

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

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CA 24-00472

PRESENT: WHALEN, P.J., CURRAN, SMITH, OGDEN, AND HANNAH, JJ.

EDWARD H. BUSH, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF CYNTHIA R. BUSH, DECEASED,
CLAIMANT-APPELLANT,

V

MEMORANDUM AND ORDER

COUNTY OF LEWIS, BY AND THROUGH ITS AGENTS,
OFFICERS AND/OR EMPLOYEES, AND LEWIS COUNTY
GENERAL HOSPITAL, BY AND THROUGH ITS AGENTS,
OFFICERS AND/OR EMPLOYEES, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR
CLAIMANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY J. SCHOONMAKER OF COUNSEL), FOR
RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Lewis County (James P. McClusky, J.), entered March 11, 2024. The order denied in part the application of claimant to deem a notice of claim timely served, or in the alternative, 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: On September 9, 2022, claimant's decedent was admitted to respondent Lewis County General Hospital (LCGH), a municipal hospital owned by respondent County of Lewis, for treatment of injuries arising from a fall. She was later re-admitted to LCGH for rehabilitation and remained under its care until September 30, 2022. While decedent was a patient at LCGH, she allegedly fell while unattended, resulting in complications that required further surgery. Decedent died from sepsis on November 17, 2022. On November 9, 2023, claimant's counsel sent a demand letter outlining the details of decedent's care at respondents' facilities and the potential claims against respondents for medical malpractice and wrongful death. On January 17, 2024, claimant served a notice of claim, which was rejected as untimely.

Claimant moved for an order allowing the notice of claim to be accepted and deemed timely served or, alternatively, granting leave to serve a late notice of claim. Supreme Court concluded that the notice of claim was timely only with respect to the wrongful death claim and

thus denied the application with respect to all other claims. In appeal No. 1, claimant appeals from that order. Claimant thereafter moved for leave to renew his application insofar as it sought leave to serve a late notice of claim with respect to the medical malpractice claims. Respondents moved for leave to renew their opposition to claimant's prior application, asserting that claimant had mischaracterized the date on which he was appointed executor of decedent's estate and that the notice of claim with respect to the wrongful death claim was untimely when measured from the date he was originally appointed. Respondents further argued that, upon renewal, the court should deny claimant's application for leave to serve a late notice of claim with respect to the wrongful death claim. The court denied claimant's motion for leave to renew, granted respondents' motion for leave to renew and, upon renewal, granted claimant leave to serve a late notice of claim with respect to his claim for wrongful death. In appeal No. 2, claimant appeals and respondents cross-appeal from that order. We affirm in both appeals.

Contrary to claimant's contention in appeal No. 1, the court properly denied that part of claimant's application with respect to the medical malpractice claims. Claimant was required to commence the action not more than one year and 90 days after those claims accrued (see General Municipal Law § 50-i [1]). The claims arose at the time of the "last treatment where there is continuous treatment," which was September 30, 2022 (CPLR 214-a; see *Marlowe v DuPont deNemours & Co.*, 112 AD2d 769, 771 [4th Dept 1985]; see also *Allende v New York City Health & Hosps. Corp.*, 90 NY2d 333, 337-339 [1997]). Thus, the court properly concluded that it lacked authority to grant claimant's application insofar as it sought leave to serve a late notice of claim with respect to the medical malpractice claims (see General Municipal Law §§ 50-e [5]; 50-i [1]). To the extent that claimant's claims also sound in ordinary negligence, the court likewise lacked authority to grant claimant's application insofar as it sought leave to serve a late notice of those claims (see § 50-i [1]).

With respect to appeal No. 2, we reject claimant's contention on his appeal that the court erred in denying his motion for leave to renew. Claimant failed to show any "facts not offered on the prior [application] that would change the prior determination" (CPLR 2221 [e] [2]).

We reject respondents' contention on their cross-appeal that the court abused its discretion in granting claimant's application insofar as it sought leave to serve a late notice of claim for wrongful death. "It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant has demonstrated a reasonable excuse for the delay, whether the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in maintaining a defense on the merits" (*Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016] [internal quotation marks omitted]). "Absent a clear abuse of the court's broad discretion, the

determination of an application for leave to serve a late notice of claim will not be disturbed" (*Matter of Szymkowiak v New York Power Auth.*, 162 AD3d 1652, 1653-1654 [4th Dept 2018] [internal quotation marks omitted]).

Here, although claimant failed to provide a reasonable excuse for the delay, we conclude that the remaining factors support the court's exercise of discretion in granting claimant's application upon renewal. Claimant's 90-day period within which to serve the notice of claim for wrongful death began to run when he was appointed as the representative of decedent's estate on December 23, 2022 (see General Municipal Law § 50-e [1] [a]; [5]). Claimant's demand letter, however, was not sent until November 9, 2023. Although respondents did not learn of the essential facts constituting the claim within 90 days of claimant's appointment, i.e., March 23, 2023, respondents did acquire that knowledge within a reasonable time thereafter (see *Matter of Diegelman v City of Buffalo*, 148 AD3d 1692, 1694 [4th Dept 2017]; see also *Leonard v Motor Veh. Acc. Indem. Corp.*, 175 AD3d 1795, 1796 [4th Dept 2019]). Moreover, claimant made a sufficient showing that the late notice would not substantially prejudice respondents, and respondents failed to "respond with a particularized evidentiary showing that [they] will be substantially prejudiced if the late notice is allowed" (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 467 [2016], *rearg denied* 29 NY3d 963 [2017]).