

Smith v Cooper
2018 NY Slip Op 34120(U)
January 11, 2018
Supreme Court, Westchester County
Docket Number: Index No. 56422/2017
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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JACK SMITH and MARILYN SMITH,
Plaintiffs,

- against -

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HOWARD A. COOPER, M.D., and WESTCHESTER
MEDICAL CENTER,

DECISION & ORDER

Defendants.
----- X

In an action to recover damages for medical malpractice, the defendant Westchester Medical Center moves to dismiss the complaint, pursuant CPLR 3211 or for summary judgment, pursuant to CPLR 3212, on the ground that plaintiffs failed to timely file a notice of claim pursuant to General Municipal Law 50-d & 50-e:

Papers Considered

1. Notice of Motion/Affirmation of Thomas M. Grove Esq./Exhibits A-G;
2. Affirmation in Opposition of Jay A. Wechsler, Esq./Exhibits A-E;
3. Reply Affirmation of Thomas M. Grove, Esq./Exhibits H-K.

Factual and Procedural Background

Plaintiffs commenced this action against Howard A. Cooper, M.D. and Westchester Medical Center ("WMC") for medical malpractice, lack of informed consent, and loss of consortium, with the filing of a summons and complaint on April 28, 2017.

The complaint alleges that on October 30, 2015, while plaintiff Jack Smith was a patient at WMC, he underwent the draining of a pericardial effusion by pericardiocentesis during which his heart was punctured requiring an emergency sternotomy and repair of the right ventricle on October 31, 2015.

Plaintiffs served a notice of claim upon WMC on January 12, 2017. The notice of claim asserts that the nature of the claim is for personal injuries as a result of the medical malpractice and negligence in performing a pericardiocentesis for removal of a pericardial effusion at WMC. The incident, which gives rise to the cause of action, occurred on

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October 30, 2015, at WMC, when the plaintiff was undergoing a pericardiocentesis and his heart was punctured requiring an emergency sternotomy and repair of the right ventricle. The notice of claim alleges that the injured plaintiff had continuous treatment at WMC from the date of the incident to the present. The damages claimed include injuries related to the puncture of the heart, the sternotomy and repair, which otherwise would not have been necessary, severe and protracted pain, and extended delay of a kidney transplant resulting in continued dialysis.

WMC moves to dismiss the complaint, pursuant to CPLR 3211, or for summary judgment, pursuant to CPLR 3212, on the ground that plaintiffs failed to file a timely notice of claim pursuant to General Municipal Law 50-d and 50-e.

WMC argues that treatment was rendered to plaintiff from October 30, 2015, through November 6, 2015. Specifically, the pericardiocentesis was performed on October 30, 2015, the sternotomy was performed on October 31, 2015, and the plaintiff was discharged on November 6, 2015. The notice of claim was not served until January 12, 2017, without leave of court, which is 343 days after the expiration of the ninety-day (90) time period to file a notice of claim. Moreover, WMC argues that the one year and ninety-day (90) statute of limitations expired on February 4, 2017 prior to the commencement of this action.

WMC further argues that the continuous treatment doctrine is not applicable because the malpractice claims involve cardiac care and the subsequent treatment sought by plaintiff was for a kidney transplant. However, even if the continuous treatment doctrine applies, WMC argues that the notice of claim is still untimely. Plaintiff's cardiac related treatment at the Kidney Transplant Center occurred on December 16, 2015, March 3, 2016, and March 16, 2016, after which there was no further cardiac treatment. WMC argues that plaintiff's treatment after March 16, 2016, was unrelated to any course of treatment with respect to the condition that gave rise to the lawsuit. Thus, even if the continuous treatment doctrine applies, the plaintiffs would have had to file a notice of claim by June 14, 2016, or were required to make a motion to serve a late notice of claim by June 14, 2017, which they failed to do.

In opposition, plaintiff argues that the continuous treatment doctrine is applicable to toll the notice of claim requirement. Plaintiffs argue that the injured plaintiff was a kidney patient whose cardiac treatment was incidental to his kidney treatment. Plaintiffs argue that when the injured plaintiff presented to WMC on October 30, 2015, it was part of a work-up for an upcoming kidney transplant. At that time, a chest x-ray revealed fluid around his heart requiring a pericardiocentesis to drain the fluid. Plaintiffs argue that the pericardiocentesis was negligently performed, which resulted in the need for an emergency sternotomy. As a result, plaintiffs claim that the injured plaintiff lost the opportunity for a donor kidney, had to wait over a year and a half for the transplant, and was subjected to unnecessary and lengthy dialysis. Plaintiffs argue that the follow-up treatment was at WMC's transplant center occurred as recently as April 27, 2017, where plaintiff Jack Smith was evaluated for a kidney transplant. Thus, plaintiffs argue that the

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Discussion

A notice of claim against a municipal corporation must be served within 90 days of the time the claim arises (General Municipal Law § 50-e [1]; *Allende v New York City Health & Hosps. Corp.*, 90 NY2d 333 [1997]). A medical malpractice action accrues on the date when the alleged original negligent act or omission occurred (see *Young v New York City Health & Hosps. Corp.*, 91 NY2d 291 [1998]).

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 (see *Davis v City of New York*, 38 NY2d 257, 259 [1975]). The toll applies when continuous treatment is sought "for the same illness, injury or condition which gave rise to the said act, omission or failure" originally complained of (CPLR 214-a; *Plummer v N.Y. City Health & Hosps. Corp.*, 98 NY2d 263 [2002]; *McDermott v Torre*, 56 NY2d 399, 407 [1982]). Essential to the application of the continuous treatment doctrine is "a course of treatment established with respect to the condition that gives rise to the lawsuit" (*Nykorchuck v Henriques*, 78 NY2d 255, 258-259 [1991]). "Routine examination of a seemingly healthy patient, or visits concerning matters unrelated to the condition at issue giving rise to the claim, are insufficient to invoke the benefit of the doctrine" (*Plummer v N.Y. City Health & Hosps. Corp.*, 98 NY2d at 268).

Here, defendants demonstrated that no further cardiac related treatment occurred after March 16, 2016. The medical records from WMC demonstrate that the pericardiocentesis was performed on October 30, 2015, and the sternotomy was performed on October 31, 2015. Plaintiff was discharged on November 6, 2015. Thereafter, plaintiff presented at the Kidney Transplant Center on December 16, 2015, for a postsurgical follow up. On March 3, 2016, plaintiff presented at the transplant center for pericardial effusion in furtherance of his preoperative cardiovascular examination. An echocardiogram was ordered to reassess the pericardial effusion. The echocardiography was performed on March 16, 2016. Through the submission of medical records, defendants demonstrated that any subsequent cardiac treatment after March 16, 2016, was in furtherance of plaintiff's "pre-transplant evaluation for end stage renal disease".

In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs' argument that the evaluation of plaintiff Jack Smith on April 27, 2017, at WMC's transplant center for a kidney transplant fails to establish continuous treatment.

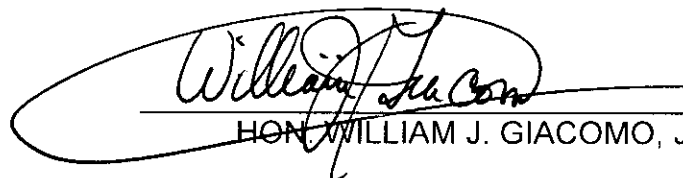
Here, the continuous treatment doctrine tolled the statute of limitations until March 16, 2016. Therefore, plaintiffs were required to file a notice of claim within 90 days of that date, or June 14, 2016. Plaintiffs' service of a late notice of claim on January 12, 2017, without leave of court is a nullity (see *Maxwell v City of New York*, 29 AD3d 540 [2d Dept 2006]; *Santiago v City of New York*, 294 AD2d 483 [2d Dept 2002]). Moreover, plaintiffs failed to seek leave of court to file a late notice of claim within one year and ninety days after accrual of the claim (see General Municipal Law § 50-l; CPLR 217-a; see *Daniel J.*

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v New York City Health & Hosps. Corp., 77 NY2d 630 [1991]; *Maxwell v City of New York*, 29 AD3d 540).

Accordingly, WMC's motion to dismiss the complaint pursuant to General Municipal Law 50-d and 50-e, and CPLR 3211 and 3212, for failure to file a timely notice of claim is GRANTED.

Dated: White Plains, New York
January 11, 2018


HON. WILLIAM J. GIACOMO, J.S.C.