

Johns v Broome County Correctional Facility

2010 NY Slip Op 32199(U)

August 18, 2010

Supreme Court, Broome County

Docket Number: 2010-0107

Judge: Ferris D. Lebus

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District in the Broome County Courthouse, 92 Court Street, City of Binghamton, New York, on the 30th day of July, 2010.

PRESENT: HON. FERRIS D. LEBOUS
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT : : BROOME COUNTY

RONDU JOHNS,

Plaintiff,

-vs-

BROOME COUNTY CORRECTIONAL FACILITY,
and COUNTY OF BROOME,

Defendants.

DECISION AND ORDER

Index No. 2010-0107
RJI No. 2010-0557-M

APPEARANCES:

COUNSEL FOR PLAINTIFF:

PATRICK J. KILKER, ESQ.
136 WASHINGTON STREET
BINGHAMTON, NY 13901

COUNSEL FOR DEFENDANTS:

SMITH, SOVIK, KENDRICK & SUGNET, P.C.
BY: DANIEL R. RYAN, ESQ., OF COUNSEL
250 SOUTH CLINTON STREET, SUITE 600
SYRACUSE, NY 13202-1252

FERRIS D. LEBOUS, J.S.C.

This is an action by an inmate alleging that he was denied prompt and adequate medical care during his incarceration. By way of this motion, defendants, Broome County Correctional Facility and County of Broome, move for dismissal of the Complaint based upon plaintiff's failure to timely serve both the Notice of Claim and the Summons and Complaint (GML §§ 50-e & 50-i; CPLR § 3211 [5]). Plaintiff, Rondu Johns, opposes the motion.

The court heard oral argument from counsel on July 30th, 2010.

BACKGROUND

The Notice of Claim states that on May 21, 2008 plaintiff hyper-extended his 4th finger during a game of volleyball while an inmate at the Broome County Jail (Exhibit 1 to Ryan Affidavit; emphasis added). Plaintiff was taken to Lourdes Hospital for X-rays with a recommendation for follow-up tendon repair. There are allegations that plaintiff saw some unidentified specialist approximately two weeks after the accident. There are further allegations that surgery was scheduled for mid-June 2008, but apparently not performed.

The Complaint alleges "[t]hat the date and happening of the above events upon which this claim is based began on 5/21/08. The negligence upon which this claim is based arose on 8/19/08 and continues to date" (Complaint, ¶ 4). Next, the Complaint states that "[o]n or about 5/13/08 Plaintiff hyper extended his 4th finger during a game of volleyball" (Complaint, ¶ 7;

emphasis added). The Complaint further alleges that X-rays were taken on 5/17/08 and that "[o]n 6/25/08 the Plaintiff was rechecked and tendon damage verified" (Complaint, ¶¶ 8 & 10).

In response to this motion, plaintiff submitted two affidavits namely, a "Reply Affidavit in Opposition" sworn to May 18, 2010 and an "Amended Reply Affidavit in Opposition" sworn to July 13, 2010 (hereinafter "Plaintiff's Affidavit #1" and "Plaintiff's Affidavit #2", respectively).

Plaintiff Affidavit #1 avers that "[t]he effective date for the 90 days to run pursuant to GML § 50-c [sic] is September 11, 2008 when I discovered I was not getting further treatment and was sentenced in Broome County Court to State prison and I was not permitted to receive medical treatment" (Plaintiff's Affidavit #1, ¶ 8; emphasis added). Further, plaintiff avers he "[w]as not advised until September 11, 2008 that I would no longer be getting medical treatment. That is the first time I became aware of the problem that the facility would not provide adequate medical care for my injury" (Plaintiff's Affidavit #1, ¶ 10; emphasis added).

Plaintiff then submitted a second affidavit in opposition revising the accrual date by stating "[t]he effective date for the 90 days to run pursuant to GML § 50-c [sic] is October 18, 2008 when I discovered I was not getting further treatment and was advised by medical staff at Wyoming Correctional Facility that I was not going to receive any further treatment" (Plaintiff's Affidavit #2, ¶ 8; emphasis added).¹ Further, plaintiff averred that "I was not advised until

¹The court raised the issue during oral argument as to whether the allegations involving the State facility must be pled in the Court of Claims.

October 18, 2008 that I would no longer be getting medical treatment. That is the first time I became aware of the problem" (Plaintiff's Affidavit #2, ¶ 11).²

DISCUSSION

In the first instance, this court finds that this action for failure to provide proper medical care accrued on the date of the accident, namely May 21, 2008 (*Pizarro v State of New York*, 19 AD3d 891 [3rd Dept 2005], *lv denied* 5 NY3d 717 [2005]). The court rejects plaintiff's argument that this action accrued on the date (or dates) he learned he would not receive further medical treatment (either on September 11, 2008 or October 18, 2008 depending on which plaintiff's version of events are accepted). Quite simply, plaintiff has offered no legal authority in support of his argument nor, even if the court accepted the legal proposition, has plaintiff offered any proof other than his own inconsistent affidavits about these alleged dates of discovery of non-treatment. To the extent that plaintiff is arguing that he is entitled to some toll under the continuous treatment doctrine, the court rejects the applicability of said doctrine to this action. As the Court of Appeals has stated, "[w]hile the failure to treat a condition may well be negligent, we cannot accept the self-contradictory proposition that the failure to establish a course of treatment is a course of treatment" (*Nykorchuck v Henriques*, 78 NY2d 255, 259 [1991]). Consequently, the court will address the defense motion in terms of applying to an action that accrued on the date of the accident, namely May 21, 2008.

²During oral argument, defense counsel mentioned that plaintiff was on furlough at some point during the time periods at issue here. However, no proof was offered regarding this assertion and, as such, is not considered herein.

I. Notice of Claim (GML § 50-e)

It is well settled that a Notice of Claim must be served within ninety days from the time a claim arises (GML § 50-e). This court has deemed this action to have accrued on May 21, 2008. Thus, the Notice of Claim had to be served within ninety days or August 19, 2008. However, the Notice of Claim was not served until November 12, 2008 and, as such, was untimely.

II. Statute of Limitations (GML § 50-i)

GML § 50-i (1) (c) provides that no action shall be maintained against a county for personal injury unless "[c]ommenced within one year and ninety days after the happening of the event upon which the claim is based." The action has been deemed to have accrued on May 21, 2008. Thus, the action had to be commenced within one year and ninety days or August 19, 2009. However, the Summons and Complaint were not filed until January 12, 2010 and, as such, were untimely.

CONCLUSION

For the reasons stated, defendants' motion for dismissal is granted and the action is dismissed.

It is so ordered.

August 18, 2010
Binghamton, New York

s/ Ferris D. Lebous
Hon. Ferris D. Lebous
Justice, Supreme Court

