

Bartholomew v New York City Health & Hosps. Corp.
2023 NY Slip Op 32792(U)
August 11, 2023
Supreme Court, Kings County
Docket Number: Index No. 511162/2023
Judge: Consuelo Mallafre Melendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 7 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 11th day of August 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
NICOLE BARTHOLOMEW, As Administratrix of the Estate of
ANGELA BARTHOLOMEW, Deceased,

Plaintiff,

-against-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION d/b/a DR. SUSAN SMITH MCKINNEY
NURSING AND REHABILITATION CENTER,

Defendants.

-----X
HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:
NYSCEF #s: Seq. 1: 9 – 10, 11 – 28, 32
Seq. 2: 33 – 34, 26, 38, 39 – 45

This action arises out of claims of alleged malpractice by NEW YORK CITY HEALTH AND HOSPITALS CORPORATION d/b/a DR. SUSAN SMITH MCKINNEY NURSING AND REHABILITATION CENTER (“NYCHHC”), defendant, brought by NICOLE BARTHOLOMEW, plaintiff-administrator, for the alleged personal injuries to and wrongful death of decedent ANGELA BARTHOLOMEW (“Ms. Bartholomew”) while in the care of DR. SUSAN SMITH MCKINNEY NURSING AND REHABILITATION CENTER. Defendant moves pursuant to CPLR § 3211(a)(5) to dismiss this action on the ground that the matter is time-barred; and in the alternative, claiming that NYCHHC is immune from liability pursuant to New York’s Emergency or Disaster Treatment Protection Act (“EDTPA”), N.Y. Pub. Health Law §§ 3080-82. Plaintiff cross moves for a stay of proceedings pursuant to CPLR § 2201.

DECISION & ORDER

Index No. 511162/2023
Mo. Seq. 1 & 2

Ms. Bartholomew was a patient of the above-named nursing and rehabilitation center of NYCHHC during the outbreak of the COVID-19 pandemic in March 2020. At that time, in accordance with state and federal health guidance, NYCHHC claims she began checking patients regularly for symptoms of COVID-19 such as fever and ceased allowing visitors as of March 13, among other precautionary measures.

Ms. Bartholomew was noted to be febrile on March 29, 2020, with a temperature of 101.1°. While she was not tested for COVID-19, COVID was listed in her differential diagnosis as a possible cause of her symptoms. Ms. Bartholomew's condition remained febrile with no other concerning symptoms until April 8, when her condition worsened; she became restless, her blood pressure dropped, and her blood oxygenation level dropped to 83%. She was then transferred to Kings County Hospital, where she tested positive for COVID-19 and died shortly thereafter on April 10, 2020.

On July 9, 2021, plaintiff's temporary administrator commenced an action against NYCHHC for wrongful death, pain and suffering, negligent infliction of emotional distress, and medical expenses. On July 11, 2022, defendant's motion pursuant to CPLR § 3211(a)(3) to dismiss for lack of capacity to sue was granted and the complaint was dismissed without prejudice. Plaintiff refiled the complaint on June 2, 2023.

Defendant moves to dismiss this action pursuant to CPLR § 3211(a)(5) on the grounds that the action is time-barred, arguing that the plaintiff refiled this action past the six-month grace period afforded to dismissed actions pursuant to CPLR § 205(a).

“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.” *Stewart v. GDC*

Tower at Greystone, 138 A.D.3d 729, 729 [2d Dept 2016]; *see also Campone v. Panos*, 142 A.D.3d 1126, 1127 [2d Dept 2016]. If the defendant meets this burden, the plaintiff must then “raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period” in order to defeat the motion. *Stewart*, 138 A.D.3d at 730.

Pursuant to CPLR § 205(a), a claim for anything other than “voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits” that is dismissed without prejudice may be refiled as a new action within six months of its dismissal, provided that it was timely when originally filed. CPLR § 205(a); *see Ross v. Jamaica Hosp. Med. Ctr.*, 122 A.D.3d 607, 607–08 [2d Dept 2014].

Pursuant to N.Y. Unconsol. Law § 7401(2), a plaintiff has one year and ninety days from the accrual of a cause of action to commence an action for personal injuries against any public entity or public corporation, such as NYCHHC (*see Watts v. City of New York*, 186 A.D.3d 1574, 1576 [2d Dept 2020]). A cause of action for medical malpractice accrues on the date when the alleged original negligent act or omission occurred. *Young v. New York City Health & Hosps. Corp.*, 91 N.Y.2d 291, 295 [1998]. And pursuant to N.Y. Pub. Auth. Law § 2981, a plaintiff has two years to commence an action for wrongful death from the date of the death. *Watts*, 186 A.D.3d at 1576.

The statute of limitations began to run for each of plaintiff’s claims April 10, 2020, the date of Ms. Bartholomew’s death, as that was both the date of the alleged wrongful death and the date at which her treatment ceased. However, due to the pandemic, nearly all actions in the civil courts were tolled by executive order until November 3, 2020. *See Executive Order [A. Cuomo]*

No. 202.28 [9 NYCRR 8.202.8, .67, .73] (tolling the statute of limitations, and subsequently extending the toll in successive orders until November 3, 2020). Therefore the statutory period began in earnest on November 3, 2020, and at the latest, an action for personal injuries must have been commenced within one year and ninety days of that date, or by February 3, 2022. Plaintiff's original summons and complaint filed on July 9, 2021, then was timely filed. However, that action was dismissed on July 11, 2022, pursuant to CPLR § 205(a), giving plaintiff six months in which to recommence its action. Six months from July 11, 2022, is January 11, 2023. Plaintiff did not recommence this action until April 14, 2023, and therefore the claims for personal injury were untimely and must be dismissed.

As to the claims of wrongful death, the two-year statutory period would, if begun on November 3, 2020, have expired on November 3, 2022. Therefore that original claim was timely filed, as it, too, was filed July 9, 2021. However, as noted above, the case was dismissed July 11, 2022, and pursuant to CPLR § 205(a) plaintiff had six months from that date to recommence the action. Six months from July 11 is January 11, 2023; plaintiff did not refile until April 14, 2023. Therefore the claim for wrongful death is also late, and must also be dismissed as untimely.

In response to the above, plaintiff has submitted only conclusory statements regarding the timeliness of this action, and has not raised a question of fact as to whether the action was “actually commenced the action within the applicable limitations period.” *Stewart v. GDC Tower at Greystone*, 138 A.D.3d 729, 729 [2d Dept 2016]. Therefore the defendant has met its burden in demonstrating that the matter is time-barred, and plaintiff has not adequately rebutted that assertion.

Accordingly, as the time-barred nature of the complaint is dispositive in this case, any discussion of the Emergency or Disaster Treatment Protection Act (Public Health Law Article

30-D) or its conferrence of immunity upon defendants is academic, and need not be addressed here. Additionally, any discussion of plaintiff's cross motion for a stay of proceedings is rendered moot.

The motion of defendant NYCHHC to dismiss as untimely all claims by plaintiff Nicole Bartholomew (Seq. #1) is hereby GRANTED. Cross motion of plaintiff to stay proceedings is DENIED (Seq. #2).

Accordingly, the action is dismissed as time barred.

This constitutes the decision and order of the court.

ENTER.



**Hon. Consuelo Mallafre Melendez
J.S.C.**