

**Hardison v New York Health and Hospitals
Corporation**

2003 NY Slip Op 30197(U)

September 12, 2003

Supreme Court, New York County

Docket Number: 122922/02

Judge: Sheila Abdus-Salaam

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: Hon. SHEILA ABDUS-SALAAM PART 13
Justice

Brian Hardison

INDEX NO. 122922/02

- v -

MOTION DATE 5/15/03

MOTION SEQ. NO. 001

New York Health and Hospitals Corporation
and Bellevue Hospital Center

MOTION CAL. NO. 42

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion : Yes No

Upon the foregoing papers it is ordered that this motion by plaintiff to deem plaintiff's Notice of Claim timely filed and the Summons and Complaint timely filed, to strike defendants' affirmative defenses as they relate to untimely service of the notice of claim and expiration of the Statute of Limitations, or alternatively, for leave to file a late notice of claim is granted. Defendants' cross-motion to dismiss the action because plaintiff failed to serve a timely notice of claim is denied.

In this medical malpractice action, plaintiff claims that while he was a patient at defendant Bellevue Hospital on January 2, 2001 and from January 13 through January 31, 2001, defendant failed to diagnose and properly treat an infection in (his right eye which developed into endophthalmitis causing a virtual complete loss of vision of the right eye. Plaintiff, who had suffered from juvenile glaucoma and had been a patient of Bellevue since 1988 when he was 15, had already lost vision in his left eye. After plaintiff's discharge from Bellevue on January 31, 2001, he continued to receive treatment for his right eye at Bellevue's Ophthalmology Clinic. Plaintiff's treatment included prescriptions for eye drops and other medications for

MOTION/CASE IS RESOLUTELY REFERRED TO JUSTICE DATED: J.S.C.

his eye that he took and continues to take on a daily basis. Plaintiff also returned to Bellevue for regular follow-up visits every few weeks through September 4, 2001. Billing records from Bellevue and Medicaid show that these visits occurred on February 6, 2001, February 16, 2001, February 28, 2001, March 21, 2001, April 21, 2001, May 1, 2001, July 10, 2001 and September 4, 2001. According to plaintiff, these visits were interrupted by the September 11, 2001 tragedies, as his blindness coupled with fear of traveling and of what might happen in an emergency kept him from keeping his next scheduled appointment, which he rescheduled once or twice.

On December 10, 2001, plaintiff went to the New York Eye and Ear Infirmary for a second opinion. Plaintiff states that he sought this second opinion because he was depressed **about** his condition and frustrated by the prognosis he received from Bellevue that he would not regain his eyesight. Between December 13, 2001 and the beginning of 2002 plaintiff made five visits to New York Eye and Ear. As was stated by plaintiff in his testimony at the 50-H hearing, and is indicated in the New York Eye and Ear record for the visit on December 13, 2001, plaintiff was prescribed eye drops. Plaintiff testified that these eye drops **were the same** medication that had been prescribed by Bellevue. The motion papers do not include the records for the remainder of the five visits to New York Eye and Ear which would indicate what was done at those three visits.

Plaintiff claims that once he learned the treatment recommended by New York Eye and Ear was the **same** treatment he received at Bellevue, he returned to Bellevue. His next visit there occurred on July 9, 2002. Plaintiff explains that his return to Bellevue was delayed by the premature birth of his son on March 2, 2002 and the baby's continued hospitalization until the end of May 2002. Since July 9, 2002, plaintiff has continued to receive treatment at Bellevue, including surgery to his right eye that was recommended by New York Eye and Ear.

To be timely, a **notice** of claim in a medical malpractice action against defendant New York City Health and Hospitals Corporation (**HHC**) must be filed within 90 days after the claim arises (General Municipal Law § 50-e; McKinney's Uncons Laws of NY § 7401 [2]). Similarly, a medical malpractice lawsuit against HHC must be commenced within one year and 90 days after the cause of action

arises (McKinney's Uncons. Laws § 7401[2]). A court has discretion to extend the time to serve a notice of claim if "the application for the extension is made not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled (citations omitted)." (Pierson v. City of New York, 56 NY2d 950, 954; see also Hochberg v. City of New York, 99 AD2d 1028, affd 63 NY2d 665).

Under these circumstances, plaintiff asserts that his notice of claim was timely filed on July 22, 2002 and his **summons and complaint were timely filed on October 22, 2002** because he has been under the **continuous treatment of Bellevue** up until the present time. Alternatively, plaintiff argues that **he had been under the continuous treatment of Bellevue until December 10, 2001**, when he went to New York Eye and Ear for a second opinion, that the action accrued on December 10, 2001, and that therefore, pursuant to General Municipal Law § 50-e (5), this court has discretion to extend his time to file a late notice of claim because the application for an extension was made within one year and 90 days from the date that this action accrued.

In opposing plaintiff's **motion to have his** notice of claim and lawsuit deemed timely filed and in support of their **cross-motion** for dismissal of this action, defendants contend that plaintiff's **claim accrued** on January 31, 2001 when he was discharged from Bellevue. Defendants also argue that **plaintiff's** visits to New York Eye and Ear Infirmary for a second opinion further evidences that plaintiff's treatment by Bellevue was interrupted and **that** plaintiff should not benefit from the continuous treatment doctrine that would make this action timely.

The statute of limitations may be tolled in a situation where a plaintiff has demonstrated an on-going continuous course of treatment following the alleged negligence which gives rise to a claim (see Allende v. New York City Health and Hospitals Corp., 90 NY2d 33.3). "The time in which to bring a malpractice action is stayed 'when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint' " (McDermott v. Torre, 56 NY2d 399, 405, quoting Borsia v. City of New York, 12 NY2d 151, 155). Thus, the time to file a notice of claim and commence a lawsuit does not begin to run until the end of a course of treatment

(see Borgia v. City of New York, 12 NY2d at 151; CPLR 214-a). Further, the treatment is continuous only **when** further treatment is explicitly anticipated by both the doctor and the 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.. .. [W]here the physician and patient reasonably intend the patient's uninterrupted reliance upon the physician's observation, directions, concern, and responsibility for overseeing the patient's progress, the requirement for continuous ... treatment ... is satisfied" (Richardson v. Orentreich, 64 NY2d 896, 898-899; see also Cox v. Kinnsboro Med. Group, 88 NY2d 904).

Defendants assert that plaintiff's cause of action accrued on January 31, 2001 upon his discharge **from** Bellevue. However, plaintiff **has** shown that he continued to be treated by Bellevue for his eye condition after his discharge. He has averred that he was prescribed eye drops that he took on a daily basis, and that he returned on a regular basis so that the Bellevue doctors **could examine and treat** his eye. He has also stated that **he** continued to take **the eye drops that had been** prescribed for him by Bellevue subsequent to the **September 4, 2001** visit. Here, as in Ramirez v. Friedman (287 AD2d 376), there was **continuous treatment of** plaintiff by defendant after the surgery that was **performed in January 2001**. Thus, plaintiff's cause of action did not accrue upon his discharge **from Bellevue on** January 31, 2001.

I do not believe that plaintiff's visit to New York Eye and Ear on December 10, 2001 for the purpose of obtaining a second opinion amounted to an interruption of his treatment by Bellevue. The record of that visit indicates only that he was there for a second opinion, and does not indicate that any treatment was prescribed.¹ (compare Sposato v. Di Giacinto, 247 AD2d 267, where plaintiff received treatment by three different doctors without consulting defendant, until returning to defendant). Plaintiff has testified that he continued to take the medication prescribed by Bellevue after his September 4, 2001 visit to that medical provider. However, assuming arguendo, that the December 10, 2001 visit

¹The record of the December 13, 2001 visit indicates that eye drops were prescribed.

constituted an interruption in Bellevue's treatment of plaintiff and that his cause of action accrued on that date, this action was timely commenced by the filing of a summons and complaint on October 21, 2002. Additionally, the motion for leave to serve a late notice of claim was filed within the statute of limitations. Thus, this court has discretion to extend the time to file the notice of claim.

In light of the fact that defendant has been in possession of plaintiff's medical records and has had knowledge of plaintiff's medical condition, specifically, the loss of vision that is the subject of this lawsuit, and that there is no demonstrable prejudice caused to defendant as a result of the delay in filing the notice of claim, the late notice of claim is deemed timely filed nunc pro tunc (see McMillan v. Citv of New York, 279 AD2d 280; Spaulding v. New York Citv Health and Hospital Corporation, 210 AD2d 128).

Defendants' affirmative! defenses with respect to the late notice of claim and statute of limitations are dismissed.

This constitutes the **decision** and order of the court.

Dated: 9/12/03

AA-S

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION