

**Diaz-Mazariegos v New York City Health & Hosps.
Corp. (Bellevue Hosp.)**

2013 NY Slip Op 32712(U)

February 9, 2013

Supreme Court, New York County

Docket Number: 800275/11

Judge: Judy H. Kluger

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

PRESENT: July H. Kluger
Justice

PART 38

Index Number : 800275/2011
DIAZ-MAZARIEGOS, VIDALIA
vs
NEW YORK CITY HEALTH
Sequence Number : 003
ORDER/JUDGMENT NUNC PRO TUNC

INDEX NO. 800 275/11
MOTION DATE _____
MOTION SEQ. NO. (003)
MOTION CAL. NO. _____

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~~—

plaintiff's motion is denied and
defendant's cross-motion is granted
as per the Court's written decision
dated February 9, 2012.

FILED

FEB 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/16/12

July H. Kluger
J.S.C.

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: PART 38

COPIY

-----X
Vidalia Diaz-Mazariegos & Wilfido
Mazariegos, Plaintiffs,

- against -

New York City Health and Hospitals Corporation
(Bellevue Hospital), Hollace Jackson, M.D. and
Valarece Johnson, M.D.,
Defendant.

DECISION AND ORDER

February 9, 2012

Index No. 800275/11

FILED

-----X
Judy Harris Kluger, J.:

FEB 17 2012

Plaintiffs, Vidalia Diaz-Mazariegos and Wilfido Mazariegos, move for an order deeming their notice of claim timely filed, *nunc pro tunc*. Defendants oppose the order requested and cross-move to dismiss plaintiffs' complaint in its entirety for failure to timely file and serve a notice of claim as mandated by General Municipal Law §50-e(1). The court has reviewed the plaintiffs' notice of motion, affirmation in support and exhibits dated November 10, 2011; the defendants' cross-motion, affirmation in support and exhibits dated December 7, 2011; the plaintiffs' affirmation in opposition to the cross-motion and exhibits dated December 29, 2011; and, defendants' reply affirmation in support of their cross-motion dated January 11, 2012. For the reasons stated below, the plaintiffs' motion is denied and the defendants' cross-motion is granted.

Based upon the submissions before this court, it is undisputed that plaintiff, Vidalia Diaz-Mazariegos, was receiving prenatal care at Bellevue Hospital beginning in 2009, throughout the course of her pregnancy and delivery and thereafter, for a postpartum visit on May 21, 2010. More than one year later, plaintiff returned to the Bellevue Hospital Emergency Room complaining of pain in her left breast and armpit. Shortly thereafter, she was diagnosed with breast cancer. On August 9, 2011¹, a notice of claim was served on New York City Health and Hospitals Corporation (HHC), a public corporation, alleging negligent treatment of plaintiff at Bellevue Hospital OB/GYN Clinic "from approximately May 21, 2010 . . . to June 16, 2011 . . ." Days later, on August 12, 2011, a summons and complaint was filed with the County Clerk in New York County. Subsequently, on November 10, 2011, plaintiffs filed a Notice of Motion seeking an order from this court deeming the aforementioned Notice of Claim timely, *nunc pro tunc*.

In addition to the undisputed facts above, plaintiff Diaz-Mazariegos alleges that during two separate visits to Bellevue, in February 2010 and May 2010, she made complaints of a lump in her left breast to her treating physician and another Bellevue employee. In plaintiffs' motion dated November 10, 2011, Diaz-Mazariegos maintains that she was advised that the lump was ". . . normal because [she] was pregnant." The defendants disputes these allegations. Instead, the defendants allege that no such

¹Defendants maintain that the Notice of Claim was filed on August 11, 2011 rather than August 9, 2011 as alleged by plaintiffs. This two-day discrepancy has no bearing on the court's factual or legal findings.

complaints were ever made to a Bellevue doctor or employee until plaintiff Diaz-Mazariegos appeared at the Bellevue Emergency Room on June 16, 2011.

Plaintiffs' Motion

In the motion dated November 10, 2011, the plaintiffs seek an order from this court deeming their notice of claim timely, *nunc pro tunc*. In support of the motion, the plaintiffs set forth the factors to be considered as outlined in General Municipal Law §50-e(5) and discussed in Williams v. Nassau County Med. Ctr., 6 NY 3d 531 (2006). In their motion, the plaintiffs concede that the Notice of Claim was untimely, but argue that it was filed "less than one year and 90 days after the negligent act occurring on May 21, 2010 . . ." (Plaintiffs' Notice of Motion, ¶ 14)(emphasis added). Plaintiffs also concede that the notice was "not sufficient absent a court order permitting its service . . ." (Plaintiffs' Notice of Motion, ¶ 14).²

The defendants, citing De La Cruz v. City of New York, 221 AD 2d 168 (1st Dept. 1995), maintain that not only was the notice untimely but, it was a nullity since it was filed without leave of court. They further maintain that the court has no discretion in deeming the late notice of claim timely since the motion seeking such relief was filed after the expiration of the statute of limitations. The defendants argue that any such action by the court would thwart the purpose of General Municipal Law §50-e.

General Municipal Law §50-e(1) requires that a notice of claim must be served on a public corporation within 90 days after the claim arises. A court, in its discretion and upon application by the plaintiff, may extend the time to serve said notice. See, General Municipal Law §50-e(5); Williams v. Nassau County Med. Ctr., *supra*. However, such discretion may not be exercised beyond the "time limited for commencement of an action by the claimant against the public corporation." *Id.*; see also, Hochberg v. City of New York, 99 AD 2d 1028 (1st Dept. 1984) *aff'd* 63 NY 2d 665 (1984); McGarty v. City of New York, 44 AD 3d 447 (1st Dept. 2007)(plaintiff's service of a late notice of claim, without leave of court, served 91 days after his claim arose was a nullity and his failure to seek an order excusing such lateness within one year and 90 days required dismissal of the action). The statute of limitations in this matter is one year and ninety days. General Municipal Law §50-k(6).

The court finds, based upon the undisputed facts, that the notice of claim filed without leave of court is a nullity and it has no discretion to consider the plaintiffs' subsequent motion attempting to correct this procedural error filed after the one year and ninety day statute of limitation expired.³ General Municipal Law §50-e(5); Hochberg, *supra*. Moreover, the court notes that the plaintiffs offer no legal authority for

²In their November 10, 2011 motion papers, the plaintiffs do not argue that any tolling provisions apply in this matter.

³The fact that the summons and complaint were timely filed and defendants participated in preliminary discovery proceedings are also not sufficient grounds to overcome the statutory mandate of GML § 50-e(5).

their argument that the court may deem the notice timely, *nunc pro tunc*, after the statute of limitations expires.

Defendants' Cross-Motion

In the defendants' response and cross-motion dated December 7, 2011, in addition to opposing the relief requested by the plaintiffs, the defendants argue that the plaintiffs' complaint should be dismissed in its entirety. Defendants maintain that plaintiff Diaz-Mazariegos was not undergoing a continuous course of treatment at Bellevue following her postpartum visit on May 21, 2010. As such, by their calculation, the notice of claim deadline was August 19, 2010 and the statute of limitations expired on August 18, 2011. Thus, it is their position that based upon the plaintiffs failure to file a timely notice of claim, a condition precedent to the commencement of an action against a public corporation, and their further failure to seek leave of court to file a late notice of claim prior to August 18, 2011, the instant complaint must be dismissed.

In response to the cross-motion, plaintiffs argue for the first time that the continuous treatment doctrine applies and, based upon that theory and plaintiff Diaz-Mazariegos' visit to Bellevue on June 16, 2011, the notice of claim filed on August 9, 2011 was timely.⁴ In the Affirmation in Opposition dated December 29, 2011, plaintiffs' counsel also raises for the first time that at both visits in February and May 2010, in addition to plaintiff Diaz-Mazariegos' contention that she complained about the lump in her breast, she was told that it would be "re-evaluated postpartum" and "re-evaluated after breast feeding had ended," respectively.

To understand the application of the continuous treatment doctrine as it applies to public corporations, the Court of Appeals decision in Young v. New York City Health and Hospitals Corporation, 91 NY 2d 291 (1998), is particularly instructive. Initially, the Court of Appeals noted that to maintain an action against HHC, an injured plaintiff must timely file a notice of claim within 90 days of the date the claim arises or the cause of action accrues. *Id.* at 295. The Court further reiterated well established precedent that the cause of action accrues when the alleged negligent act or omission occurred. *Id.* (citations omitted).

In a medical malpractice action, CPLR § 214-a provides that the action must be commenced within two and a half years from the date "of the act, omission or failure complained of *or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to said act, omission or failure.* Young, *supra* at 295 (citing CPLR § 214-a [emphasis added]). This tolling provision has equal application in cases filed against HHC wherein the statute of limitations is one year and 90 days and the notice of claim period is 90 days.

The Court of Appeals noted that the continuous treatment toll was created to "enforce the view that a patient should not be required to interrupt corrective medical

⁴The plaintiffs' statement that the notice of claim was timely is contrary to the concessions in their original motion. (Plaintiff's Notice of Motion, ¶ 14).

treatment by a physician and undermine the continuing trust in the physician-patient relationship in order to ensure the timeliness of a medical malpractice action or notice of claim." Young, *supra* at 296 (citations omitted).

In Young, the Court also noted that "treatment does not necessarily terminate upon a patient's last visit if further care or monitoring is 'explicitly anticipated by both physician and 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 past.'" *Id.* at 296 (emphasis added)(internal citations omitted).

In the instant case, based upon plaintiffs' allegations and their notice of claim, it appears undisputed that the cause of action accrued on May 21, 2010. Thus, as in Young, *supra*, unless plaintiffs can establish that the toll of the continuous treatment doctrine applies, their notice of claim is untimely. While plaintiffs did not initially advance a theory of continuous care, their opposition to defendants' cross-motion alleges that there was an agreement to "re-evaluate" Diaz-Mazariegos' lump following the two 2010 visits in question.

The court notes that the plaintiffs' allegations are not supported by any *contemporaneously* made medical records or by the sworn testimony provided. In fact, the exhibits that are cited in support in counsel's December 29, 2011 Affirmation in Opposition and plaintiff Diaz-Mazariegos' December 31, 2011 Affidavit contain absolutely no reference to a re-evaluation. Further, while the Physician Affirmation of Dr. Reinaldo Figueroa dated December 31, 2011 draws a conclusion based upon "instructions regarding follow-up examinations," there is no documentary evidence or testimony concerning such instructions to support his conclusory assertions. To be sure, in plaintiffs' Affirmation in Opposition, Exhibit D, (Transcript of Examination Before Trial of Vidalia Diaz-Mazariegos by her counsel held on October 28, 2011), the following question and answer were recorded:⁵

- Q. After you had the [postpartum] conversation with the doctor, did she give you any appointment for any further tests or a referral to any specialists to follow up with regard to the lump in your left breast?
- A. No.

In Nelson v Weiss, 275 AD 2d 399 (2d Dept. 2000), cited by the plaintiffs, the Appellate Division found that there was conflicting evidence as to whether or not the continuous care doctrine applied and thus, the defendant's motion for summary judgment should not have been granted. In that failure to diagnose breast cancer case, however, the defendants conceded that there were prenatal examinations involving a lump in the plaintiff's breast which, presumably, were documented in their charts. In

⁵According to the transcript, plaintiff Diaz-Mazariegos was assisted by a Spanish-speaking interpreter.

this case, there is no evidence tending to substantiate the plaintiffs' claims and there is no factual dispute as to whether follow-up care was discussed since the defendants dispute that the lump was ever brought to their attention.⁶

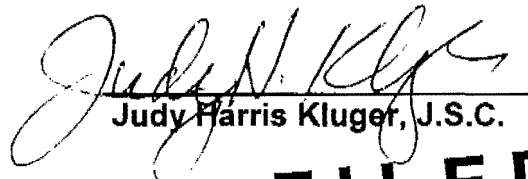
Further undermining plaintiffs belated attempt to claim continuous care is the fact that there were no visits between May 2010 and June 2011. While this court is cognizant of the fact that treatment does not necessarily end with a patient's last visit, see, Oksman v. City of New York, 271 AD 2d 213 (1st Dept. 2000), there is also no evidence that further treatment was contemplated. In fact, it is plaintiff Diaz-Mazariegos' visit to the Bellevue Emergency Room *more than a year following her last visit* that led to the ultimate diagnosis of breast cancer. Cf. Connors v. Eng, 42 AD 3d 511 (2d Dept. 2007) (a triable issue of fact as to continuous treatment found where plaintiff returned to defendant's office 41 times over a period of years for the purpose of monitoring her thyroid nodule). The timing and nature of this emergency room visit is consistent with this court's finding that plaintiff did not contemplate further treatment by defendants. See, Young, *supra*.

Based upon the foregoing, this court finds that while there remains a dispute as to whether or not plaintiff Diaz-Mazariegos reported the presence of a lump in her left breast prior to June 2011, she has failed to establish that both she and her doctors at Bellevue Hospital OB/GYN Clinic explicitly contemplated further treatment related to her left breast between May 21, 2010 and June 16, 2011. See generally, Allende v. New York City Health and Hospitals Corporation, 90 NY 2d 333 (1997); Richardson v. Orentreich, 64 NY 2d 896 (1985). In addition, inasmuch as the record contains no proof that follow-up appointments or treatment were even contemplated, there was no danger of interrupting corrective medical treatment and thus, the purpose of the continuous treatment doctrine would not be served by its application here. Young, *supra*.

Accordingly, plaintiffs' motion to deem the notice of claim filed timely *nunc pro tunc* is denied and defendant's cross-motion to dismiss plaintiffs' complaint in its entirety is granted. The clerk of the court is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of this court.

Dated: New York, New York
February 9, 2012


Judy Harris Kluger, J.S.C.

FILED

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⁶The plaintiffs' attempts to utilize the statements of plaintiff Diaz-Mazariegos made on June 16, 2011 and thereafter as evidence of what transpired more than a year earlier are unavailing.