

<b>Harrison v City of New York</b>
2009 NY Slip Op 31749(U)
July 20, 2009
Supreme Court, New York County
Docket Number: 406123/07
Judge: Douglas E. McKeon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Douglas E. McKean  
Justice

PART 38

W.H. Harrison  
- v -  
City of New York

INDEX NO. 406123/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. ~~004~~ 005  
MOTION CAL. NO. (Formerly 002)

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for EXTEND TIME

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion  
is decided per annexed Memorandum Decision.

**FILED**

JUL 24 2009

COUNTY CLERK'S OFFICE  
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/20/09

DE  
Douglas E. McKean  
Justice Supreme Court J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----X  
WILLIAM HENRY HARRISON; BETTY MASON, for  
Herself, and as Administratrix of the Estate OF EDITH  
HARRISON (Deceased); JAMES ANDREW HARRISON,  
JR.; CELESTER REGINALD HARRISON; EARNEST  
VERDELL HARRISON,

Plaintiffs,

MEMORANDUM DECISION

-against-

Index No. 406123/07

CITY OF NEW YORK; NEW YORK CITY HEALTH  
AND HOSPITAL'S CORPORATION (NYCHHC); ASQA  
SIDDIQUL (MD); VEL SIVIPALAN (MD); RICHARD  
BROWN (MD); J.MEHTA, (MD); DR KAMPAIAH  
(MD); NURSE MIGUEL (LPN); JEAN LUNDGREN CC3  
(MD); DOCTOR OCAMPO (MD); DOCTOR PALMER  
(ADMINISTRATOR); TURNBULL (ADMINISTRATOR)

Defendants.

**FILED**  
JUL 24 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X

HON. DOUGLAS E. MCKEON:

Motion by the City of New York ("City") to dismiss, pursuant to CPLR 3211, for plaintiffs' failure to comply with the notice of claim requirements of General Municipal Law §§50-e and 50-i and defendant Sudha Karumpaiah, M.D.'s motion to dismiss, also pursuant to CPLR 3211, for plaintiffs' failure to comply with the governing statute of limitations and notice of claim requirements together with the *res judicata* effects of a related Federal action determination together with plaintiffs' motion for permission to extend their time to serve certain named defendants and to obtain information so that these proposed parties may be located and served are consolidated for disposition and decided as follows:

Basically, this claim arises out of alleged medical malpractice at Harlem Hospital, a New York City Health and Hospitals Corporation (“HHC”) facility, resulting in decedent Edith Harrison’s death on April 24, 2002. Plaintiffs also allege claims for intentional torts, personal injury, medical malpractice, wrongful death and violation of civil rights.

By way of background, plaintiffs commenced a federal suit involving the same facts and circumstances as this action, which was dismissed by order, dated September 28, 2007, by Hon. William H. Pauley, III, U.S.D.J. who held that the Federal action had not been commenced within the governing three-year statute of limitations. While also dismissing the state claims asserted in the federal action, Judge Pauley referenced 28 U.S.C. §1367(d) and its tolling provisions, permitting plaintiffs to assert any viable state claims within 30 days of his decision; but plaintiffs have no viable state court actions.

The statute mandates and it is well-settled that an extension of time in which to serve a late notice of claim or to make a motion requesting permission to serve a late notice of claim may not exceed the statute of limitations. The statute of limitations for intentional torts, negligence or medical malpractice against HHC and its’ physicians is one year and 90 days from the date of accrual; a wrongful death action must be brought within two years of the date of death. McKinney’s Unconsol. Laws § 7401, General Municipal Law §§ 50-e and 50-i; *De Gradi v. Coney Island Medical Group, P.C.*, 172 AD2d 582 (2d Dep’t 1991) . Thus, in the instant case, plaintiffs had until July 23, 2003 (one year and 90 days from the date of death) and April 24, 2004 (two years from the date of death), at the latest, to make an application to the court to file a late notice of claim.

When the statute of limitations has run, this court has no discretion (indeed, is without jurisdiction) to grant an application to serve or file a late notice of claim. *See, e.g., Pierson v. City of New York*, 56 NY2d 950 (1982). This action was not commenced until more than three years after the decedent's death, which was April 24, 2002. The toll to which plaintiffs are entitled while the Federal action was pending does not change this result, as that action was not filed until 2005.

Likewise, plaintiffs' civil and constitutional rights are dismissed as time-barred. Not only did Judge Pauley previously rule with regard to these claims in his September 28, 2007 order, entitling defendants to the benefit of *res judicata*, but the abbreviated statute of limitations pertaining to New York City Health and Hospitals Corporation and its' employees applies to these causes of action as well.

Notwithstanding that Judge Pauley ruled that plaintiffs were not entitled to equitable tolling, plaintiffs' submissions once again have failed to establish that they are entitled to this relief as they did not demonstrate that the medical records were fraudulently concealed, nor did the alleged concealment deprive plaintiffs of information needed to file a notice of claim.

Based on the entire record before it, the court finds that plaintiffs have failed to meet the criteria set forth in General Municipal Law §§50-e and 50-i and defendants' motion to dismiss is granted.

Finally, the City is an improper party defendant. HHC is a public benefit corporation, separate and distinct from the City and charged with the control and operation of the city's municipal hospital facilities and clinics. Thus, an action for alleged

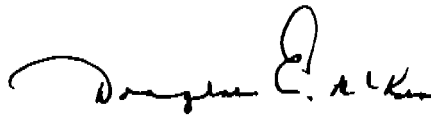
medical malpractice arising from treatment provided at a municipal hospital may not be maintained against the City. Harlem Hospital is controlled and operated by HHC, which was the proper party to be served with a notice of claim and summons and complaint. *See* McKinney's Unconsol. Laws § 7401; General Municipal Law §50-i. Hence, the complaint is dismissed against the City of New York.

Issues raised in plaintiffs' motion to extend the time to serve certain defendants and to obtain identifying information with regard to said defendants, and other remaining issues are moot in light of the dismissal as to all defendants.

As such, the Clerk of the Court is directed to enter judgement accordingly.

So ordered.

DATED: New York, New York  
July 20, 2009

  
Douglas E. McKeon, J.S.C.

**FILED**  
JUL 24 2009  
COUNTY CLERK'S OFFICE  
NEW YORK