

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 11-01729

PRESENT: SCUDDER, P.J., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

TIMOTHY C. CLARK, CLAIMANT-RESPONDENT,

V

MEMORANDUM AND ORDER

ROSWELL PARK CANCER INSTITUTE CORPORATION,
DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (JENNIFER L. NOAH OF COUNSEL),
FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (MICHAEL R. DRUMM OF COUNSEL), FOR
CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered December 3, 2010 in a medical malpractice action. The order granted the application of claimant for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Contrary to defendant's contention, the Court of Claims did not abuse its discretion in granting claimant's application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). "The court is vested with broad discretion to grant or deny [such an] application" (*Wetzel Servs. Corp. v Town of Amherst*, 207 AD2d 965). Although claimant failed to offer a reasonable excuse for his failure to serve the notice of claim within the 90-day statutory period (see § 50-e [1] [a]), that failure " 'is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [defendant]' " (*Hale v Webster Cent. School Dist.*, 12 AD3d 1052, 1053; see *Matter of LaMay v County of Oswego*, 49 AD3d 1351, 1352, lv denied 10 NY3d 715). Here, defendant had actual notice of the facts constituting the claim by virtue of its possession of medical records pertaining to claimant's care and treatment while he was a patient of defendant (see *Kavanaugh v Memorial Hosp. & Nursing Home*, 126 AD2d 930, 931). The treatment provided by defendant forms the basis of the alleged malpractice, and the relevant facts are contained in defendant's own records (see *Rechenberger v Nassau County Med. Ctr.*, 112 AD2d 150, 152). Finally, we conclude that defendant

was not prejudiced as a result of the delay in the filing of a notice of claim.

Entered: February 17, 2012

Frances E. Cafarell
Clerk of the Court