

Estate of Branch v NYC Health & Hosps. Corp.

2018 NY Slip Op 32966(U)

November 16, 2018

Supreme Court, New York County

Docket Number: 805258/2017

Judge: George J. Silver

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 10**

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THE ESTATE OF NIKKI BRANCH, by The
Administrator of her estate, ASIA BRANCH,

Index No. 805258/2017

Plaintiff,

DECISION & ORDER

-against-

NYC HEALTH & HOSPITALS CORPORATION, Harlem
Hospital, Rosanne Cousins, MD, Drs. John Doe and Drs.
Jane Doe. Each of the above joint and Severally. The names
'DOE' being fictitious as the True names not Presently known,

Defendants.
-----X

HON. GEORGE J. SILVER:

In this medical malpractice action, defendants NEW YORK CITY HEALTH AND HOSPITALS CORPORATION ("NYCHHC") and Harlem Hospital (collectively "defendants"), seek an order dismissing the action with prejudice due to plaintiff's failure to (1) file a timely notice of claim, pursuant to §§ 50-e and 50(i) of the General Municipal Law ("GML § 50-e" and "GML § 50(i)"), § 7401 of the Unconsolidated Laws of New York State, and CPLR § 217-a, and (2) seek leave to file a late notice of claim within the applicable statutes of limitations. Defendants also seek to dismiss the complaint with respect to plaintiff's claim for pain and suffering, pursuant to CPLR § 3211(a)(5), due to plaintiff's failure to comply with the statute of limitations. Plaintiff THE ESTATE OF NIKKI BRANCH ("decedent"), by The Administrator of her estate, ASIA BRANCH ("Ms. Branch" or "plaintiff"), opposes the motion.

BACKGROUND AND ARGUMENTS

The substance of plaintiff's claim is that employees and staff of Harlem Hospital, one of NYCHHC's facilities, negligently treated decedent until her death on March 10, 2016.¹ Plaintiff alleges that she filed a notice of claim on April 20, 2016. On July 6, 2017, plaintiff filed a Summons and Complaint. Thereafter, defendants filed an Answer on July 17, 2017.

Defendants argue that plaintiff's claims for pain and suffering and wrongful death should be dismissed because plaintiff failed to timely file a notice of claim prior to the commencement of the action. In support of their motion, defendants annex the affidavit of Mericia Nobbs ("Ms. Nobbs"), Principal Administrative Associate in the Office of Legal Affairs, Claims and Litigation Unit of NYCHHC, who attests that a notice of claim was not served upon NYCHHC on behalf of decedent or her estate for any treatment she received at Harlem Hospital.

Additionally, defendants assert that because the statute of limitations for plaintiff's cause of action for pain and suffering expired on June 8, 2017, one year and ninety days after decedent's death on March 10, 2016, the court may not grant plaintiff leave to serve a late notice of claim for this cause of action. Defendants also aver that plaintiff's cause of action for pain and suffering must be dismissed since plaintiff failed to timely file the Summons and Complaint with regard to this cause of action.

Defendants further argue that because plaintiff was appointed the administrator of decedent's estate on December 7, 2016, plaintiff had until March 7, 2017 to file a notice of claim with respect to plaintiff's cause of action for wrongful death, but failed to do so. As such, defendants assert that the court cannot extend plaintiff's time to seek leave to file a late notice of

¹ Defendants claim that because plaintiff failed to provide any dates of treatment, they will calculate the various statutes of limitations based on the date of decedent's death.

claim since the statute of limitations to commence a wrongful death action expired on March 10, 2018, two years after the date of decedent's death on March 10, 2016.

In opposition, plaintiff requests that the court dismiss the action without prejudice.² Plaintiff submits that the claim arose on March 10, 2016, and that a notice of claim was filed within the statute of limitations on April 20, 2016. Plaintiff also asserts that the Summons and Complaint was filed within the one year and ninety days statutory period.³

In reply, defendants assert that plaintiff has not opposed their motion to dismiss the action. Rather, defendants contend that plaintiff merely requests that the court dismiss the matter "without prejudice," without providing any explanation. Defendants also argue that plaintiff has failed to serve a notice of claim upon NYCHHC to date. According to defendants, plaintiff annexed a notice of claim to her opposition papers, but failed to indicate which agency she served. Defendants maintain that the stamp in the upper right-hand corner of plaintiff's notice of claim appears to be the stamp from the City of New York Comptroller's Office, and looks nothing like the stamp NYCHHC uses to verify receipt of a notice of claim. Defendants also note that plaintiff's opposition lacks the acknowledgment letter that is sent to every claimant advising of NYCHHC's claim number and receipt of the notice of claim. Defendants further point out that a search was conducted, and no notice of claim was served upon NYCHHC.

Defendants also reiterate that because the statutes of limitations have expired for plaintiff's claims for pain and suffering and wrongful death, plaintiff is barred from seeking leave to file a late notice of claim, and therefore, defendants' motion to dismiss the action with prejudice should

² It should be noted that plaintiff failed to appear for oral argument before the court on October 30, 2018.

³ Plaintiff's assertion that the Summons and Complaint was filed within the statutory period is incorrect insofar as the statute of limitations for plaintiff's pain and suffering claim expired on June 10, 2017. Plaintiff filed the Summons and Complaint one month late on July 6, 2017.

be granted. Defendants alternatively request that even if the court finds that a notice of claim was properly served upon NYCHHC, it should nonetheless dismiss plaintiff's claims for pain and suffering because plaintiff failed to timely file a Summons and Complaint for this cause of action. Lastly, defendants aver that bringing a wrongful death claim in the same action as a claim for pain and suffering does not toll the statute of limitations for the pain and suffering claim.

DISCUSSION

Actions against a municipal entity such as defendants are governed by McKinney's Unconsolidated Laws of N.Y. § 7401(2) which, in relevant part, provides that such actions may not be commenced "unless a notice of intention to commence such action and of the time when and the place where the tort occurred and the injuries or damage, were sustained [...] shall have been filed with a director or officer of the corporation within ninety days after such cause of action shall have accrued." Pursuant to General Municipal Law (GML) § 50-e, the timely filing of a notice of claim is a statutory precondition to the initiation of personal injury suits against a municipality. Thus, a party has 90 days from the date the claim arises, or 90 days from the appointment of a representative of a decedent's estate in a wrongful death action, to file a notice of claim. When a notice of claim is served beyond the required ninety-day period without leave of court, it is deemed a nullity (*see McShane v. Town of Hempstead*, 66 AD3d 652 [2d Dept. 2009]; *Fuschsia Sun et al. v. New York City Health and Hosps. Corp. et al.*, 13 AD3d 151, 152 [1st Dept. 2004]); *Potts v. City of New York Health and Hosps. Corp.*, 270 AD2d 129, 130 [1st Dept. 2000]). The failure to comply with this condition precedent is grounds for dismissal of the action (*see generally Silberstein v. County of Westchester*, 92 AD2d 867 [2d Dept. 1983], *aff'd* 62 NY2d 675

[1984)].

I. *Plaintiff Failed to Timely File a Notice of Claim*

Plaintiff's failure to file a timely notice of claim warrants dismissal of the action. Since plaintiff's cause of action for pain and suffering accrued on the date of decedent's death, March 10, 2016, plaintiff had until on or about June 8, 2016 to file a notice of claim with respect to this claim. Similarly, plaintiff had until March 7, 2017 to file a notice of claim with respect to her claim for wrongful death since Ms. Branch was appointed the administrator of decedent's estate on December 7, 2016.

Presently, plaintiff is almost two and a half years late in timely filing a notice of claim with respect to her cause of action for pain and suffering, and one year and eight months late in filing a notice of claim with respect to her cause of action for wrongful death. In her affidavit, Ms. Nobbs states that she is familiar with NYCHHC's procedures of when a notice of claim is received, and a search she personally conducted revealed that no such notice was served upon NYCHHC on behalf of decedent or her estate. Indeed, plaintiff failed to show compliance with NYCHHC's procedures of receiving a notice of claim. For instance, plaintiff does not provide the NYCHHC Office of Legal Affairs date stamp or a letter from NYCHHC acknowledging receipt of her claim and advising of her claim number (*see Feliciano v. New York City Hous. Auth.*, 123 A.D.3d 876, 877 [2d Dept. 2014] [dismissed complaint for plaintiff's failure to serve a timely notice of claim]; *McGriff v. New York City Health & Hosps. Corp.*, 38 A.D.3d 504, 504 [2d. Dept. 2007] [dismissed action for plaintiffs' failure to serve a late notice of claim where prior to commencing the action, plaintiffs neither served a timely notice of claim, nor sought leave, within the relevant one-year-and-90-day limitations period, to serve a late notice of claim]). Moreover, any argument that the document attached to plaintiff's opposition papers serves as a notice of claim is without merit,

especially since such document has several defects, including the lack of the NYCHHC date stamp and a five-digit claim number (*Dreckette v. New York City Health & Hosps. Corp.*, 45 Misc. 3d 752, 756 [Sup. Ct. 2014] [dismissed complaint with prejudice where a notice of claim filed electronically with city comptroller was insufficient to constitute service on NYCHHC]). As defendants have established that plaintiff failed to serve a timely notice of claim, plaintiff's complaint must be dismissed.

II. *Plaintiff Cannot Seek Leave to File a Late Notice of Claim*

Furthermore, plaintiff cannot correct her failure to serve a notice of claim since plaintiff has failed to move for leave to serve a late notice of claim within the applicable statutes of limitations. While a court can grant a plaintiff leave to serve a late notice of claim, a court cannot extend the statute of limitations (*see Bayne v. City of New York*, 137 A.D.3d 428, 429 [1st Dept. 2016]; *see also Baez v. New York City Health & Hosps. Corp.*, 80 NY2d 571, 577 [1992]; *Ahnor v. City of New York*, 101 A.D.3d 581, 582 [1st Dept. 2012]). "The failure to seek a court order excusing such lateness within one year and 90 days after accrual of the claim requires dismissal of the action" (*Plaza ex rel. Rodriguez v. New York City Health and Hosps. Corp. (Jacobi Med. Ctr.)*, 97 A.D.3d 466, 467 [1st Dept. 2012] [dismissed complaint where plaintiff failed to serve a timely notice of claim and failed to seek a court order excusing such lateness within one year and 90 days after the claim accrued]; *Argudo v. New York City Health & Hosps. Corp.*, 81 A.D.3d 575, 576-77 [2d Dept. 2011] [same]; *Croce v. City of New York*, 69 A.D.3d 488, 488 [1st Dept. 2010] [dismissed action where plaintiff's late notice of claim was a nullity, and plaintiff failed to seek a court order excusing such lateness within one year and 90 days after the happening of the accident]).

Here, it is undisputed that plaintiff's claims accrued on March 10, 2016, the date of decedent's death. One year and 90 days from the date of accrual afforded plaintiff until on or about June 8, 2017 to commence a lawsuit for pain and suffering. Similarly, plaintiff had until March 10, 2018, two years from the date of decedent's death, to commence a lawsuit for wrongful death. As plaintiff failed to move for leave to serve a late notice of claim within the applicable statutes of limitations, this action is necessarily time-barred, and must be dismissed pursuant to CPLR § 3211(a)(5) (*see Feliciano v. New York City Hous. Auth.*, 123 A.D.3d 876, 877 [2d Dept. 2014] ["Even if the plaintiff had attempted the proper procedure and sought leave to serve a late notice of claim, the [court] would have had no authority to grant leave to serve a late notice of claim as the application would have been made after the expiration of the statute of limitations."]).

Accordingly, plaintiff's failure to serve a timely notice of claim, failure to seek leave to serve a late notice of claim within the applicable statutes of limitations, and failure to adequately oppose defendants' motion either orally or in her opposition papers warrants dismissal of the complaint.

Finally, because plaintiff never personally served Rosanne Cousins, M.D. ("Dr. Cousins"), a necessary precondition to obtaining jurisdiction over Dr. Cousins, this action is also dismissed as against Dr. Cousins for lack of personal jurisdiction (*see* CPLR § 3211[a][8]; CPLR § 306-b). Similarly, to the extent that plaintiff claims, without proof, that Dr. Cousins was personally served, dismissal is also appropriate considering plaintiff's failure to seek a default judgment against Dr. Cousins within a year of service (*see* CPLR § 3215[c]).

Based on the foregoing, it is hereby

ORDERED that defendants New York City Health and Hospitals Corporation and Harlem Hospital's motion to dismiss the complaint in its entirety with prejudice, pursuant to CPLR §

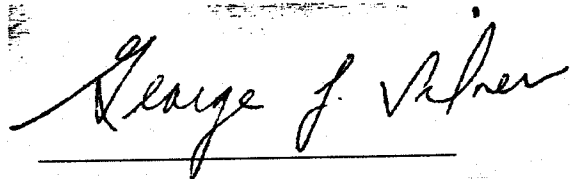
3211(a)(7), for plaintiff's failure to timely file a notice of claim pursuant to GML § 50-e(5) is

GRANTED; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: November 16, 2018



HON. GEORGE J. SILVER