

Caballero v City of New York
2022 NY Slip Op 30685(U)
March 4, 2022
Supreme Court, New York County
Docket Number: Index No. 151647/2017
Judge: Erika Edwards
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA EDWARDS PART 10M

Justice

-----X

COREY CABALLERO,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY
HEALTH AND HOSPITALS CORPORATION, and
BELLEVUE HOSPITAL CENTER,

Defendants.

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INDEX NO. 151647/2017

MOTION DATE 07/27/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 16, 17, 18, 19, 21, 22, 23

were read on this motion to/for DISMISS.

Upon the foregoing documents, the court grants in part Defendants The City of New York’s (“City”), The New York City Health and Hospitals Corporation’s (“HHC”) and Bellevue Hospital Center’s (“Bellevue”) (collectively “Defendants”) motion by order to show cause to dismiss Plaintiff Corey Caballero’s (“Plaintiff”) complaint and for costs and fees to the extent that the court determines that Plaintiff’s complaint sounds in medical malpractice and not general negligence, the court directs Plaintiff to appear for a 50-h hearing no later than May 6, 2022, directs Plaintiff to serve a Verified Bill of Particulars, responses to Defendants’ outstanding discovery demands, dated March 3, 2017, file a Notice of Medical Malpractice Action and Certificate of Merit on or before April 6, 2022, and the court denies the remainder of the relief requested in Defendants’ motion.

Plaintiff filed a summons and complaint on October 24, 2016, alleging in substance that on or about July 26, 2015, Defendants negligently and carelessly administered care to Plaintiff while he was a patient in Bellevue’s intensive care unit by leaving him unattended and

unsupervised while he walked to the bathroom causing Plaintiff to slip and/or trip and fall and suffer serious injuries. Plaintiff further alleged in substance that Defendants permitted and allowed the premises to become and remain in a defective, unsafe and dangerous condition.

Defendants now move to dismiss Plaintiff's complaint for Plaintiff's failure to comply with a condition precedent to filing suit for Plaintiff's failure to appear for a duly noticed 50-h hearing, failure to respond to Defendants' demand for a Bill of Particulars and discovery demands on March 3, 2017, failure to file a Notice of Malpractice Action, failure to file a Certificate of Merit and an order to pay Defendants' costs of the motion. Defendant City noticed Plaintiff's 50-h hearing on November 2, 2015, but Plaintiff failed to appear for the hearing on December 4, 2015. Although Plaintiff stated that he attempted to reschedule the hearing by calling and writing defense counsel, Defendants have no record of such requests.

Plaintiff opposes the motion and argues in substance that the court should not dismiss Plaintiff's complaint or require costs because Plaintiff attempted to reschedule the 50-h hearing, but Defendants failed to respond, thus waiving the hearing. Additionally, Plaintiff argues that dismissal of the complaint is not warranted because there was no court order directing Plaintiff to serve a Bill of Particulars, respond to Defendants' discovery demands or to provide discovery. Plaintiff also argues in substance that he is not required to file a Notice of Medical Malpractice Action or Certificate of Merit because the action is based upon negligence and not medical malpractice. In the alternative, Plaintiff advises the court in substance that Plaintiff is willing to appear for a 50-h hearing, but since he was incarcerated, Plaintiff's counsel needs additional time to locate Plaintiff.

Courts have held that an action sounds in medical malpractice and not ordinary negligence when the gravamen of the challenged act or omission constitutes negligence in

furnishing medical treatment to a patient (*Bleiler v Bodnar*, 65 NY2d 65, 73 [1985]); *Payette v Rockefeller Univ.*, 220 AD2d 69, 71 [1st Dept 1996]). Conduct may be considered to be medical malpractice and not negligence when it “constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician” (*Scott v Uljanov*, 74 NY2d 673, 674-675 [1989] [internal quotation marks and citation omitted]). When the nature of the alleged duty owed to a plaintiff that defendant is alleged to have breached arises from the physician-patient relationship or is substantially related to medical treatment then the action sounds in medical malpractice and not simple negligence (*see Chaff v Parkway Hosp.*, 205 AD2d 571, 72 [2d Dept 1994]; *Stanley v. Lebetkin*, 123 AD2d 854, 854 [2d Dept 1986]). If the allegations of lack of due care can be determined by the jury based upon common knowledge, then the action sounds in simple negligence, however, if the directions given or treatment received by the patient is in issue, or consideration of the professional skill and judgment of the practitioner or facility is required, then the theory of medical malpractice applies (*see Reardon v Presbyterian Hosp.*, 292 AD2d 235, 236-237 [1st Dept 2002]).

CPLR 3406(a) provides that a plaintiff must file with the court a notice of medical malpractice action not more than sixty days after issue is joined. Pursuant to a motion under CPLR 2004, however, the court may, in its discretion, extend a plaintiff’s time to file such a notice and the plaintiff need not demonstrate a meritorious claim or a reasonable excuse for the delay in order for the motion to be granted (*Casiano v New York Hospital-Cornell Medical Center*, 169 AD2d 806 [2d Dept 1991]).

In a medical malpractice action, a Certificate of Merit is required and the failure to file it is a pleading defect requiring dismissal of the complaint unless a plaintiff can establish a

reasonable excuse for the default and a meritorious cause of action (*see* CPLR 3012-a; *Perez v Lenox Hill Hosp.*, 159 AD2d 251, 251 [1st Dept 1990]).

As a condition precedent to the commencement this action, Plaintiff was required to comply with the City's demand for examination by appearing for his 50-h hearing (General Municipal Law §50-h[5]). Although Plaintiff contends that he requested an adjournment on multiple occasions, Plaintiff failed to include copies of any correspondence or proof of the dates when such requests were made and Defendants claim to have no record of such requests. Therefore, the court will provide Plaintiff with another opportunity to comply with Defendant's demand for a 50-h hearing by permitting Plaintiff to do so on or before May 6, 2022.

Here, the court finds that Plaintiff's action sounds in medical malpractice and not simple negligence. In his complaint, Plaintiff did not simply allege that he was caused to trip and/or slip and fall because of a defective, dangerous and unsafe condition on premises owned, controlled or operated by Defendants. Plaintiff alleged in substance that the cause of his injuries was Defendants negligence and carelessness in their administration of care to Plaintiff while he was a patient at their medical facility when Defendants' employees left him unattended and unsupervised while he walked to the bathroom. Therefore, the main thrust of Plaintiff's action is Defendants' breach of a duty of care owed to Plaintiff while they were furnishing medical treatment to Plaintiff based upon their physician-patient relationship. Additionally, this action involves considerations of the nature of this duty of care and treatment required, the level of supervision required based upon Plaintiff's condition, whether directions were provided to Plaintiff regarding whether he was permitted to walk to the bathroom unescorted and the professional skill and judgment of Defendants' employees. Therefore, this action clearly sounds in medical malpractice and not ordinary negligence.

As such, Plaintiff was required to file a Certificate of Merit and Notice of Medical Malpractice Action. Plaintiff attempted to explain his reason for not filing such documents because he believed that the action was based on negligence and not medical malpractice. The court finds this explanation to be a reasonable excuse for not filing the documents in a timely manner. Therefore, the court denies the portion of Defendants' motion seeking dismissal of Plaintiff's complaint at this time, but directs Plaintiff to file a late Notice of Medical Malpractice Action and a Certificate of Merit on or before April 6, 2022.

Furthermore, the court denies the portion of Defendants' motion seeking dismissal of Plaintiff's complaint for Plaintiff's failure to serve a Bill of Particulars and responses to Defendants' discovery demands, dated March 7, 2017. However, the court directs Plaintiff to file a Verified Bill of Particulars and responses to Defendants' discovery demands on or before April 6, 2022.

Finally, the court denies Defendants' request for costs and fees.

The court has considered all additional arguments not specifically addressed herein and denies all additional requests for relief which are not expressly granted herein.

As such, it is hereby

ORDERED that the court grants in part Defendants The City of New York's, The New York City Health and Hospitals Corporation's and Bellevue Hospital Center's motion by order to show cause to dismiss Plaintiff Corey Caballero's complaint and for costs and fees to the extent that:

(1) the court directs Plaintiff to appear for a 50-h hearing no later than May 6, 2022;

- (2) the court directs Plaintiff to serve a Verified Bill of Particulars and responses to Defendants' outstanding discovery demands, dated March 3, 2017, on or before April 6, 2022;
- (3) the court directs Plaintiff to file a Notice of Medical Malpractice Action and Certificate of Merit on or before April 6, 2022; and
- (4) the court denies the remainder of the relief requested in Defendants' motion; and it is further

ORDERED that the parties must appear for a preliminary conference before this court via Microsoft Teams on June 21, 2022, at 11:30 a.m. (separate links will be provided).

This constitutes the decision and order of the court.

3/4/2022
DATE



ERIKA EDWARDS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE