

**O'Hara v Silver**

2022 NY Slip Op 34087(U)

November 18, 2022

Supreme Court, Kings County

Docket Number: Index No. 504314/2022

Judge: Bernard J. Graham

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: Part 36**

Index No. 504314/2022

JADINE O'HARA,

Plaintiff(s),

**DECISION**

-against-

Present:

DR. MARK SILVER, DR. ALHADDAD ADIB  
and NYU LANGONE HOSPITAL,

**Hon. Judge Bernard J. Graham**  
Supreme Court Justice

Defendant(s).

**Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion :**  
Defendant's Motion to Dismiss Plaintiff's Complaint pursuant to CPLR §§ 214(5) and 214-a and  
CPLR Rule 3211(a)(5):

Papers	Numbered
Defendant's Notice of Motion and Supporting Aff .....	<u>1-2</u>
Plaintiff's Opposition to Motion for Summary Judgment.....	<u>3</u>
Other::Plaintiff's Memorandum of Law in Opp.....	<u>4</u>

**Upon the foregoing cited papers, the Decision/Order on this application is as follows:**

**Decision:**

The instant motion for summary judgment has been submitted on behalf of defendants Dr. Mark Silva ("Dr. Silva")<sup>1</sup>, Dr. Adib Alhaddad ("Dr. Alhaddad") and NYU Langone Hospitals ("NYU Langone") who move, inter alia, for dismissal of plaintiff's complaint pursuant to CPLR Rule §3211(a)(5); CPLR §214-a and CPLR §214(a)(5).

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<sup>1</sup>Dr, Mark Silva was sued in this action mistakenly as "Dr. Mark Silver"; Dr. Adib Alhaddad was sued in this action mistakenly as "Dr. Alhaddad Adib"; and NYU Langone Hospitals was sued here mistakenly as "NYU Langone Hospital". This Court hereby amends the caption to accurately reflect the proper names.

Plaintiff Jadine O'Hara ("O'Hara"), by her attorneys, opposes the motion, asserting that this medical malpractice action is not time-barred and may proceed due to the doctrine of continuous treatment, and, in addition, by the tolling of legal matters which was initiated by executive orders issued by former Governor Andrew Cuomo during the Covid Pandemic.

Argument was conducted before the undersigned on August 18, 2022, on the Microsoft Teams platform. Attorneys for all parties were present for the argument of the motion.

### **Background:**

The undisputed facts in this case show that Ms. O'Hara was 67 years of age when she was treated at NYU Langone, commencing on November 20, 2018 through December 11, 2018. During her admission, plaintiff was treated by the defendants, Dr. Silva and Dr. Alhaddad.

During her admission at NYU Langone, Ms. O'Hara was treated for obstructive uropathy caused by kidney stones. Bilateral nephrostomy tubes were placed within plaintiff to drain urine on November 21, 2018. It is plaintiff's allegation that a small piece of wire was present in plaintiff's kidney and Dr. Silva was unable to remove it. Plaintiff was discharged on December 11, 2018, and the ureteral stents remained in place. Dr. Silva removed the ureteral stents on December 9, 2019 and provided no further treatment to plaintiff.

After being discharged from NYU Langone on December 11, 2018 plaintiff received dialysis treatment under the care of Dr. Alhaddad at Bay Ridge Dialysis Center on an out-patient basis between December 11, 2018 and April 23, 2019. Plaintiff did not return for dialysis treatment after April 23, 2019.

Plaintiff experienced nausea, vomiting and left flank pain on or about December 16, 2021, and was admitted to NYU Langone that day. Plaintiff was under the care of Dr. Alhaddad who, coincidentally, was the service attending physician on call for Internal Medicine on December 16, 2021. Plaintiff was given medication and IV fluids and was discharged on December 18, 2021.

### **Issues Presented:**

Defendants' counsel argues that plaintiff's complaint, which was filed on February 11, 2022, is time-barred because the two and one-half year (2 1/2) year statute of limitation for medical malpractice claims had expired as to each named defendant by the time the action was commenced. (See CPLR §214-a). The defendants' counsel has set forth the applicable statute of limitation dates for each defendant as follows:

It is defendants' position that the statute of limitations against NYU Langone expired on May 11, 2021 as that date is two and one half (2 1/2) years after plaintiff was discharged from the hospital on December 11, 2018;

It is defendants' position that the statute of limitations for claims against Dr. Silva had expired on July 9, 2021 which date is two and one half (2 1/2) years after Dr. Silva last saw plaintiff in his office on January 9, 2019; and

It is defendants' position that the statute of limitations against Dr. Alhaddad had expired on October 23, 2021, which date is two and one half (2 1/2) years after Dr. Alhaddad last saw the plaintiff for dialysis treatment at Bay Ridge Dialysis Center on April 23, 2019.

In response to defendants' arguments, plaintiff has opposed the motion by asserting the action is timely under both the doctrine of continuous treatment and the protections of the tolling provisions of the executive orders issued by former Governor Andrew Cuomo during the Covid Pandemic. It is plaintiff's position that her lawsuit is timely given the treatment she received for a continuous period which serves to extend the recognized two and one half (2 1/2) year statute of limitation. Plaintiff's counsel suggests that even if the Court should not accept the application of the continuous treatment doctrine, the Governor's executive orders initiated during the onset of the Covid Pandemic allows for a tolling of the filing deadline for a lawsuit and, applied here, the lawsuit is timely (see Plaintiff's Memorandum of Law in Opposition to the Defendants' Motion, pg. 9).

### **Former Governor Andrew Cuomo's Executive Orders in Response to the Pandemic**

This Court will first consider whether or not the plaintiff's complaint alleging medical malpractice and negligence was timely filed based upon the provisions set forth in the executive orders issued by former Governor Andrew Cuomo.

On March 20, 2020, Governor Cuomo issued Executive Order No. 202.8 in response to the public emergency caused by the Covid-19 Pandemic. The Executive Order provides as follows:

“any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including, but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020.”

The executive order specifically uses the term “tolled” in conjunction with the commencement and filing of a wide variety of legal matters.

The Executive Order 202.8 was followed by two other executive orders (202.67 and 202.72) which also provide for a tolling of the commencement, filing and service of any legal action, as set forth above. This Court is of the opinion that the instant lawsuit may be deemed timely commenced due to the provisions in former Governor Cuomo’s executive orders which provide for a tolling of the time in which a lawsuit must be commenced. This conclusion is consistent with the well reasoned decision by the Appellate Division (Second Department) in the case of *Brash v Richards*, 195 AD3d 582 (2d Dept., 2021). In *Brash*, the court found that “Governor Cuomo’s March 20, 2020 executive order, Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8), expressly and plainly provided that the subject time limits were ‘hereby tolled’, and two of the subsequent executive orders also referred to the temporary alternation of the subject time limits as a ‘toll’”. *Brash v Richards*, 195 AD 3d at 584. (See also *Foy v State of New York*, 71 Misc. 3d 605 [Ct. of Claims, 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 at 582, quoting *Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 505 fn. 8 [2020].

By application of the tolling created by the executive orders, the deadline for filing the plaintiff’s summons and complaint is extended for 228 days (for the period in which the toll was in place).

Accordingly, the executive orders described above allowed the plaintiff to file her lawsuit against the defendants by the following extended dates:

1. The date for commencement of the complaint against defendant Dr. Silva was extended to February 22, 2022;
2. The date for commencement of the lawsuit against defendant Dr. Alhaddad was extended to June 8, 2022; and
3. The date for commencement of the lawsuit against defendant NYU Langone was extended to July 27, 2022.

The Court notes that the plaintiff, by her attorneys, commenced the instant lawsuit on February 11, 2022 which was well within the allowable statute of limitations.

Defendants' counsel has challenged the tolling analysis set forth in the *Brash* decision and argues that the appropriate analysis of the executive orders of former Governor Andrew Cuomo is that there was only a "suspension" of the dates for commencing, filing or service of legal papers. (See *Lola Joseph Baker v 40 Wall Street Holdings Corp, et al.*, 74 Misc 3d 381 [Sup. Kings, 2022]). This Court disagrees with the reasoning and analysis employed in the *Baker* decision and concludes that the executive orders resulted in a tolling of the time to commence a lawsuit.

This Court has considered the differing interpretations of the somewhat inconsistent executive orders and, while this Court firmly maintains that the filing or commencement of legal actions was tolled by the terms of the orders, there is further reason to apply tolling to the instant case, as it is a claim for medical malpractice.

As pointed out by counsel for the plaintiff during argument of the motion, the Covid Pandemic had a deleterious effect on the ability of clients to confer with attorneys, to assemble documents and to generally prepare for the prosecution of a lawsuit. It is also reasonable to assume that a plaintiff pursuing medical malpractice claims during the Covid Pandemic would likely be more at risk (whether actual or perceived) if they were leaving their homes and traveling to meet with attorneys in their offices. This rationale further supports the interpretation that the executive orders should be interpreted to provide a tolling of the time to commence a lawsuit, in order to provide a reasonable accommodation for plaintiffs in medical malpractice cases to file a lawsuit.

For the reasons set forth herein, this Court finds that the instant lawsuit filed by plaintiff is not time-barred and may proceed to trial.

#### **Continuous Treatment/ Foreign Object Exception:**

The instant motion for dismissal separately presents the argument by defendants' counsel that plaintiff's lawsuit may not be deemed to have been filed timely by application of the doctrine of continuous treatment. In addition, it is the defendants' position that the "foreign object" exception which may serve to extend a statute of limitations deadline is not available, based on the specific facts of this case.

In light of the decision reached by this Court, finding that the instant lawsuit is not time-barred when taking into account the executive orders issued by former Governor Andrew Cuomo, it does not warrant any further analysis or consideration to resolve the instant motion. Accordingly, there is no need to reach a determination as to the applicability of the continuous treatment doctrine or the foreign object exception as they may relate to the timeliness of this lawsuit

**Conclusion:**

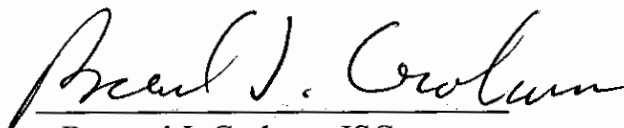
This Court finds that the application of the executive orders issued by former Governor Andrew Cuomo had served to toll the date for filing or commencement of the instant lawsuit. The commencement of the lawsuit on February 22, 2022 was timely, given the addition of 228 days (representing the period in which the filing of legal matters was tolled). Therefore, the motion to dismiss the lawsuit as time-barred pursuant to CPLR §214-a is denied.

That portion of the defendants' motion seeking dismissal of the case as untimely by rejecting an application of the "continuous treatment" doctrine or the "foreign object exception" are deemed moot as this Court has found the instant lawsuit to be timely.

This shall constitute the decision and order of this Court.

Dated: November 18, 2022

ENTER:



Bernard J. Graham, JSC

HON. BERNARD J. GRAHAM