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

PRESENT: GEORGE J. SILVER PART 10
Justice

FRANK MAZZOCCHI,

Plaintiff,

- v -

THE CITY OF NEW YORK and NEW YORK CITY CITY HEALTH AND HOSPITALS CORP.

Defendants

MOTION INDEX NO. 452841/2015

MOTION DATE

MOTION SEQ. NO. 001

Cross-Motion: ☐ Yes ■ No

In this action defendant, The City of New York (hereinafter "the City") moves unopposed for an order, pursuant to CPLR §§ 3212 and 217-a and General Municipal Law §50-e and §50-l, granting summary judgment dismissing the complaint as against it on the grounds that: (i) plaintiff failed to file a timely notice of claim or seek leave to file a late notice of claim, and (ii) plaintiffs action is time-barred. The City's motion is granted for the reasons stated herein.

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

BACKGROUND

This negligence and medical malpractice action against the City arises out of plaintiff's treatment and transport by FDNY EMS personnel from his Brooklyn home to Bellevue Hospital on May 9, 2013. Plaintiff's action as against co-defendant New York City Health and Hospitals Corporation (hereinafter "HHC") arises out of his treatment at Bellevue Hospital from May 9, 2013 through May 31, 2013. Plaintiff commenced this action by e-filing the summons and verified complaint in Kings County on August 27, 2014. In his verified complaint, plaintiff averred that on May 9, 2013 EMS personnel took his vital signs and administered emergency treatment to stabilize plaintiff, who was experiencing breathing problems, and transported him to Bellevue Hospital at his request. Plaintiff also averred that EMS personnel "incorrectly wrote [p]laintiff's last name as 'Mazzocca,' 'Nazzocca,' 'and/or Mazzoccha.'" Moreover, plaintiff averred that he served his notice of claim on August 29, 2013. Based on these allegations, plaintiff asserted two causes of action against the City for medical malpractice and ordinary negligence.

The City served its answer, which denied the material allegations of the complaint, on September 15, 2014. In its answer, the City asserted various affirmative defenses,

including that "The action on behalf of the plaintiff(s) is barred by reason of the fact that it was not commenced within the time provided by the Statute of Limitations." On or about September 25, 2014, HHC moved to transfer the venue of this action to New York County. HHC's motion was granted by a settled Order entered on September 28, 2015 and this action was subsequently transferred.

At no time has plaintiff sought leave to file a late notice of claim. At a preliminary conference appearance held on December 5, 2017, the Assistant Corporation Counsel appearing for the City advised the Court that plaintiff's notice of claim was untimely. The City was subsequently directed to move by Order to Show Cause to dismiss the complaint, resulting in the instant application.

DISCUSSION

CPLR § 3212(b) provides, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Summary judgment is granted where it is clear that there are no triable issues of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]).

Additionally, pursuant to General Municipal Law § 50-e(l)(a), in "any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action . . . the notice of claim shall . . .be served . . . within ninety days after the claim arises." General Municipal Law §50-i(l) further provides that compliance with General Municipal Law §50-e is a condition precedent to commencing a personal injury negligence action.

CPLR § 217-a also requires that a notice of claim be served within the time limit established by General Municipal Law §50-e and that the claim must be commenced within one year and 90 days after a cause of action accrues. A notice of claim filed after the 90-day period without leave of court is of no legal effect or null (*see McGarty v. City of New York*, 44 AD3d 447 [1st Dept. 2007]).

General Municipal Law §50-i further provides that "a cause of action against the City accrues upon 'the happening of the event upon which the claim is based'" (*Murray v. City of New York*, 283 AD2d 560, 561 [2d Dept. 2001]). In medical malpractice actions, "the cause of action accrues on the date when the alleged original negligent act or omission

occurred" (*Young v. New York Health & Hosps. Corp.*, 91 NY2d 291, 295 [1998]).

Here, as the City highlights, plaintiff's interaction with the FDNY EMS personnel began and ended on May 9, 2013, meaning any alleged acts or omissions occurred on that date and that is when his causes of action against the City accrued. The continuous treatment doctrine cannot be applied to toll the accrual date for the period during which plaintiff was treated at Bellevue Hospital, as the City and HHC are entirely separate public entities that cannot be treated interchangeably (*see Scantleburv v. N.Y. City Health & Hosps. Corn.*, 4 NY3d 606 (2005). Thus, plaintiff's last day to file a notice of claim with the City was August 7, 2013. Because plaintiff did not file his notice of claim until August 29, 2013, more than three weeks after the 90-day deadline expired, plaintiff's notice of claim has no legal effect with respect to the City.

Notably, plaintiff had one-year and 90 days from the accrual of his causes of action to request leave of court to file a late notice of claim. However, plaintiff did not move for leave to file a late notice of claim. As such, this court is unable to exercise its discretion to grant plaintiff leave to file a late notice of claim since the statute of limitations has passed.

Similarly, plaintiff's complaint must be dismissed as against the City because the action was not commenced within the limitations period. General Municipal Law §50-i(l) provides that a lawsuit against the City "shall be commenced within one year and ninety days after the happening of the event upon which the claim is based." CPLR 217-a provides that an "action must be commenced in compliance with all the requirements of section fifty-e and subdivision one of section fifty-i of the general municipal law. . . . [A]n action . . . for personal injuries . . . shall not be commenced more than one year and ninety days after the cause of action therefor shall have accrued or within the time period otherwise prescribed by any special provision of law, whichever is longer."

Here, there is no special provision of law which would permit plaintiff to extend the statute of limitations beyond one year and 90 days. Thus, plaintiff's last day to commence this action was August 7, 2014. Because plaintiff did not file his summons and complaint until August 27, 2014, this action is time-barred as against the City and the complaint must be dismissed on this ground as well.

Accordingly, it is hereby

ORDERED that the City's motion for summary judgment is granted in its entirety;

and it is further

ORDERED that given the City's removal from this action, the caption is amended to read as follows:

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

Index No. 452841/2015

FRANK MAZZOCCHI,

Plaintiff,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORP.

Defendant.

; and it is further

ORDERED that the parties appear for a conference before the court on Tuesday August 7, 2018 at 111 Centre Street, Room 1227, at 9:30 AM.

This constitutes the decision and order of the court.

Dated: June 12, 2018

HON. GEORGE J. SILVER

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**