

<b>Garcia v Takeko Takeshige, M.D.</b>
2019 NY Slip Op 32208(U)
March 15, 2019
Supreme Court, Bronx County
Docket Number: 24908/2016E
Judge: George J. Silver
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

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**CINTHYA GARCIA,**

**Index No. 24908/2016E**

**Plaintiff,**

**Motion Seq. 004 and 005**

**-against-**

**DECISION & ORDER**

**TAKEKO TAKESHIGE, M.D., ANNIKA CHADEE,  
M.D., RUCHI UPADHYAY, M.D., LINCOLN  
MEDICAL AND MENTAL HEALTH CENTER and  
NYC HEALTH + HOSPITALS,**

**Defendants.**  
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**HON. GEORGE J. SILVER:**

In this medical malpractice action, plaintiff CINTHYA GARCIA (“plaintiff”), moves (Sequence No. 004) for an order to extend her time to file a note of issue. Defendants TAKEKO TAKESHIGE, M.D. (“Dr. Takeshige”), ANNIKA CHADEE, M.D. (“Dr. Chadee”), RUCHI UPADHYAY, M.D. (“Dr. Upadhyay”), LINCOLN MEDICAL AND MENTAL HEALTH CENTER (“Lincoln Hospital”) and NYC HEALTH + HOSPITALS (“NYCHHC” collectively “defendants”), partially oppose plaintiff’s motion.

In a separate motion (Sequence No. 005), defendants move for an order dismissing all allegations from plaintiff’s bills of particulars which were not contained in her notice of claim. Defendants also move for dismissal based on plaintiff’s failure to comply with Unconsolidated Laws § 7401 and General Municipal Law § 50-e (“GML § 50-e[5]”). Defendants further seek an order, pursuant to CPLR § 3043, precluding and/or striking all new allegations and injuries pleaded in plaintiff’s supplemental bill of particulars. Plaintiff opposes the motion.

The court will decide both motions collectively in the decision herein.

### BACKGROUND

On June 1, 2015, plaintiff underwent a hysterectomy at Lincoln Hospital due to abnormal uterine bleeding and fibroids. Plaintiff was discharged on June 4, 2015. The following day, plaintiff presented to Montefiore Medical Center (“Montefiore”) with complaints of dizziness and chest tightness. She was diagnosed with a pulmonary embolism, and was treated with anticoagulants. Plaintiff was discharged on June 8, 2015.

Plaintiff commenced this action by filing a summons and complaint on or about July 21, 2016. The various defendants thereafter filed answers on August 3, 2016, August 16, 2016, January 10, 2017, and February 3, 2017 respectively. On November 29, 2016, plaintiff served a bill of particulars.

A preliminary conference was held on June 13, 2017. Per the preliminary conference order that followed, plaintiff’s deposition was scheduled to take place on or before September 19, 2017, and defendants’ depositions were to take place between October 19, 2017 and November 30, 2017. On the day of plaintiff’s deposition, plaintiff advised that she did not feel well, and the deposition was adjourned. Plaintiff’s deposition continued on October 26, 2017, where plaintiff again requested an adjournment because she did not feel well.

On November 14, 2017 and March 27, 2018, a compliance conference was held. Per the compliance conference orders that followed, plaintiff’s continued deposition was scheduled for December 14, 2017. On November 28, 2017, plaintiff served a supplemental bill of particulars. By a letter dated December 12, 2017, defendants objected to and rejected plaintiff’s supplemental bill.

During plaintiff’s December 14, 2017 deposition, plaintiff requested an adjournment because she did not feel well. The parties rescheduled plaintiff’s deposition for March 1, 2018, however, plaintiff adjourned the deposition in advance of that date. On March 27, 2018, a

compliance conference was held. Plaintiff's continued deposition was scheduled for on or before April 26, 2018, however, the parties agreed to adjourn the deposition to June 4, 2018 due to a scheduling conflict. On June 4, 2018, plaintiff's deposition was completed.

On June 11, 2018, a compliance conference was held. Defendants' depositions were subsequently held on August 7, 2018, August 16, 2018, and August 27, 2018. Per the compliance conference order, plaintiff reserved the right to designate a witness on behalf of NYCHHC within thirty (30) days of defendants' depositions.

### **ARGUMENTS AND DISCUSSION**

#### **I. Plaintiff's Motion for an Extension of Time to File a Note of Issue**

Plaintiff asserts that she needs an extension of time to file a note of issue in order to conduct defendants' depositions.<sup>1</sup> Plaintiff contends that she has been unable to complete discovery due to defendants' failure to comply with the court's November 14, 2017 compliance conference order. Plaintiff argues that if the court refuses to extend her time to file a note of issue, she would be punished for attempting to obtain pertinent discovery from defendants without court intervention. Plaintiff also asserts that she would be prejudiced if she were forced to file a note of issue prior to the completion of discovery. Plaintiff further avers that because her deadline to file a note of issue was on June 29, 2018, the failure to extend her time to file a note of issue would give defendants grounds for dismissal.

Defendants partially oppose plaintiff's application for an extension of time to file a note of issue. Defendants assert that while they take no position with respect to plaintiff's request for an extension of time, they take exception to plaintiff's misrepresentation of the procedural history of

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<sup>1</sup> Plaintiff's motion is dated June 26, 2018. During the pendency of plaintiff's motion, defendants' depositions have been held, thereby making plaintiff's instant application moot.

the case and the statements contained in plaintiff's counsel's good faith affirmation. According to defendants, the delay in this case is solely attributable to plaintiff. To be sure, defendants argue that plaintiff's attempt to blame her inability to timely file a note of issue on them is erroneous, outrageous, and made in bad faith. Defendants contend that they were ready, willing, and able to conduct plaintiff's deposition on every scheduled date, and have consented to adjourn the deposition based on plaintiff's purported illnesses.

CPLR § 2004 provides that "the court may extend the time fixed by any statute rule or order from doing any act, upon such terms as may be just and upon good cause shown." In considering a motion seeking to extend the time to file a note of issue, the court "may properly consider factors such as the length of the delay, whether the opposing party has been prejudiced by the delay, the reason given for the delay [and] whether the moving party was in default before seeking the extension" (*Aquino v. New York City Housing Authority*, No. 156939/12, 2014 WL 4186933 [Sup. Ct. Aug. 21, 2014] citing *Grant v. City of New York*, 17 A.D.3d 215, 217 [1st Dept. 2005]).

Here, despite defendants' disagreement with plaintiff as to the cause of the delay in this case, defendants do not object to plaintiff's request for an extension of time to file a note of issue. Accordingly, based on defendants' lack of opposition to plaintiff's request, coupled with the completion of plaintiff and defendants' depositions, plaintiff's time to file a note of issue is extended insofar as the parties are directed to complete any outstanding discovery within 45 days of this order. **Plaintiff is directed not to file a note of issue until the final compliance conference.** To the extent not already completed, plaintiff may designate a witness on behalf of NYCHHC within thirty (30) days of this order, pursuant to the court's June 11, 2018 compliance

conference order. Furthermore, plaintiff shall not file a note of issue until all discovery is certified as complete via a stipulation signed by all parties.<sup>2</sup>

## II. Defendants' Motion

Defendants move for an order dismissing all allegations from plaintiff's bills of particulars that were not contained in her notice of claim. Defendants argue that plaintiff's claim that her hysterectomy was performed improperly, resulting in fecal and urinary incontinence, infection, and aggravation of her uterus' condition, should be stricken and dismissed since plaintiff failed to assert these allegations and injuries in her notice of claim. Rather, defendants assert, plaintiff's notice of claim alleged that defendants failed to diagnose plaintiff's deep vein thrombosis and/or pulmonary embolism. Specifically, defendants contend that plaintiff's claim that her hysterectomy was performed improperly is a new theory of liability and damages which cannot be pleaded for the first time in plaintiff's bill or supplemental bill of particulars.

Defendants note that the manner of the claim in plaintiff's notice of claim focuses on plaintiff's post-operative management and defendants' alleged failure to properly recognize signs and symptoms of a pulmonary embolism. Defendants also highlight the notice of claim only includes damages related to a pulmonary embolism. Defendants further point out that plaintiff testified at her 50-h hearing about her hysterectomy and subsequent diagnosis and treatment for deep vein thrombosis and pulmonary embolism, but never mentioned urinary or fecal incontinence, infection, or worsening of her uterine condition. Defendants also note that plaintiff's Lincoln Hospital medical records of her post-operative and follow up care from June 1, 2015 through July 24, 2015 do not contain any complaints of incontinence, and that plaintiff has failed

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<sup>2</sup> Notwithstanding this ruling, the court takes judicial notice of the delays occasioned by plaintiff in this matter and plaintiff's incomplete and inaccurate representation in her moving papers that she was unable to complete discovery due to defendants' failure to comply with the November 14, 2017 compliance conference order.

to provide any medical evidence confirming a diagnosis of fecal or urinary incontinence. In that regard, defendants assert that the court should dismiss plaintiff's allegations of an improperly performed hysterectomy since plaintiff cannot seek leave to file a late notice of claim with respect to new theories of liability and damages since the statute of limitations has expired.

Finally, defendants argue that the court should preclude and/or strike all new allegations and injuries pleaded in plaintiff's supplemental bill of particulars since plaintiff raises new theories of liability and damages in her supplemental bill that were not pleaded in her notice of claim or initial bill of particulars. Defendants submit that plaintiff's initial bill of particulars does not mention urinary or fecal incontinence, but only alleges that defendants failed to appreciate the signs and symptoms of deep vein thrombosis and pulmonary embolism, failed to monitor and follow up post-operatively, and failed to perform tests to diagnose infection, deep vein thrombosis, and pulmonary embolism.

In opposition, plaintiff argues that defendants' motion must be denied since her additional claims stem from her initial claims. Plaintiff contends that her initial bill of particulars alleges that defendants failed to properly perform a vaginal hysterectomy and negligently aggravated her uterus condition, and that her supplemental bill only elaborates on these previously alleged claims. Alternatively, plaintiff argues that if the court finds that she must file leave to amend and supplement the bill of particulars, leave should be granted as defendants have not been prejudiced since they had ample time to question plaintiff at her deposition about the supplemental bill of particulars. Plaintiff also posits that the nature of supplemental pleadings is to properly assess damages, and due to defendants' negligence, new damages related to her improperly performed hysterectomy and subsequent care have been unearthed.

Finally, plaintiff maintains that she provided defendants with a bill of particulars almost two years ago and a supplemental bill almost one year ago, but defendants failed to move to dismiss these claims. As such, plaintiff avers that defendants' request to dismiss her claims is "a tactic" since she has previously been questioned about every claim in her bill of particulars.

In reply, defendants reiterate that plaintiff's notice of claim delineates the nature and manner of the claim as one arising from the failure to diagnose and treat a pulmonary embolism, and that the injuries alleged in plaintiff's notice of claim relate only to a pulmonary embolism and its sequelae. Defendants also reiterate that plaintiff's notice of claim does not mention any negligence or damages related to an improperly performed hysterectomy, urinary or fecal incontinence, infection, aggravation of uterine condition, or any psychological damages as plaintiff alleged in her subsequent bills of particulars. As such, defendants argue that because these are new theories of liability and damages which plaintiff has failed to allege in her notice of claim, they must be dismissed. Defendants contend that while plaintiff's bill of particulars alleges that defendants failed to properly perform a vaginal hysterectomy and negligently aggravated her uterus' condition, these allegations were made approximately one and a half years after the cause of action accrued, beyond the time within which to file a notice of claim and beyond the statute of limitations.

Defendants further argue that any new allegations made in plaintiff's supplemental bill filed approximately two and a half years after the cause of action accrued must be dismissed since they were not pleaded in plaintiff's notice of claim. Defendants also assert that plaintiff has served another supplemental bill delineating additional injuries arising from the newly alleged negligence, which should similarly be dismissed.

*a. Plaintiff Cannot Allege Claims Related to her Hysterectomy*

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 to file a notice of claim. The failure to comply with this condition precedent is grounds for dismissal of the action (*see generally Silberstein v. County of Westchester*, 92 A.D.2d 867 [2d Dept. 1983], *aff'd* 62 NY2d 675 [1984]).

The purpose of the statutory notice of claim requirement is to provide a municipality or public corporation with an adequate opportunity to investigate and to explore the merits of the claim while the information is fresh and readily available (*Cruz v. New York City Housing Authority*, 269 A.D.2d 108 [1st Dept. 2000]; *Rosenbaum v. City of New York*, 8 NY3d 1, 11 [2006]). Indeed, “[t]he test of the sufficiency of a notice of claim is merely whether it includes information sufficient to enable the city to investigate” (*Rosenbaum*, 8 NY3d at 7, *citing to Brown v City of New York*, 95 NY2d 389 [2000] [internal quotation marks and citations omitted]). Therefore, the notice of claim must contain a sufficient description of “the place,” “the time,” and “the nature” of the claim (*see id.*).

Here, plaintiff’s notice of claim failed to alleged claims relating to an improperly performed hysterectomy, resulting in fecal and urinary incontinence, infection, or aggravation of her uterus’ condition. Rather, plaintiff’s notice of claim delineates the nature of the claim as one

for medical malpractice “in failing to properly, timely, and adequately diagnose and treat Claimant’s pulmonary embolism.” Likewise, the manner in which the claim arose stated that defendants “negligently fail[ed] to diagnose Claimant with pulmonary embolism; fail[ed] to order appropriate medical consultations, notwithstanding clear signs and symptoms of pulmonary embolism,” and failed to provide proper post-operative care. Similarly, the damages alleged in plaintiff’s notice of claim only reflect those related to a pulmonary embolism, including dizziness, shortness of breath, need for anticoagulants, and need for repeat hematological testing (*see e.g., Fleming v. City of New York*, 89 A.D.3d 405, 405 [1st Dept. 2011] [“The trial court correctly dismissed plaintiff’s negligence claims because that theory of liability was not asserted in the original notice of claim, in which plaintiff asserted that he was injured as a result of an intentional assault by the corrections officer]; *Olivera v. City of New York*, 270 A.D.2d 5, 6 [1st Dept. 2000] [plaintiff cannot add personal injury claim where the notice of claim asserts property damage since “an amendment that would alter the substantive nature of the claim . . . does not fall within [GML § 50-e (6)], which “permits amendment to a notice of claim to correct a mistake or omission made in good faith, provided the public corporation is not prejudiced”]).

Indeed, nowhere in plaintiff’s notice of claim nor at her 50-h hearing on April 15, 2016 does plaintiff mention fecal and urinary incontinence, infection, aggravated uterine condition, or psychological injuries (*see e.g., Hunt v. New York City Hous. Auth.*, 280 A.D.2d 391, 391–92 [1st Dept. 2001] [rejecting “plaintiff’s effort to claim that his slip and fall was caused not only by snow and ice on the stairs, as alleged in his notice of claim, but also by inadequate lighting” since plaintiff failed to testify that inadequate lighting was a factor of the incident at his 50-h hearing taken five months after the accident]). As these claims were not alleged in plaintiff’s notice of claim or during her 50-h hearing, they must be dismissed.

Moreover, plaintiff cannot correct her failure to serve a notice of claim with respect to her claims of an improperly performed hysterectomy and its resulting injuries since plaintiff has failed to move for leave to serve a late notice of claim within the applicable statute 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]; *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, plaintiff’s claim accrued on June 8, 2015, the date of her discharge from Montefiore following her treatment for a pulmonary embolism.<sup>3</sup> One year and 90 days from the date of accrual afforded plaintiff until on or about September 8, 2016 to commence a lawsuit. As plaintiff failed to move for leave to serve a late notice of claim within the applicable statute of limitations as to claims related to her hysterectomy, 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

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<sup>3</sup> Although plaintiff’s claims relating to the performance of her hysterectomy accrued on the date of her discharge from Lincoln Hospital on June 4, 2015, the court will accept plaintiff’s later accrual date of June 8, 2015 as stated in her notice of claim.

[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.”]).

*b. Plaintiff Cannot Make New Allegations in Supplemental Bill of Particulars*

Furthermore, plaintiff cannot make new allegations in her supplemental bill of particulars of an improperly performed hysterectomy that resulted in fecal and urinary incontinence, infection, or aggravation of her uterus' condition. CPLR § 3404(b) permits a party to serve a supplemental bill of particulars without leave of the court, “provided however that no new cause of action may be alleged or new injury claimed . . .” Here, plaintiff impermissibly raises new theories of liability and damages in her supplemental bill of particulars that were neither pleaded in her notice of claim or initial bill of particulars. As defendants have correctly identified, plaintiff’s initial bill of particulars does not mention urinary or fecal incontinence, but only alleges injuries relating to “blood clots, deep vein thrombosis/pulmonary embolisms requiring prolonged antibiotic therapy, conscious pain and suffering, loss of enjoyment of life, diminished sexual and intimate relations, swelling, redness and intense pain, PTSD, and fear of physicians and gynecologists. Great pain in legs and throughout body, agony, injury, suffering, disability, hospitalization, mental anguish, and emotional stress” (*see e.g., White v. New York City Hous. Auth.*, 288 A.D.2d 150, 150 [1st Dept. 2001] [granting defendant’s motion to strike plaintiff’s claim of inadequate lighting from bill of particulars where the notice of claim and the complaint alleged that plaintiff was caused to slip and fall by a foreign substance on the stairwell, and the poor lighting condition was raised for the first time in plaintiff’s bill of particulars. This allegation created a new theory of liability, which is “not within the scope of permissible corrections to the notice of claim covered by GML § 50-e

(6)). Since plaintiff's notice of claim and initial bill of particulars were limited primarily to claims related to the failure to diagnose and treat deep vein thrombosis and pulmonary embolism, plaintiff's allegation that her improperly performed hysterectomy caused fecal and urinary incontinence, infection, and aggravation of plaintiff's uterus' condition constitutes a new theory of liability, and is thus stricken from plaintiff's supplemental bill of particulars.

Based on the foregoing, it is hereby

ORDERED that plaintiff's request for an extension of time to file a note of issue is granted to the extent previously indicated; and it is further

ORDERED that any new allegation of a negligent performance of a hysterectomy causing fecal and urinary incontinence, infection, or aggravation of plaintiff's uterus' condition in plaintiff's supplemental bill of particulars is stricken; and it is further

ORDERED that the parties are directed to appear for a conference on April 17, 2019 at 9:30 a.m. at 851 Grand Concourse, Room 600, Bronx, New York to facilitate further discovery.

This constitutes the decision and order of the court.

Dated: March 15, 2019

  
HON. GEORGE J. SILVER

HON. GEORGE J. SILVER