

**Simmons v New York & Presbyt. Hosp.**

2023 NY Slip Op 30956(U)

March 27, 2023

Supreme Court, New York County

Docket Number: Index No. 156026/2018

Judge: Kathy J. King

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. KATHY J. KING **PART** **06**

*Justice*

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BRUCE J. SIMMONS,

Plaintiff,

- v -

THE NEW YORK AND PRESBYTERIAN HOSPITAL, THE  
NEW YORK PRESBYTERIAN HOSPITAL - ALLEN  
HOSPITAL, FORT TRYON REHABILITATION & HEALTH  
CARE FACILITY LLC, FORT TRYON REHABILITATION LLC  
D/B/A FORT TRYON CENTER FOR REHABILITATION AND  
NURSING, FORT TRYON CENTER FOR REHABILITATION  
AND NURSING,

Defendants.

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**INDEX NO.** 156026/2018

**MOTION DATE** 08/12/2022

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78, 79, 85, 86, 87

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, defendants The New York and Presbyterian Hospital s/h/a The New York and Presbyterian Hospital and The New York-Presbyterian Hospital-Allen Hospital (“NYPH”), move to dismiss the plaintiff’s complaint, pursuant to CPLR §§ 3211(a)(5) and 214-a, on the ground that plaintiff’s medical malpractice claims relating to decedent’s hospitalization from August 28, 2015 through September 2, 2015, are time-barred, and should have been brought no later than March 2, 2018. Plaintiff’s decedent died on June 28, 2016. Plaintiff opposes the motion.

The instant action was commenced on June 27, 2018, along with a document entitled “Certificate of Merit Medical or Dental Malpractice Action” which states that certification could not be timely obtained before the statute of limitations expired. The complaint sets forth five

causes action. The first cause of action contains allegations of medical malpractice by the defendants, stating, in sum and substance, that the defendants were “negligent in the medical and/or surgical treatment rendered to the decedent,” and was “rendered in a manner which departed from good and accepted medical practice then and there prevailing and constituted professional medical malpractice” from August 28, 2015 through June 28, 2016 (Verified Complaint at ¶¶ 18, 32, NYSCEF Doc. No. 26). The plaintiff alleges that the defendants rendered “medical care to the plaintiff’s decedent, JOHN JAMISON and rendered continuous treatment through his date of death on June 28, 2016” (*Id.*, at ¶¶ 17, 31). The complaint further alleges that the defendants “failed to properly test, diagnose, and treat plaintiff’s decedent JOHN JAMISON including but not limited to treating and preventing pressure ulcers which adversely affected plaintiff’s decedent’s health...” (*Id.*, at ¶ 33).

The second and third causes of action allege lack of informed consent; the fourth cause of action alleges conscious pain and suffering by the decedent; and the fifth cause of action alleges wrongful death. Plaintiff’s bill of particulars contains allegations comprising medical malpractice concerning medical management relating to pressure ulcers, infectious disease, and sepsis, requiring a right above-the-knee amputation and peg tube placement.

By way of background, subsequent to decedent’s discharge from NYPH on September 2, 2015, he was transferred to Fort Tryon Center for Rehabilitation and Nursing, a co-defendant in this action. Thereafter, the decedent returned to NYPH in January 2016, and was subsequently hospitalized at NYPH on four separate occasions until his death on June 28, 2016.

In opposition to the defendants’ motion, plaintiff argues that the limitations period was tolled by the continuous treatment doctrine through June 28, 2016. Plaintiff also contends that

the crux of plaintiff's claims involves treatment of pressure ulcers, which constitutes ordinary negligence for which the three-year statute of limitations applies.

Based on the allegations contained in the complaint and bill of particulars, the gravamen of the plaintiff's complaint sounds in medical malpractice rather than ordinary negligence. "The distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of the facts" (*Jeter v New York Presbyt. Hosp.*, 172 AD3d 1338, 1339 [2d Dept 2019]). Allegations in the complaint that "challenge the medical facility's performance of functions that are an integral part of the process of rendering medical treatment and diagnosis to a patient...sounds in medical malpractice" (*Id.*, at 1340 [internal quotation marks omitted]).

Here, plaintiff's complaint was accompanied by a certificate of merit of medical malpractice. In addition, plaintiff's first cause of action alleges that the defendants "departed from good and accepted medical practice...and constituted professional medical malpractice." The complaint further alleges that defendants failed "to properly test, diagnose and treat plaintiff's decedent..." Plaintiff's complaint includes allegations that clearly relate to medical care and treatment rendered by a physician, involving sepsis, an above-the-knee amputation of the plaintiff's right leg, and peg tube placement, in addition to claims that defendants failed to treat and/or prevent pressure ulcers. Therefore, the statute of limitations relating to medical malpractice actions, as set forth in CPLR 214-a, is applicable.

Pursuant to CPLR § 214-a, "[a]n action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of."

The statute allows for a toll that delays the running of the limitations period “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 seeking to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the action has expired” (*Campone v Panos*, 142 AD3d 1126, 1127 [2d Dept 2016], quoting *Stewart v GDC Tower at Greystone*, 138 AD3d 729 [2d Dept 2016] [internal quotation marks omitted]). “If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period” (*Campone v Panos*, 142 AD3d at 1127, quoting *Barry v Cadman Towers, Inc.*, 136 AD3d 951 [2d Dept 2016] [internal quotation marks omitted]).

Here, the date of filing of the summons and verified complaint establishes that the instant action was commenced on June 27, 2018, well beyond the two years and six months statute of limitations period which ended on March 2, 2018. Thus, defendants have made a *prima facie* showing that the medical malpractice cause of action was time-barred (*see generally Schwelnus v Urological Assoc. of L.I., P.C.*, 94 AD3d 971 [2d Dept 2012]). The burden then shifted to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or that the action was actually timely commenced.

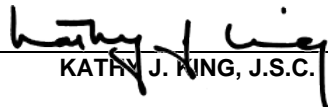
Plaintiff has not demonstrated that medical treatment was mutually agreed upon or contemplated in the future, after decedent’s discharge on September 2, 2015 (*see Fraumeni v Oakwood Dental Arts, LLC*, 108 AD3d 495 [2d Dept 2013]). The continuing nature of the

decedent's diagnosis, or the continuation of a general doctor/patient relationship is insufficient to invoke the continuous treatment doctrine (*see Couch v County of Suffolk*, 296 AD2d 194; *Nykorchuck v Henriques*, 78 NY2d 255). “[A] key to a finding of continuous treatment is whether there is an ongoing relationship of trust and confidence between the patient and physician” (*Devadas v Niksarli*, 120 AD3d 1000, 1006 [1<sup>st</sup> Dept 2014], quoting *Ramirez v Friedman*, 287 AD2d 376 [1<sup>st</sup> Dept 2001] [internal quotation marks omitted]). The various admissions to NYPH subsequent to decedent's discharge on September 2, 2015, were discrete, and a “renewal, rather than a continuation, of the physician-patient relationship” (*Rizk v Cohen*, 73 NY2d 98, 105 [1989]). Thus, the Court finds that the continuous treatment doctrine is inapplicable here, and the plaintiff's claims as to the medical treatment rendered by NYPH in 2015 are time-barred, pursuant to CPLR §§ 3211(a)(5) and 214-a.

While plaintiff argues, in opposition, that NYPH continuously treated the decedent for pressure ulcers from August 28, 2015 through June 28, 2016, both the complaint and bill of particulars contain allegations of malpractice as to defendants' *failure* to properly treat the decedent's pressure ulcers during that period, which does not constitute “affirmative and ongoing” treatment (emphasis added). Further, plaintiff's medical claims as to sepsis, right leg amputation and peg tube placement sound in medical malpractice, having a two year and six months statute of limitations (*see* CPLR 214-a). Thus, plaintiff has failed to raise a question of fact as to whether the statute of limitations was tolled pursuant to the continuous treatment doctrine.

Accordingly, it is hereby,

**ORDERED**, that the motion of defendants, NYPH, seeking dismissal of plaintiff's claims arising from decedent's hospitalization from August 28, 2015 through September 2, 2015, pursuant to CPLR §§ 3211(a)(5) and 214-a, is granted.

3/27/2023			
<b>DATE</b>			<b>KATHY J. KING, J.S.C.</b>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> GRANTED IN PART
		<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