

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

D33132
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Submitted - November 16, 2011

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

2010-11612

DECISION & ORDER

Jedina Barnaman, appellant, v New York City
Health and Hospitals Corporation, et al.,
respondents.

(Index No. 23382/08)

Nnebe & Associates, P.C., Williamsburg, N.Y. (O. Valentine Nnebe of counsel), for
appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Kristin M. Helmers and
Norman Corenthal of counsel), for respondents.

In an action, inter alia, to recover damages for medical malpractice and lack of
informed consent, the plaintiff appeals from an order of the Supreme Court, Queens County
(O'Donoghue, J.), entered October 22, 2010, which granted the defendants' motion to dismiss the
complaint for failure to serve a timely notice of claim and denied her cross motion for leave to serve
a late notice of claim and to deem the notice of claim served nunc pro tunc.

ORDERED that the order is affirmed, with costs.

Service of a notice of claim within 90 days after accrual of the claim is a condition
precedent to commencing an action against the defendant New York City Health and Hospitals
Corporation (hereinafter HHC) (*see* McKinney's Uncons Laws of NY § 7401[2] [L 1969, ch 1016,
§ 1 (§ 20[2]), as amended by L 1990, ch 804, § 122]; General Municipal Law § 50-e[1][a];
Scantlebury v New York City Health & Hosps. Corp., 4 NY3d 606, 609; *Argudo v New York City
Health & Hosps. Corp.*, 81 AD3d 575, 576; *Wade v New York City Health & Hosps. Corp.*, 59 AD3d
528, 530; *Urena v New York City Health & Hosps. Corp.*, 35 AD3d 446, 446).

December 6, 2011

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The plaintiff was required to serve a timely notice of claim upon HHC in connection with her action against the defendants Queens Hospital Center and Kenneth A. Nakdimen (*see Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662, 665; *DeNaro v Rosalia*, 59 AD3d 584, 587; *W.E. Rest., Inc. v Wilson*, 38 AD3d 762; *DeRise v Kreinik*, 10 AD3d 381, 382). The plaintiff served a notice of claim upon the Comptroller of the City of New York and upon Queens Hospital Center, a medical facility operated by HHC, within 90 days after her claim accrued. The City of New York and HHC are separate entities for purposes of a notice of claim (*see Scantlebury v New York City Health & Hosps. Corp.*, 4 NY3d at 611; *Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662). Accordingly, service upon the Comptroller of the City of New York was insufficient to constitute service upon HHC, the proper party to be served (*see Scantlebury v New York City Health & Hosps. Corp.*, 4 NY3d at 613; *King v Wu*, 18 AD3d 716, 717; *Stallworth v New York City Health & Hosps. Corp.*, 243 AD2d 704). Furthermore, serving a notice of claim upon Queens Hospital Center did not satisfy the statutory requirements mandating notification to the proper public body or official, in this case a director or officer of HHC or the Corporation Counsel (*see McKinney's Uncons Laws of NY* § 7401[2]; *General Municipal Law* § 50-e[3][a]; *Viruet v City of New York*, 97 NY2d 171, 176; *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 547-548; *Bender v New York City Health & Hosps. Corp.*, 38 NY2d at 665; *Camarella v East Irondequoit Cent. School Bd.*, 34 NY2d 139, 142; *Chesney v Board of Educ. of Union Free School Dist. No. 5*, 5 NY2d 1007; *Munroe v Booth*, 305 NY 426).

The plaintiff contends that the savings provision of *General Municipal Law* § 50-e(3)(c) is applicable here because Queens Hospital Center forwarded the notice of claim to HHC. However, assuming that service was made upon a proper party, *General Municipal Law* § 50-e(3)(c) provides, in pertinent part, that service shall be valid if “the notice is actually received by a proper person” within 90 days after the claim accrued (*see Scantlebury v New York City Health & Hosps. Corp.*, 4 NY3d at 611; *Munroe v Booth*, 305 NY 426). The record reveals that the notice of claim was actually received by HHC’s Office of Legal Affairs over three months after the 90-day statutory period expired. In the absence of evidence that the notice of claim was actually received by a proper person within 90 days after the claim accrued, service upon HHC cannot be found to be valid under *General Municipal Law* § 50-e(3)(c) (*see Herrera v Duncan*, 13 AD3d 485, 486; *Paladino v Commack Union Free School Dist.*, 307 AD2d 284, 285).

Contrary to the plaintiff’s contention, the defendants were under no obligation to plead, as an affirmative defense, the plaintiff’s failure to comply with the statutory notice of claim requirement (*see Laroc v City of New York*, 46 AD3d 760, 761; *Maxwell v City of New York*, 29 AD3d 540, 541; *Lynch v New York City Tr. Auth.*, 12 AD3d 644, 646). Furthermore, the defendants’ participation in pretrial discovery did not preclude them from raising the untimeliness of the notice of claim (*see Laroc v City of New York*, 46 AD3d at 761; *Wade v New York City Health & Hosps. Corp.*, 16 AD3d 677; *Hall v City of New York*, 1 AD3d 254, 256).

Since the plaintiff failed to make a timely application pursuant to *General Municipal Law* § 50-e(5) for leave to serve a late notice of claim upon HHC, the defendants are entitled to dismissal of the complaint (*see Pierson v City of New York*, 56 NY2d 950; *Argudo v New York City Health & Hosps. Corp.*, 81 AD3d at 576-577; *Laroc v City of New York*, 46 AD3d 760; *Maxwell v City of New York*, 29 AD3d at 541). Accordingly, the Supreme Court properly granted the

defendants' motion to dismiss the complaint for failure to serve a timely notice of claim and properly denied the plaintiff's cross motion for leave to serve a late notice of claim and to deem the notice of claim served nunc pro tunc.

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

ENTER:


Aprilanne Agostino
Clerk of the Court