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

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VICTORIA MOONBLIT-VODOVOZ,

Plaintiff,

-against-

CONEY ISLAND HOSPITAL, THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, MATTHEW J. DAVID, ANDREW RIZZO,

Defendants.

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DECISION & ORDER

Index No. 526039/2018
Mo. Seq. 1 & 2

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: 32 – 33, 34, 36 – 42, 49 – 52
Seq. 2: 35 – 36, 37 – 42, 49 – 52, 53

Plaintiff moves (Seq. No. 1) for an Order, pursuant to CPLR 1015 (a) and CPLR 1021, to substitute "Yuri Vodovoz, as Administrator of the Estate of Victoria Moonblit-Vodovoz" for the deceased Plaintiff in the caption and lift the stay in this action.

Defendants New York City Health and Hospitals Corporation ("NYCHHC"), sued herein as The New York City Health and Hospitals Corporation and Coney Island Hospital, Matthew J. David, and Andrew Rizzo, oppose Plaintiff's motion and cross move (Seq. No. 2) for an Order dismissing Plaintiff's complaint, pursuant to CPLR 1021, for failure to substitute an administrator within a reasonable time, and/or pursuant to CPLR 3211 and Gen. Mun. Law § 50-e, for failure to timely serve a notice of claim.

This is a medical malpractice action arising from treatment rendered on or about January 12 through January 22, 2018.

Plaintiff filed a summons and complaint on April 11, 2019, asserting claims of medical malpractice against NYCHHC and two individual employees of NYCHHC/Coney Island Hospital. Defendants appeared by filing an Answer on June 13, 2019.

Subsequently, Plaintiff passed away on November 17, 2019. Yuri Vodovoz was issued letters of administration by Surrogate's Court on May 10, 2021. However, no motion to substitute a personal representative in this action and lift the stay was filed until March 20, 2025.

"Generally, the death of a party divests a court of jurisdiction to act, and automatically stays proceedings in the action pending the substitution of a personal representative for the decedent" (*see 2911 Mgt., LLC v Davis*, 235 AD3d 938, 938 [2d Dept 2025], quoting *Neuman v Neumann*, 85 AD3d 1138, 1139 [2d Dept 2011]).

CPLR 1021 provides that "[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made." The statute does not impose a strict time limit for what constitutes a "reasonable time," but courts making this determination may consider "several factors, including the diligence of the party seeking substitution, prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has merit" (*Borruso v New York Methodist Hosp.*, 84 AD3d 1293, 1294 [2d Dept 2011]).

The instant motion (Seq. No. 1) to substitute Yuri Vodovoz as representative of the decedent's estate was filed on March 20, 2025, over five years after the action was stayed by Plaintiff's death. Plaintiff's counsel states in their affirmation that prior to filing the motion, they had reached out to Defendants' counsel seeking a stipulation and were given "reassurances that the stipulation should be forthcoming."

In their opposition and cross motion, Defendants argue that Plaintiff did not seek substitution within a reasonable time. They submit emails showing their communications with Plaintiff's counsel regarding a proposed stipulation began on or about November 16, 2023, over two years (30 months) after the decedent's administrator was appointed by Surrogate's Court. In an email dated December 15, 2023, Defendants' counsel advised Plaintiff and the Court that they needed authority from their client and would "advise counsel shortly whether the stay can be lifted via stipulation or will necessitate motion practice." Defendants ultimately advised Plaintiff's counsel they did not have the authority from their clients to sign the stipulation on January 22, 2024. (NYSCEF Doc. No. 37-38.)

On January 24, 2024, Plaintiff's counsel attempted to e-file a partially signed stipulation, and they were informed by the Part Clerk that the requested relief could not be granted without a motion: "The matter is stayed and the substitution has not taken place. The Judge does not have authority at this time without a motion asking for the requested relief." (NYSCEF Doc. No. 40.) In February 2025, one year later, Plaintiff's counsel again e-filed a letter to the Court asking for a conference to "resolve outstanding issues including caption change," and they were informed by chambers that a motion was required (NYSCEF Doc. No. 41).

Upon review of the history of this action, Plaintiff has not consistently exercised "diligence" in seeking substitution. Although a petition to appoint an administrator of the estate was filed and letters were issued by May 2021, nearly four years have passed since then and no motion was ever made to substitute the administrator and proceed with this action. Plaintiff demonstrated some attempts at reviving the action during that period, and they place responsibility on the opposing side for their unwillingness to stipulate to a caption change, particularly between November 2023 – January 2024. However, Plaintiff's counsel provides no

explanation for the initial 30-month delay after the letters of administration were issued. There is also no explanation for the additional year that passed between their attempts to unilaterally amend the caption in January 2024 and filing this motion in March 2025.

Nevertheless, the Court notes that Plaintiff filed this motion to substitute prior to Defendants' cross motion to dismiss the action, an administrator of the estate has been duly appointed by Surrogate's Court, and there is strong public policy in favor of disposing matters on their merits (*cf. Laroche v Laroche,* 162 AD3d 1000, 1002 [2d Dept 2018]; *see also White v Diallo,* 156 AD3d 664, 665 [2d Dept 2017]; *Reed v Grossi,* 59 AD3d 509, 511 [2d Dept 2009]). For these reasons, the Court is constrained to grant Plaintiff's motion to lift the stay, substitute the administrator of the decedent's estate, and amend the caption accordingly.

The stay having been lifted, the Court turns to the part of Defendants' cross motion (Seq. No. 2) to dismiss on the grounds that Plaintiff failed to timely serve a notice of claim.

A notice of claim served within 90 days after the claim arises is a condition precedent of all suits against NYCHHC (*see* Gen. Mun. Law § 50-e). The notice of claim requirement also applies to employees of NYCHHC named as individual defendants, and thus it applies to co-defendants Matthew J. David, D.O. and Andrew Rizzo, D.O., who are identified as such in Plaintiff's complaint and the joint answer filed by Defendants (Gen. Mun. Law § 50-k [6]).

An extension of the 90-day notice of claim period may be granted under Gen. Mun. Law § 50-e (5), but "the extension shall not exceed the time limited for the commencement of an action." Thus, the Court has no discretion to entertain an application for leave to serve a late notice of claim after the statute of limitations has expired.

Here, Plaintiff's 90-day notice of claim period ended on April 22, 2018, and an untimely notice of claim was filed on or about December 27, 2018. Plaintiff filed a Proposed Order to

Show Cause seeking leave to serve a late notice of claim on the same date. However, this Order to Show Cause was never signed, served upon NYCHHC, or heard before the court.

An inquiry into the NYSCEF (e-filing) system shows that under "Document Comments," Plaintiff's counsel was directed to "submit a working copy to Part 72 for review, with confirmation notice attached." There is no indication that decedent/claimant or their counsel followed up with the court's directive, and no copy was received or processed by Part 72. Thus, contrary to Plaintiff's argument in response to the cross motion, an application was never "properly before the Court," and it was not "unopposed" by the Defendants. The Proposed Order to Show Cause was not signed or heard.

To this date, Plaintiff and/or her administrator have made no proper motion or petition to the Court for leave to serve a late notice of claim. As Defendants argue in their cross motion, the statute of limitations period has long since expired, and the court is without authority to permit the extension beyond that time under Gen. Mun. Law § 50-e (5).

For pain and suffering/personal injury claims sounding in medical malpractice, the statute of limitations is one year and ninety days (Gen. Mun. Law § 50-i). Based on the alleged dates of treatment in January 2018, the statute of limitations period expired on April 22, 2019, and Plaintiff failed to make a proper application to the Court for leave to serve a late notice of claim before that date. Even assuming *arguendo* that the statute of limitations ran from the date of her death, the time to seek an extension for the notice of claim expired, at latest, on February 15, 2021.

Although the estate has not sought to add a wrongful death claim to this action, the Court notes that under Gen. Mun. Law §§ 50-e and 50-i, the notice of claim period ran 90 days from the appointment of the administrator (August 8, 2021) and the time to seek an extension expired

two years after the death (November 17, 2021). Therefore, any application to serve a late notice of claim would also be untimely as to wrongful death.

The Court rejects Plaintiff's argument that any toll on the statute of limitations was in effect because of the decedent's death. The Second Department has held that a pending petition for letters of administration does *not* toll the statute of limitations under CPLR 204 (a) (*Singh v New York City Health and Hosps. Corp.*, 107 AD3d 780, 782 [2d Dept 2013]). Further, as stated above, the one-year-and-ninety-days period expired in April 2019 while the decedent was still alive. The administrator also had ample time after her death to seek leave from the Court; it was their own unexplained delay which prolonged the stay in this action after letters were issued on May 10, 2021.

In the alternative, Plaintiff argues for the first time in opposition that the "continuous treatment" doctrine applied from the alleged date of malpractice until her date of death, and therefore the notice of claim dated December 27, 2018 *was timely*.

As Defendants argue in opposition, this doctrine requires a three-pronged showing that "(1) the patient 'continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period'; (2) the course of treatment was 'for the same conditions or complaints underlying the plaintiff's medical malpractice claim'; and (3) the treatment is 'continuous'" (*Hillary v Gerstein*, 178 AD3d 674, 678 [2d Dept 2019], quoting *Gomez v Katz*, 61 AD3d 108, 111-112 [2d Dept 2009]). Plaintiff presents no evidence or concrete facts to support their use of the continuous treatment doctrine, only a vague and conclusory statement in the attorney affirmation that "Plaintiff continued to receive treatment at Gouverneur Hospital (also a NYCHHC facility) for 1.5 years following the incident, for

conditions directly related to the initial malpractice." This is insufficient to support their position or raise a genuine issue of fact as to the timeliness of her notice of claim.

Finally, contrary to Plaintiff's last argument in opposition, Defendants did not waive their right to dismissal on these grounds by holding a 50-h hearing or participating in initial discovery exchanges (*see Watts v City of New York*, 186 AD3d 1574, 1577 [2d Dept 2020]; *Barnaman v New York City Health and Hosps. Corp.*, 90 AD3d 588, 589-590 [2d Dept 2011]). "Estoppel against a public corporation will lie only when the public corporation's conduct was calculated to, or negligently did, mislead or discourage a party from serving a timely notice of claim and when that conduct was justifiably relied upon by that party" (*Matter of Attallah v Nassau Univ. Med. Ctr.*, 131 AD3d 609, 609-610 [2d Dept 2015]; *see also Dier v Suffolk County Water Auth.*, 84 AD3d 861, 862 [2d Dept 2011]). Plaintiff has not made a sufficient showing that in this case, Defendants "wrongfully or negligently engaged in conduct that misled the plaintiff" and that Plaintiff justifiably relied on that conduct to their detriment (*Konner v New York City Tr. Auth.*, 143 AD3d 774, 776-777 [2d Dept 2016]).

Thus, the Court finds that although Plaintiff has brought a proper motion to substitute the administrator and lift the stay, Defendants are entitled to dismissal of the complaint based on failure to timely serve a notice of claim. Based on the foregoing, the death stay is lifted and Defendants' cross motion to dismiss is granted with prejudice.

Accordingly, it is hereby:

ORDERED that Plaintiff's motion (Seq. No. 1) for an Order, pursuant to CPLR 1015 (a) and CPLR 1021, to substitute the administrator of the estate in this action and lift the stay is **granted**; and it is further

ORDERED that the stay is lifted and the case restored to active status; and it is further

ORDERED that the caption is amended to read:

YURI VODOVOZ, as Administrator of the Estate of
VICTORIA MOONBLIT-VODOVOZ,

Plaintiff,

-against-

CONEY ISLAND HOSPITAL, THE NEW YORK
CITY HEALTH AND HOSPITALS CORPORATION,
MATTHEW J. DAVID, ANDREW RIZZO,

Defendants.

ORDERED that the part of Defendants' cross motion (Seq. No. 2) seeking to dismiss this action on the grounds that Plaintiff failed to timely substitute an administrator pursuant to CPLR 1021 is **denied;** and it is further

ORDERED that the part of Defendants' cross motion (Seq. No. 2) seeking to dismiss this action on the grounds that Plaintiff failed to timely serve a notice of claim pursuant to CPLR 3211 and Gen. Mun. Law § 50-e, is **granted;** and it is further

ORDERED that this action is dismissed with prejudice.

The Clerk shall enter judgment in favor of CONEY ISLAND HOSPITAL, THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, MATTHEW J. DAVID and ANDREW RIZZO.

This constitutes the decision and order of the Court.

ENTER.

Hon. Consuelo Mallafre Melendez
J.S.C.