

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D22854
O/prt

_____AD3d_____

Submitted - March 11, 2009

REINALDO E. RIVERA, J.P.
MARK C. DILLON
JOSEPH COVELLO
RANDALL T. ENG, JJ.

2008-06299

DECISION & ORDER

In the Matter of Humza Ali, etc., respondent,
v New York City Health & Hospitals
Corporation, appellant.

(Index No. 6784/08)

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Stephen J. McGrath and Cheryl Payer of counsel), for appellant.

Gair, Gair, Conason, Steigman & Mackauf, New York, N.Y. (Rhonda E. Kay of counsel), for respondent.

In a proceeding pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim, the respondent New York City Health & Hospitals Corporation appeals from an order of the Supreme Court, Kings County (Steinhardt, J.), dated May 8, 2008, which granted the petition.

ORDERED that the order is reversed, on the law, with costs, and the petition is denied.

The Supreme Court improvidently exercised its discretion in granting the petition for leave to serve a late notice of claim for the alleged medical malpractice. The balancing of factors under General Municipal Law § 50-e(5) predominates against permitting service of a late notice of claim in this case. The mere fact that the New York City Health & Hospitals Corporation (hereinafter the hospital) was in possession of the infant's medical records did not, without more, establish that the hospital had actual knowledge of the essential facts constituting the claim (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537; *Arias v New York City Health & Hosps. Corp. (Kings County Hosp. Ctr.)*, 50 AD3d 830, 832). The petitioner failed to satisfactorily explain a nine-year delay in

April 21, 2009

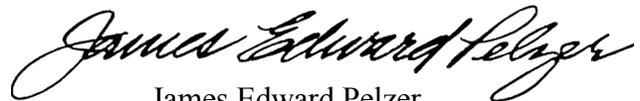
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seeking to serve a late notice of claim (*see Beretey v New York City Health & Hosps. Corp. [Elmhurst Hosp. Ctr.]*, 56 AD3d 591, 594). The delay is not directly attributable to the infant petitioner's infancy (*see Matter of Doe v Goshen Govt. School Dist.*, 13 AD3d 526; *Matter of Lennon v Roosevelt Union Free School Dist.*, 6 AD3d 713). Moreover, the petitioner failed to meet his burden of establishing that the hospital has not been prejudiced in maintaining its defenses on the merits (*see Casias v City of New York*, 39 AD3d 681; *Matter of Flores v County of Nassau*, 8 AD3d 377, 378) given the lengthy and unexcused delay in seeking to serve the late notice of claim (*see Beretey v New York City Health & Hosps. Corp. [Elmhurst Hosp. Ctr.]*, 56 AD3d at 594; *Matter of King v New York City Health & Hosps. Corp.*, 42 AD3d 499, 501).

RIVERA, J.P., DILLON, COVELLO and ENG, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court