

Degratto v Clove Lakes Healthcare & Rehabilitation
2020 NY Slip Op 32481(U)
June 22, 2020
Supreme Court, Richmond County
Docket Number: 153453-2018
Judge: Judith N. McMahon
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

IAS PART 6

LISA DEGRATTO, as the Administratrix of the
Estate of, RICHARD MIKOLAJCZAK, Deceased,

ORDER

Plaintiffs,

- against -

Index Number: 153453-2018

CLOVE LAKES HEALTHCARE AND
REHABILITATION, RICHMOND UNIVERSITY
MEDICAL CENTER, SEA VIEW HOSPITAL
REHABILITATION CENTER AND HOME, and
STATEN ISLAND UNIVERSITY HOSPITAL,

Hon. Justice
Judith N. McMahon

Defendants.

X

Defendant New York City Health and Hospitals Corporation s/h/a Sea View Hospital Rehabilitation Center and Home (“SEA VIEW”)’s motion (sequence 003) to dismiss Plaintiff’s complaint against SEA VIEW is granted and Plaintiff’s cross-motion (sequence 004) seeking permission to file a Late Notice of Claim is denied as detailed herein.

Plaintiff Decedent Richard Mikolajczak was admitted to SEA VIEW between May 30, 2017 and July 5, 2017. Plaintiff Decedent received rehabilitation treatment at SEA VIEW for dysphagia and dehydration, secondary to mucosal melanoma following chemotherapy and radiation treatment. Mr. Mikolajczak passed away on December 25, 2017.

In this action for medical malpractice, Plaintiff alleges, among others, the staff at SEA VIEW: failed to assess Plaintiff Decedent's fall risk; failed to provide adequate discharge instructions and walking assistance; negligently discharged Mr. Mikolajczak without a walker, cane or wheelchair; and caused Plaintiff Decedent to fall and fracture his ribs. Furthermore, Plaintiff is alleging that as a result thereof, Mr. Mikolajczak suffered from hand swelling, pain and suffering, and was hospitalized at Staten Island University Hospital . Plaintiff’s complaint also includes a cause of action for wrongful death.

SEA VIEW is a New York City Health and Hospitals long-term care facility on Staten Island. Pursuant to General Municipal Law § 50-e(1)(a) and Unconsolidated Laws § 7401(2), a notice of claim against SEA

VIEW must be served within ninety (90) days after a claim arises, or in a wrongful death action, ninety (90) days after the appointment of a representative of the decedent's estate.

The proper filing of a Notice of Claim is a condition precedent to the commencement of a tort action against SEA VIEW. *NY Gen. Mun. Law § 50-e*; see also *Daniel J. by Ann Mary J. v. New York City Health & Hosps. Corp.*, 77 N.Y.2d 630, 571 N.E.2d 704 (1991). The failure to comply with this condition is grounds for dismissal of the action. See *Smith v. Pierce*, 81 A.D.3d 849, 119 N.Y.S.3d 867 (N.Y.A.D. 2nd Dept. 2020).

Plaintiff Decedent's causes of action for pain and suffering accrued on July 5, 2017, his last day of treatment at SEA VIEW. Mr. Mikolajczak's cause of action for wrongful death accrued on December 25, 2018, the date of his death. Therefore, Plaintiff was required to serve SEA VIEW with a notice of claim as to allegations of pain and suffering on or before on or before October 5, 2017, which was 90 days after Plaintiff Decedent's last day of treatment at SEA VIEW. Additionally, Plaintiff was required to serve SEA VIEW with a notice of claim as to allegations of wrongful death on or before January 28, 2019, which was 90 days after the October 30, 2018 appointment of Plaintiff Lisa Degratto as the Administrator of the Decedent's Estate.

"Courts are authorized to extend the time in which to serve a notice of claim, provided that the extension does not exceed the time limit for the commencement of an action by the claimant against the municipality." *E.R. v. Windham*, 181 A.D.3d 736, 122 N.Y.S.3d 106 (N.Y.A.D. 2nd Dept. 2020); see also *NY Gen. Mun. Law § 50-e*.

Where a plaintiff moves for relief to file a late notice of claim after the expiration of the applicable statute of limitations, the Court is without authority to grant it. *Royal Daycare Ctr., LLC v. PB 2180 Pitkin Ave, LLC*, 180 A.D.3d 1097, 121 N.Y.S.3d 336 (N.Y.A.D. 2nd Dept. 2020).

"No action or special proceeding shall be prosecuted or maintained against a [municipality]...unless, ... (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death." *NY Gen. Mun. Law § 50-i*.

In the present action, the statute of limitations on Plaintiff's claims for pain and suffering expired October 5, 2018, one year and ninety days after Mr. Mikolajczak's last day of treatment at SEA VIEW. The

statute of limitations on Plaintiff's claims for wrongful death expired on December 25, 2019, two years after Plaintiff Decedent's death.

Plaintiff has cross-moved in opposition to SEA VIEW's motion and for permission, pursuant to General Municipal Law § 50-e(5) to file a Late Notice of Claim.

As quoted above, General Municipal Law § 50-e(5) states that, "upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section, whether such service was made upon a public corporation or the secretary of state. **The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation** (emphasis added). *NY Gen. Mun. Law § 50-e*.

Plaintiff cites caselaw focusing on the factors Courts use to determine whether to grant such an application. However, the caselaw cited by Plaintiff does not contradict the explicit language of the statute barring an application made after the applicable statute of limitations has expired. The caselaw cited by Plaintiff concerns applications made prior to the expiration of the statute of limitations or cases where a plaintiff's timely attempt at filing of the notice of claim suffered from some technical defect which those plaintiffs later tried to correct after the applicable statute of limitations had expired. In the present case, there has not even been the suggestion that this Plaintiff previously attempted to serve a notice of claim.

Plaintiff's cross-motion seeking permission to file a Late Notice of Claim was efiled May 8, 2020. During oral argument on these motions, it became clear that the filing of Plaintiff's cross-motion in response to SEA VIEW's motion to dismiss was Plaintiff's first attempt at correcting the failure to file a Notice of Claim and that no previous attempts to serve a Notice of Claim had been attempted. Plaintiff's filing of the cross-motion occurred after the statute of limitations as to Plaintiff's pain and suffering causes of action had expired on October 5, 2018 and after the statute of limitations as to Plaintiff's wrongful death causes of action had expired on December 25, 2019.

There is no basis for the Court to grant Plaintiff's application for permission to file a Late Notice of Claim. Plaintiff's causes of action against SEA VIEW must be dismissed as Plaintiff has failed to comply

with a condition precedent to the commencement of a tort action against SEA VIEW and all applicable statutes of limitations have expired.

Accordingly, it is

ORDERED that the motion of Defendant SEA VIEW to dismiss Plaintiff’s complaint against Defendant New York City Health and Hospitals Corporation s/h/a Sea View Hospital Rehabilitation Center and Home is granted and the complaint is dismissed in its entirety as against said Defendant, with costs and disbursements to said Defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said Defendant; and it is further

ORDERED that the action is severed and continued against the remaining Defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the Court bear the amended caption; and it is further

ORDERED that counsel for Defendant SEA VIEW shall serve a copy of this order with notice of entry upon the Clerk of the Court who are directed to mark the Court’s records to reflect the change in the caption herein, and it is further

ORDERED that any and all additional requests for relief are hereby denied.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: June 22, 2020

So Ordered.

/S/

ENTER: _____

Hon. Judith N. McMahon, J.S.C.