Myklyn v Coney Is. Hosp.

2023 NY Slip Op 33959(U)

November 2, 2023

Supreme Court, Kings County

Docket Number: Index No. 507251/2020

Judge: Consuelo Mallafre Melendez

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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 2nd day of November 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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VOLODYMYR MYKLYN, As Administrator of the Estate of VOLODYMYR NYKOLYSHYN, Deceased,

Plaintiff,

-against-

CONEY ISLAND HOSPITAL and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.

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DECISION & ORDER

Index No. 507251/2020
Mo. Seq. 2

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

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:

NYSCEF #s: 64 – 65, 66 – 80, 83, 84 – 88, 89

Defendants, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION s/h/a CONEY ISLAND HOSPITAL and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (hereinafter NYC Health + Hospitals) move to dismiss plaintiff's claims for conscious pain and suffering with prejudice pursuant to CPLR § 3211(a)(7) for plaintiff's failure to serve a timely Notice of Claim pursuant to General Municipal Law § 50-e and Unconsolidated Laws § 7401. Defendants, NYC Health + Hospitals, also move this court for an order pursuant to CPLR § 3212 granting summary judgment in their favor. Plaintiff submitted opposition. Plaintiff opposes and, in its opposition papers seeks to deem the December 27, 2019 notice of claim timely served *nunc pro tunc.* Plaintiff has not filed a cross motion for such relief.

In this action, Plaintiff contends that defendant NYC Health + Hospitals failed to properly evaluate, diagnose, and treat the decedent, Volodymyr Nykolyshyn in the Coney Island Hospital Emergency Room on September 3, 2019. The Notice of Claim in this case was filed late on December 27, 2019, 25 days after the statutory 90 days elapsed. There is no dispute that this Notice was served within 90 days of decedent's death, thus it is timely as to the Wrongful Death cause of action.

Pursuant to General Municipal Law § 50–e, a party seeking to sue a public corporation must serve a notice of claim on the prospective defendant within 90 days after the claim arises. See *Matter of Newcomb v. Middle Country Cent. Sch. Dist*., 28 N.Y.3d 455, 460 [2016]. "In determining whether to grant a petition for leave to serve a late notice of claim or to deem a late notice of claim timely served, *nunc pro tunc*, the court must consider all relevant circumstances, including whether (1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and (3) the delay would substantially prejudice the public corporation in its defense on the merits. *Matter of Brown v. City of New York*, 202 A.D.3d 783 [2d Dept 2022]; see General Municipal Law § 50–e[5]; *Matter of Reddick v. New York City Housing Auth.*, 188 A.D.3d 890, 890 [2d Dept 2020]. The presence or absence of any factor is not determinative (see *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d at 460; *Etienne v. City of New York*, 189 A.D.3d 1400, 1402 [2d Dept 2020])." *Vincent v. City of New York*, 208 AD3d 589, 590 [2d Dept 2022].

Relevant here, "'[s]ubject to certain tolling provisions, and except in a wrongful death action, a party must seek leave to serve a late notice of claim within one year and 90 days of the accrual date of the claim' (*Matter of Johnson v. County of Suffolk*, 167 AD3d 742, 744 [2018];

see General Municipal Law §§ 50-e [5]; 50-i [1]). 'Where a [party] moves for such relief . . . after the one-year-and-90-day period has expired, the Supreme Court is without authority to grant such relief' (*Cassidy v. Riverhead Cent. Sch. Dist.*, 128 AD3d 996, 997-998 [2015]; see *Pierson v. City of New York*, 56 NY2d 950, 954 [1982])." *Lockwood v. City of Yonkers*, 179 AD3d 688 [2d Dept 2020].

Further, the fact that a wrongful death claim is being brought in the same action with a claim for conscious pain and suffering does not toll the ninety-day filing period for the conscious pain and suffering claim until the appointment of an administrator or executor. *Mack v. The City of New York*, 265 A.D.2d 308 [2d Dept. 1999]; *Hidalgo v. New York City Health and Hosps. Corp.*, 210 A.D.2d 481 [2d Dept. 1994]; *Heslin v. County of Greene*, 14 NY3d 67 [2010].

In this case, the action accrued on September 3, 2019, the last date of treatment. The Notice of Claim should have been filed by December 2, 2019, but was filed on December 27, 2019. The statute of limitations relative to the claims for pain and suffering elapsed on or about December 3, 2020. Leave of court to deem a late Notice of Claim timely has not been sought and as the statute of limitations passed, the court is without authority to do so now. See *Lockwood v. City of Yonkers*, supra. Therefore, defendant's motion to dismiss plaintiff's claims for conscious pain and suffering is GRANTED and these claims are dismissed with prejudice.

This case involves treatment of the patient at Coney Island Hospital on September 3, 2019 for symptoms that included abdominal pain, nausea and vomiting, and mild fever and complaints of back ache. Mr. Nykolyshyn was evaluated but left the hospital against medical advice. He was brought to the hospital by ambulance on September 10, 2019 in cardiac arrest. Plaintiff claims that the patient died of complications from perforation of the appendix which was undiagnosed on September 3, 2019.

"'In order to establish the liability of a physician for medical malpractice, a plaintiff must prove that the physician deviated or departed from accepted community standards of practice, and that such departure was a proximate cause of the plaintiff's injuries [internal citations omitted].'" *Hutchinson v. New York City Health and Hosps. Corp.*, 172 AD3d 1037, 1039 [2d Dept. 2019] citing *Stukas v. Streiter*, 83 AD3d 18, 23 [2d Dept. 2011]. "Thus, in moving for summary judgment, a physician defendant must establish, prima facie, 'either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries.'" *Hutchinson*, 132 AD3d at 1039, citing *Lesniak v. Stockholm Obstetrics & Gynecological Servs., P.C.*, 132 AD3d 959, 960 [2d Dept. 2015]. "Expert testimony is necessary to prove a deviation from accepted standards of medical care and to establish proximate cause [internal citations omitted]." *Navarro v. Ortiz*, 203 AD3d 834, 836 [2d Dept 2022]. "'When experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution.'" *Stewart v. North Shore University Hospital at Syosset*, 204 AD3d 858, 860 [2d Dept. 2022] citing *Russell v. Garafalo*, 189 A.D.3d 1100, 1102, [2d Dept. 2020] [internal citations omitted]. "Any conflicts in the testimony merely raised an issue of fact for the fact-finder to resolve." *Palmiero v. Luchs*, 202 AD3d 989, 992 [2d Dept. 2022] citing *Lavi v. NYU Hosps. Ctr.*, 133 A.D.3d 830, 832 [2d Dept. 2015]. However, "expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise a triable issue of fact [internal citations omitted]." *Wagner v. Parker*, 172 AD3d 954, 966 [2d Dept. 2019].

Defendant's expert, Gregory Mazarin, M.D., a physician board-certified in Emergency Medicine, established that they are qualified to opine as to the care and treatment rendered to the patient by Alexander Ostrovsky, M.D. and Coney Island Hospital in this case. Plaintiff's expert,

Reshma B. Patel, M.D., a physician board-certified in Emergency Medicine, established that they are qualified to opine as to the care and treatment rendered to the patient by defendants.

Defendants established their prima facie entitlement to summary judgment through its submissions and the affirmation of their expert. Defendants' expert, Dr. Mazarin, opines that Coney Island Hospital did not deviate from the standards of good and accepted medical practice and the injuries alleged by the patient were not proximately caused by any negligent acts or omissions of the defendant at Coney Island Hospital. Dr. Mazarin opines that the Emergency Department staff properly assessed the patient's condition, appropriately performed the initial examination, provided appropriate pain and nausea medication, performed an appropriate neurosurgery consult, and gave the patient timely care. Further, Defendants' expert states the patient prevented defendant staff from providing him treatment as the patient left Coney Island Hospital against medical advice prior to a scheduled MRI for evaluation of patient's condition. Dr. Mazarin also opines that the allegation that decedent already had appendicitis during the September 3, 2019 Emergency Room visit as speculative because the patient had no fever, his white blood count was normal, and was reporting back pain he had for over three years. Dr. Mazarin opines the workup does not establish the patient had appendicitis.

Dr. Mazarin opines the main complaint was chronic back pain. Defendant's expert refers to the Prehospital Care Report Summary FDNY on September 3, 2019, in which the patient alleges complaints of back pain and running out of medication. These complaints were made during transit between the patient's home to Coney Island Hospital. Dr. Mazarin relies on this report to demonstrate no other complaints were made and no abdominal tenderness was reported on exam in the ambulance during transit. Dr. Mazarin opines the failure to make a definitive diagnosis and promptly treat the patient was not a departure by the defendant, rather the patient

prevented defendant from reaching a diagnosis by not completing the medical workup of his condition at Coney Island Hospital.

Plaintiff's expert, Dr. Patel, opines that the patient's appendicitis was not timely diagnosed and treated on September 3, 2019, resulting in its perforation and the patient's demise. Dr. Patel, refutes Dr. Mazarin's assertion that the patient did not have signs and symptoms of appendicitis at the September 3, 2019 Emergency Room visit as speculative because the record confirms "complaints of a low-grade fever 100F (37.8C), abdominal pain, pain radiating to right lower abdominal area, nausea, emesis (vomiting) and physical examination noting tenderness right CVA (costovertebral angle), right mid abdominal." Dr. Patel opines these clinical symptoms are hallmark early signs of appendicitis. Plaintiff's expert states that no fever and the absence of elevated white blood count are not dispositive in the diagnosis of appendicitis. Dr. Patel opines elevated white blood count has a low predictive value for appendicitis. Plaintiff's expert opines the failure to consider appendicitis as a differential diagnosis was a departure from the standards of good and accepted medical practice and that this departure was a proximate cause of the patient's suffering and death.

Dr. Patel further opines the decision to not perform a CT scan was a departure from the appropriate standard of emergency medical care and that this departure was a proximate cause of the patient's suffering and death as the CT scan would have detected the appendicitis. Dr. Patel opines Coney Island Hospital, namely Dr. Ostrovsky, cancelled the CT scan. When the patient left, the decision not to perform a CT scan had already been made and no workup to rule out appendicitis was planned despite the patient's complaints of abdominal pain, his vomiting, nausea, and low-grade fever. On this basis, Dr. Patel opines Coney Island Hospital's decision to discontinue the CT scan impeded the diagnosis of appendicitis. Further, she opines that Dr.

Mazarin's opinion that "[i]t is unknown what other consults would have been ordered if the decedent had stayed" is speculative. Dr. Patel also noted that the patient was in the Emergency Room for five hours yet a work-up to rule out appendicitis was not done.

Accordingly, summary judgment is not indicated here, as the parties have adduced conflicting, non-conclusory, non-speculative medical expert opinions, which can only be resolved by a jury. *See Senatore v. Epstein*, 128 AD3d 794 [2d Dept 2015]; *Feinberg v. Feit*, 23 AD3d 517 [2d Dept 2005]; *Shields v. Baktidy*, 11 AD3d 671, 672 [2d Dept. 2004]; *McHale v. Sweet*, 217 AD3d 666 [2d Dept 2023].

Accordingly, Defendants' motion for summary judgment is DENIED as to all claims sounding in medical malpractice relating to NYC Health + Hospitals. Additionally, as aforementioned, as the notice of claim was not filed timely for claims for pain and suffering, this cause of action is dismissed.

This constitutes the decision and order of the court.

ENTER.

Hon. Consuelo Mallafre Melendez

J.S.C.