

Axisa v Bellevue Hosp. Ctr.

2024 NY Slip Op 31507(U)

April 25, 2024

Supreme Court, New York County

Docket Number: Index No. 805337/2021

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

-----X
GARY AXISA, as the Administrator of the Estate of
CHARMAINE PEREZ, Deceased,

INDEX NO. 805337/2021

Plaintiff,

MOTION DATE 02/01/2024

- v -

MOTION SEQ. NO. 002

BELLEVUE HOSPITAL CENTER,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X
HON. ARTHUR F. ENGORON:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to

DISMISS

Upon the foregoing documents, and for the reasons stated hereinbelow, defendant's motion, pursuant to CPLR 3211(a)(7), to dismiss is granted.

Background

On November 22, 2020, decedent, Charmaine Perez ("Decedent"), died twelve days after being admitted to defendant, Bellevue Hospital Center ("Bellevue"), for an amputation of her left hallux (big toe). NYSCEF Doc. No. 24. Bellevue is a facility owned and operated by non-party New York City Health and Hospitals Corporation ("NYC HHC").

In a letter dated December 15, 2020, an attorney for a prior plaintiff in the instant action, Charleen Rivera ("Rivera"), wrote to Bellevue's Risk Management Department informing it of his retention to pursue a negligence claim arising from Decedent's passing. NYSCEF Doc. No. 31. In a letter dated January 6, 2021, the same attorney wrote Bellevue that he had been retained to pursue negligence and medical malpractice claims arising from the death. NYSCEF Doc. No. 32.

On September 28, 2021, letters of administration for Decedent's estate were issued to plaintiff, Gary Axisa ("Axisa"). NYSCEF Doc. No. 14

On October 28, 2021, Rivera, as Proposed Administrator of the Estate of Decedent, commenced the instant action against Bellevue, alleging medical malpractice; wrongful death; negligent hiring, retention, training and supervision, negligence; and deprivation of companionship. NYSCEF Doc. No. 1.

On April 7, 2022, Bellevue moved, pursuant to CPLR 3211(a)(3), to dismiss the instant action on the grounds that Rivera had not been duly appointed as a representative of the Decedent's estate. NYSCEF Doc. No. 4.

On May 26, 2022, Axisa sent Notices of Claim to NYC HHC and Bellevue. NYSCEF Doc. No. 34.

On May 27, 2022, Axisa, as Administrator of the Estate of Decedent, commenced a second action, under Index No. 805179/2022 (the "2022 Action"), against NYC HHC and Bellevue, alleging medical malpractice, negligence, and negligent hiring, retention, training and supervision.

In a Decision and Order dated October 11, 2022, Justice Erika M. Edwards denied Bellevue's motion to dismiss the instant action and granted a cross-motion substituting Axisa as the administrator of Decedent's estate. NYSCEF Doc. No. 21.

In a Decision and Order dated January 19, 2023, Justice John J. Kelley denied Axisa's motion for leave to serve a late Notice of Claim, as General Municipal Law § 50-e(5) prevented the Court from granting an extension of time to serve a Notice of Claim beyond the statute of limitations. Furthermore, and upon the court's own initiative, the Court dismissed the complaint on the grounds that Axisa had failed timely to serve a Notice of Claim, a condition precedent to the commencement of a tort action against a municipal corporation. NYSCEF Doc. No. 38. In a Decision and Order dated June 27, 2023, Justice Kelley denied Axisa's motion to renew and reargue. NYSCEF Doc. No. 39. An appeal of that Decision is currently fully briefed before the Appellate Division, First Department, Index No. 2023-04068.

In the instant action, on February 1, 2024, defendant moved, pursuant to CPLR 3211(a)(7), to dismiss for failure timely to serve a Notice of Claim as General Municipal Law § 50-e(1) and the Unconsolidated Laws of New York § 7401(2) require. NYSCEF Doc. No. 22.

Arguments

Defendant argues that the instant motion does not violate CPLR 3211(e)'s single-motion rule, as plaintiff's time to file a Notice of Claim had not expired when Bellevue filed its prior motion, and because the prior motion was not decided on the merits. NYSCEF Doc. No. 23.

Defendant also argues that plaintiff never served a Notice of Claim in the instant action and provides the affidavit of NYC HHC's Principal Administrative Associate, Marcia Nobbs, who maintains a record of all Notices of Claim served upon NYC HHC, and who states that NYC HHC only received Axisa's May 26, 2022, Notice of Claim filed in the 2022 Action. NYSCEF Doc. No. 28. Further, defendant argues that plaintiff failed to obtain leave from this Court to serve a late Notice of Claim, that plaintiff's time to do so has passed, and that, in any event, the denial of plaintiff's motion to file a late Notice in the 2022 Action is law of the case (and/or collateral estoppel and/or res judicata).

In opposition, plaintiff argues, inter alia, that defendant had timely, actual knowledge of the essential facts of the claim, that defendant would suffer no prejudice from a late Notice, that the claim is meritorious and is sufficiently specific, and asks that, pursuant to General Municipal Law § 50-e(5), the Court grant petitioner leave to file a late Notice of Claim and deem it filed *nunc pro tunc*. NYSCEF Doc. No. 30.

In reply, Bellevue argues, inter alia, that the Court has no discretion to grant leave to file a Notice of Claim beyond the statute of limitations and that plaintiff's request for affirmative relief is improper as it was made without a notice of motion or cross-motion. NYSCEF Doc. No. 41.

Discussion

Pursuant to General Municipal Law § 50- e(1)(a), a party seeking to sue a public corporation must serve a Notice of Claim "within ninety days after the claim arises." Such Notice "is a condition precedent to commencing a suit for damages." Umeh v New York City Health and Hosps. Corp., 205 AD3d 599, 601 (1st Dept 2022). Still, General Municipal Law § 50-e(5) allows the court, in its discretion and upon application, to extend the time to serve a Notice of Claim. However, it is well-settled that courts are precluded from granting an extension exceeding

the time limited for the commencement of an action by the claimant against the public corporation. Therefore, an application for an extension may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled.

Pierson v City of New York, 56 NY2d 950, 953-54 (1982) (internal quotations and citations omitted).

Pursuant to General Municipal Law § 50(i)(1)(c), an action against a public corporation "shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death."

Here, as decedent died on November 22, 2020, plaintiff was required to serve NYC HHC with a Notice of Claim on or before February 20, 2021 (non-wrongful death claims), or on or before December 27, 2021, 90 days after the appointment of Axisa as administrator of the decedent's estate (wrongful death claim). Failing that, plaintiff had until February 20, 2022, to apply to the Court for leave to serve a non-wrongful death Notice of Claim and November 22, 2023, to serve a wrongful death Notice of Claim. Plaintiff did neither, and the Court is prevented from granting plaintiff leave to serve a late Notice now.

This Court has considered plaintiff's other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

The motion to dismiss is granted, and the Clerk is hereby directed to dispose of the action accordingly.

APR 25 2024 HON. ARTHUR F. ENGORON, J.S.C.



4/25/2024

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE