Matter of Lincoln v New York City Health & Hosps. Corp.
2018 NY Slip Op 34085(U)
May 3, 2018
Supreme Court, Bronx County
Docket Number: Index No. 21116/2013E
Judge: Lewis J. Lubell
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - PART IA-19A
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In the Matter of the Application of
ELIZABETH LINCOLN,

Petitioner,

- against - INDEX NO: 21116/2013E

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, DECISION/ORDER

Respondent.
----------X

HON. LEWIS J. LUBELL:

By order to show cause brought pursuant to General Municipal Law (GML) § 50-e (5), petitioner seeks leave to serve and file a late notice of claim upon respondent New York City Health and Hospitals Corporation (NYCHHC). The petition is decided as follows.

In May 2010, the petitioner underwent breast-imaging studies of her right breast at NYCHHC facility Jacobi Medical Center (Jacobi). She was informed that the studies revealed an area that was likely benign, and to follow-up in six months for further studies. In November 2010, breast imaging studies were again performed at Jacobi, and again petitioner was informed that the area was benign, and to return in a year to follow up.

Petitioner avers that she made several attempts to be examined at Jacobi in 2011, and was either denied an appointment, or an appointment was made and cancelled. In any event, on March 1, 2012, a bilateral breast imaging study was performed at Jacobi. On March 21, 2012, a needle biopsy was performed. Petitioner was diagnosed with stage 3 cancer of the left breast, for which she underwent surgery and began radiation treatment on or about May 19, 2012.

In support of her application to file a late notice of claim, petitioner maintains that due to her medical condition and the need for treatment, she was unable to obtain an attorney until January

30, 2013. Petitioner argues that Jacobi nevertheless had actual knowledge of the essential facts of this claim within a reasonable time from the medical records that were in Jacobi's possession. Moreover, petitioner asserts that because respondent was monitoring plaintiff for a breast mass, the continuous treatment doctrine applies. As she was last treated on April 30, 2012, petitioner claims that an application for a late notice of claim could be filed at the latest by July 29, 2013.

In further support of the application, petitioner submits the expert opinion of Dr. Schwartz, an internist, who states that he has expertise and knowledge of "the standard of care governing medical care and treatment of patients who undergo breast examinations and breast imaging studies." He opines that substandard care is demonstrated by the medical records themselves, including the fact that the May 17, 2010, imaging was performed only on the right breast. Although bi-lateral imaging was performed on November 23, 2010, because the only imaging done on the prior visit was of the right breast, it was impossible to detect any changed or suspicious abnormality in petitioner's left breast. Dr. Schwartz maintains that using accepted standards of care the cancer that was eventually diagnosed in petitioner's left breast should have been detected.

In opposition, respondent argues that the fact that NYCHHC was in possession of the petitioner's Jacobi hospital chart does not establish actual knowledge. Prior to 2012, NYCHHC argues, the petitioner's routine breast examinations were benign. Nothing in the records suggests that the earlier examinations were performed incorrectly or read incorrectly, or that cancer was present before that date. There is no proof that respondent had contemporaneous notice of the possibility of the malpractice claim. Respondent argues that claimant's counsel and expert simply outline the examinations that were performed and their results, all of which were benign until March 2012, a year and one month after her last examination as sufficient to put respondent on

notice of her claim. Furthermore, there is no record in the Jacobi records or any attempts to schedule an appointment or the cancellation of any appointments.

Respondent further argues that Dr. Schwartz, an internist, is not qualified to render an expert opinion in this matter, as he is not a radiologist, oncologist or a breast surgeon. Respondent argues that Dr. Schwartz makes no mention of any training or expertise in mammography or radiology nor does he establish a familiarity with the standards of care applicable thereto. Dr. Schwartz' opinion that plaintiff's medical condition and history mandated the performance of a bilateral mammogram on May 17, 2010, the time of her first visit to Jacobi, respondent argues, is unfounded, and is merely an attempt to "create liability" through hindsight, as plaintiff's cancer was diagnosed contemporaneous with the performance of her first bilateral imaging studies on March 1, 2012. Because Dr. Schwartz is not a specialist in the field of breast cancer, a foundation must be laid to support the reliability of the opinion rendered.

Analysis

All actions sounding in medical malpractice brought against NYCHHC are subject to the requirement of the filing of a notice of claim, and must be filed within 90 days after the claim arises under GML § 50-e. Generally, a medical malpractice action accrues on the date of the alleged wrongful act. The doctrine of continuous treatment, however, may toll the 90-day period within which a notice of claim must be filed under GML § 50-e. (*Plummer v. N.Y. City Health & Hosps. Corp.*, 98 N.Y.2d 263, 774 N.E.2d 712, 746 N.Y.S.2d 647 [2002]; *Hill v New York City Health & Hosps. Corp.*, 147 A.D.3d 430, 47 N.Y.S.3d 267 [1st Dept. 2017].)

CPLR 214-a provides that a medical malpractice action must be commenced within 2 1/2 years of the relevant act, or the last treatment where there is continuous treatment for the same

illness, injury or condition which gave rise to the challenged act, omission, or failure. The operative accrual date for the purposes of determining a claim's statute of limitations is at the end of treatment when the course of treatment which includes the wrongful acts or omissions has run continuously, and is related to the same original condition or complaint. (*Lohnas v Luzi*, 2018 N.Y. LEXIS 215, *3, 2018 NY Slip Op 01114, 2 [2018] [the fact that defendant repeatedly told plaintiff she should return "as needed" did not foreclose a finding that the parties anticipated further treatment, where plaintiff's injury was a chronic, long-term condition which both plaintiff and defendant understood to require continued care].) Under the continuous treatment doctrine, a gap in treatment longer than the statute of limitations is not per se dispositive of defendant's claim that the statute has run. (*Lohnas v Luzi*, supra, 2018 N.Y. LEXIS 215 at *5.)

Under the present circumstances, the Court finds that the plaintiff was being treated for a suspicious mass in her breast, as to which further diagnostic procedures were clearly contemplated by NYCHHHC in the form of "follow up" visits. This ongoing course of monitoring for breast cancer constituted continuous treatment. The argument by the respondent that all breast cancer screenings were benign before 2012 ignores the fact that petitioner was being actively monitored for a suspicious mass. As petitioner was last treated on April 30, 2012, a notice of claim could be filed at the latest by July 29, 2013, and thus the present application, submitted by order to show cause dated June 20, 2013, is timely.

In deciding to allow a late notice of claim, among other things, the court shall consider whether the public corporation acquired actual knowledge of the essential facts constituting the claim within ninety days or within a reasonable time thereafter. "Merely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on

plaintiff . . ." (*Williams v. Nassau County Med. Ctr.*, 6 N.Y.3d 531, 537, 847 N.E.2d 1154, 1157, 814 N.Y.S.2d 580, 583 [2006].) Medical records must evince that the medical staff, by its acts or omissions, inflicted an injury on plaintiff in order for the medical provider to have actual knowledge of the essential facts. (*Wally G. v. New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 N.Y.3d 672, 677, 57 N.E.3d 1067, 1070, 37 N.Y.S.3d 30, 33 [2016].)

The salient factor here is whether NYCHHC obtained actual knowledge of the facts. In support of that contention, petitioner submits the affidavit of an expert. (*Harris v New York City Health & Hosps. Corp.*, 2018 N.Y. App. Div. LEXIS 2345, *1, 2018 NY Slip Op 02403, 1 [1st Dept. 2018] [allowing late notice of claim where plaintiff's expert affidavit established that HHC obtained actual knowledge of the facts underlying plaintiff's theory of a departure from the accepted standard of care with regard to the diagnosis and treatment of her brain tumor and the existence of a causally related injury].)

Respondent relies only on its counsel's conclusions based on the record. (*Perez v New York City Health & Hosps. Corp.*, 81 A.D.3d 448, 449, 915 N.Y.S.2d 562, 564 [1st Dept. 2011] ["In response, defendant did not submit any expert affirmations to challenge the conclusions of plaintiff's medical experts. Instead, defendant relied solely on the opinions of its attorney, a non-medical professional, who drew her own conclusions from the records. Since the medical issues presented here are not within the ordinary knowledge and experience of a layperson, an expert affidavit was necessary to refute the opinions of plaintiff's experts."]) While respondent argues the Dr. Schwartz is unqualified to give an opinion, he stated that he had knowledge of breast imaging studies, which is sufficient for the present purposes. Dr. Schwartz's opinion that the departures are indicated on the face of the medical record is, accordingly, essentially unrefuted.

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The petitioner has submitted a reasonable excuse for the failure to timely file a notice of claim, given the need for medical treatment and her advanced age, which is not contested by NYCHHC.

As to prejudice, once a petitioner has presented some evidence or plausible argument that supports a finding of no substantial prejudice, the public corporation must respond with a particularized evidentiary showing that the corporation will be substantially prejudiced if the late notice is allowed. (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466-467, 68 N.E.3d 714, 45 N.Y.S.3d 895 [2016]; *Matter of Townson v New York City Health & Hosps. Corp.*, 158 A.D.3d 401, 405, 70 N.Y.S.3d 200, 205 [1st Dept. 2018].) No prejudice appears on the present record. "HHC will not be prejudiced by allowing plaintiff to file a late notice of claim pertaining to the alleged failure to timely diagnose her brain tumor because her medical records presumably reflect the course of treatment and the facts relevant to her claims." (*Harris v New York City Health & Hosps. Corp.*, 2018 N.Y. App. Div. LEXIS 2345, *2-3, 2018 NY Slip Op 02403, 1 [1st Dept. 2018].)

Accordingly, it is

ORDERED that the petition is granted, and it is further

ORDERED that a notice of claim shall be filed within 30 days after the entry of this Order.

Dated: May 3, 2018

Lewis J. Lubell, J.S.C.