SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

STEPHANIE DUHART-NEAL, as Administrator of the Estate of SAMUEL NEAL, JR.,

Plaintiff,

-vs-

DECISION AND ORDER
Index No. E2022009742

MONROE COUNTY, MONROE COUNTY HOSPITAL, and JOHN/JANE DOES #1-5 (fictitiously named),

Defendants.

APPEARANCES: **NEIL FLYNN, ESQ.**
The Russell Friedman Law Group, LLP
Attorney for Plaintiff

JOHN P. BRINGEWATT, ESQ.
Monroe County Attorney
ALISSA M. BRENNAN, ESQ., Of Counsel
Attorney for Defendants

VICTORIA M. ARGENTO, J.

Defendants have moved to dismiss the complaint pursuant to CPLR 3211(a)(2), (5), and (7). Plaintiff opposes the motion and has cross-moved for leave to reargue and vacate that part of the Court's Decision and Order dated March 20, 2023, which held that her claims were barred by the statute of limitations. Defendant's motion is denied and plaintiff's motion is granted for the reasons that follow.

The Court will begin by addressing plaintiff's motion to reargue. As an initial matter, defendant urges the Court not to consider plaintiff's motion papers because they were served and filed four days late pursuant to CPLR 2214(d). Although plaintiff's

filings were untimely, "[c]ourts have discretion to overlook late service where the nonmoving party sustains no prejudice" (*Bucklaew v. Walter*, 75 AD3d 1140, 1141 [4th Dept. 2010]). Here, the delay was short, the motion papers did not raise new facts, and defendants were not prejudiced as they were able to file reply papers (*cf Mosheyeva v. Distefano*, 288 AD2d 448 [2nd Dept. 2001]; *Risucci v. Zeal Management Corp.*, 258 AD2d 512 [2nd Dept. 1999]). The Court will therefore consider plaintiff's motion.

A motion for leave to reargue may be granted in the court's discretion where the moving party makes a showing that "the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision" (*Smith v. City of Buffalo*, 122 AD3d 1419, 1420 [4th Dept. 2014]; *see also Robinson v. Viani*, 140 AD3d 845, 847 [2nd Dept. 2016]; CPLR 2221[d]). Here, the motion for leave to reargue is granted because the Court overlooked or misapprehended the applicability of CPLR 210(a) to this case.

By way of background, plaintiff filed a notice of claim with defendants on or about August 25, 2021, seeking to "recover money damages for personal injuries, pain and suffering, medical expenses and related damages incurred by [decedent]...by reason of the negligence, recklessness, gross negligence and carelessness of [defendants]...regarding the stage IV bedsore suffered by [decedent]." Plaintiff subsequently moved for an order permitting her to file a second – late – notice of claim upon defendants which would supplement the prior notice to include claims for fear of impending death, deprivation of statutory rights, wrongful death, and medical malpractice which allegedly caused decedent's bedsore to become infected, leading to "sepsis and

ultimately his death."

The Court denied the motion for two reasons. First, the Court determined that it did not have the power to authorize the filing of a late notice of claim regarding the bedsore because the statute of limitations for that action had expired. Second, with regard to the claims involving sepsis and wrongful death, the Court denied the motion after considering the factors set forth in General Municipal Law §50-e(5).

Plaintiff argues the Court erred when it determined the statute of limitations had run for personal injury causes of action relating to the bedsore because, among other things, CPLR 210(a) extended the statute of limitations one year from decedent's death.

CPLR 210(a) states:

> "Death of Claimant. Where a person entitled to commence an action dies before the expiration of the time within which the action must be commenced and the cause of action survives, an action may be commenced by his representative within one year after his death."

The first step in deciding how CPLR 210(a) applies to this case is to determine the statute of limitations deadline. The statute of limitations for filing a personal injury claim against a county is "one year and ninety days after the happening of the event upon which the claim is based" (General Municipal Law 50-i[1]). The first notice of claim – filed on August 25, 2021 – stated decedent's bedsore "has now reached stage IV" and decedent's "doctors [have] opined that the bedsore will be permanent." Plaintiff argues that a "reasonable interpretation" of the statement that the bedsore "will be" permanent is: "at some unspecified time, some unidentified doctors told some unidentified person(s) that, in the unidentified doctors' opinion, if Claimant continues to receive the deficient care

provided by Defendants, the bedsore will become permanent at some unknown date in the future." The Court finds this interpretation unreasonable.

If something "will" happen it is inevitable unless the word "will" is accompanied by a conditional word (i.e. if, unless, until). Here, the notice said the bedsore "will be permanent," not that it "could become permanent if defendants continue to provide inadequate care and/or treatment." If plaintiff wanted to say that she could have. The clear implication and only reasonable interpretation of the phrase "will be permanent" in the context of the notice of claim is that it meant the condition will not cease; in other words it "will be" something the decedent will suffer from for the rest of his life. Plaintiff is asking the Court to read "will be" as "could be;" the Court declines to do so because those phrases have two very different meanings.

Having determined the notice of claim identified the bedsore as being permanent by August 25, 2021, the statute of limitations would expire 1 year and 90 days later, on November 23, 2022. Plaintiff commenced this action on November 28, 2022, which is why the Court initially determined the statute of limitations had expired. However, plaintiff now argues, for the first time, that CPLR 210(a) applies. The Court agrees.

Contrary to defendant's contention, the decedent was the "claimant" identified in the first notice of claim and "a person entitled to commence an action" pursuant to CPLR 210(a). Decedent died on February 19, 2022, with 9 months and 4 days left on the statute of limitations. Although defendant disagrees, the decedent died with less than one year remaining on the statute of limitations, thus CPLR 210(a) applies (*see Barnes v. County of Onondaga,* 103 AD2d 624 [4th Dept. 1984]; *Matter of Gelpi v. New York City Health*

& Hosps.Corp., 90 AD2d 503 [2nd Dept. 1982]). Having made this determination, the Court need not address the parties' arguments concerning whether the continuous treatment doctrine applies.

Accordingly, plaintiff's motion to reargue and vacate that portion of the Court's March 20, 2023 Decision and Order which held that the statute of limitations for personal injuries suffered by plaintiff had expired is granted. This does not mean the Court is vacating its decision regarding the filing of a late notice of claim. Plaintiff's late notice of claim remains denied in its entirety after having considered the factors set forth in General Municipal Law 50-e(5).

Turning to defendant's motion to dismiss, which argues for dismissal on four grounds: (1) the statute of limitations for personal injuries expired before the commencement of this action; (2) plaintiff failed to file a certificate of merit pursuant to CPLR 3012-a regarding the medical malpractice claim; (3) plaintiff's claims for punitive damages must be dismissed because they may not be awarded against the County or any individual the County must indemnify; and (4) all causes of action set forth in the complaint that include allegations not included in plaintiff's original notice of claim must be dismissed.

As stated above, the Court has determined that the statute of limitations for plaintiff's personal injuries did not expire before commencement of this action, so the motion to dismiss on that ground is denied.

Plaintiff concedes she has not filed a certificate of merit pursuant to CPLR §3012-a, but is correct that this alone does not require dismissal (*see Dye v. Leve*, 181 AD2d 89

[4th Dept. 1992]). However, the Court's Decision and Order denying plaintiff's motion to file a late notice of claim that would have included a claim for medical malpractice renders this argument moot. Based on that Decision and Order, defendant's motion to dismiss plaintiff's medical malpractice claim (plaintiff's seventh cause of action) is granted because medical malpractice allegations were not included in the original notice of claim.

Plaintiff has conceded that she cannot recover punitive damages from the County (*see Krohn v. New York City Police Dept.*, 2 NY3d 329, 336 [2004]), therefore, that portion of her third cause of action which seeks to recover punitive damages is dismissed.

Defendant's motion to dismiss plaintiff's causes of action for statutory violations (second cause of action), and negligent hiring/retention (sixth cause of action) are granted because those claims were not included in plaintiff's original notice of claim. The motion to dismiss the first, fourth, and fifth causes of action are denied because the allegations contained therein were encompassed by the allegations in the first notice of claim.

This constitutes the Decision and Order of the Court.

Dated this 9th day of May, 2023, at Rochester, New York.

HON. VICTORIA M. ARGENTO
SUPREME COURT JUSTICE