

Abreu v New York City Health & Hosp. Corp.

2011 NY Slip Op 33805(U)

August 11, 2011

Sup Ct, New York County

Docket Number: 111300/07

Judge: Douglas E. McKeon

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: Douglas E. McKeon
Justice Supreme Court
Justice

PART 38

Alcibiades Abreu

INDEX NO. 11300/07

- v -

MOTION DATE _____

MCHHL

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

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

This motion is decided in accordance with the annexed Memorandum Decision.

FILED

AUG 12 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

Dated: 8/11/11



Douglas E. McKeon - J.S.C.
Justice Supreme Court

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
ALCIBIADES ABREU,

Plaintiff,

-against-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, HELEN LEWANDOWSKI and
NAHEED ABBASI,

Defendants.
-----X

HON. DOUGLAS E. MCKEON:

Memorandum Decision
Index No. 111300/07

FILED

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NEW YORK
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Defendant New York City Health and Hospitals Corporation's ("NYCHHC") motion pursuant to CPLR 3211 and §3215 for an order dismissing plaintiff's complaint is granted as follows:

In this medical malpractice action, plaintiff alleges that on April 6, 2006 and May 10, 2006 he complained of shortness of breath, improper breathing and excessive fatigue to Naheed Abbasi, M.D. and Helen Lewandowski, M.D. at Bellevue Hospital Center ("Bellevue") on those dates, respectively, and both doctors failed to diagnose his condition of pneumonia for which he was eventually treated at New York Presbyterian Hospital on May 12, 2006. It is also alleged that plaintiff requested a chest x-ray from Dr. Lewandowski but instead was given Motrin for muscle pain. Plaintiff's last treatment at the Bellevue Dermatology Clinic was May 10, 2006. The visit was documented as a follow-up for the patient's psoriasis. The plan was for a return to the clinic in two months.

Notably, although Drs. Abbasi and Lewandowski were named as defendants, they have not been served nor have they appeared in this action.

Defendant argues that dismissal should be granted as plaintiff commenced his action beyond

the statute of limitations. They set forth that based on plaintiff's last date of treatment, the one year and ninety (90) day statute of limitations for plaintiff's claim expired on August 8, 2007 and plaintiff did not commence his medical malpractice action against NYCHHC until August 17, 2007, nine days after the expiration of the statute of limitations. *See* General Municipal Law § 50-i.

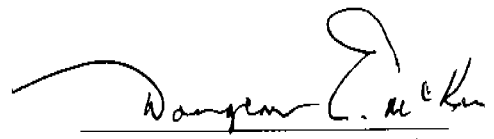
In opposition, plaintiff sets forth that plaintiff's bone density scan, scheduled for May 22, 2006 (twelve (12) days after his last date of treatment on May 10, 2006) tolled the statute of limitations on his action to August 20, 2006 and that since he commenced the action on August 17, 2007, under the continuous treatment doctrine, it is timely.

Plaintiff's argument that his time to file was tolled by this last scheduled but never kept appointment is unavailing because the continuous treatment doctrine does not apply to his malpractice claim for failure to diagnose or treat pneumonia. The continuous treatment doctrine applies to cases where medical care is provided to correct the injury or condition for which malpractice is claimed. Plaintiff's bone density scan was scheduled as part of a routine check-up by a physician whose care is not an issue in this action. Thus, the scheduled scan was unrelated to plaintiff's allegation for failure to diagnose or treat his pneumonia and its related complaints (shortness of breath and chest pain) and the continuous treatment doctrine does not apply. *See Plummer v. New York City Health and Hospitals Corp.*, 98 NY2d 263 (2002); *Young v. New York City Health and Hospitals Corp.*, 91 NY2d 291 (1998); *Nykorchuck v. Henriques*, 78 NY2d 255 (1991). Plaintiff's action was commenced beyond the statute of limitations, and thus, his action must be dismissed as untimely.

Accordingly, defendant's motion is granted and plaintiff's complaint is dismissed in its entirety as against NYCHHC.

So ordered.

Date: August 11, 2011
New York, New York


Douglas E. McKeon, J.S.C.

Douglas E. McKeon
Justice Supreme Court

FILED

AUG 12 2011

NEW YORK
COUNTY CLERK'S OFFICE