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| <b>Holt v Bellevue Hosp.</b>                                                                                                                                                                                                   |
| 2022 NY Slip Op 33175(U)                                                                                                                                                                                                       |
| September 21, 2022                                                                                                                                                                                                             |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: Index No. 805349/2021                                                                                                                                                                                           |
| Judge: Erika M. Edwards                                                                                                                                                                                                        |
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

**PRESENT: HON. ERIKA M. EDWARDS****PART 10M***Justice*

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DIANE HOLT,

Plaintiff,

- v -

BELLEVUE HOSPITAL and NEW YORK CITY HEALTH  
AND HOSPITALS CORPORATION,

Defendants.

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INDEX NO. 805349/2021MOTION DATE 11/03/2021MOTION SEQ. NO. 001**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for

LEAVE TO FILE

Upon the foregoing documents, for the reasons set forth below and those stated on the record during the oral argument held before this court on September 21, 2022, the court denies Plaintiff Diane Holt's ("Plaintiff") motion for leave to serve a late notice of claim and to deem the notice of claim served on October 14, 2021 as timely served nunc pro tunc and the court grants Defendants Bellevue Hospital's ("Bellevue") and New York City Health and Hospitals Corporation's ("NYCHHC") ("collectively "Defendants") cross-motion to dismiss Plaintiff's complaint.

Plaintiff had a left breast mastectomy and placement of a tissue expander at Bellevue Hospital on March 26, 2001. During Plaintiff's subsequent treatment, she had the tissue expander refilled on multiple occasions, during an examination on April 28, 2003, the tissue expander was noted to be normal and she had breast exams and was treated at Bellevue until December 23, 2004. She had a chest x-ray on June 17, 2020, which revealed that she still had the tissue expander implanted in her left breast. She subsequently had it removed on August 27, 2021.

Plaintiff served a notice of claim on Defendant NYCHHC on October 14, 2021, served a summons with notice on November 3, 2021 and a complaint on November 24, 2021.

Plaintiff now moves under motion sequence 001 for leave to serve a late notice of claim and to deem the notice of claim filed on October 14, 2021 as timely served nunc pro tunc. Defendants oppose the motion and cross-move to dismiss Plaintiff's complaint, pursuant to CPLR 3211(a)(5) and (a)(7), 214-a, Unconsolidated Law 7401 and GML 50-e and 50-i. Plaintiff opposes Defendants' cross-motion.

General Municipal Law § 50-e(1) requires that to commence a tort action against a municipal defendant, such as Defendants or its employees, the claimant must serve a notice of claim on the defendant within ninety days of the date on which the claim arose and the notice must include the claimant's name and address, the nature of the claim, the time, place, and manner in which the claim arose, and the damages or injuries sustained (General Municipal Law § 50-e[1] and [2] and 50-i). Timely service of a notice of claim is a condition precedent to the commencement of an action against Defendant (*see* CPLR 217-a). Failure to do so is grounds for dismissal. Although the court has discretion to extend the time in which to serve a notice of claim, it cannot do so if such time is beyond the applicable statute of limitations (*Hall v City of New York*, 1 AD3d 254, 256 [1<sup>st</sup> Dept 2003]).

In a medical malpractice case, the statute of limitations generally begins to run when a cause of action accrues, which is the date of the original alleged negligent "act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure . . ." (CPLR 214-a; *see Wally G. v New York City Health & Hosps. Corp.*, 27 NY3d 672, 674 [2016]).

One of the exceptions set forth in CPLR 214-a is the discovery of a foreign object in the body of the patient, where the statute of limitations expires one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier (CPLR 214-a[a]). A foreign object does not include a “chemical compound, fixation device or prosthetic aid or device” (CPLR 214-a).

The statute of limitations in this matter expires one year and 90 days after the happening of the event upon which the claim is based, which may be different than the date that the claim actually accrued (*see* General Municipal Law § 50-e[5]; *Pierson v City of New York*, 56 NY2d 950, 954 [1982]; *Bloomington, Inc. v New York City Tr. Auth.*, 13 NY3d 61, 65 [2009]).

For the reasons set forth on the record and herein, the court denies Plaintiff’s motion for leave to file a late notice of claim and grants Defendants’ cross-motion to dismiss Plaintiff’s complaint. The court determines that Plaintiff failed to meet her burden required to file a late notice of claim, she failed to demonstrate that the tissue expander which was implanted in Plaintiff’s left breast was a foreign object and that Plaintiff’s action falls within the foreign object exception to the expiration of the statute of limitations set forth in CPLR 214-a. Therefore, the court finds that the Statute of Limitations has long since expired.

Additionally, the court finds that Defendants met their burden for entitlement to dismissal of Plaintiff’s complaint for Plaintiff’s failure to timely file a notice of claim and summons and complaint within the applicable Statutes of Limitations.

Furthermore, the court determines that even if Plaintiff had demonstrated that the tissue expander was a foreign object because it was only intended to be temporarily implanted in Plaintiff’s breast and that Defendants failed to remove it, then Plaintiff failed to allege a date or time period when it should have been removed which is necessary to determine when it became a

foreign object. Additionally, Plaintiff failed to address Defendants arguments alleging in substance that even if it was a foreign object, then Plaintiff was aware of it during her treatment until as late as December 2004 because she had it refilled several times, it was noted to be normal on April 28, 2003, and when she had a breast examination in December 2004. Therefore, Plaintiff failed to establish that Plaintiff did not know that the tissue expander was still inside her left breast prior to December 2004, that it became a foreign object at some point after this date and that Plaintiff first “discovered” it in 2020.

Therefore, since the court determines that the Statute of Limitations has long since expired, the court need not decide whether Plaintiff proffered a reasonable excuse for failing to serve a timely notice of claim in 2020 because her fear of contracting COVID-19, its resulting delays and her serious medical condition. However, the court finds that Plaintiff failed to demonstrate that Defendants had actual knowledge of essential facts regarding her medical malpractice claim or that Defendants would not be substantially prejudiced in maintaining their defense on the merits. Clearly, Defendants would be substantially prejudiced if the court were to grant Plaintiff’s motion because twenty years have passed, most of Plaintiff’s medical records have been destroyed, Defendants would have severe problems identifying and locating potential witnesses and even if located, the witnesses would likely not recall anything about this matter.

Therefore, the court denies Plaintiff’s motion and grants Defendants’ cross-motion.

The court has considered all additional arguments raised by the parties which were not specifically addressed herein and denies all additional requests for relief not expressly granted.

As such, it is hereby

ORDERED that the court denies Plaintiff Diane Holt’s motion for leave to serve a late notice of claim and to deem the notice of claim served on October 14, 2021 as timely served

