

Barrett v New York Presbyt. Hosp.-N.Y. Weill Cornell Med. Ctr.
2023 NY Slip Op 35137(U)
January 3, 2023
Supreme Court, Bronx County
Docket Number: Index No. 21044/2020E
Judge: Alicia Gerez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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CYNTHIA BARRETT,

Plaintiff,

- against -

DECISION and ORDER
Index No. 21044/2020E

NEW YORK PRESBYTERIAN HOSPITAL – NEW
YORK WEILL CORNELL MEDICAL CENTER,
NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, “XYZ CORP” d/b/a LINCOLN
MEDICAL AND MENTAL HEALTH CENTER, and
JANE DOES 1-5,

Defendant(s).

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HON. ALICIA GEREZ

Defendants NEW YORK CITY HEALTH AND HOSPITALS CORPORATION s/h/a NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, “XYZ CORP” d/b/a LINCOLN MEDICAL AND MENTAL HEALTH CENTER (hereinafter “NYCHHC” or “defendants”) moves for an Order pursuant to CPLR § 3211(a)(5) dismissing the action against NYCHHC for failure to file the summons and complaint within one year and ninety (90) days of the accrual of the cause of action in accordance with § 7401 of the Unconsolidated Laws of the State of New York and CPLR § 217-a. Defendants also move pursuant to CPLR § 3211(a)(7) to dismiss all allegations of medical malpractice and lack of informed consent, which are not contained in the Notice of Claim, for failure to state a cause of action in that plaintiff failed to comply with Unconsolidated Laws § 7401 and General Municipal Law § 50-e. Plaintiff opposes the application. Upon review of the papers, together with the opposition submitted thereto, the motion is decided as follows.

Plaintiff commenced the instant action by service of a notice of claim upon NYCHHC on July 24, 2018. It is alleged that defendants NYCHHC were negligent in escorting and accompanying plaintiff to the bathroom causing her to fall on July 2, 2018, at NYCHHC facility Lincoln Medical and Mental Health Center. On January 2, 2019, a 50-h hearing was held. The action was commenced

via the filing of the summons and complaint on January 22, 2020. The summons and complaint and verified bill of particulars contained specified allegations of medical malpractice and lack of informed consent not included in the Notice of Claim. On March 6, 2020, NYCHHC served an Answer asserting as an affirmative defense that plaintiff had failed to commence the action within the proscribed statute of limitations.

CPLR § 217-a imposes a prerequisite to tort actions against municipalities and other government or quasi-government entities in that a Notice of Claim must be served within the prescribed time limit established by § 50-e of the General Municipal Law. As is relevant here, a claim against a municipality must be commenced within one year and ninety days after the happening of the event upon which the claim is based (General Municipal Law § 50-i[1]).

It is undisputed that plaintiff has timely served a Notice of Claim upon defendants. However, defendants argue that the Notice of Claim failed to adequately set forth a medical malpractice claim and instead set forth a claim sounding in general negligence. The Notice of Claim alleges, in relevant part,

Negligence in the custody and care and transport and escort of claimant, who was a patient within and under the care of Lincoln Hospital. On July 2, 2018 at and around 10:30 -11:30 A.M., agents and/or employees of Lincoln Hospital were in the course of escorting and aiding plaintiff into the bathroom of her hospital room when claimant was caused to fall and sustain injuries due to the failure of said hospital employees and/or agents to properly outfit and/or hold and/or direct and/or secure and/or escort claimant.

Plaintiff, in opposition, claims that the Notice is sufficiently pled in medical malpractice in that it explicitly identifies the nature of the claim, the time of the injury, and place it occurred, and the manner in which the injury happened, despite the omission of the words “medical malpractice” or inclusion of any deviations from standards or care.

In support of this claim, plaintiff relies on the *Fox* matter wherein a patient fell when attempting to ambulate to the bathroom unattended after surgery (*Fox v White Plains Med. Ctr.*, 125

AD2d 538 [2d Dept 1986]). In *Fox*, the Second Department found that a duty is owed to a patient from the physician-patient relationship and any breach gives rise more appropriately to a medical malpractice action as opposed to general negligence. However, as noted by defendants, the *Fox* case is distinguishable from the instant case in that medical malpractice allegations contained in the complaint included an improper assessment of the plaintiff's condition, specifically her ability to ambulate postoperatively. Here, the Notice of Claim alleges that the defendants failed to exercise a more general standard of care to the plaintiff in not properly outfitting, holding, directing, or escorting plaintiff when the injury occurred. As the Second Department noted in the subsequent *Papa* case distinguishing *Fox* "...the allegations of the complaint do not involve diagnosis, treatment or the failure to follow a physician's instructions. Rather, the gravamen of the action concerns the alleged failure to exercise ordinary and reasonable care to ensure that no unnecessary harm befell the patient" (*Papa v Brunswick Gen. Hosp.*, 132 AD2d 601 [2d Dept 1987]). Here, as in *Papa*, the allegations put forth in the Notice of Claim failed to set forth allegations sounding in medical malpractice.

Further, as the date of the alleged injury was July 2, 2018, movants contend that plaintiff had until September 30, 2019, to timely file the summons and complaint. Ultimately plaintiff filed same on January 22, 2020, to which defendants argue renders the instant action untimely. This Court agrees. As this matter is more properly sounding in general negligence, all arguments relating to an extension of the statute of limitations in accordance with the continuous treatment doctrine fail.

The remainder of plaintiff's claims are found to be without merit.

Accordingly, it is hereby

ORDERED that defendant's motion is GRANTED, and it is further

ORDERED that the summons and complaint are deemed to be untimely and are therefore dismissed as time barred against moving defendants NEW YORK CITY HEALTH AND HOSPITALS CORPORATION s/h/a NEW YORK CITY HEALTH AND HOSPITALS

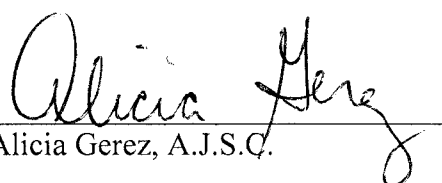
CORPORATION, "XYZ CORP" d/b/a LINCOLN MEDICAL AND MENTAL HEALTH CENTER,
and it is further

ORDERED that the Clerk of the Court is directed to dismiss the action as to the moving
defendants only.

This is the Decision and Order of the Court.

ENTER

Dated: 1/3/23


Alicia Gerez, A.J.S.C.