

Berman v New York City Health & Hosps. Corp.

2024 NY Slip Op 32726(U)

July 9, 2024

Supreme Court, New York County

Docket Number: Index No. 805339/2018

Judge: Arthur F. Engoron

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

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

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RICHARD BERMAN, KATHLEEN BERMAN,	INDEX NO. <u>805339/2018</u>
Plaintiffs,	MOTION DATE <u>11/08/2023</u>
	MOTION SEQ. NO. <u>003</u>

- v -

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, BELLEVUE HOSPITAL CENTER, TAIYE
O. ODEDOSU, BENJAMIN RUBIN, STEPHEN MICHAEL
RUSSELL, ELLEN JULIE KURKOWSKI, JORDAN LOUIS
SWARTZ, JOVAN BEGOVIC, MICHAEL LOCURCIO,
BRYAN GARRETT BEUTEL, THEODORE SAMUEL
WOLFSON, DEKEYA R. SLAUGHTER-LARAKEM, CONOR
GRADY, ALEXANDRA J. SEQUEIRA, JOSE LUIS
TORRES, ASHLEY J. SINKIN, THOMAS BERK, ERIC LEE,
ABIOLA A. ATANDA, OSAMAH CHOUDRY, OMAR
TANWEER, CAROLINA BENJAMIN,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173

were read on this motion for

SUMMARY JUDGMENT

Upon the foregoing documents, and for the reasons stated hereinbelow, the motion for summary judgment to dismiss, pursuant to CPLR 3211(a)(5) and 3212, is granted.

Background

On June 5, 2015, after a slip-and-fall accident, plaintiff Richard Berman was admitted to defendant Bellevue Hospital Center (“Bellevue”), a facility owned and operated by defendant New York City Health and Hospitals Corporation (“NYC HHC”). NYSCEF Doc. No. 156. On September 14, 2015, Berman was discharged from Bellevue and transferred to the Bronx VA Spinal Cord Injury Care Center. *Id.* However, Berman continued receiving out-patient treatment at Bellevue until May 11, 2016, when the staff noted in his chart that there was “no need for further neurosurgical follow up.” NYSCEF Doc. No. 118.

On August 8, 2017, one year and 89-days after Berman’s last visit to Bellevue, plaintiffs, Berman and his wife, Kathleen Berman, petitioned the court for leave to file a late notice of claim, alleging medical malpractice. In a Decision and Order dated November 30, 2017, Justice Erika M. Edwards granted the petition, specifying that defendants “preserv[e] their right to make

a motion to dismiss on [statute of limitation] grounds, related to continuous [treatment] at the close of discovery.” NYSCEF Doc. No. 123.

On December 5, 2017, plaintiffs served a notice of claim on defendants. NYSCEF Doc. No. 126 ¶ 2.

On October 18, 2018, plaintiffs commenced the instant action against defendants, Bellevue, NYC HHC, Taiye O. Odedosu, M.D., Benjamin Rubin, M.D., Stephen Michael Russell, M.D. (“Dr. Russell”), Ellen Julie Kurkowski, M.D., Jordan Louis Swartz, M.D., Jovan Begovic, M.D., Michael Locurcio, M.D., Bryan Garrett Beutel, M.D., Theodore Samuel Wolfson, M.D., Dekeya R. Slaughter-Larkem, M.D., Conor Grady, M.D., Alexandra J. Sequeira, M.D., Jose Luis Torres, M.D., Ashley J. Sinkin, O.T., Thomas Berk, M.D., Eric Lee, M.D., Abiola A. Atanda, M.D., Osamah Choudry, M.D., Omar Tanweer, M.D., and Carolina Benjamin, M.D., alleging medical malpractice and loss of consortium. NYSCEF Doc. No. 126. Plaintiffs allege in paragraph five of the complaint that the action was “commenced within one year and 90 days of the date of the occurrence herein, or the continuous treatment thereof.” NYSCEF Doc. No. 126 ¶ 5.

On May 7, 2019, NYC HHC filed an answer in which it, inter alia, denied the allegation in paragraph five and asserted an affirmative defense that “the action has not been timely brought according to law.” NYSCEF Doc. No. 12.

In a Decision and Order dated August 13, 2021, Justice George M. Silver granted the motion, pursuant to 42 USC § 2651(d) and CPLR 1013, of intervenor-plaintiff, The United States of America (“United States”), to intervene so as to recover the costs of Berman’s medical care arising from Bellevue’s alleged medical malpractice. NYSCEF Doc. No. 87. Justice Silver ordered that all parties submit a stipulation agreeing to a discovery schedule within 45 days of the Order, and that the United States also serve a copy of the proposed complaint and a notice of entry on all defendants within 20 days. Id.

On September 8, 2023, plaintiffs filed a Note of Issue. NYSCEF Doc. No. 145.

On November 8, 2023, defendants moved, pursuant to CPLR 3211(a)(5) and 3212, for summary judgment dismissing the complaint on statute of limitations grounds. NYSCEF Doc. No. 108.

Defendants argue that the claims of plaintiffs and intervenor-plaintiff are barred because: under General Municipal Law § 50-i and CPLR 214-a, the one year and 90-day statute of limitations time-bars the complaint against NYC HHC and Bellevue; under General Municipal Law § 50-e and General Municipal Law § 50-i, the notice of claim requirement and one year and 90-day statute of limitations time-bar the complaint against the individually-named resident physicians and non-physician employees, as indemnified hospital staff appointees; under General Municipal Law § 50-i, the one year and 90-day statute of limitations time-bars the complaint against Dr. Russell and the remaining attending physicians, as employees pursuant to General Municipal Law § 50-k and, in the alternative, the two year and six-month statute of limitations applicable to general medical malpractice actions time-bars the complaint against the remaining attending physicians; plaintiffs did not timely serve the notice of claim; the toll on Berman’s continuous

treatment statute of limitations expired May 11, 2016; and, finally, because the United States waived its independent right of recovery. NYSCEF Doc. No. 110.

In opposition, plaintiffs argue, inter alia, that: defendants are estopped from asserting a statute of limitations defense because they did not properly plead one in the first instance or, alternatively, because of defendants' undue delay in making the instant motion; defendants have not proven that those other individually-named defendants are entitled to a one year and 90-day statute of limitations instead of a two year and six-month statute of limitations because only Dr. Russell requested representation pursuant to General Municipal Law § 50-k and there was no discovery performed as to the employment status of the other individually-named defendants; and plaintiffs timely served the notice of claim because they served it on December 5, 2017, within 20 days of serving Justice Edwards' Decision and Order with notice of entry. NYSCEF Doc. No. 155.

In reply, defendants argue that: the tolling of the statute of limitations stopped when Justice Edwards' order granting plaintiffs leave to file a late notice of claim was entered with the County Clerk on December 1, 2017; defendants' answer contained a valid statute of limitations affirmative defense that put plaintiffs on notice; and that the claims against the individually-named physicians fall outside any possible statute of limitations period. NYSCEF Doc. No. 168.

Also in opposition, the United States argues that: it timely filed its complaint-in-intervention; it appropriately re-served the complaint-in-intervention; its subrogated rights survive; and that defendants impliedly consented to the United States' claim. NYSCEF Doc. No. 162.

In reply, defendants argue that because the United States never filed its intervener complaint and failed to comply with court-ordered service directives, it waived any independent right of recovery. NYSCEF Doc. No. 173.

Discussion

Dismissal pursuant to CPLR 3211(a)(5) is warranted when "the cause of action may not be maintained because of ... statute of limitations." To obtain summary judgment pursuant to CPLR 3212, the "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law." Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (internal citations omitted).

Pursuant to CPLR 3211(e), a party must raise a statute of limitations defense by motion to dismiss or in a responsive pleading to preserve the defense; otherwise, it is waived.

Pleadings, including affirmative defenses, "shall be sufficiently particular to give the court and parties notice of the ... occurrences ... intended to be proved and the material elements of each cause of action or defense." CPLR 3013. The Court of Appeals has held that it is "sufficient under CPLR 3013" that a defendant "plead the 'statute of limitations' as a defense" because CPLR 3013 does not require a statute of limitations affirmative defense to "identify the statutory section relied on or to specify the applicable period of limitations." Immediate v St. John's Queens Hosp., 48 NY2d 671, 673 (1979).

Here, defendants clearly preserved their right to move to dismiss based on statute of limitations grounds by raising the issue as an affirmative defense that was “sufficiently particular” pursuant to CPLR 3013 to give plaintiffs notice. Plaintiffs were also on notice of such a defense dating back to their 2017 petition to file a late notice of claim. Additionally, defendants timely moved to dismiss pursuant to both Justice Edwards’ order and CPLR 3212 by moving within 120 days of the Note of Issue.

A personal injury action against a public corporation requires that a notice of claim be made and served within 90 days of the occurrence and that the action “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)(c). Doctors working at public benefit corporations like NYC HHC are employees pursuant to General Municipal Law § 50-k(1)(e) and, therefore, are “entitled to the benefits of the abbreviated statutory period of limitation set forth in General Municipal Law § 50-i.” De Gradi v Coney Is. Med. Group, P.C., 172 AD2d 582, 583 (2d Dept 1991) (internal citations omitted).

It is well-settled that courts are precluded from granting leave to serve a late notice of claim beyond the statute of limitations for commencing an action against a public corporation. Thus, “an application for an extension may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled.” Pierson v City of New York, 56 NY2d 950, 953-54 (1982) (internal quotations and citations omitted).

The continuous treatment doctrine tolls the time a plaintiff may begin an action “until the end of the course of treatment ‘when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint.’” Nykorchuck v Henriques, 78 NY2d 255, 258 (1991) citing McDermott v Torre, 56 NY2d 399, 405 (1982), quoting Borgia v City of New York, 12 NY2d 151, 155 (1962).

Here, the applicable statute of limitations is one year and 90 days for NYC HHC, Bellevue, and Dr. Russell, as he timely requested representation pursuant to General Municipal Law § 50-k. Based on the clear documentary evidence, including the individually-named defendants’ sworn statements that they were working for NYC HHC in an official capacity when Berman was being treated at Bellevue, the Court finds that they are employees entitled to the one year and 90-day statute of limitations.

Therefore, defendants are entitled to summary judgment because plaintiffs commenced this action after the expiration of the one year and 90-day statute of limitations. Berman’s last day of treatment was May 11, 2016, and so, even under the continuous treatment doctrine, the statute of limitations would have expired on August 9, 2017. Assuming, without deciding, that the statute of limitations was tolled during the pendency of plaintiffs’ petition until November 30, 2017, the instant action would still be time barred because plaintiffs filed their Summons and Complaint on October 18, 2018, almost a year after the statute of limitations expired on December 2, 2017. In addition, plaintiffs served their notice of claim on December 5, 2017, also after the expiration of the statute of limitations.

Pursuant to the Federal Medical Recovery Act, the United States is entitled to intervene in a medical malpractice suit commenced by a veteran for whom it provides medical care necessary because of the alleged medical malpractice of a third-party tortfeasor and recover the cost of such medical care, but its right of recovery is dependent upon the veteran's recovery in the suit. 42 USC § 2651 et seq.

Here, however, the United States' claims are moot because they are dependent on plaintiffs' recovery, which is barred by the statute of limitations. Thus, this Court need not, and does not, reach defendants' arguments that the intervenor-complaint was improperly and/or not filed.

This Court has considered the other arguments of plaintiffs and intervenor-plaintiff and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, the instant motion for summary judgment based on the expiration of the statute of limitations is granted and, accordingly, the Clerk is hereby directed to enter judgment dismissing the complaint in its entirety.

HON. ARTHUR P. ENGORON



7/9/2024

DATE

ARTHUR P. ENGORON, J.S.C.

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