

**Gorodetskiy v New York City Health & Hosps. Corp.**

2007 NY Slip Op 32784(U)

August 24, 2007

Supreme Court, New York County

Docket Number: 0109226/2005

Judge: Joan B. Carey

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

PRESENT: Honorable Joan B. Carey  
Justice

PART 40 D

GERBERT S. GORODETSKIY,

Plaintiff,

Index No.: 109226/05

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, CONEY ISLAND HOSPITAL, PLASTIC SURGERY CLINIC, REHABILITATION MEDICINE & OCCUPATIONAL THERAPY CLINIC, DR. R. CONWAY, M.D., DR. G. KIMMEL, M.D., DR. M. GUOBADIA, M.D.,

Defendants.

The following papers, 1- 17, were read on this motion by defendants New York City Health and Hospitals Corporation and New York City Health and Hospitals Corporation s/h/a Coney Island Hospital, Plastic Surgery Clinic and the Rehabilitation Medicine & Occupational Therapy Clinic to dismiss the complaint on the ground that plaintiff failed to satisfy the notice of claim requirement; and cross-motion by plaintiff for an order deeming the amended notice of claim annexed to the instant cross-motion timely served, nunc pro tunc.

Order to Show Cause - Affidavits - Exhibits  
Cross-Motion - Affidavits - Exhibits  
Opposition to Cross-Motion  
Replying Affidavits

**FILED**  
SEP 05 2007  
NEW YORK COUNTY CLERKS OFFICE

Papers Numbered

1-5  
15  
16  
17

Cross-Motion:     Yes     No

The instant medical malpractice action involves allegations that defendants failed to properly treat plaintiff, Gerbert S. Gorodetskiy's, left pinky finger. Plaintiff injured his left pinky finger while exercising on July 17, 2003. It appears that plaintiff felt no immediate pain and did not seek treatment in connection with this injury until August 3, 2003, when he sought treatment in the emergency room at Coney Island Hospital. Plaintiff was diagnosed as having a dislocated finger and surgery was recommended. According to plaintiff, the surgical procedure was performed improperly. Additionally, post surgery, plaintiff's finger was placed in a cast, which he alleges was put on too tight and restricted his blood flow. Plaintiff experienced pain and discomfort in his left pinky finger, as well as loss of use, during the course of his post surgery follow-up visits, which

continued through late September of 2003. Thereafter, plaintiff alleges that he continued to treat at Coney Island Hospital up to October 28, 2004, receiving occupational therapy. According to plaintiff, he presently suffers from the loss of use of his left pinky finger as a result of the negligent care and treatment at issue.

On or about June 8, 2004, plaintiff served a notice of claim on the Office of the Comptroller of the City of New York.<sup>1</sup> On July 1, 2005, plaintiff commenced the instant action against defendant New York City Health and Hospital Corporation ("NYCHHC") as the owner and operator of Coney Island Hospital, as well as the Plastic Surgery Clinic and the Rehabilitation Medicine & Occupational Therapy Clinic within the Coney Island Hospital facility.<sup>2</sup> In his complaint plaintiff plead, *inter alia*, timely service of a notice of claim. Issue was joined by NYCHHC and NYCHHC s/h/a Coney Island Hospital, Plastic Surgery Clinic and the Rehabilitation Medicine & Occupational Therapy Clinic by service of an answer on or about July 21, 2005. In the answer defendants denied those allegations contained in plaintiff's complaint alleging that a notice of claim was timely served on NYCHHC, but admitted "that on or about June 6, 2004 a purported notice of claim was presented to the Comptroller of the City of New York . . . ."

NYCHHC and NYCHHC s/h/a Coney Island Hospital, Plastic Surgery Clinic and the Rehabilitation Medicine & Occupational Therapy Clinic presently move to dismiss the complaint on the ground that plaintiff failed to satisfy the notice of claim requirement, arguing that service of a notice of claim on the Office of the Comptroller of the City of New York is insufficient to constitute service upon NYCHHC. Plaintiff cross-moves for an order granting leave to file a late amended notice of claim, deeming the amended notice of claim annexed to the instant cross-motion timely served, *nunc pro tunc*. It is noted that after defendants served the instant motion, plaintiff commenced a special proceeding, under New York County Index No. 104430/07, and sought to move, by order to show cause, for an order granting leave to file a late amended notice of claim. However, since the relief being sought by plaintiff as the petitioner in that special proceeding should have been sought via a cross-motion to the instant motion to dismiss, the court declined to sign the aforementioned order to show cause and directed plaintiff to submit the instant cross-motion.

Service of a notice of claim on the Comptroller of the City of New York is insufficient to constitute service on NYCHHC. *Scantlebury v. NYCHHC*, 4 NY3d 606 [2005]; *Stallworth v. NYCHHC*, 243 Ad2d 704 [2d Dept. 1997]. Therefore, the notice of claim served by plaintiff in the instant action on the Comptroller of the City of New York, on or about June 8, 2004 was

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<sup>1</sup> It is noted that the notice of claim served on the Office of the Comptroller of the City of New York on or about June 8, 2004 was served while plaintiff was still receiving occupational therapy at the defendants' facility. The date of occurrence contained in that notice of claim is April 12, 2004, which apparently was the plaintiff's last visit to the facility prior to serving the notice of claim. Plaintiff alleges that he continued to treat at Coney Island Hospital up to October 28, 2004, and as part of the relief sought in connection with the instant motion seeks to amend the notice of claim to reflect that plaintiff sought continuous treatment at Coney Island Hospital up to October 28, 2004.

<sup>2</sup> It appears that the physicians individually named in the complaint, *i.e.*, Dr. R. Conway, M.D., Dr. G. Kimmel, M.D. and Dr. M. Guobadia, M.D., were never served in connection with this action.

Insufficient to constitute service on NYCHHC. Plaintiff now seeks an order deeming the amended notice of claim annexed to the instant cross-motion timely served upon defendants, *nunc pro tunc*.

Plaintiff argues that because: (i) he has a reasonable excuse for the delay in serving the notice of claim<sup>3</sup>; (ii) defendants received actual knowledge of the essential facts within the 90-day period; and (iii) defendants has not been prejudiced by the delay, the court, in its discretion, should grant leave to file a late notice of claim, under Gen. Mun. L. §50-e(5). In pertinent part, Gen. Mun. L. §50-e(5) reads that "upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. *The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation.*" (emphasis added). In the instant action, even if this court was to determine that plaintiff was receiving continuous treatment with respect to the condition that gave rise to his cause of action until October 28, 2004, the one year and ninety days statute of limitations expired on January 26, 2006. See §7401(2) of McKinney's Unconsolidated Laws of New York State. As a result, the extension plaintiff seeks exceeds the time limited for the commencement of this action against NYCHHC by more than a year. Therefore, this court is without discretion to grant the relief requested. See Gen. Mun. L. §50-e(5); see also *Coely v. NYCHHC*, 162 AD2d 492 [2d Dept. 1990]. Accordingly, defendants motion to dismiss the complaint on the ground that plaintiff failed to satisfy the notice of claim requirement is granted and the cross-motion by plaintiff for an order deeming the amended notice of claim annexed to the instant cross-motion timely served, *nunc pro tunc* is denied. Further, as the physicians individually named in the complaint, *e.g.*, Dr. R. Conway, M.D., Dr. G. Kimmel, M.D. and Dr. M. Guobadia, M.D., were never served process in connection with this action, the complaint is dismissed in its entirety.

Lastly the court notes that plaintiff also seeks to amend the notice of claim pursuant to Gen. Mun. L. §50-e(6) to reflect that plaintiff sought continuous treatment at Coney Island Hospital up to October 28, 2004. However, as that portion of plaintiff's cross-motion to for leave to file a late notice of claim has been denied, that portion of plaintiff's cross-motion for leave to amend has been rendered moot.

Based on the foregoing, it is hereby

ORDERED that defendants New York City Health and Hospitals Corporation and New York City Health and Hospitals Corporation s/h/a Coney Island Hospital, Plastic Surgery Clinic and the Rehabilitation Medicine & Occupational Therapy Clinic motion to dismiss is granted and the complaint is dismissed; and it is further

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<sup>3</sup> Plaintiff contends that because defendants did not deny receipt of plaintiff's notice of claim and did not raise any substantive objections to it, he was unaware that defendants were rejecting such notice of claim until they moved to dismiss the complaint. Despite plaintiff's contention to the contrary, defendants' answer denied the specific allegations contained in plaintiff's complaint alleging that a notice of claim was timely served on NYCHHC; except admitted "that on or about June 6, 2004 a purported notice of claim was presented to the Comptroller of the City of New York . . .", thereby putting plaintiff on notice of his error. See *Scantlebury v. NYCHHC*, *supra*. Defendants were under no duty to raise a failure to serve a notice of claim on NYCHHC as an affirmative defense. *Kroin v. The City of New York*, 210 AD2d 95 [1st Dept. 1994].

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ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross-motion for an order deeming the amended notice of claim annexed to the instant cross-motion timely served, *nunc pro tunc*, is denied; and it is further

ORDERED that the special proceeding, commenced by plaintiff under New York County Index No. 104430/07, seeking an order granting leave to file a late amended notice of claim is rendered moot and is dismissed.

Dated: 8/24/2007

A handwritten signature in black ink, appearing to read "Joan J. ...", is written over a horizontal line. To the right of the signature is a circular stamp containing the initials "J.S.C." in a serif font.

Check one:  FINAL DISPOSITION

NON- FINAL DISPOSITION

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