

Sharkansky v New York City Health & Hosps. Corp.

2025 NY Slip Op 34452(U)

November 20, 2025

Supreme Court, Kings County

Docket Number: Index No. 503499/2020

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

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 20th day of November 2025.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
MICHELLE SHARKANSKY, AS ADMINISTRATIX OF
THE ESTATE OF VOLF SHARKANSKY, DECEASED,

Plaintiff,

-against-

DECISION & ORDER

Index No. 503499/2020
Mo. Seq. 3 & 4

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

Defendant.

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

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

NYSCEF #s: Seq. 3: 35 – 36, 37 – 40, 46 – 51, 52 – 54, 55
Seq. 4: 42 – 51, 52 – 54, 56

Defendant New York City Health and Hospitals Corporation (“NYCHHC”) moves for an Order, pursuant to CPLR 3211 (a) (7), Uncon. Law § 7401, and Gen. Mun. Law § 50-e, to dismiss claims in Plaintiff’s Complaint and Bill of Particulars which were not contained in the notice of claim dated February 20, 2019 (Seq. No. 3).

Plaintiff opposes the motion and cross moves for an Order granting spoliation sanctions or other discovery relief pursuant to CPLR 3126, and granting Plaintiff leave to serve an amended notice of claim *nunc pro tunc* (Seq. No. 4).

Defendant opposes Plaintiff’s cross motion.

This medical malpractice action involves Decedent’s treatment and care at NYCHHC/Coney Island Hospital from November-December 2018. The notice of claim filed in February 2019 asserted a failure to diagnose and treat his cardiovascular condition on or about

November 12, 2018. Plaintiff later filed a Bill of Particulars asserting various other claims and injuries, including hospital-acquired bacterial infections and pressure injuries.

It is a condition precedent for all lawsuits against a municipal entity that the plaintiff must first file a notice of claim, within 90 days after the claim arose. The notice must set forth “the nature of the claim,” “the time when, the place where and the manner in which the claim arose,” and “the items of damage or injuries claimed to have been sustained so far as then practicable” (Gen. Mun. Law § 50-e [1] [b]; *see also* Uncon. Law § 7401). The purpose of this requirement is to enable the municipality to timely “collect evidence and evaluate the merit of a claim” (*Ruark v City of Glen Cove*, 164 AD3d 1492, 1493 [2d Dept 2018]). Thus, the notice must include “information sufficient to enable the city to investigate the claim” (*Brown v City of New York*, 95 NY2d 389, 393 [2000], quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981]).

“A notice of claim may be amended only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, not to substantively change the nature of the claim or the theory of liability” (*Castillo v Kings County Hosp. Ctr.*, 149 AD3d 896, 897 [2d Dept 2017]; *see* Gen. Mun. Law § 50-e [6]). In *Castillo*, the plaintiff’s notice of claim alleged injuries from negligent insertion of a Foley catheter, and he later sought to amend the notice to assert a nerve injury related to his surgical procedure during the same admission. The Second Department held it was impermissible to amend the notice of claim in a medical malpractice action when “the proposed amendments . . . asserted a new injury and added a new theory of liability” (*i.d.*).

Here, Plaintiff filed a notice of claim against NYCHHC on or about February 20, 2019. The notice of claim asserted personal injuries, pain and suffering, wrongful death, and loss of

consortium on behalf of Decedent and his spouse. Specifically, the claim arose from “failure to diagnose, detect, and properly treat claimant’s cardiovascular condition.”

On February 12, 2020, Plaintiff commenced this action. Plaintiff’s Complaint dated July 21, 2020¹ asserted claims of medical malpractice against NYCHHC for failing to “properly monitor, treat, diagnose, and care for the plaintiff, including but not limited to negligently failing to diagnose and treat plaintiff’s decedent’s cardiovascular condition.” A 50-h hearing was held, which according to the movants “focused solely on the cardiovascular allegations as pled in the notice of claim.”

On November 28, 2023, over five years after the notice of claim, Plaintiff filed and served a Bill of Particulars. The movants argue this Bill of Particulars asserted new claims and theories of liability wholly unrelated to diagnosis and treatment of Decedent’s cardiovascular condition, as stated in the notice of claim. These included the following new claims related to prevention, diagnosis, and treatment of stroke/cerebrovascular accident, infectious disease, pulmonary edema, and pressure ulcers:

- negligently, carelessly and unskillfully failing to properly and/or timely diagnose and treat patient’s stroke/cerebrovascular accident;
- negligently, carelessly and unskillfully misplacing nasogastric (NG tube);
- negligently, carelessly and unskillfully causing patient to suffer a Hospital-Acquired Infection during his admission at Coney Island Hospital;

¹ Plaintiff later filed an Amended Complaint on August 2, 2023, which was identical to the original Complaint but reflected the appointment of an Administrator rather than “Proposed Administrator” of Decedent’s estate.

- negligently, carelessly and unskillfully causing patient to suffer a Methicillin-Resistant Staphylococcus Aureus (MRSA) bacteremia infection during his admission at Coney Island Hospital;
- negligently, carelessly and unskillfully failing to use proper sterilization techniques;
- negligently, carelessly and unskillfully failing to wash hands between patients or inadequate handwashing;
- negligently, carelessly and unskillfully failing to adequately clean of the patient's room and furnishings;
- inadequate infection control training;
- negligently, carelessly and unskillfully failing to wear appropriate sterile gloves and gowns;
- negligently, carelessly and unskillfully failing to change personal protective equipment between patients;
- negligently, carelessly and unskillfully failing to use proper sterilization techniques for supplies, catheters, tubes and/or implants;
- negligently, carelessly and unskillfully failing to keep intubation procedure reports and flowsheets;
- negligently, carelessly and unskillfully failing to anticipate the need for long-term enteral nutritional support and plan for same;
- negligently, carelessly and unskillfully failing to diagnose, to detect, and/or to recognize and/or to appreciate patient's elevated white blood cell count/ leukocytosis;
- negligently, carelessly and unskillfully failing to diagnose, to detect, and/or to recognize and/or to appreciate patient's fever spike on November 26, 2018;
- negligently, carelessly and unskillfully failing to order a blood and/or sputum culture on November 26, 2018;
- negligently, carelessly and unskillfully failing to timely test the blood culture and sputum taken on December 3, 2018;
- negligently, carelessly and unskillfully allowing plaintiff's decedent's congestive changes/pulmonary edema/bilateral infiltrates to worsen;

- negligently, carelessly and unskillfully allowing plaintiff's decedent to suffer Foley catheter-associated trauma;
- negligently, carelessly and unskillfully allowing plaintiff's decedent to develop decubitus ulcers/ pressure ulcers during his hospitalization;

The Bill of Particulars asserts that Decedent sustained injuries including MRSA infection, pneumonia, infiltrate, edema, pleural effusions, atelectasis, leukocytosis, hematuria due to traumatic placement of foley catheter, bladder rupture, congestion, decubitus/pressure ulcers, acute kidney injury, septic shock, and malnourishment. Additionally, the Bill of Particulars asserts a claim for "failing to obtain informed consent." The movants argue that none of these theories of liability and damages were adequately noticed in the February 20, 2019 notice of claim.

In their opposition and cross motion, Plaintiff argues that the Bill of Particulars merely "amplifies" their existing claims of medical malpractice and negligence, and that all the injuries including infections and pressure ulcers "arise out of the same incident and period" of Decedent's November-December 2018 hospital admission. In the alternative, Plaintiff requests leave to amend the notice of claim to include references to the prevention, diagnosis, and treatment of Decedent's "stroke/cerebrovascular accident(s), pneumonia, sepsis, bacterial infection (including MRSA), kidney injury, and associated complications."

The Court finds that the original notice of claim dated February 20, 2019 did not assert claims as to the "nature of the claim" or damages/injuries sustained beyond Decedent's cardiovascular diagnosis and treatment. It certainly did not include claims for stroke, infectious

disease (including MRSA and pneumonia), or pressure ulcers. Contrary to Plaintiff's argument, these are not merely "sequelae or consequences" of the treatment alleged in their notice of claim but represent entirely different alleged departures from the standard of care. Additionally, the original notice of claim did not include an allegation of lack of informed consent, a separate cause of action under the Public Health Law.

Plaintiff cannot amend the notice of claim at this stage to assert new injuries and theories of liability against NYCHHC, as this constitutes a substantive change and not a good faith, nonprejudicial "mistake or omission." Further, a new notice of claim would be untimely, and the court has no discretion to permit an extension of the 90-day period, because the statute of limitations period has expired (*see* Gen. Mun. Law 50-e [5]).

For these reasons, Defendants' motion to dismiss (Seq. No. 3) is **granted to the extent** of striking all claims in the Bill of Particulars other than those for cardiovascular injury, as well as dismissing the cause of action for lack of informed consent. Further, the part of Plaintiff's cross motion (Seq. No. 4) seeking to amend the notice of claim or file a late notice of claim is **denied**.

Turning to the portion of Plaintiff's cross motion (Seq. No. 4) seeking sanctions for spoliation and discovery non-compliance, Plaintiff contends that there are "missing charts, code reports, procedure documentation, and progress notes" which have been withheld or which NYCHHC failed to maintain. Plaintiff's specific allegation is that the medical records they received from NYCHHC do not include "procedure reports for nasogastric tube placement and intubation, daily progress notes [and] flow sheets," and "code blue and resuscitation documentation."

Plaintiff has failed to establish at this stage of discovery that NYCHHC has “negligently lost or intentionally destroyed key evidence” warranting spoliation sanctions (*see Dagro Assoc. II, LLC v Chevron U.S.A., Inc.*, 206 AD3d 793, 794 [2d Dept 2022]). The part of the motion is therefore **denied**.

Accordingly, it is hereby:

ORDERED that the portion of Defendant’s motion (Seq. No. 3) to dismiss claims in Plaintiff’s Complaint and Bill of Particulars other than for cardiovascular injury is **granted**, and it is further

ORDERED that the portion of Defendant’s motion (Seq. No. 3) to dismiss the claim/cause of action for lack of informed consent is **granted**; and it is further

ORDERED that the part of Plaintiff’s cross motion (Seq. No. 4) seeking spoliation sanctions is **denied**; and it is further

ORDERED that the part of Plaintiff’s cross motion (Seq. No. 4) seeking leave to amend the notice of claim is **denied**.

This constitutes the decision and order of this Court.

ENTER.



**Hon. Consuelo Mallafre Melendez
J.S.C.**