling period to the instant matter, the plaintiff had until April 1, 2022 to commence this action and interpose his medical malpractice causes of action, and until October 1, 2022 to interpose the common-law negligence and statutory causes of action. His commencement of the action on April 1, 2022.renders this action timely commenced.

Accordingly, it is

ORDERED that the motion of the defendants Dewitt Rehabilitation and Nursing Center, Inc., and Upper East Side Rehabilitation and Nursing Center to dismiss the complaint insofar as asserted against them is denied.

This constitutes the Decision and Order of the court.

9/21/2022
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE