

**Anto v New York City Health & Hosps. Corp.**

2016 NY Slip Op 33078(U)

March 31, 2016

Supreme Court, Bronx County

Docket Number: 22380/14E

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

COUNTY OF BRONX - PART IA-19A

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JOHNSON ANTO, as Administrator of the Estate  
of JOSEPHINE B. FRIMPONG,

Plaintiff(s),

- against -

INDEX NO: 22380/14E

THE NEW YORK CITY HEALTH & HOSPITALS  
CORPORATION and LINCOLN MEDICAL and  
MENTAL HEALTH CENTER,

DECISION/ORDER

Defendant(s).

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**HON. DOUGLAS E. MCKEON**

Motion by defendants for an order dismissing the claims for pain and suffering related to plaintiff's decedent's medical care and treatment at Lincoln Medical and Mental Health Center rendered on or before April 1, 2013 is decided as follows:

This is a medical malpractice action arising from treatment rendered to plaintiff's decedent's from March 2, 2013 until June 9, 2013 at Lincoln. During that time, plaintiff's decedent was treated at Lincoln on six occasions. Movant argues that decedent's treatment was not continuous between March 2<sup>nd</sup> and June 9, 2013 but that the visits were separate and distinct treatments. Therefore, plaintiff's claim regarding the March 2<sup>nd</sup> through March 5, 2013 treatment accrued at the latest on April 1, 2013, her last Infectious Disease clinic appointment after which she did not return to Lincoln for any further appointments related to cholecystitis and potential

cholecystectomy. As such, plaintiff's notice of claim should have been served on or before June 30, 2013 and plaintiff's July 9, 2013 notice of claim is untimely. Decedent did not return to Lincoln clinic after the April 1, 2013 Infectious Disease appointment and never scheduled a follow-up in that clinic or any other Lincoln clinic.

At no time prior to the expiration of the statute of limitation did plaintiff seek leave of the Court to file a late Notice of Claim. Plaintiff is now barred from seeking leave to serve a late Notice of Claim as the statute of limitations expired on June 30, 2014.

In opposition, plaintiff argues that decedent received medical treatment from March 2, 2013 up until her death on June 9, 2013 for the exact same underlying medical condition; acute cholecystitis. She was treated at Lincoln from March 2<sup>nd</sup> through 5<sup>th</sup> 2013, March 12<sup>th</sup>, March 18<sup>th</sup>, March 22<sup>nd</sup>, April 1<sup>st</sup>, and May 29<sup>th</sup> through June 9, 2013. Plaintiff argues that while movant attempts to distinguish the specific medical illness of the decedent on each of these dates, medical expert, Dr. Irine Grant, who has treated hundreds of patients with cholecystitis opines that the medical treatment rendered by defendant to decedent from March 2<sup>nd</sup> through June 9, 2013 was continuous and related to the exact same underlying medical condition. Dr. Grant further opines that defendant's physicians departed from good and accepted medical practice which contributed to decedent's pain, suffering and death. As such, defendant's motion seeking to dismiss claims for pain and suffering for

treatment rendered on or before April 1, 2013 should be denied.

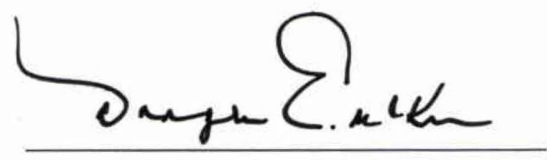
Movant argues that plaintiff's submission of an expert affirmation is misplaced and does not demonstrate continuous treatment. The focus in determining whether continuous treatment exists is on whether the patient believed further treatment was necessary and whether there were periodic appointments which characterized the treatment in the past. Movant argues that plaintiff has failed to produce evidence that decedent believed a course of treatment was in place herein and in fact, contrary to his attempt to rely upon the continuous treatment doctrine, plaintiff alleges that defendants failed to recommend or pursue a course of treatment. Plaintiff's testimony indicates that after the last visit of April 1, 2013 she did not intend to return to Lincoln for further treatment because she did not believe she required further treatment.

The failure to diagnose a condition and the consequent failure to establish a course of treatment does not constitute continuous treatment. See Trebach v. Brown, 250 AD2d 449 (1<sup>st</sup> Dept. 1998). Here, there is no indication that decedent complied with any course of treatment as the result of her March 2<sup>nd</sup> through 5<sup>th</sup>, 2013 Lincoln admission or subsequent visits which ended on April 1, 2013 and her May 29<sup>th</sup> Lincoln emergency department visit was merely a return visit to have her condition checked which does not constitute continuous treatment. As such, plaintiff's claims for pain and suffering for all treatment prior to April 1, 2013 are

dismissed for failure to comply with a condition precedent to suit.

So ordered.

Dated: *March 31, 2016*

A handwritten signature in black ink, appearing to read "Douglas E. McKeon", written over a horizontal line.

Douglas E. McKeon, J.S.C.