

**Estate of Veytsman v New York City
Health & Hosps. Corp.**

2024 NY Slip Op 31464(U)

April 22, 2024

Supreme Court, Kings County

Docket Number: Index No. 505521/2015

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 7 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of April 2024.

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

-----X
THE ESTATE OF DORA VEYTSMAN BY RIMMA VEYTSMAN AS ADMINISTRATRIX,

Plaintiff,

-against-

NEW YORK CITY HEALTH & HOSPITALS CORPORATION and HAMILTON PARK NURSING AND REHABILITATION CENTER,

Defendants.

-----X
HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

DECISION & ORDER

Index No. 505521/2015
Mo. Seq. 25 & 26

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: Seq. 25: 504 – 505, 508, 509 – 511, 520, 521 – 522

Seq. 26: 512 – 513, 514 – 516, 517, 518 – 519, 523, 524 – 526

Defendant New York City Health And Hospitals Corporation S/H/A New York City Health & Hospitals Corporation (hereinafter “NYC Health + Hospitals”) moves for an Order, pursuant to CPLR Rule 3211(a)(7) and General Municipal Law § 50-e dismissing the Plaintiff’s Complaint in its entirety for failure to file a Notice of Claim as to new theories of liability and damages asserted for the first time in the Bills of Particulars, or alternatively, striking those new theories of liability and damages asserted for the first time in the Bills of Particular and absent from the Notice of Claim; and to extend the time to file for summary judgment (Seq. No. 25). Plaintiff submits opposition to the motion.

Additionally, Plaintiff cross-moves to include claims that movant failed to diagnose and treat “pressure ulcers/bed sores, open wounds, skin tears, dehydration, malnutrition, lethargy or sepsis,” in the Notice of Claim under General Municipal Law § 50-e, and also seeks that the

Court “permit the inclusion of a cause of action for “wrongful death” in the Notice of Claim, under General Municipal Law § 50-e(6) (Seq. No. 26).

This is a medical malpractice action involving the treatment of plaintiff’s decedent, Mrs. Dora Veytsman, at NYC Health + Hospitals/South Brooklyn Health (formerly known as NYC Health + Hospitals/Coney Island) (hereinafter “Coney Island Hospital”). Mrs. Dora Veytsman, a non-verbal, ventilator-dependent, 86-year-old woman, confined to the bed at the Hamilton Park Nursing and Rehabilitation Center (hereinafter “Hamilton Park facility”), was transferred to Coney Island Hospital on or about September 13, 2014, through September 29, 2014. After her discharge from Coney Island Hospital, upon her return to the Hamilton Park facility on September 29, 2014, Mrs. Veytsman was diagnosed with a fracture to the right arm/wrist and a wound and infection on her right arm.

On or about October 8, 2014, Plaintiff served a Notice of Claim upon NYC Health + Hospitals, alleging negligence and medical malpractice resulting in a wrist fracture and infection. Dora Veytsman passed away on April 22, 2015, after the Plaintiff served her Notice of Claim. The nature of the claim, as asserted within the Notice of Claim, states the following:

“To recover money damages for personal injuries, pain and suffering, medical expenses, and related damages incurred by and on behalf of claimant DORA VEYTSMAN by reason of negligent care and medical treatment causing personal injuries to claimant by reason of the negligence, carelessness and medical malpractice of respondents, its agents, servants, employees, licensees, medical staff, and those persons who rendered care, treatment, services, and advice to claimant.”

The time when, the place where, and the manner in which the claim arose is asserted as follows:

“The claim arose on or about the month of September 2014, believed to be around September 13, 2014, (the exact date and time presently unknown) claimant was a patient at the Hamilton Park Nursing and Rehabilitation Center, and had been transported by the respondents’ ambulance from said Center to Coney Island Hospital to receive treatment for various unrelated complaints. That while in care and custody of the respondents, at a point in time presently unknown, claimant was caused and or permitted to sustain injuries as a result of the respondents’ negligence, which included a fracture to the right arm/wrist. Thereafter, while still a patient at

the Coney Island Hospital, the claimant was caused/permitted to contract an infection and/or suffer a severe reaction, with acute and lasting sequela. Inter alia, these respondents were careless and negligent in their care and treatment of the claimant, in failing to provide timely and proper care, and medication, in negligent transport, in failing to secure the patient and make her feel safe; in that they caused or permitted incompetent, unskillful, and improper treatment and care of the claimant; in accordance with accepted standards of medical and nursing practices, procedures, and techniques prevailing at the aforesaid time and place; respondents failed to exercise the knowledge, skill, and diligence which they should have exercised on claimant's behalf thereby inflicting or allowing serious injury to claimant; in permitting and allowing a dangerous condition to exist and the respondents were otherwise negligent, careless, and reckless in their care and treatment.

Claimant Dora Veytsman sustained severe permanent personal injuries, the full extent of which is not presently known, including but not limited to, upon information and belief, a fracture of the right arm/wrist and a severe infection/reaction. Claim is for personal injuries, hospital, physician, and other medical expenses, pain and suffering, loss of quality and/or enjoyment of life, and all other damages to which claimant is entitled to by case law and statute."

The issue was joined by the service of NYC Health + Hospitals' answer on July 29, 2015, and demands for Verified Bills of Particulars and other pleadings were served with the answer.

On May 18, 2016, more than a year and a half after the treatment at issue, Plaintiff served a Bill of Particulars that was not verified or signed. The Bill of Particulars alleges new injuries that were not previously stated in the Notice of Claim, including pressure ulcers, open wounds, skin tear, and contact dermatitis.

On November 14, 2018, Plaintiff, Mrs. Veytsman's daughter, appeared for a hearing pursuant to General Municipal Law § 50- h ("50-h hearing"). Plaintiff's main complaint with respect to Mrs. Veytsman's care at Coney Island Hospital was a fractured right wrist and a noticeable wound on her right hand and wrist. Plaintiff's testimony did not include any complaints as to the care and management of Mrs. Veytsman's alleged bed sores, or any claims as to lack of informed consent or wrongful death at Coney Island Hospital.

On December 6, 2018, an order was entered consolidating an action filed under index number 5019881/2016 against co-defendant Hamilton Park with the instant action. Plaintiff

served her “Response to the Compliance Conference Order Dated 9/6/2019” on NYC Health + Hospitals on November 12, 2019. The “Response to the Compliance Conference Order Dated 9/6/2019” included a “Supplemental Bill of Particulars” that was signed, but not verified, and which solely alleged negligent acts that caused a wrist fracture and caused or permitted an infection or severe reaction. On January 22, 2020, NYC Health + Hospitals received plaintiff’s “Response to the Final Pre-Note Order Dated 12/3/2019,” which included Plaintiff’s “2nd Supplemental Bill of Particulars,” and listed additional injuries of “bedsores, ulcers, open wounds, skin tears, [and] infections.”

On February 10, 2021, Plaintiff served her “3rd Supplemental Bill of Particulars,” which contained lack of informed consent and wrongful death claims that were not included in plaintiff’s Notice of Claim or in the Complaint. After more motion practice, plaintiff served on NYC Health + Hospitals and co-defendant her “4th Supplemental Bill of Particulars in Response to Court Order Dated 4/21/2021” (hereinafter “4th Supplemental Bill of Particulars”) which includes allegations pertaining to injuries of pressure ulcers, open wounds and skin tears, lack of informed consent, and wrongful death. To date, plaintiff has not withdrawn any of the allegations contained in her Bills of Particulars, other than lack of informed consent which was withdrawn in the affirmation in support of Plaintiff’s cross motion.

Defendant correctly argues that allegations regarding pressure ulcers were not stated in the Notice of Claim. A Notice of Claim must set forth the nature of the claim and the time when, place where and manner in which the claim arose. General Municipal Law § 50-e[2]. The purpose of the statute is to enable the municipality to investigate the facts of the incident in issue and whether the Notice of Claim includes information sufficient to enable the municipality to investigate the claim. Palmieri v. New York City Tr. Auth., 288 A.D.2d 361 [2d Dept 2001]. Service of a notice of claim is required in medical malpractice actions against respondent and are

governed by the provisions of section 50-e of the General Municipal Law, which provides that the notice of claim must ordinarily be served within 90 days after the cause of action accrues. General Municipal Law § 50-e[2]. The filing of a notice of claim within 90 days after the alleged claim arises is a condition precedent to the commencement of a tort action against a municipality, and the failure to comply with this condition precedent is grounds for dismissal of the action. J. H. v. New York City Health and Hosps. Corp., 169 A.D.3d 880 [2d Dept 2019]. The Second Department holds that “[a] claimant is limited to the claims asserted and any claim not contained in the notice of claim that would substantially alter the claim alleged is barred.” Manns v. New York City Transit Authority, 50 A.D.3d 860, 861 (2d Dept 2008). The claims at issue clearly alters the subject of this litigation.

In their cross motion, Plaintiff seeks leave to amend the Notice of Claim over eight years after the statute of limitations for pain and suffering has expired, and over seven years after the statute of limitations for wrongful death has expired.

With respect to a wrongful death cause of action, the 90 days runs from the appointment of a representative of the decedent's estate. General Municipal Law § 50-e(1)(a); Watts v. City of New York, 186 A.D.3d 1574 [2d Dept 2020]. The Court does not have authority to grant an amendment to a notice of claim beyond the statute of limitations, one year and 90 days as to claims for pain and suffering, and two years as to claims for wrongful death. Thus, the Court is without discretion to grant such relief seeking to add a claim for wrongful death at this time. Therefore, any claim for wrongful death is stricken from the Bill of Particulars and to the extent it is asserted as a cause of action in this case, it is dismissed. Unconsolidated Laws § 7401(2); CPLR § 217-a; General Municipal Law §§ 50-e(5), 50-i. See also, Congero v. City of Glen Cove, 193 A.D.3d 679, 681 [2d Dept 2021]; Watts v. City of New York, 186 A.D.3d 1574 [2d Dept

2020]; Argudo v. New York City Health & Hosps. Corp., 81 A.D.3d 575 [2d Dept 2011];
Barnaman v. New York City Health & Hosps. Corp., 90 A.D.3d 588 [2d Dept 2011].

Furthermore, Plaintiff cannot use a bill of particulars to assert new theories of liability and new injuries that were not previously included in the Notice of Claim. See Carter v. City of New York, 38 A.D.3d 702 [2d Dept 2007] (“The new theory of recovery contained in the plaintiffs' proposed amended notices of claim, if interposed, would have substantially altered the nature of their claims. Amendments of a substantive nature are not within the purview of General Municipal Law § 50-e (6)”). A complaint or bill of particulars cannot allege, for the first time, new facts, theories of liability, time frames, or injuries that are not contained in the Notice of Claim. See Palmer v. Society for Seaman’s Children, 88 A.D.3d 970 [2d Dept 2011] (dismissing allegations in the Complaint where “the notice of claim failed to adequately apprise” the defendant of those claims).

In Castillo v. Kings County Hosp. Ctr., 149 A.D.3d 896 [2d Dept 2017], the Second Department denied the plaintiff’s motion for leave to amend the notice of claim, as the proposed amendment “asserted a new injury and added a new theory of liability.” *Id.* at 897. “Causes of action for which notice of claim is required which are not listed in plaintiff’s original notice of claim may not be interposed” Finke v. City of Glen Cove, 55 A.D.3d 785 [2d Dept 2008], quoting Mazilli v. City of New York, 154 A.D.2d 355, 357 [2d Dept 1989]. “Amendments to notices of claim are appropriate only to correct good faith and nonprejudicial ‘technical mistakes, defects or omissions, not substantive changes in the theory of liability’” Robinson v. City of New York, 138 A.D.3d 1093, 30 N.Y.S.3d 311 [2d Dept 2016], quoting Ahmed v. New York City Hous. Auth., 119 A.D.3d 494, 495 [2d Dept 2014].

Here, Plaintiff asserts in their Notice of Claim, that “claimant was caused and or permitted to sustain injuries as a result of the respondents’ negligence, which included a fracture

to the right arm/wrist. Thereafter, while still a patient at the Coney Island Hospital, the claimant was caused/permitted to contract an infection and/or suffer a severe reaction, with acute and lasting sequela". Absent from the Notice of Claim are any claims for lack of informed consent, wrongful death, pressure ulcers/bed sores, open wounds, skin tears, dehydration, malnutrition, lethargy, or sepsis. The Notice of Claim fails to allege anything other than negligence and medical malpractice regarding a right arm fracture. The failure to include such claims or injuries is a change that is more than a mere technicality, and to include them now would do more than simply add damages, but rather would substantively change the nature of the theory of liability. Clearly, the addition of claims for "pressure ulcers/bed sores" would mean not just that a new injury is being asserted, but also substantively change the nature of the claim to add new theories of liability, injuries, and causation. *Id.* See also Manns v. New York City Transit Authority, 50 A.D.3d 860, 861 [2d Dept 2008], citing Calix v. New York City Transit Authority, 14 A.D.3d 583 [2d Dept 2005] ("A claimant is limited to the claims asserted and any claim not contained in the notice of claim that would substantially alter the claim alleged is barred.").

While pursuant to General Municipal Law § 50-e[6], a notice of claim may be corrected in limited circumstances of mistake, omission, irregularity, or defect, it only authorizes the correction when it is made in good faith, is nonprejudicial, corrects technical defects or omissions, and is not a new or substantive change in the theory of liability. See Mosley v. City of New York, 217 A.D.3d 857 [2d Dept 2023] (motion to amend notice of claim denied as the notice of claim listed only one theory of liability and did not directly or indirectly reference allegations raised in the bill of particulars); Macareno v. New York City Tr. Auth., 206 A.D.3d 642, 644 [2d Dept 2022] (plaintiff's motion to amend notice of claim properly denied as proposed amendment was not technical in nature, but rather included a substantive change to the

facts and added a new theory of liability). In this matter, the omissions are substantive in nature and cannot be added as claims herein.

Plaintiff cites to a First Department case to ask that this Court permit the inclusion of “wrongful death” under Ramos v. New York City Transit Authority, 60 A.D.3d 517 [1st Dept. 2009], where plaintiff was granted leave to amend their notice of claim to add a wrongful death claim, where the wrongful death claim arose out of the same facts that were alleged in a timely and valid notice of claim, and simply added an item of damages to be proven by the aggrieved party. Ramos v. New York City Transit Authority, 60 A.D.3d 517 [1st Dept. 2009]. The Plaintiff’s argument that the decedent’s alleged wrongful death, as well as injuries of pressure ulcers, bed sores, open wounds, skin tears, dehydration, malnutrition, lethargy, and sepsis, arise out of the same facts as the alleged wrist fracture and infection is unsupported and baseless.

Accordingly, defendant’s motion is GRANTED to the extent that this Court strikes new claims set forth in the Bill of Particulars, Supplemental Bill of Particulars, 2nd Supplemental Bill of Particulars, 3rd Supplemental Bill of Particulars, and 4th Supplemental Bill of Particulars as to pressure ulcers, bed sores, open wounds, skin tears, dehydration, malnutrition, lethargy, sepsis and death; and such claims are dismissed. Claims for wrongful death are also stricken. Plaintiff withdrew her claim for lack of informed consent and therefore this claim is dismissed as unopposed.

Finally, Defendants NYC Health + Hospitals move for an extension of time to file summary judgment from the date of this order. The Court of Appeals holds “filing late summary judgment motion requires a showing of good cause for the delay in making the motion, a satisfactory explanation for the untimeliness, rather than simply permitting meritorious, nonprejudicial filings, however tardy...” Brill v. City of New York, 814 N.E.2d 431 [N.Y. 2004]. Here, plaintiff filed the Note of Issue before the January 31, 2024 deadline and defendants

expeditiously made the instant motion on December 27, 2023. As defendant would have not been able to make a summary judgment motion without the Court's ruling on the issues herein, they have thereby established cause for the extension. This Court hereby GRANTS an extension of time to Defendants NYC Health + Hospitals to move for summary judgment 60 days from the date of this order.

In accordance with the above, the motion of Defendant NYC Health + Hospitals is GRANTED TO THE EXTENT OF striking new theories of liability and resulting damages asserted for the first time in the Bills of Particular and absent from the Notice of Claim. [Seq. No. 25].

The cross-motion to add claims that NYC Health + Hospitals failed to diagnose and treat "pressure ulcers/bed sores, open wounds, skin tears, dehydration, malnutrition, lethargy or sepsis" in the Notice of Claim and to amend same to include claims for wrongful death is DENIED in its entirety.

This constitutes the decision and order of the court. ¹

ENTER.



Hon. Consuelo Mallafré Melendez
J.S.C.

¹ This decision was drafted with the assistance of legal intern Jessica Ramsawak, Brooklyn Law School.