

**Creque v New York City Health & Hosps. Corp.**

2019 NY Slip Op 34165(U)

September 24, 2019

Supreme Court, Bronx County

Docket Number: 22957/2016E

Judge: George J. Silver

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 19A**

-----X  
**TERESA CREQUE**

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**Plaintiff**

**-against-**

**NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION,**

**Defendant**

-----X  
**HON. GEORGE J. SILVER:**

In this medical malpractice action, defendant NEW YORK CITY HEALTH & HOSPITALS CORPORATION (“NYCHHC” or “defendant”) moves, pursuant to McKinney's Unconsolidated Laws of N.Y. § 7401 and CPLR §3211(a)(5) to dismiss plaintiff TERESA CREQUE’s claims prior to January 30, 2015, on the grounds that those claims are time-barred by the 1 year and 90-day statute of limitations. More broadly, defendant submits pursuant to the General Municipal Law §50-e( 1 ), that full dismissal of plaintiff’s claims is warranted on the grounds that those claims are barred by plaintiff’s late filling of a notice of claim. Plaintiff opposes defendant’s application.

**BACKGROUND**

This case involves allegations by plaintiff, a then 58-year-old female, that defendant was negligent in failing to diagnose and properly treat invasive ductal carcinoma of the right breast, resulting in a malignant neoplasm of the right breast requiring plaintiff to undergo chemotherapy and radiation treatment.

**ARGUMENTS**

In support of the instant motion, defendant argues that plaintiff’s claims in the instant action prior to January 30, 2015 are time-barred by a one year and 90-day statute of limitations, running from the date of the alleged misdiagnosis. Specifically, plaintiff alleges dates of negligence between April 17, 2014, the date of the plaintiff’s initial mammogram at NYCHHC, and April 14, 2015, the date of her cancer diagnosis. However, defendant contends that the date of the alleged misdiagnosis is actually May 27, 2014, which is the date of a subsequent mammogram study at NYCHHC. Thus, according to defendant, the 1 year and 90-day statute of limitations with respect to same would have expired on August 25, 2015, yet plaintiff failed to file her complaint until April 29, 2016.

Further, defendant argues that the continuous treatment doctrine does not apply in this matter prior to January 30, 2015, as there was a substantial gap in treatment which would have disrupted any continuous course of treatment. Specifically, defendant highlights that plaintiff did not treat with any doctors at

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NYCHHC between April 17, 2014 and February 2, 2015. Defendant contends that the lack of continuous treatment in this matter bars the action for any claim alleged prior to January 30, 2015, notably, barring any claims as to the alleged failed diagnosis of March 27, 2014. Thus, defendant states that plaintiff cannot establish a prima facie case as to defendant. Finally, defendant submits that plaintiff's notice of claim is untimely and thus this matter should be dismissed with prejudice. As noted above, defendant contends that the alleged date of misdiagnosis was May 27, 2014, thus the deadline for service of a notice of claim was August 25, 2014. Plaintiff did not file a notice of claim until August 28, 2015, over 1 year and 90 days later. Since this filing is not only late, but after the expiration of the statute of limitations, this court has no jurisdiction to grant an extension of time for service.

In opposition, plaintiff states that she only sought treatment throughout the referenced period at NYCHHC facilities—namely, Segundo Ruiz Belvis Clinic and Lincoln Hospital. Thus plaintiff states that any purported “gaps” in her treatment for her breast cancer were a result of defendant wrongfully advising her that everything was normal and that she did not need to come back for a year. Plaintiff further submits that defendant is mistaken about when the causes of action accrued. To be sure, plaintiff avers that NYCHHC's negligent treatment continued from the date of her missed tumor through to the delayed treatment of her cancer on July 10, 2015. Critical to this court's determination, plaintiff argues, is consideration of the fact that plaintiff continued to have trust and confidence in the recommendations of her NYCHHC physicians.

In reply, defendant objects to plaintiff's recitation of the factual history and applicable standards governing this court's determination of the instant motion. To be sure, defendant argues that plaintiff makes representations regarding standards of care with no reference to an expert affirmation, but rather based on plaintiff's opinion and on reliance on unsubstantiated medical websites and articles. Defendant further emphasizes that the instant motion is a motion to dismiss rather than a motion for summary judgment. In that regard, defendant stresses that it has moved to dismiss the claims prior to January 30, 2015 as barred as set forth by the applicable statutes and not, as plaintiff asserts, to dismiss the entire action as untimely because there was no continuous treatment. Thus, defendant submits that this is not a matter for which summary judgment applies.

Defendant also notes that the alleged dates of malpractice set forth in plaintiff's bill of particulars spans from April 2014 to April 2015. As such, while the earlier claims are time-barred, the allegations applicable from January 30, 2015 (the first visit in this case being on February 2, 2015) to April 14, 2015 would not be affected by the outcome of this motion. In other words, defendant states that plaintiff's claims from February 2, 2015 continuing to April 14, 2015 should be the only claims considered under the continuous treatment doctrine given the date the plaintiff's complaint was filed.

Finally, defendant argues that plaintiff's opposition fails to oppose defendant's argument that all claims prior to January 30, 2015 are time-barred. In addition, defendant contends that plaintiff's opposition fails to set forth that any continuous treatment existed to toll plaintiff's time to file a notice of claim. Accordingly, defendant reiterates its position that it is entitled to the relief requested in the instant motion, not limited to dismissal of the action in its entirety.

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## DISCUSSION

Actions against NYCHHC 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 and 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]).

Under CPLR §214, the statute of limitations for medical malpractice does not begin to run until the continuous course of care or treatment has terminated. Essential to the application of the doctrine is the notion that there has been a course of treatment established with respect to the condition that gives rise to the lawsuit (*see Nykorchuck v. Henriques*, 78 NY2d 255 [1991]). Neither the mere continuing relationship between physician and patient nor the continuing nature of a diagnosis is sufficient to satisfy the requirements of the doctrine (*id.*). Instead, it must be shown that a defendant or defendants rendered an actual course of treatment during the applicable period for the same conditions or complaints underlying the plaintiff's medical malpractice claims (*see Chambers v. Mirkinson*, 68 AD3d 702, 705 [2d Dept. 2009]). Here, in essence, plaintiff alleges that “the fact that she did not treat at the defendant facilities for breast-cancer related complaints for several months should have no bearing on the toll, because the gap was at the instruction of the defendants.” As such, plaintiff states that she should be afforded the benefit of the continuous treatment doctrine based on her own subjective belief in defendant's ongoing treatment, even if defendant contemplated otherwise. Plaintiff's position runs athwart of legal precedent in this area of the law. To be sure, the Court of Appeals has ruled that the absence of treatment, even as a result of malpractice, cannot constitute continuous treatment (*see Nykorchuck*, 78 NY2d 255, *supra*). Further, in *Gordon v. Magun*, 83 NY2d 881 (1994), the Court of Appeals held that “the fact that the condition allegedly overlooked in the first consultations was the condition ultimately diagnosed in the later consultation does not bring this case within the continuous treatment doctrine even if a correct diagnosis would have led to an ongoing course of treatment.”

Here, regardless of whether defendant's alleged malpractice may have contributed to plaintiff not receiving diagnostic and curative treatment until 2015, plaintiff's allegations regarding the purported absence of treatment are insufficient for her to avail herself of the protections of the continuous treatment doctrine. To be sure, invocation of the continuous treatment doctrine would require that plaintiff sought and received an actual course of treatment from defendant during the relevant time period. In the instant action, plaintiff did not seek or receive an actual course of treatment for her breast condition from June 4, 2014 to February 2, 2015. Indeed, during that period of time plaintiff merely presented for a singular, routine, annual gynecology visit at NYCHHC on September 2, 2014. As such, there was no continuous course of treatment following the June 4, 2014 appointment until February 2, 2015 that could toll the statute of limitations.

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Plaintiff correctly identifies that treatment can be deemed continuous “when further treatment is anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during the last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past” (*see Richardson v. Orentreich*, 64 NY2d 896 [1985]). However, key to this standard, as plaintiff acknowledges, is that a patient remain under the “continuous treatment or care” of a physician between the time of the last visit and the next scheduled one where the latter's purpose is to administer ongoing corrective efforts for the same or a related condition. Here, even taking plaintiff's belief of continuous treatment at face value, she fails to cite to a single example of any physician anticipating further treatment in the form of a regularly scheduled appointment for the purpose of administering ongoing corrective efforts for the same or a related condition between June 2014 and February 2015. Rather, the medical records annexed to the moving papers reveal that no physician ever anticipated to administer continuous treatment as to plaintiff's breasts and never scheduled any type of follow-up appointment in the near future as to her breasts. To be sure, nothing in the record shows that plaintiff and defendant's physicians explicitly contemplated further treatment (*see Young v. New York City Health & Hospitals Corp.*, 91 NY2d 291 [1998]). Even a mere suggestion that plaintiff return for a routine yearly mammogram does not constitute a regularly scheduled appointment. Notably, *Young, supra*, involved a malpractice claim predicated upon NYCHHC's failure to advise a patient of abnormal mammogram results until seven months after the mammogram report was issued. Under such a circumstance, the Court of Appeals still concluded that the patient had not been undergoing continuous treatment for her breast condition until *after* being advised of her mammogram results.

More to the point, at her return visits, plaintiff had new that were not directly linked to her previous treatment. As such, plaintiff's return to NYCHHC clinics constituted new rather than continuous treatment. Indeed, it is axiomatic that the continuous treatment doctrine cannot apply where, as in here, a physician does not treat a patient for the same conditions or complaints underlying the medical malpractice claim. Plaintiff admits in paragraph 45 of her opposition that “the fact that she did not treat there for breast-cancer related complaints for several months...should have no bearing on the toll afforded by continuous treatment.” Thus, plaintiff cannot even argue that she received continuous treatment for symptoms that are traced to breast cancer, as she affirmatively admits that she did not. Plaintiff also alleges that there was a November 2014 visit at which she presented for complaints of unrelated foot pain, and that while she was at the visit she mentioned pain and burning in her chest. Plaintiff then attempts to argue that the defendant failed to link plaintiff's complaints of chest pain to breast cancer, without citing any medical record substantiating this visit took place much less these complaints, without acknowledging that chest pain is a complaint associated with a number of different ailments, and without providing an expert affidavit to establish a nexus between the two. As plaintiff provides no support that the separate and distinct treatment dates of September 2014 and alleged November 2014 visit had any relation whatsoever to plaintiff's breast cancer condition, plaintiff has failed to satisfy essential requirements under the continuous treatment doctrine. Consequently, plaintiff is not entitled to the continuous treatment doctrine's toll for any treatment rendered prior to January 30, 2015.

Plaintiff attempts to resurrect the viability of her continuous treatment argument for claims prior to January 30, 2015 by advancing the position that she exhibited continuing trust and confidence in her treating

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physicians at NYCHHC, thus establishing continuous treatment. Plaintiff makes this argument without the support of an affidavit, or a citation to plaintiff's 50-H hearing or deposition transcript to provide any support for this argument. Further, even if the plaintiff could establish continuing trust in her treating physicians, such trust does not obviate the fact that there was a significant and relevant break in plaintiff's treatment, as detailed above.

Accordingly, this court finds here that plaintiff's claims prior to January 30, 2015 are time-barred. However, inarguably, there is continuous treatment for the documented visits that plaintiff had from February 2, 2015, and thereafter. To be sure, defendant is incorrect about plaintiff's entire lawsuit being barred on account of subsequent treatment that plaintiff indisputably received for breast cancer after January 30, 2015. Indeed, while the alleged misdiagnosis of plaintiff's breast cancer may have occurred on May 27, 2014, in defendant's view, the last claimed date of negligence was July 10, 2015, when five malignant nodes were removed from plaintiff. Notably, subsequent to that removal, plaintiff underwent several rounds of chemotherapy, followed by radiation treatments, that continued into 2016. Thus, plaintiff's notice of claim filed on August 28, 2015, was well within the 90-day deadline from the last claimed date of negligence, July 10, 2015, for any claims arising after January 30, 2015. As such, defendant's application to dismiss the entire lawsuit on account of the timing of plaintiff's notice of claim is denied.<sup>1</sup>

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted only to the extent that plaintiff's claims prior to January 30, 2015 are dismissed as time-barred; and it is further

ORDERED that defendants' application for an order dismissing this lawsuit for treatment rendered on and subsequent to January 30, 2015 is denied; and it is further

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<sup>1</sup> Notably, NYCHHC's implied admission that it was presented with a claim does not bar it from arguing that plaintiff failed to serve a timely notice of claim or that the claim admittedly presented did not comply with notice of claim requirements. As a general rule, "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties. Among other reasons, to permit estoppel against the government 'could easily result in large scale public fraud.' While we have not absolutely precluded the possibility of estoppel against a governmental agency, our decisions have made clear that it is foreclosed 'in all but the rarest cases'" (*Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 130 [1990]; *Luka v New York City Tr. Auth.*, 100 AD2d 323, 325 [1st Dept 1984] ["It is to be invoked sparingly and only under exceptional circumstances"].) The court is not persuaded that NYCHHC's involvement in this lawsuit up to the present juncture warrants estoppel from NYCHHC's advancement of an argument that it was never properly served with a notice of claim. To be clear, plaintiff is not arguing that NYCHHC prevented plaintiff from serving a timely notice of claim. This is not a situation where NYCHHC prevented plaintiff from discerning the actual circumstances, thereby preventing plaintiff from serving a notice of claim upon NYCHHC within 90 days of the alleged malpractice (*see Reed v City of Syracuse*, 309 AD2d 1195 [4th Dept 2003] [defendants equitably estopped from asserting lack of a timely notice of claim because the vehicle that allegedly collided with plaintiff's vehicle was registered to a fictitious individual, and the County did not acknowledge ownership until the statute of limitations expired]). Neither is this a situation where NYCHHC lulled plaintiff into refraining from serving a timely notice of claim (*Conquest Cleaning Corp. v New York City School Constr. Auth.*, 279 AD2d 546, 547 [2d Dept 2001]).

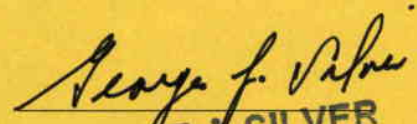
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ORDERED that defendant's application for dismissal on account of the timing of the filing of plaintiff's notice of claim, is denied; and it is further

ORDERED that the parties are directed to appear for a conference before the court on November 6, 2019 at 9:30 AM at the courthouse located at 851 Grand Concourse, Room 600 (Part 19A).

This constitutes the decision and order of the court.

Dated: September 24, 2019

  
GEORGE J. SILVER