

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

D32812
O/kmb

_____AD3d_____

Submitted - October 19, 2011

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
JOHN M. LEVENTHAL
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2011-00676

DECISION & ORDER

In the Matter of Kenneth Magana, etc., et al.,
respondents, v Westchester County Health Care
Corporation, et al., appellants.

(Index No. 25180/10)

Martin Clearwater & Bell, LLP, New York, N.Y. (Stewart G. Milch, John L.A.
Lyddane, and Laurie Ann Annunziato of counsel), for appellants.

Barton Barton & Plotkin, LLP, New York, N.Y. (Thomas P. Giuffra and Jeremy A.
Hellman of counsel), for respondents.

In a proceeding pursuant to General Municipal Law § 50-e for leave to serve a late notice of claim, Westchester County Health Care Corporation and Westchester Medical Center appeal, as limited by their brief, from so much of an order of the Supreme Court, Westchester County (Loehr, J.), entered November 17, 2010, as granted that branch of the petition which was for leave to serve a late notice of claim on behalf of the petitioner Kenneth Magana, by his mother and natural guardian, Ilsi Salguero.

ORDERED that the order is reversed insofar as appealed from, on the law, on the facts, and in the exercise of discretion, with costs, that branch of the petition which was for leave to serve a late notice of claim on behalf of the petitioner Kenneth Magana is denied, and the proceeding is dismissed.

November 9, 2011

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HEALTH CARE CORPORATION

In exercising its discretion to grant leave to serve a late notice of claim, a court must consider various factors, including whether (1) the claimant has demonstrated a reasonable excuse for failing to serve a timely notice of claim, (2) the claimant was an infant, or mentally or physically incapacitated, (3) the public corporation acquired actual knowledge of the facts constituting the claim within 90 days of its accrual or a reasonable time thereafter, and (4) the delay would substantially prejudice the public corporation in defending on the merits (*see* General Municipal Law § 50-e[5]; *Matter of Iacone v Town of Hempstead*, 82 AD3d 888; *Matter of Barnes v New York City Health & Hosps. Corp.*, 69 AD3d 934; *Matter of Chambers v Nassau County Health Care Corp.*, 50 AD3d 1134, 1135).

While the petitioner Kenneth Magana (hereinafter the petitioner) is an infant, the factor of infancy alone does not compel the granting of a petition for leave to serve a late notice of claim (*see Contreras v KBM Realty Corp.*, 66 AD3d 627, 629; *Matter of Ali v New York City Health & Hosps. Corp.*, 61 AD3d 860, 861; *Rowe v Nassau Health Care Corp.*, 57 AD3d 961, 962-963). The delays in serving the notice of claim and, thereafter, in commencing this proceeding pursuant to General Municipal Law § 50-e for leave to serve a late notice of claim, were not the product of the petitioner's infancy, and no other excuse was proffered for the delays (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 538; *Contreras v KBM Realty Corp.*, 66 AD3d at 629; *Rowe v Nassau Health Care Corp.*, 57 AD3d at 962-963; *Arias v New York City Health & Hosps. Corp. [Kings County Hosp. Ctr.]*, 50 AD3d 830, 832). Furthermore, the evidence submitted by the petitioner failed to establish that the appellants had actual knowledge of the essential facts constituting the claim within the requisite 90-day period or a reasonable time thereafter (*see Williams v Nassau County Med. Ctr.*, 6 NY3d at 538; *Argueta v New York City Health & Hosps. Corp. [Coney Is. Hosp.]*, 74 AD3d 713, 713-714; *Matter of Rios v Westchester County Healthcare Corp.*, 32 AD3d 540, 541-542; *Matter of Alessi v County of Nassau*, 85 AD2d 725, 726). Finally, the petitioner failed to establish that the appellants would not be substantially prejudiced in maintaining a defense on the merits as a result of the delay (*see Williams v Nassau County Med. Ctr.*, 6 NY3d at 539; *Argueta v New York City Health & Hosps. Corp. [Coney Is. Hosp.]*, 74 AD3d at 714; *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 152).

DILLON, J.P., DICKERSON, LEVENTHAL, AUSTIN and MILLER, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court