

Matter of Graham v Roswell Park Cancer Inst. Corp.
2021 NY Slip Op 33123(U)
April 1, 2021
Court of Claims
Docket Number: Claim No. 135298
Judge: J. David Sampson
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GRAHAM v. ROSWELL PARK CANCER INSTITUTE CORPORATION, # 2021-053-511, Claim No. 135298,
Motion No. M-96094, Cross-Motion No. CM-96298

Synopsis

Roswell Park Cancer Institute's motion to dismiss the claim and verified complaint as to the personal injury claims is granted. Claimant's cross-motion seeking an order that the notice of claim was timely served applying the doctrine of equitable estoppel is denied; as is claimant's alternative relief seeking discovery as to whether Roswell Park intentionally impeded, impaired or interfered with governmental investigations regarding the actions of defendant's employee.

Case information

UID: 2021-053-511

Claimant(s): In the Matter of the Claim of LISA ANN GRAHAM, as Administratrix of the Estate of FRANCIS R. McCOLLOUGH, Deceased

Claimant short name: GRAHAM

Footnote (claimant name) :

Defendant(s): ROSWELL PARK CANCER INSTITUTE CORPORATION

Footnote (defendant name) :

Third-party claimant(s):

Third-party defendant(s):

Claim number(s): 135298

Motion number(s): M-96094

Cross-motion number(s): CM-96298

Judge: J. DAVID SAMPSON

Claimant's attorney: KRAMER, DILLOF, LIVINGSTON & MOORE
BY: Carmine A. Rubino, Esq.

Defendant's attorney: GIBSON, McASKILL & CROSBY, LLP
BY: Craig R. Watson, Esq.

Third-party defendant's attorney:

Signature date: April 1, 2021

City: Buffalo

Comments:

Official citation:

Appellate results:

See also
(multcaptioned case)

Decision

Defendant Roswell Park Cancer Institute Corporation (Roswell Park) moves to dismiss the notice of claim and verified complaint of claimant Lisa Ann Graham, as Administratrix of the Estate of Frances R. McCollough, deceased pursuant to CPLR §§ 201 and 3211 (a) (2) (5), Public Authorities Law § 3567 (1), General Municipal Law § 50-e and New York Court of Claims Act §§ 9 and 11 (a) and (c). Claimant opposes this motion and has

filed a cross-motion seeking an order finding the notice of claim timely under the doctrine of equitable estoppel; or, in the alternative, directing discovery on the issue of equitable estoppel. The notice of motion and affidavits were filed October 26, 2020. At the request of claimant's counsel, the original return date of December 9, 2020 was rescheduled to January 20, 2021 and oral argument was also granted. The notice of cross-motion and affidavits in support and in opposition to defendant's motion were filed December 24, 2020. Roswell Park's reply affidavit was filed on February 18, 2021. As a result, the return date for oral argument of both motions was rescheduled to March 2, 2021.

The notice of claim alleges that Roswell Park was negligent in the care provided to Frances R. McCollough, the decedent during the time period of her treatment as an inpatient and outpatient between January 2018 and April 6, 2018, her date of death. The notice of claim alleges that her treatment as an inpatient and outpatient began in January 2018 and ended in March 2018. The notice of claim seeks to recover money damages for the decedent's personal injuries sustained and for wrongful death damages and economic losses (Affidavit of Craig R. Watson, Esq., Exhibit A at paragraphs 2 and 4). The verified complaint alleges four causes of action, including negligence, wrongful death, lack of informed consent and negligently granting privileges and employing personnel involved in decedent's care, including a former nurse, Kelsey Mulvey, who was subsequently charged with criminally tampering with patients' intravenous pain medication (Affidavit of Craig R. Watson, Esq., Exhibit C at paragraphs 5 through 30).

The first cause of action alleging medical negligence against Roswell Park references Kelsey A. Mulvey, R.N., a nurse employed by Roswell Park at that time who is alleged to have stolen pain medication from the decedent and that she instead received intravenous injections of tap water in place of the pain medications, resulting in severe pain and suffering. It is further alleged that Roswell Park undertook actions to intentionally conceal this misconduct and the consequences to patients, including the decedent, and to prevent authorities from informing patients or their families, including claimant and the decedent's family, prior to expiration of the applicable statute of limitations. Claimant alleges that she first learned of the misconduct of Kelsey A. Mulvey in July of 2020 when she was notified by a victim specialist from the Buffalo office of the Federal Bureau of Investigations (FBI) and that she was informed that the FBI did not notify her of these circumstances and misconduct earlier because Roswell Park refused to provide the FBI with sufficient information, including the identities of affected patients and their families until shortly before she was contacted in July of 2020. Claimant alleges that on July 29, 2020, she was appointed administrator of the decedent's estate by the Erie County Surrogate. The claimant alleges in the verified claim (Exhibit C incorrectly named as a "complaint") that the doctrine of equitable estoppel applies to prevent the use of any statute of limitations defense by Roswell Park.

The defendant states that on June 4, 2019, the United States Attorney for the Western District of New York issued a press release (Exhibit D) announcing that Kelsey Mulvey, a Roswell Park nurse, had been criminally charged with illegally obtaining controlled substances by fraud, tampering and in violation of the Health Insurance Portability and Accountability Act. The announcement also states that Kelsey Mulvey was placed on administrative leave by Roswell Park on June 28, 2018 after an investigation by Roswell Park led it to infer that Mulvey had removed and replaced controlled substances with water and that in June and July 2018, there had been a span of waterborne infections at Roswell Park and that six patients had allegedly become infected as a result of Mulvey replacing medications with contaminated water. The announcement also states that Mulvey resigned her position in lieu of termination on July 13, 2018. On June 4, 2019, the Buffalo News issued an article concerning this announcement entitled, "Ex-Roswell Park nurse accused of stealing drugs, replacing them with water" (Exhibit E).

Roswell Park contends that the claimant's personal injury claims in her negligence action are barred by the applicable statute of limitations. As a public corporation created in accordance with Public Authorities Law (PAL) § 3553 (a), actions against it are governed by PAL § 3567, which requires as a condition precedent that a notice of claim be served on Roswell Park in compliance with General Municipal Law (GML) § 50-e. It is Roswell Park's contention that as to the negligence claim, claimant failed to comply with the requirements of PAL § 3567 (1) (a) and GML § 50-e (1) (a) by failing to serve a notice of claim within ninety days after the claim arose. Furthermore, Roswell Park contends that claimant failed to comply with the statutory requirement to commence a negligence action within one year and ninety days (PAL § 3567 [1] [c]). It is argued that claimant did not serve a notice of claim on Roswell Park until August 5, 2020 (Exhibit B) and that if the time period is computed from the decedent's date of death, April 6, 2018, the ninety day period had long ago expired. In addition, Roswell Park contends that claimant's only option was to file a motion seeking leave to serve a late notice of claim prior to the expiration of the one year and ninety day statute of limitations and that service of the notice of claim without that motion and an order granting this relief is a nullity. As such, Roswell Park argues that as the statute of limitations expired in July of 2019, the Court lacks authority to extend the time to serve a

late notice of claim and that any toll of the statute of limitations pursuant to the New York State Governor's Executive Orders are inapplicable. Roswell Park further argues that any argument that the doctrine of equitable estoppel should be applied to this claim should be rejected.

In her cross-motion, claimant seeks to have the Court apply the doctrine of equitable estoppel and deem the notice of claim served August 5, 2020 as timely; or, in the alternative, direct discovery on the issue of equitable estoppel. Claimant's affidavit in support of the cross-motion states that the decedent was her mother and at the time of her death on April 6, 2018, she was in hospice care and being treated for multiple infections. She also states that her mother had been previously diagnosed with lung cancer in January of 2018 and began radiation treatments in February 2018 three times per week as an inpatient at Roswell Park. Claimant states that while at Roswell Park, her mother experienced severe side effects from the radiation treatment, including excruciating pain. She states that during a visit with her mother two weeks after the radiation treatments began, her mother expressed a strong desire to discontinue treatment and medications because of the immense and constant pain she experienced. Claimant states that after that visit her mother refused further treatment and was discharged in early March of 2018 to home and was admitted to hospice care two weeks later until her death on April 6, 2018.

Claimant states that on July 18, 2020, over two years following her mother's death, she received a letter from the FBI stating that her mother had been identified as a victim of a crime (Exhibit A1). She avers that prior to receiving this letter that she had no knowledge from any other source that her mother was a victim of a crime. On July 20, 2020, claimant states that she spoke to Brandi Gross, a victim specialist with the FBI, who advised that her mother's direct nurse was Kelsey Mulvey and that she had been involved in administering medication to her mother at Roswell Park. Claimant states that Gross advised her that Mulvey had stolen the medication of more than 80 patients and replaced the drugs with tap water, which caused many of those patients to develop waterborne and other infections. Claimant was also advised by Gross that there was an investigation that lasted approximately one year and that the criminal case against Mulvey had actually begun in May of 2019. She informed claimant that the FBI had requested the names of all patients treated by Mulvey at that time but that Roswell Park had refused to provide the identities of patients until May of 2020, and as no other information was provided, it took the FBI until late June of 2020 to identify next of kin, including claimant.⁽¹⁾ The claimant avers that from the time that her mother was a patient at Roswell Park up to the date of her affidavit, no one from Roswell Park contacted her to advise her of Kelsey Mulvey's actions and her involvement with her mother's treatment. Claimant then contacted her lawyer and on July 29, 2020 was appointed administrator of her mother's estate. On August 1, 2020, the claimant executed the notice of claim. Claimant contends that Roswell Park's motion should be denied as they should be barred from asserting the defense of the statute of limitations under the doctrine of equitable estoppel.

As stated in support of its motion to dismiss, Roswell Park is a public authority and PAL § 3567 (1) (a) provides that it is a condition precedent to bringing an action that service of a notice of claim be made within the ninety day time limitation of General Municipal Law § 50-e. In addition, a claim against Roswell Park for personal injuries must be commenced within one year and ninety days after the happening of the event upon which the claim is based (PAL § 3567 [1] [c]; GML § 50-e [5]). A wrongful death claim must comply with Public Authorities Law § 3567 (1) (d) and a notice of claim for wrongful death pursuant to General Municipal Law § 50-e must be served with ninety days of the appointment of the estate's representative (Public Authorities Law § 2980). The wrongful death action must then be commenced no later than two years from the date of death (Public Authorities Law § 2981; *Gibson v Roswell Park Cancer Inst. Corp.*, 21 Misc3d 638, 641-642 [2008]). Roswell Park's motion does not seek to dismiss the claim as to the wrongful death cause of action. The defendant's motion seeks to dismiss the decedent's personal injury claims only. And with respect to the time periods in the PAL cited above, this Court does not have discretion to grant leave to serve a late notice of claim if doing so would permit the filing and service of a notice of claim beyond the time prescribed to commence an action against a public authority (CPLR § 201).

The present motion to dismiss is brought pursuant to CPLR 3211 (a) (2) and (5), i.e., that the Court of Claims lacks jurisdiction as the claimant has not complied with the applicable statute of limitations. In a pre-answer motion to dismiss, the Court is to "accept the facts as alleged in the complaint as true, accord [claimant] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Collins v Davirro*, 160 AD3d 1343 [4th Dept 2018], citing *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). In that the principal ground to dismiss is pursuant to CPLR 3211(a)(5), that the personal injury claim is barred by the statute of limitations, it has been held that Roswell Park bears the initial burden of establishing, prima facie, that the time in which to bring this claim has expired" (*Collins, supra* at 1343-1344, citing *Island ADC, Inc. v. Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2d Dept. 2008]). I find that

Roswell Park has met its initial burden by establishing that the notice of claim was not served within ninety days and the claim within the one year and ninety day statute of limitations.

It is claimant's contention, however, that the doctrine of equitable estoppel applies to this claim and that if it does, both the notice of claim and the claim would have been timely served and filed within the applicable time periods and no motion for leave to serve a late notice of claim would be necessary. As the facts set forth in the claim are deemed true for purposes of this motion, the outcome of this motion is dependent upon whether the claim sufficiently pleads the elements of equitable estoppel so as to create an issue of fact (*Collins, supra* at 1344, citing *Local No. 4, Intl. Assn. of Heat & Frost & Asbestos Workers v. Buffalo Wholesale Supply Co., Inc.*, 49 AD3d 1276, 1278 [4th Dept 2008]).

The doctrine of equitable estoppel has been held to apply to prevent a defendant from pleading the statute of limitations if the "[claimant] was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Zumpano v Quinn*, 6 NY3d 666 [2006], citing *Simcusi v Saeli*, 44 NY2d 442, 449 [1978]). Equitable estoppel is considered an extraordinary remedy that should be invoked sparingly and only under exceptional circumstances (*Storey v Sum*, 151 AD2d 991 [4th Dept 1989]). In order for the doctrine to apply, it has been held that the movant may not rely on the same act that forms the basis for the claim, the later fraudulent misrepresentation must be for the purpose of concealing the former tort (*Ross v Louise Wise Servs., Inc.* 8 NY3d 478 [2007]); and it is claimant's burden to establish that subsequent and specific actions by the defendant somehow kept him from timely serving a notice of claim (*Zumpano, supra* at 674). Furthermore, it has been held that equitable estoppel must be established by "'clear and convincing proof' and . . . 'general accusation[s] of . . . deception not based on personal knowledge' are insufficient" (*Dombroski v Samaritan Hosp.*, 47 AD3d 80 [3d Dept 2007], citing to *Central Fed. Sav. v Laurels Sullivan County Estates Corp.*, 145 AD2d 1, 6 [1989], *lv denied* 76 NY2d 704 [1990]).

It is alleged in the notice of claim that Roswell Park failed to cooperate in the criminal investigation concerning Kelsey A. Mulvey with the FBI, the Food and Drug Administration, the New York State Department of Health and with patients whose treatment was affected by Nurse Mulvey. It is also alleged that Roswell Park intentionally impeded and impaired the investigations of these governmental authorities so as to prevent patients and their families from bringing timely causes of action for injuries caused by Kelsey A. Mulvey. The claim alleges at paragraphs 12 and 13 that Roswell Park undertook actions to intentionally conceal its misconduct and the consequences to patients affected, including the decedent and her family, and in preventing the appropriate authorities from informing the affected patients and their families prior to expiration of the applicable statute of limitations. Specifically, claimant alleges at paragraph 13 that she first learned of Roswell Park's misconduct when notified by a victim specialist of the FBI, who informed her that the FBI did not earlier notify her because Roswell Park refused to provide the FBI with sufficient information until July of 2020 (Affidavit of Craig R. Watson, Esq., Exhibits B and C).

After examination of the pleadings and consideration of claimant's argument, I do not find that the claim pleads the necessary elements for the application of equitable estoppel. In particular, claimant has failed to allege any affirmative misconduct or statement by Roswell Park that was made directly to the decedent and/or the claimant and upon which the decedent and/or the claimant relied to her detriment and failed to pursue a claim prior to expiration of the applicable statute of limitations. It has been held that in order for equitable estoppel to apply, there must be a statement by the defendant that was "calculated to mislead" the claimant and the statement must "evidence a purposeful concealment and misrepresentation of the facts" (*Storey v Sum*, 151 AD2d 991, 992 [4th Dept 1989]). Admittedly, claimant did not speak with or seek any information from Roswell Park or perform any investigation into her mother's death until after she received a letter from the FBI on July 18, 2020, informing her that the decedent had been identified as a victim of a crime (Claimant's Affidavit at paragraph 4). By the time claimant had received the FBI letter, the one year and ninety day statute of limitations had long ago expired. It is also inconsequential that Roswell Park did not reach out to claimant during that time period as it has been consistently held that "mere silence or failure to disclose the wrongdoing is insufficient" to trigger the application of the doctrine of equitable estoppel (*Ross v Louise Wise Servs., Inc.* 8 NY3d 478, 491-492 [2007], citing to *Zoe G. v Frederick F.G.*, 208 AD2d 675, 675-676 [2d Dept 1994]). As the doctrine of equitable estoppel requires a showing by claimant of deliberative and specific acts designed to prevent claimant from pursuing a claim, I find that the allegations in the claim do not allege a sufficient basis to warrant its application or even to create a question of fact that would warrant discovery on the issue of equitable estoppel (*Zumpano, supra* at 674).

The claimant incorrectly cites to case law equating the facts of this claim with those in which a physician or hospital purposefully delays the production of the injured party's medical records.⁽²⁾ Quite simply, these cases do

not apply to these facts because at no time did the claimant ever request the decedent's medical records or any information concerning her mother's treatment prior to the expiration of the statute of limitations. The only request for any portion of the decedent's medical records came from the FBI and that was for the purpose of conducting a criminal investigation into Kelsey Mulvey, not a civil action against Roswell Park. Any alleged delay by Roswell Park in responding to the FBI's request for the decedent's medical records does not inure to claimant as a basis to now allege that Roswell Park was engaged in a purposeful act of deception or concealment to prevent claimant from initiating a claim on the decedent's behalf.

In addition, equitable estoppel cannot apply to these facts on the alleged existence of a fiduciary relationship. It has been held that "the duty owed by one member of society to another is a legal issue for the courts" (*Eiseman v State of New York*, 70 NY2d 175, 187 [1987]). A medical provider generally owes only a duty of care to the patient (*McNulty v City of New York*, 100 NY2d 227, 232 [2003]). The courts have been reluctant to extend that legal duty to encompass nonpatients "because doing so would render such providers liable to a prohibitive number of possible plaintiffs" (*McNulty, supra* at 232). In this claim, any physician-patient relationship between the claimant's mother and Roswell Park, and with it, the existence of a duty of care ended on April 6, 2018 with the decedent's death. Relying upon the Court of Appeals decision in *McNulty*, other courts have declined to extend the duty of care and hold that a physician owes a duty of care to a non-patient, even where the physician knows that the nonpatient will be caring for the physician's patient, unless the physician's treatment of the patient causes the injury to the nonpatient (*Candelario v Teperman*, 15 AD3d 204 [1st Dept 2005]). The Appellate Division, Fourth Department in *John Cardenas, as Administrator of the Estate of Abraham E. Cardenas, Deceased v Rochester Regional Health, et al.*, 2021 WL 1049743; 2021 NY App Div LEXIS 1725, recently declined to extend the duty of care to the child of a parent-patient who had been hospitalized and treated for mental health issues and who then after her release killed the decedent son with a knife.

If the hearsay allegations of claimant are accurate concerning Roswell Park's conduct in failing to cooperate with the FBI and provide records regarding patients impacted by Kelsey Mulvey's criminal conduct until the statute of limitations had passed for the decedent and approximately 80 other patients, while morally and ethically it can be argued that Roswell Park owed a duty to the impacted patients and their families, absent a statutory basis of liability, the courts are left to determine how far legal liability is to be extended to third parties, and in this instance, to family members. The courts have sought to address this issue by carefully assessing the impact of any extension of duty, stating that "[a] line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. It is always tempting, especially when symmetry and sympathy would so seem to be best served, to impose new duties, and, concomitantly, liabilities, regardless of the economic and social burden. But, absent legislative intervention, the fixing of the 'orbit' of duty, as here, in the end is the responsibility of the courts" (*Kingsley v Price*, 163AD3d 157 [4th Dept 2018], citing *DeAngelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 1055 [1983]). I do not find that claimant has demonstrated in her pleadings that these facts warrant such an extension of that legal duty.

Accordingly, Roswell Park's motion to dismiss the notice of claim and verified claim as to the personal injury claims in her negligence cause of action is granted; and claimant's cross-motion seeking an order that the notice of claim was timely served applying the doctrine of equitable estoppel is denied; and claimant's alternative relief seeking discovery as to whether Roswell Park intentionally impeded, impaired or interfered with the investigation by governmental authorities into the actions of Kelsey Mulvey is also denied.

April 1, 2021

Buffalo, New York

J. DAVID SAMPSON

Judge of the Court of Claims

The following have been read and considered by the Court:

- 1) Notice of motion and affidavit of Craig R. Watson, Esq., sworn to October 23, 2020 with annexed Exhibits A-E;
- 2) Affirmation in opposition and cross-motion of Carmine A. Rubino, Esq., dated December 23, 2020 with annexed Exhibits A-C;

3) Reply affidavit of Craig R. Watson, Esq., sworn to February 16, 2021 with annexed Exhibit A; and

4) Memorandum of Law of Craig R. Watson, Esq. sworn to October 23, 2020.

1. The claimant also avers at paragraph 14 of her affidavit that she asked Brandi Gross if she would provide an affidavit detailing the information related by her and was told that Ms. Gross was not permitted to provide an affidavit.

2. Affirmation of Carmine A. Rubino, Esq. at paragraphs 27-30, citing to *Abraham v Kosinski*, 305 AD2d 1091 (4th Dept 2003); *Arbutina v Bahuleyan*, 75 AD2d 84 [4th Dept 1980]; *Kamruddin v Desmond*, 293 AD2d 714 [2d Dept 2002]; and *Cassidy v County of Nassau*, 84 AD2d 742 [2d Dept 1981]).

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