

Gonzalez v New York City Health & Hosps. Corp.

2023 NY Slip Op 31876(U)

June 2, 2023

Supreme Court, New York County

Docket Number: Index No. 805182/2019

Judge: Erika M. Edwards

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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. ERIKA M. EDWARDS

PART 10M

Justice

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ROSA GONZALEZ,

Plaintiff,

- v -

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, and DR. JEFFREY MARKEY,

Defendants.

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INDEX NO. 805182/2019

MOTION DATE 12/14/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for DISMISS/CROSS MOTION TO AMEND

Upon the foregoing documents, the court grants Defendant New York City Health and Hospitals Corporation’s (“NYCHHC”) and Dr. Jeffrey Markey’s (“Dr. Markey”) (collectively, “Defendants”) motion to dismiss Plaintiff Rosa Gonzalez’s (“Plaintiff”) additional allegations and injuries set forth in her Bill of Particulars and Supplemental Bill of Particulars, which were not included in her Notice of Claim and complaint, and Plaintiff’s cause of action for negligent hiring and supervision. Additionally, the court denies Plaintiff’s cross-motion to amend her Notice of Claim and complaint and to deem Plaintiff’s proposed documents as being duly served on Defendants.

Plaintiff brought this action against Defendants and alleged claims of medical malpractice, negligent hiring and supervision and lack of informed consent. On March 16, 2018, Plaintiff underwent a rhinoplasty and cheiloplasty, which involved surgeries to her nose and lip, respectively, at the facial and plastics clinic of NYCHHC’s Bellevue Hospital. She was treated in the Emergency Department of Bellevue Hospital on March 23, 2018 and March 24, 2018 for

bleeding and she had a second rhinoplasty on December 27, 2019. Plaintiff served a Notice of Claim on or about August 17, 2018, alleging damages related to medical malpractice and professional malpractice and negligence from the surgery performed on or about March 16, 2018, "and for all prior and subsequent treatment and care at Bellevue, which is continuing." Plaintiff testified at a General Municipal Law (GML) 50-h hearing on March 11, 2019, which was prior to her second surgery. Plaintiff filed her Summons and Complaint on June 3, 2019, which was also prior to her second surgery. Subsequent to the second surgery, Plaintiff served a Verified Bill of Particulars on July 7, 2020, and a Supplemental Verified Bill of Particulars on July 13, 2020, which both included additional claims and injuries related to the Emergency Department visits and second surgery.

Defendants now move under motion sequence 003, pursuant to CPLR 3211(a)(7), for an order dismissing and/or striking Plaintiff's new allegations of malpractice and injuries contained in Plaintiff's Verified Bill of Particulars and Supplemental Verified Bill of Particulars which were not previously pled in her Notice of Claim and for an order dismissing Plaintiff's Second Cause of Action for negligent hiring and supervision. Defendants argue in substance that the claims regarding the additional treatments in the Emergency Department and second surgery should be precluded because they are new theories of liability and new damages which were not included in Plaintiff's Notice of Claim or complaint.

Plaintiff opposes Defendants' motion and cross-moves for an order permitting Plaintiff to amend her Notice of Claim, pursuant to GML 50-e(6), and amend her complaint, pursuant to CPLR 3025(b), to include her claims for liability and injuries related to the subsequent treatment and surgery and to deem the proposed Amended Notice of Claim and proposed Summons and Amended Complaint filed with this cross-motion as being served upon Defendants.

Plaintiff argues in substance that the court should permit Plaintiff to amend her Notice of Claim to correct a mistake, deficiency and/or omission, that such request is made in good faith and because there would be no prejudice to Defendant NYCHHC. Plaintiff further argues in substance that the pleadings, discovery documents and testimony all indicate that Plaintiff's claims for negligence included claims for malpractice and injuries sustained subsequent to the date of the first surgery and specifically included the two Emergency Department visits.

Plaintiff further argues in substance that Defendant NYCHHC had actual and timely knowledge of the essential facts of Plaintiff's claims since it caused or created the injury condition. Therefore, Plaintiff argues that the balance of equities favor Plaintiff.

Here, the court grants Defendants' motion to dismiss Plaintiff's claims regarding theories of liability, injuries and damages involving treatment not included in Plaintiff's Notice of Claim and Complaint, including her Emergency Department treatment on March 23, 2018 and March 24, 2018, and her second rhinoplasty on December 27, 2019. Additionally, the court denies Plaintiff's cross-motion to amend her Notice of Claim and complaint and finds that Plaintiff failed to demonstrate her entitlement to such amendments.

The court finds that Plaintiff failed to comply with the provisions of GML § 50-e and Unconsolidated Laws § 7401, as Plaintiff failed to include these theories of liability and claims for injuries and damages in her Notice of Claim or complaint and she failed to put Defendant NYCHHC on notice of these claims by amending her Notice of Claim and complaint in a timely manner. The court determines the additional claims are new theories of liability and damages which cannot be included in the Verified Bill of Particulars or Supplemental Verified Bill of Particulars for the first time.

Additionally, the court finds that the phrase “all prior and subsequent treatment and care at Bellevue, which is continuing,” included in the Notice of Claim is too general and vague as to provide Defendant NYCHHC with sufficient notice that Plaintiff’s allegations of malpractice and negligence included the treatment and care in Emergency Department visits and second surgery. Additionally, this is particularly true when Plaintiff suffered from nose bleeds prior to and subsequent to the first surgery and since Plaintiff’s allegations appeared to be specific to the first surgery.

Furthermore, the court dismisses the claims because Plaintiff failed to seek leave to serve a late notice of claim containing the new theories of liability and damages prior to the expiration of the one year and 90-day statute of limitations period (*see* GML § 50-e[5]; *Cambio v City of New York*, 118 AD3d 577, 578 [1st Dept 2014]). Plaintiff’s attempt to amend the Notice of Claim and complaint in this cross-motion and opposition to Defendants’ motion is untimely, as it is well after the expiration of the statute of limitations (*Kales v City of New York*, 169 AD3d 585, 585 [1st Dept 2019]; *Semprini v Village of Southampton*, 48 AD3d 543, 544 [2d Dept 2008]).

Additionally, Plaintiff failed to argue that the facts regarding the second surgery were included in the pleadings and testimony. Therefore, the court strikes the allegations and claims for damages involving Defendants’ treatment and care of Plaintiff during her Emergency Department visits and second surgery and the court dismisses these allegations and claims.

Finally, Plaintiff failed to oppose the portion of Defendants’ motion seeking dismissal of Plaintiff’s Second Cause of Action for negligent hiring and supervision and the court finds that Defendants demonstrated their entitlement to dismissal of this cause of action. Therefore, the court dismisses this claim as well.

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

As such, it is hereby

ORDERED that the court grants Defendant New York City Health and Hospitals Corporation's and Dr. Jeffrey Markey's motion to dismiss filed under motion sequence 003 and the court strikes the language of and dismisses Plaintiff Rosa Gonzalez's allegations and claims for injuries set forth in her Verified Bill of Particulars and Supplemental Verified Bill of Particulars which were not included in her Notice of Claim, including any allegations and claims related to her treatment and care related to her Emergency Department visits on March 23, 2018 and March 24, 2018, and her second rhinoplasty on December 27, 2019, and the court dismisses Plaintiff's Second Cause of Action for negligent hiring and supervision; and it is further

ORDERED that the court denies Plaintiff's cross-motion to amend her Notice of Claim and complaint and to deem Plaintiff's proposed documents as being duly served on Defendants; and it is further

ORDERED that the court directs the parties to appear for a compliance conference on July 25, 2023, at 10:00 a.m. in Part 10, located in room #412, at 60 Centre Street, New York, New York, unless otherwise directed by the court.

This constitutes the decision and order of the court.



ERIKA M. EDWARDS, J.S.C.

6/2/2023

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE