

Simms v New York City Health & Hosps. Corp.
2020 NY Slip Op 30715(U)
January 9, 2020
Supreme Court, Queens County
Docket Number: 712278/16
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

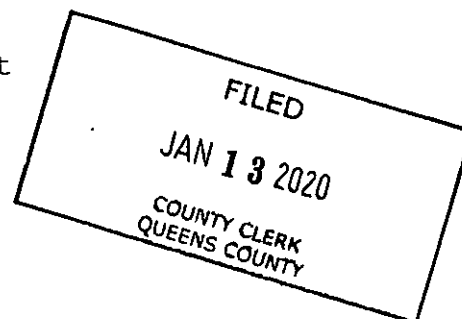
Present: HONORABLE KEVIN J. KERRIGAN
JusticePart 10-----X
Angela Simms,Index
Number: 712278/16

Plaintiff,

- against -

Motion
Date: 1/6/20New York City Health & Hospitals
Corporation, Queens Hospital Center,
Jamaica Hospital Medical Center, Medisys
Family Health Center, Jason Lin, M.D.,
Sandeep Singh, M.D., "Jane Doe" Phlebotomist
at Queens Hospital Center, "Jane Doe" R.N.
at Jamaica Hospital Medical Center,
"Jane Doe" R.N. at Queens Hospital,
Jeffrey Chan, M.D. & JHMC-St Albans
Family Medicine,

Motion Seq. No.: 4

Defendants.
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The following papers numbered 1 to 8 read on this motion by defendant, New York City Health & Hospitals Corporation ("HHC") s/h/a New York City Health & Hospitals Corporation and Queens Hospital Center, to dismiss.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibit.....	5-6
Reply.....	7-8

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by HHC to dismiss the complaint against it, ostensibly pursuant to CPLR 3211(a)(5), upon the ground that the action is barred by the statute of limitations, pursuant to General Municipal Law (GML) §50-i, is granted.

Plaintiff alleges that she sustained nerve injury to her right arm during a botched attempt by an unidentified employee at HHC's facility, Queens Hospital Center, to draw blood. Plaintiff first presented to the emergency room of Queens Hospital Center on May 27, 2015 complaining of rectal bleeding and weakness and was admitted to the medical surgical unit of the hospital that same day. A colonoscopy was performed which did not show an active

bleed, and plaintiff was treated for anemia. She was then, that same day, transferred to the general medicine floor and remained there until she was discharged on June 2, 2015. Plaintiff testified in her deposition that on May 30, 2015, a lady, whether a nurse or physician, plaintiff did not know, came to draw blood, and made unsuccessful attempts to insert the needle into the vein located on the inside portion of her left arm. Said individual then gave up on the left arm and attempted to insert the needle into the vein of her right arm, again, the vein located on the inside portion of her elbow. Plaintiff relates that she told her "this was a final try she is going to try with me". Plaintiff testified that when this individual attempted to draw blood from her right arm, she exclaimed, "Oh shit. I think I touched your nerve." Plaintiff then told this person, using expletives, to get away from her and screamed for the nurse and the doctors, and two nurses came. A physician was then summoned and plaintiff complained feeling a pins-and-needles tingling from her forearm to her fingers. She was, at the time of her discharge, given an outpatient referral to a neurologist.

Plaintiff returned to the emergency room of Queens Hospital Center on June 12, 2015 for her scheduled appointment with the neurologist. She was seen by one Dr. Sharon Atkinson, to whom plaintiff related that during an attempted blood draw on May 30th, the needle struck a nerve that caused pain and numbness. Dr. Atkinson performed an examination and found that plaintiff had reduced grip strength in her right hand, and diagnosed plaintiff with carpal tunnel syndrome in her right hand. She thereupon gave plaintiff an appointment for a date in December of 2015 to return for physical therapy and an EMG. Plaintiff, instead, began to treat with a private neurologist on June 25, 2015 and never returned to Queens Hospital Center.

Pursuant to GML 50-i(1)(c), the statute of limitations for commencement of a medical malpractice action against HHC is one year and 90-days. HHC contends that since plaintiff's last treatment at Queens Hospital Center was on June 12, 2015, she had one year and 90 days from that date, or until September 12, 2016, to commence an action. Consequently, the action that was commenced on October 14, 2016 was untimely against HHC. Plaintiff's counsel, in opposition, contends that plaintiff's course of continuous treatment extended to at least December 1, 2015 based upon plaintiff's testimony that she was given an appointment by Dr. Atkinson to return to Queens Hospital Center in December 2015, and, therefore, the commencement of an action against HHC on any date between December 1, 2015 and October 14, 2016 would have been timely.

CPLR 214-a provides that the applicable statute of limitations in a medical malpractice action does not begin to run until the

date of "the act, omission or failure complained of or last treatment where there is a continuous treatment for the same illness, injury or condition which gave rise to said act, omission or failure." Therefore, CPLR 214-a applies only if the course of treatment "has run continuously and is related to the same original condition or complaint" (Borgia v City of New York, 12 NY 2d 151, 155 [1962]).

Continuous treatment may be found even if there was a long hiatus between doctor visits. As stated by the Court of Appeals in Richardson v. Orentreich (64 NY 2d 896, 898 [1985]), "The 'continuing trust and confidence' which underlies the 'continuous treatment doctrine' . . . does not necessarily come to an end upon a patient's last personal visit with his or her physician . . . , when further treatment is explicitly anticipated by both the physician and patient as manifested in the form of a regularly scheduled appointment for the near future Thus, a patient remains 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 related condition. Regardless of the absence of physical or personal contact between them in the interim, where the physician and patient reasonably intend the patient's uninterrupted reliance upon the physician's observation, directions, concern, and responsibility for overseeing the patient's progress, the requirement for continuous care and treatment for the purpose of the Statute of Limitations is certainly satisfied" (citations omitted).

Thus, a continuous course of treatment may include the date of a scheduled appointment in the future, but only if the patient, not only the physician, intended to keep that appointment, or a re-scheduled appointment, and intended to continue treatment with that defendant physician. Here, if plaintiff had every intention to return to Queens Hospital Center for the appointment that had been scheduled for December 2015, then there would have been no question that her course of continuous treatment would have extended to whatever date in December to which the appointment had been scheduled. But such is not the case. Not only did plaintiff not, in fact, ever return to Queens Hospital Center or ever see Dr. Atkinson again after June 12, 2015, but she admitted in her deposition that she had no intention of ever doing so but that she instead opted to see a private physician.

Therefore, having abandoned her course of treatment and care with HHC's physicians after June 12, 2015, plaintiff's course of continuous treatment at Queens Hospital Center ended on June 12, 2015. Consequently, the action that was commenced on October 14, 2016 is untimely.

Accordingly, the action is dismissed against HHC, as well as against Queens Hospital Center, since it is an HHC facility and not a distinct entity that may be sued. As to HHC's counsel's additional request that the action be dismissed against defendant Jason Lin, M.D., upon the ground that he was not served and the time to serve him has expired, counsel represents, and is moving on behalf of, HHC only. Defendant Lin has not moved for dismissal under any subdivision of CPLR 3211(a). This Court may not, sua sponte, dismiss the complaint against a defendant who has not moved for dismissal. The caption of this action is amended to read as follows:

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Angela Simms,

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Number: 712278/16

Plaintiff,

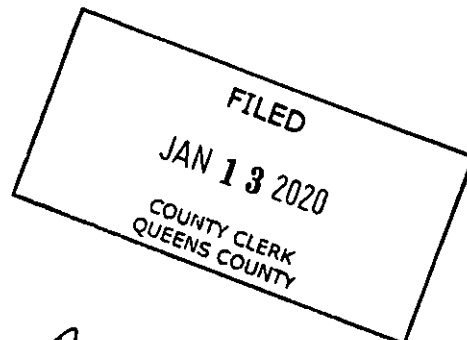
- against -

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at Queens Hospital Center, "Jane Doe" R.N.
at Jamaica Hospital Medical Center,
"Jane Doe" R.N. at Queens Hospital,
Jeffrey Chan, M.D. & JHMC-St Albans
Family Medicine,

Defendants.

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Dated: January 9, 2020



KEVIN J. KERRIGAN, J.S.C.