

Roberts v Brooklyn Hosp. Ctr. IPA, Inc.
2022 NY Slip Op 33736(U)
October 31, 2022
Supreme Court, Kings County
Docket Number: Index No. 507272/2022
Judge: Bernard J. Graham
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At an IAS Part 36 of the Supreme Court of The State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the ~~31st~~ day of October, 2022.

P R E S E N T :

Hon. Bernard J. Graham, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
LINDA ROBERTS, as Administratrix of the Estate of
LILLIE ORMOND,

Plaintiff(s),

-against-

THE BROOKLYN HOSPITAL CENTER IPA, INC.,
COBBLE HILL HEALTH CENTER, INC., "JOHN DOE
1-100", and "JANE DOE 1-100",

Defendant(s).

DECISION / ORDER

Index No.: 507272/2022

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Recitation, as required by CPLR §2219(a), of the papers considered on the review of this motion to: dismiss plaintiff's causes of action for negligence, negligence per se, medical malpractice, and wrongful death pursuant to CPLR §3211(a)(5).

Papers	NYSCEF Doc. #
Notice of Motion and Affidavits Annexed.....	12-16
Order to Show Cause and Affidavits Annexed.....	
Answering Affidavits.....	18-26
Replying Affidavits.....	27
Exhibits.....	
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Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Counsel for defendant Cobble Hill Health Center, Inc. ("Cobble Hill") has moved (seq. 1) for an Order, pursuant to CPLR §3211(a)(5), dismissing plaintiff's causes of action for negligence, negligence per se, medical malpractice, and wrongful death on the grounds that these causes of action are time-barred.

Opposition to the relief sought in defendant's motion has been submitted by plaintiff, who contends that the suit was timely filed within the statute of limitations on all causes of action against the moving defendant.

Argument of the motion was heard on October 6, 2022, on Microsoft Teams in which counsel for plaintiff, Lamont Rogers, Esq. (Sacco & Fillas, LLP) and counsel for Cobble Hill Health Center, Inc., J. Kiefer Kirk, Esq. (Caitlin Robin and Associates, PLLC) were present. Defendant The Brooklyn Hospital Center IPA, Inc. ("Brooklyn Hospital"), has not filed an answer or otherwise participated in this action.

The deceased plaintiff, Lillie Ormond, died on February 11, 2018. Upon submission of a petition to the Surrogate's Court, her daughter, Cheri Miller, was issued Letters of Administration for the Estate of Lillie Ormond on May 9, 2019. Thereafter, Cheri Miller died on May 11, 2020. Following Cheri Miller's death, Linda Roberts filed for Letters of Administration to be substituted as the Administrator of the Estate of Lillie Ormond.

On November 5, 2020, plaintiff commenced an action under Index Number 521872/2020 (the "first action") for claims related to the treatment provided to the plaintiff at Cobble Hill from October 13, 2017, to November 24, 2017. On March 22, 2021, defendant Brooklyn Hospital moved to dismiss upon the grounds that plaintiff (a proposed Administrator) did not have the requisite legal capacity to sue on behalf of the Estate of Lillie Ormond. The action was dismissed by the Order of Hon. Justice Peter Sweeney on September 17, 2021.

On February 23, 2022, plaintiff's application was granted and Letters of Administration were issued by the Kings County Surrogate's Court to Linda Roberts as Administrator of the Estate of Lillie Ormond. On March 11, 2022, plaintiff recommenced the instant action under Index Number 507272/2022 (the "instant action").

Following the dismissal of the first action by Justice Sweeney on September 17, 2021, plaintiff had six months within which to recommence the action upon the appointment of an Administrator. CPLR §205(a); *see also Carrick v Central General Hospital*, 51 NY2d 242 [1980]; *Robles v Brooklyn-Queens Nursing Home, Inc.*, 131 AD3d 1032 [2d Dept 2015]. Thus, when plaintiff recommenced the instant action on March 11, 2022, it was within six months of the dismissal of the first action.¹

¹ Six months from September 17, 2021 is March 17, 2022.

In determining whether this action was filed timely, the Court must look to when the first action was filed in conjunction with the application of the Executive Orders issued by Governor Cuomo in 2020 during the Covid pandemic (“Covid Executive Orders”). Executive Order 202.8 went into effect on March 20, 2020 and stated that “any specific time limit for the commencement, filing, or service of any legal action...is hereby tolled from the date of this executive order until April 19, 2020.” The toll of the Statute of Limitations was extended several times until the issuance of Executive Order 202.72, which stated:

“the suspension of civil cases in Executive order 202.8, as modified and extended in subsequent Executive Orders, that tolled any specific time limit for the commencement, filing, or service of any legal action...is hereby no longer in effect as of November 4, 2020.” 9 NY ADC 8.202.72.

The Statute of Limitations for filing an action pertaining to the treatment rendered to the plaintiff at Cobble Hill expired on May 24, 2020,² which was during the period the Covid Executive Orders were in effect. Plaintiff argues that the effect of the Covid Executive Orders was to “toll” the Statute of Limitations. Brash v Richards, 195 AD3d 582 [2d Dept 2021]. “A toll suspends the running of the applicable period of limitation for a finite time period, and ‘the period of the toll is excluded from the calculation of the [relevant time period].” Brash v Richards, 195 AD3d 582 [2d Dept 2021], *quoting Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 505 n8 [2020]. The first action was commenced on November 5, 2020, and it is plaintiff’s position that the lawsuit was commenced well within the tolled period.

Defendant argued that the Covid Executive Orders did not toll the Statute of Limitations, which expired on May 24, 2020 for the medical malpractice claims alleged by the plaintiff, and expired on November 24, 2020 for the Public Health Law claims. Baker v 40 Wall Street Holdings Corp., 161 NYS3d 723 [Kings Sup. Ct. 2022].

The Court finds that since the plaintiff filed the first action prior to November 24, 2020, the Public Health Law Statute of Limitations is not at issue and requires no further analysis. In addressing the medical malpractice claim, the Statute of Limitations expired during the period the Covid Executive Orders were in effect and was either “suspended” or “tolled” until

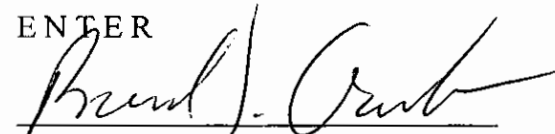
² An action for medical malpractice must be commenced within two years and six months of the act, omission, or failure complained of or last treatment where there is continuous treatment for the same illness, injury, or condition which gave rise to the said act, omission, or failure. CPLR §214-a. In addition, claims brought pursuant to the Public Health Law are governed by the three-year statute of limitations. Public Health Law §2801-d; CPLR §214; Gold v Park Ave. Extended Care Ctr. Corp., 90 AD3d 833 [2d Dept 2011].

November 4, 2020. Plaintiff would not have been required to file their action during that period regardless of whether the effect of the Covid Executive Orders was to “suspend” or “toll” the Statute of Limitations. In addition, plaintiff filed the action on November 5, 2020, which was immediately after the Covid Executive Orders expired. This Court finds that the filing of the action on November 5, 2020 by the plaintiff was timely and in accordance with the Statute of Limitations and the Covid Executive Orders.

Accordingly, defendant’s motion to dismiss plaintiff’s causes of action for negligence, negligence per se, medical malpractice, and wrongful death is denied.

This shall constitute the Order of this Court.

ENTER



Hon. Bernard J. Graham, JSC

HON. BERNARD J. GRAHAM