

**Gil v NYU Downtown Hosp.**

2014 NY Slip Op 32029(U)

July 31, 2014

Sup Ct, New York County

Docket Number: 105460/08

Judge: Joan B. Lobis

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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: LOBIS  
Justice

PART 6

GIL, JANNALIE, ETAL.

INDEX NO. 105460/08

MOTION DATE 6/3/14

NYU DOWNTOWN HOSPITAL, ETAL.

MOTION SEQ. NO. 05

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

The following papers, numbered 1 to 4 were read on this motion to/for Dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

12  
3  
4

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

*Order + Judgment*

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).

Dated: 7/31/14

JOHN LOBIS 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  
NEW YORK COUNTY: IAS PART 6**

-----X  
JANNALIE GIL, an infant by her mother JUANA COLON  
and JUANA COLON, Individually,

Plaintiffs,

Index No. 105460/08

-against-

**Decision, Order, and  
Judgment**

NYU DOWNTOWN HOSPITAL, DOWNTOWN FAMILY  
CARE CENTER and DOWNTOWN HEALTH CENTER,

Defendants.

-----X  
NEW YORK DOWNTOWN HOSPITAL,

**UNFILED JUDGMENT**

Third Party Plaintiff

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

-against-

DAMARIS PADILLA, M.D.,

Third Party Defendant.

-----X  
**JOAN B. LOBIS, J.S.C.:**

In this medical malpractice action, Plaintiffs allege New York Downtown Hospital s/h/a NYU Downtown Hospital failed to diagnose Jannalie Gil's lead poisoning. Defendants New York Downtown Hospital, Downtown Family Care Center, and Downtown Health Center (collectively "NYDH") move pursuant to Sections 208, 214-a, and 3211(a)(5) of the Civil Practice Law and Rules for an Order granting partial dismissal of the action for any claims based on treatment prior to April 17, 1998, and all derivative claims asserted individually by Jannalie's mother, Juana Colon. Plaintiffs oppose the motion. For the following reasons, the motion is granted.

Jannalie was born on April 3, 1996, at NYDH. Following her birth, Jannalie continued to receive pediatric care from NYDH. Over the next few years, Jannalie had two types of visits to NYDH: well-child visits and sick visits. "Well-child" visits are routine pediatric visits that occur even when the child is not ill. To prevent lead poisoning, pursuant to Section 1370-a of the Public Health Law, the Department of Health (DOH) promulgated regulations for primary care and non-primary care health providers to screen children between the ages of 6 months and 6 years for lead poisoning, and to implement public education programs on lead exposure. See 10 NYCRR § 67-1.2. Primary care providers are required to provide anticipatory guidance at well-child visits, routinely screen for lead poisoning, and explain test results to parents. Anticipatory guidance is defined as "providing parents or guardians . . . with information regarding the major causes of lead poisoning and means of preventing lead exposure." 10 NYCRR § 67-1.1. In this case, Plaintiffs allege that anticipatory guidance was not provided at any of Jannalie's visits to NYDH.

Jannalie had her first well-child visit to NYDH on September 17, 1996. At a well-child visit on May 14, 1997, Jannalie had her first routine blood test for lead levels, which showed she did not have lead poisoning. The lead level was 3 micrograms ( $\mu$ ) per deciliter (dL), which is within the normal limit of 0 to 10  $\mu$ /dL for a child under age 6. Between May 1997 and September 1998, Jannalie had several more well-child and sick-child visits to NYDH. On September 16, 1998, Jannalie had a second routine blood test for her lead levels, which showed that she had lead poisoning. Her lead levels were elevated at 23  $\mu$ /dL. It is uncontested that prior to this date Jannalie had never been diagnosed or treated for elevated lead levels or lead poisoning.

This action was commenced by filing of Summons and Complaint on April 17, 2008. Plaintiffs allege that NYDH was negligent and committed medical malpractice. In short, Plaintiffs allege that NYDH failed to diagnose and properly treat lead poisoning, and failed to comply with New York State statutes, rules, and regulations, by not providing Jannalie's parents with anticipatory guidance. Plaintiffs also bring derivative claims on behalf of Juana Colon for loss of services and companionship, and for expenses related to the care and treatment of Jannalie that resulted from the alleged negligence and actions of medical malpractice.

NYDH now moves for partial dismissal. NYDH argues that all claims prior to April 17, 1998, and all claims asserted by Juana Colon in her individual capacity are barred by the Statute of Limitations. Movant claims that Section 208 of the Civil Practice Law and Rules imposes a maximum ten year toll of the Statute of Limitations for infancy in medical malpractice actions. It argues that the limitations for infancy run from the date of negligence alleged rather than from the end of any period of continuous treatment.

Movant contends that an infant's well-child and sick visits to a facility do not constitute continuous treatment. It maintains that the continuous treatment doctrine is inapplicable to a failure to provide anticipatory guidance for lead poisoning. NYDH asserts that well-child visits and routine blood tests for lead poisoning are excluded from the definition of continuous treatment in Section 214-a of the Civil Practice Law and Rules similarly to examinations at the request of the patient for ascertaining the state of the patient's condition.

NYDH maintains that Juana Colon's derivative claim for loss of services and society must also be dismissed as time-barred. It claims that the infancy toll provisions of Section 208 of the Civil Practice Law and Rules do not apply to derivative causes of action.

In opposition, Plaintiffs argue that NYDH's motion is procedurally defective. They assert that NYDH attached medical records that were not certified, and, as a result, the motion is not based upon admissible evidence or the personal knowledge of the affirmant, who is NYDH's counsel. They maintain that the medical records attached to NYDH's motion are inadmissible as there is no explanation or evidence of the chain of custody. They assert that there is no medical expert affidavit provided explaining the duties of the hospital regarding the continuing obligation for lead anticipatory guidance.

Plaintiffs argue that the motion should be denied on the merits as well. Plaintiffs assert that the Statute of Limitations began to run on September 16, 1998, which they contend is the last date of malpractice. They contend that NYDH has misapplied the continuous treatment doctrine. They assert that their allegations are not for acts after lead poisoning was diagnosed but rather for the failure to provide anticipatory guidance from when Jannalie was 6 months until her diagnosis. Plaintiffs claim that the movant has violated Department of Health (DOH) regulations for lead screening and follow-up of children by health care providers. In particular, they assert that information regarding the major causes of lead poisoning and means of preventing lead exposure was not provided. Furthermore, they claim that blood lead test results and documentation of lead screening were not provided.

In reply, NYDH attaches certified copies of the record produced by the entity that currently owns and operates Downtown Family Care Center. NYDH argues that there is no need for a medical expert since this is a motion for partial dismissal based on the expiration of the Statute of Limitations that does not call for the specialized knowledge of a medical expert. It claims that there is no ongoing duty to provide anticipatory guidance that is distinct from the duty every physician has in a physician-patient relationship, which it contends is insufficient to establish continuous treatment. It claims that Plaintiffs have not addressed the portion of the motion requesting the dismissal of Juana Colon's derivative cause of action. It argues that September 16, 2008, is the date injury was discovered, and not the date the claim accrued.

Section 3211(a)(5) of the Civil Practice Law and Rules provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . statute of limitations [.]” When moving to dismiss a cause of action pursuant to Section 3211(a)(5), “a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired.” Plain v. Vassar Bros. Hops, 115 A.D.3d 922, 923 (2d Dep’t 2014). The plaintiff must then “raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period[.]” Id. (internal citations omitted) (citing Matteawan On Main, Inc. v. Beacon, 109 A.d.3d 590 (2d Dep’t 2013)).

As a threshold matter, the Court addresses Plaintiffs’ allegations of procedural defects. Though NYDH initially attached a medical record that is uncertified, this is not a motion

for summary judgment. Unlike Section 3212 of the Civil Practice Law and Rules, Section 3211(a)(5) does not require that the motion be supported by “affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions.” C.P.L.R. §3212(b). Nor does Section 3211(a)(5) require an affidavit “by a person having knowledge of the facts” that recites all the material facts. Id. Nonetheless, the parties’ papers indicate that no dates of treatment, diagnoses, or issues of fact are in contention. In this matter, the medical records are unnecessary to determine if the cause of action may not be maintained due to the statute of limitations.

The Court now turns to the merits of the motion. Section 214-a of the Civil Practice Law and Rules states that a medical malpractice action “must be commenced within two years and six months 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 the said act, omission or failure [.]” Underlying the doctrine is the policy that the best interests of a patient warrant continued treatment with an existing provider, rather than stopping treatment, since the provider is best positioned to identify and correct any malpractice. E.g., Rudolph v. Lynn, D.D.S., P.C., 16 A.D.3d 261, 412 (1st Dep’t 2005).

Under Section 208, in medical malpractice actions involving an infant plaintiff “the time within which the action must be commenced shall not be extended by this provision beyond ten years after the cause of action accrues . . . .” Medical malpractice actions accrue “at the date of the original negligent act or omission, however; subsequent continuous treatment does not change or extend the accrual date but serves only to toll the running of the applicable Statute of Limitations.” Daniel J. v. New York City Health and Hosp. Corp., 77 N.Y.2d 630, 634 (1991).

NYDH has met their initial burden to demonstrate prima facie that the time within which to commence the action has expired due to the infancy toll. The Court does not need to reach the issue of continuous treatment. The infancy toll of Section 208 of the Civil Practice Law and Rules and “the continuous treatment toll do not run consecutively.” Jaffee v. New York Hosp., 202 A.D.2d 276, 277 (1st Dep’t 1994). Due to the infancy toll, Plaintiffs had up to 10 years to commence the action from the time of accrual. See Contreras v. KBM Realty Corp., 66 A.D.3d 627, 628-29 (2d Dep’t 2009). They commenced this action on April 17, 2008, which means that any claim that accrued on or after April 17, 1998, is timely. Plaintiffs have not successfully raised any issues of fact that would further toll the statute of limitations or make it inapplicable. See Plain, 115 A.D.3d at 923. The Court finds that any claims for injuries prior to April 17, 1998, are not timely.

Finally, Plaintiffs do not oppose the motion to dismiss Juana Colon’s derivative claims, which must be dismissed as “[t]he infancy toll is personal to the infant plaintiff . . . and does not extend to the derivative cause of action.” Nardi v. Westchester, 18 A.D.3d 521, 522 (2d Dep’t 2005) (internal citations omitted). Accordingly, it is

ADJUDGED that the motion for partial dismissal is granted, and it is further

ORDERED that the parties are to appear for a pre-trial conference on August 26,

2014, at 9:30am.

Dated: July 31, 2014

ENTER:

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk’s Desk (Room 141B).

  
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 JOAN B. LOBIS, J.S.C.