

Young v New York City Health & Hosps. Corp.

2018 NY Slip Op 34527(U)

October 29, 2018

Supreme Court, Bronx County

Docket Number: Index No. 26942/2018E

Judge: George J. Silver

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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



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EVA YOUNG

Index No.: 26942/2018E

-against-

Hon. GEORGE J. SILVER

Justice Supreme Court

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, LINCOLN MEDICAL AND MENTAL HEALTH CENTER, NICOLE ASTILL, M.D., QURATULAIN ZEESHAN, M.D., MENO ERNEST LUEDERS, M.D., STEPHEN STAMPP, M.D., CORYN MARRERO-SPYROU, R.N., RAINVILLE VALMORIDA, R.N., KAROL GOLABEK, R.N., V. WILKINSON, CST and S. PETER, CST, *et al.*

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The following papers numbered 1 to 3 were read on this motion (Seq. 001):

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1
Answering Affidavit and Exhibits	No(s).	2
Replying Affidavit and Exhibits	No(s).	3

In this medical malpractice action, defendant NEW YORK CITY HEALTH AND HOSPITALS CORPORATION ("defendant") moves, pursuant to CPLR §§ 3211(a)(5) and 214-a, for dismissal, claiming that this action was not filed within the applicable statute of limitations. Plaintiff opposes the motion. For the reasons stated herein, defendant's application is granted.

BACKGROUND

This lawsuit is premised on plaintiff's allegations that defendant, through its agents and employees, was negligent in leaving a foreign body (a blue towel) inside her abdomen following surgery performed at Lincoln Hospital, one of defendant's facilities, on September 19, 2016. On February 23, 2018, plaintiff moved, under Index Number 22173/2018E, for permission to file a late notice of claim in the instant matter. By a decision dated May 8, 2018, the court granted plaintiff's motion to the extent she asserted claims related to the discovery of an alleged foreign object. By the same decision the court did, however, deny plaintiff's motion file a late notice of claim as to any other potential claims stemming from plaintiff's admission at Lincoln Hospital, including those related to general allegations of medical malpractice. Pursuant to the terms of the court's order, plaintiff subsequently served a notice of claim on defendant. In response to service of plaintiff's summons with notice, defendants served a notice of appearance and demand for complaint. On August 1, 2018, plaintiff served a verified complaint. Thereafter, defendant served the instant motion.

Motion is Respectfully Referred to Justice:

Dated:

ARGUMENTS

In support of the instant motion, defendant argues that this action is barred by the applicable statute of limitations because plaintiff discovered the presence of a foreign object in her body on January 27, 2017, but did not commence the action in earnest until after January 27, 2018. CPLR. § 214-a provides, in pertinent part, "that where the action is based upon the discovery of a foreign object in the body of the patient, the action may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier." Based on the date of discovery here, defendant contends that this action accrued on January 27, 2017 and should have been commenced by January 27, 2018. Since plaintiff failed to commence the action within the statutory period, only filing the summons with notice on June 14, 2018, defendant argues that this action necessarily must be dismissed.

Defendant further argues that the time in which to file this action was not tolled by plaintiff's late notice of claim motion. That toll - which exists pursuant to the decision of the Court of Appeals in *Giblin v. Nassau County Medical Center*, 61 NY2d 68 (1984) - only operates if the motion is made *before* the statute of limitations expires (*see Ricara v. City of New York*, 156 AD2d 206 [1st Dept. 1989]; *Pierson v. City of New York*, 56 NY2d 950, 955-56 [1982][where "no application for an extension was made prior to the expiration of the statute of limitations, the court lacked the power to authorize late filing of the notice"]). Here, defendant argues that since the motion was made on February 23, 2018, the statute of limitations for claims premised on the discovery of a foreign object had already expired. Defendant further states that the court's May 8, 2018 order, which partially granted plaintiff's motion to serve a late notice of claim and directed service of the same within 30 days cannot supersede the mandates of CPLR § 214-a. Indeed, defendant argues that an order which grants leave to serve a late notice of claim and which directs the plaintiff to serve a notice of claim within a specified amount of time cannot extend the statute of limitations (*see Bavne v. City of New York*, 137 AD3d 428 [1st Dept. 2016]). Accordingly, defendant contends that this action is time-barred, and must be dismissed pursuant to CPLR §§ 3211(a)(5).

In opposition, plaintiff contends that it filed its motion for leave to serve a late notice of claim on February 23, 2018, well within the one-year and 90 day statute of limitations set forth in General Municipal Law § 50-e, and that motion tolled the time for plaintiff to commence the within action, which she did on June 14, 2018 by the filing of a summons with notice. Plaintiff further contends that the motion should be denied because defendant's reliance on dismissal based on CPLR §214-a is misplaced. To be sure, plaintiff argues that defendant has misapprehend the foreign object exception to the "discovery" accrual rule set forth in CPLR §214-a, mistakenly applying the one-year statute of limitations in that section as the basis for the instant motion. In plaintiff's view, the law is clear that the postponement of the accrual date of a cause of action by virtue of the foreign objects rule extends the time in which an action may be commenced against a municipality. Plaintiff asserts that defendant's mistakenly argue that the foreign object rule shortens the time to commence such an action. Consequently, plaintiff contends that an action against a municipality commenced within one year and 90 days of the discovery of a foreign object is timely, notwithstanding the one-year statute of limitations in CPLR §214-a. Plaintiff further argues that defendant waived or should be estopped from asserting

a statute of limitations defense to plaintiff's foreign object claim because defendant did not highlight the argument that it is advancing now in its earlier affirmation in partial opposition to plaintiff's motion for leave to serve a late notice of claim. As such, plaintiff submits that defendant's instant motion should be denied in its entirety.

In reply defendant reiterates its position that this action is time-barred, and must be dismissed pursuant to CPLR §§ 3211(a)(5).

DISCUSSION

CPLR § 214-a provides for a delayed accrual date of an action based upon discovery of a "foreign object in the body of a patient," until the date of discovery of the "foreign object" or "the date of discovery of facts which would reasonably lead to such discovery." In the instant matter, the applicable statute of limitations is the longer of either (1) one year from the date of discovery of the foreign object as to the foreign object claim only; or (2) one year and ninety days from the date of the treatment during which there was alleged medical malpractice as to all medical malpractice claims.

Here, it is undisputed that the date of accrual for plaintiff's "foreign object" claim was the date of discovery of the alleged "foreign object," January 27, 2017. One year from that date afforded plaintiff until January 27, 2018 (as opposed to December 8, 2017 for her medical malpractice claims based on her September 19, 2016 date of surgery) to commence this lawsuit. This court has previously found that the statute of limitations provided in CPLR § 214-a is applicable to municipal defendants (*see Griffin v. New York City Health and Hosps. Corp.*, [Bronx County December 12, 2012]).

Notably, 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 AD3d 428, *supra*; *see also Baez v New York City Health & Hosps. Corp.*, 80 NY2d 571, 577 [1992]; *Abnor v City of New York*, 101 AD3d 581, 582 [1st Dept 2012]). In fact, to protect against the running of the statute of limitations, a plaintiff can file a complaint within the limitations period, or even before receiving leave to serve a late notice of claim (*see Abnor*, 101 AD3d at 582; *see also Matter of Shannon v Westchester County Health Care Corp.*, 76 AD3d 680, 682 [2d Dept 2010]; General Municipal Law § 50-e [5]). Here, while this court previously issued an order granting plaintiff permission to serve a late notice of claim, the court did not make any findings regarding the applicable statute of limitations with respect to plaintiff's foreign object claim. Moreover, contrary to plaintiff's argument, defendant cannot be assumed to have waived a statute of limitations defense merely because defendant did not raise it at the time of plaintiff's submission of its previous Order to Show Cause. Indeed, at the time that this court considered plaintiff's Order to Show Cause for leave to file a late notice of claim, the time-bar issues raised herein were not yet ripe, as no action had yet been filed. Moreover, plaintiff provides no legal basis for her argument that defendant should be estopped from asserting a statute of limitations defense. Indeed, there was no determination made on the merits as to the application of the statute of limitations to plaintiff's foreign object claim at the time of plaintiff's filing of her Order to Show Cause. Therefore defendant should not be estopped from asserting the defense, as the issue was made ripe by plaintiff's actual filing of plaintiff's verified complaint (*see Bender v. New York City Health and Hosps. Corp.*, 38 NY2d 662 [1976]).

Finally, plaintiff's argument that her time to file this action was tolled by plaintiff's late notice of claim motion is without merit. Indeed, as defendant highlights, that toll only operates if the motion is made *before* the statute of limitations expires (*see Giblin v. Nassau County Medical Center*, 61 NY2d 68, *supra*; *Rieara v. City of New York*, 156 AD2d 206, *supra*; *Pierson v. City of New York*, 56 NY2d at 956, *supra*). Here, plaintiff's motion to serve a late notice of claim was made on February 23, 2018, after the statute of limitations for claims premised on the discovery of a foreign object had already expired. As plaintiff was subsequently only permitted to serve a late notice of claim as to claims premised on the discovery of a foreign object, and not as to claims premised on general malpractice allegations, this action is necessarily time-barred, and must be dismissed pursuant to CPLR §§ 3211(a)(5). The separate continuous treatment toll cannot cure this deficiency, as that toll specifically provides that "continuous treatment shall not include examinations undertaken at the request of the patient for the sole purpose of ascertaining the state of the patient's condition" (*see* CPLR § 214-a).

The court has considered plaintiff's remaining arguments, and finds them unavailing.

Accordingly, it is hereby

ORDERED, that the instant motion to dismiss is granted; and it is further

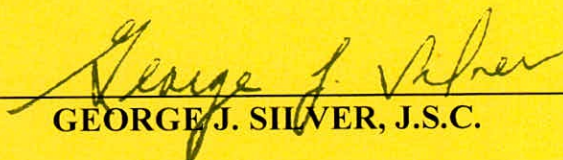
ORDERED that defendants are directed to serve a copy of this order on plaintiff with notice of entry within ten (10) days of its issuance; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants and to make this matter as disposed in accordance with this court's order.

The foregoing constitutes the decision and order of the court.

Dated: 10-29-18

Hon.


GEORGE J. SILVER, J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER