

Gomez v NYC Health + Hosps. S./Brooklyn Health

2025 NY Slip Op 32033(U)

June 6, 2025

Supreme Court, Kings County

Docket Number: Index No. 525926/2024

Judge: Consuelo Mallafre Melendez

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At an IAS Term, Part MMESP-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 6th day of June 2025.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
LUZ GOMEZ and BRIDGET GOMEZ, individually and as Co-administrators of the estate of MICHAEL PALACIO RIVERA,

Plaintiffs,

-against-

NYC HEALTH + HOSPITALS SOUTH/BROOKLYN HEALTH f/k/a CONEY ISLAND HOSPITAL a/k/a NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, THE CITY OF NEW YORK and JOHN DOE(S) 1-10, JANE DOE(S) 1-10, the first and last names being fictitious and unknown,

Defendants.

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

DECISION & ORDER

Index No. 525926/2024
Mo. Seq. 1 & 2

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

NYSCEF #s: Seq. 1: 15 – 16, 17 – 21, 33, 34 – 35

Seq. 2: 24 – 25, 26 – 32, 36, 37 – 38, 39

Plaintiffs move (Seq. No. 1) for an Order extending their time to file a notice of medical malpractice action, pursuant to CPLR 3406, CPLR 2004, and 22 NYCRR 202.56 (a), deeming the notice of medical malpractice action timely served *nunc pro tunc*, and scheduling this matter for a preliminary conference.

Defendant New York City Health and Hospitals Corporation (“NYCHHC”), sued herein as NYC Health + Hospitals South Brooklyn Health f/k/a Coney Island Hospital a/k/a New York City Health and Hospitals Corporation, opposes the motion and cross moves (Seq. No. 2) for an

Order dismissing Plaintiffs' claims of conscious pain and suffering, medical malpractice, and negligence in their entirety, on the grounds that these claims are time-barred pursuant to the statute of limitations and barred by the order of this Court dated November 20, 2024.

Plaintiffs do not oppose the part of the cross motion seeking to strike "pain and suffering" as not related to wrongful death, but they oppose removing medical malpractice or negligence as the basis of their wrongful death claim.

NYCHHC contends that based upon this court's November 20, 2024 order, Plaintiffs' wrongful death action cannot be based in medical malpractice. The November 20, 2024 order granted Plaintiffs' motion to serve a late notice of claim "only as to the claims for wrongful death," and further held that "the relief sought is time-barred as to all other claims, including but not limited to pain and suffering." NYCHHC argues that as the pain and suffering claims were denied as untimely, Plaintiffs have no viable cause of action for "medical malpractice," and thus, their notice of medical malpractice action is "impermissible" and should be rejected.

This Court disagrees. It is necessary here to distinguish "medical malpractice" as an individual cause of action and as a *theory of liability* underlying a wrongful death claim.

Medical malpractice stands alone as a cause of action for which a plaintiff can recover certain damages, upon proving their case that the defendant breached the standard of care and proximately caused their injury (*see generally Whitehall v Andrade*, 231 AD3d 1094, 1095-1096 [2d Dept 2024]). As a personal injury claim, medical malpractice may survive the injured party's death to be asserted on their behalf by the estate (*see* EPTL § 11-3.2 [b]).

Wrongful death is a distinct cause of action brought *exclusively* by the estate under EPTL § 5-4.1, with different prerequisites: "(1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the decedent's death was caused, (3) the survival of

distributees who suffered pecuniary loss by reason of the death of decedent, and (4) the appointment of a personal representative of the decedent” (*Proano v Gutman*, 211 AD3d 978, 982-983 [2d Dept 2022], quoting *Chong v New York City Tr. Auth.*, 83 AD2d 546 [2d Dept 1981]). “[S]uch claims belong to a decedent’s distributees rather than the estate standing in place of the decedent” (*Heslin v County of Greene*, 14 NY3d 67, 75 [2010]).

Quoting the plain language of EPTL 5-4.1, “a cause of action to recover damages for wrongful death may be maintained against persons ‘who would have been *liable to the decedent by reason of such wrongful conduct* if death had not ensued. Such an action must be commenced within two years after the decedent’s death.” (*Scanzano v Horowitz*, 49 AD3d 855, 856 [2d Dept 2008] [emphasis added].)

It is well established that medical malpractice may constitute the underlying “wrongful conduct” alleged to have caused the death. In *Scanzano*, a trial court’s dismissal of medical malpractice claims pursuant to CPLR 3211 (a) (5) was reversed by the Second Department, who held the decedent’s wife had a viable wrongful death claim sounding in medical malpractice (*id.*, at 856-857). Essentially, a wrongful death action based on an underlying allegation of medical malpractice is considered timely, per the wrongful death statute, if it is brought within two years *and* the medical treatment at issue was within the statute of limitations when the decedent died (*see Perez v Baez*, 185 AD3d 1062, 1063-1064 [2d Dept 2020]; *Stein v Chiera*, 130 AD3d 912, 915 [2d Dept 2015]).

Here, the treatment at issue occurred just prior to Decedent’s death and the wrongful death action was commenced within two years. The Complaint properly pleads that the decedent was “caused to suffer . . . death” by the alleged medical malpractice. The same language appears in the negligence claim. Plaintiffs are not time-barred, for instance, from asserting that the defendants

departed from the standard of care (medical malpractice) or acted in a manner which a reasonably prudent person would not (negligence) as the underlying “wrongful act” which caused the decedent’s death and proving those elements at trial.

The movants rely on this Court’s November 20, 2024 order, which pertained specifically to untimely claims (i.e., causes of action) asserted in their notice of claim. However, pursuant to that order, Plaintiffs’ “claims for wrongful death” remained viable, and Plaintiffs may allege medical malpractice and negligence as the basis for those wrongful death claims.

The part of NYCHHC’s cross motion seeking to strike all “medical malpractice” and “negligence” claims from the Complaint is therefore **denied**. Their cross motion is **granted to the extent** that Plaintiffs’ claims against NYCHHC regarding “conscious pain and suffering” on behalf of the decedent are dismissed and deemed stricken from the Complaint, without opposition.

Turning to Plaintiffs’ motion (Seq. No. 1), a notice of medical malpractice action is a procedural requirement which must be filed, pursuant to CPLR 3406 (a) and 22 NYCRR 202.56, no more than sixty days after joinder of issue by all defendants. This is a rule of court practice that initiates the pre-calendar conference required by CPLR 3406 (b) (*see generally Tewari v. Tsoutsouras*, 75 NY2d 1 [1989]). The statute is applicable to any “action to recover damages for dental, medical or podiatric malpractice,” and therefore applies to wrongful death actions premised on malpractice.

The Court of Appeals has long held that dismissal is not an appropriate sanction for failure to timely file a notice of medical malpractice (*id.* at 7). Furthermore, an untimely CPLR 3406 (a) notice is “not analogous to a pleading default,” and an extension of time may be granted under CPLR 2004 “upon such terms as may be just and upon good cause shown” (*id.* at 8, 11-12). “In considering the motion, the court may properly consider factors such as the length of the delay,

whether the opposing party has been prejudiced by the delay, the reason given for the delay, whether the moving party was in default before seeking the extension, and, if so, the presence or absence of an affidavit of merit” (*id.* at 11-12).

In this case, issue was joined by all defendants on December 11, 2024, and the notice of medical malpractice should have been filed by February 9, 2025. Plaintiffs filed an untimely notice on April 3, 2025, approximately two months late. In their affirmation in support, Plaintiffs’ counsel attributes the delay to a “ministerial error” of their law office. They also note the relatively short delay, the fact they have complied with discovery demands, the fact they have not been served a 90-day notice, and the lack of prejudice to the defendants.

In light of these factors, the Court finds Plaintiffs’ excuse of law office failure is sufficient, and there is good cause to deem the notice of medical malpractice action timely filed (*see Russo v Pennings*, 46 AD3d 795, 797 [2d Dept 2007]). Accordingly, their motion is **granted**, and the notice filed on April 3, 2025 shall be deemed timely *nunc pro tunc*.

Although Defendant NYCHHC addresses the lateness of Plaintiffs’ certificate of merit in their opposition papers, neither party requested any relief related to the certificate of merit in their notice of motion or cross motion, and that issue is not before the Court.

Accordingly, it is hereby:

ORDERED that Plaintiffs’ motion (Seq. No. 1) seeking an Order, pursuant to CPLR 3406, CPLR 2004, and 22 NYCRR 202.56 (a), for an extension of time to file a notice medical malpractice action, is **GRANTED**; and it is further

ORDERED that the notice of medical malpractice action dated April 3, 2025 (NYSCEF Doc. No. 14) is deemed timely filed *nunc pro tunc*; and it is further

ORDERED that Defendant NYCHHC’s cross motion (Seq. No. 2) to dismiss Plaintiffs’

claims of medical malpractice, negligence, and conscious pain and suffering pursuant to the statute of limitations and this Court’s November 20, 2024 order, is **GRANTED TO THE EXTENT** that Plaintiffs’ claims against NYCHHC for “conscious pain and suffering” are dismissed and deemed stricken from the Complaint; and

ORDERED that Defendant NYCHHC’s cross motion (Seq. No. 2) is **DENIED** as to Plaintiffs’ claims of wrongful death sounding in medical malpractice and/or negligence; and it is further

ORDERED that the case is scheduled for a Preliminary Conference on June 23, 2025. The parties shall follow the Part Rules in this regard.

This constitutes the decision and order of this Court.

ENTER.



Hon. Consuelo Mallafre Melendez

J.S.C.