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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB Justice PART 15

GIOVANNI HERNANDEZ

- v -

NYC HEALTH + HOSPITALS CORP.

INDEX NO. 123535/01

MOTION DATE 1-4-02

MOTION SEQ. NO. 001

MOTION CAL. NO. 2

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is granted in accordance with the accompanying memorandum decision and judgment of the court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 2-13-02

WALTER B. TOLUB J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15
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In the Matter of the Application of
GIOVANNI HERNANDEZ, an Infant, by his
mother and natural guardian, OLIVERIA
MORAN,

Petitioner,

Index No. 123535/01
Mtn Seq. No. 001

FOR AN ORDER GRANTING INFANT PETITIONER
LEAVE TO SERVE A LATE NOTICE OF CLAIM
PURSUANT TO GML SECTION 50-E(5), and
FOR CERTAIN OTHER RELIEF THEREIN, and

FOR AN ORDER, PURSUANT TO CPLR 3102(C),
DIRECTING RESPONDENT TO FURNISH
PETITIONER'S ATTORNEY WITH A COMPLETE,
LEGIBLE COPY OF INFANT PETITIONER'S
COMPLETE HOSPITAL AND CLINIC RECORDS,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORP.
(METROPOLITAN HOSPITAL),

Respondent.

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WALTER B. TOLUB, J.:

The infant petitioner, Giovanni Hernandez, by his mother and natural guardian, Oliveria Moran, moves, pursuant to General Municipal Law ("GML") § 50-e[5], for an order permitting service of a late notice of claim upon respondent, New York City Health and Hospitals Corp. ("HHC"). Petitioner also moves, pursuant to CPLR 3102(c), for an order directing respondent to produce a copy of the petitioner infant's hospital records. He further seeks an order directing respondent's to conduct an immediate hearing,

pursuant to GML § 50-h, or, in the alternative, permitting him to commence an action prior to the conduct of that hearing.

The infant petitioner was born at Metropolitan Hospital on February 25, 1992. The alleged medical malpractice occurred during the:

> pregnancy, labor and delivery of the infant, and in the neonatal and pediatric care given him, specifically in failure to properly monitor infant's mother during her labor, and in failing to detect fetal distress, and in failing to perform a Caesarean Section for delivery. Further negligence occurred in premature discharge of infant after birth, and in the neonatal and pediatric care given him during his re-admissions to Metropolitan.

(Moving Papers, Ex. B, Proposed Notice of Claim, ¶ 3). As a consequence of the alleged medical malpractice, the infant petitioner:

> suffered severe lack of oxygen during labor, and after birth, with resultant permanent brain damage and persistent seizures, for which he is medicated to date. He has profound mental retardation, cognitive impairments, delayed developmental milestones in all areas of functioning, requiring special education, speech, language, physical and occupational therapy. Future earning capacity is entirely eliminated, as infant will require medical monitoring, physical, speech, language and physical therapy, as well as 24 hour supervision for the rest of his life, as well as the rendering of all ADLs on his behalf.

(Id., ¶ 4).

Almost ten years later, on December 19, 2001, by order to show cause, the infant petitioner commenced the instant proceeding for leave to serve a late notice of claim and other ancillary relief against respondent HHC, which owns and operates Metropolitan Hospital.

Generally, an application for leave to serve a late notice of claim must be brought within the one-year and ninety day period provided for by GML § 50-e. That limitation period, however, is subject to a toll for infancy of up to ten years from the date of accrual of the claim. In the instant petition, there is no dispute that the infant petitioner's application was made within the appropriate limitation period as tolled by his infancy.

The determination as to whether to grant leave to serve a late notice of claim is a question committed to the sound discretion of the court (see, Matter of Plantin v New York City Housing Auth., 203 AD2d 579, 580[2d Dept 1994]).

HHC argues that the instant petition should be denied because in order for the toll to apply there must be "a nexus between the infancy and delay" and "a showing of a meritorious cause of action". Both arguments are unavailing.

Contrary to HHC's contention, a petitioner is not required to establish that the delay is a product of the infancy (see, Matter of Kurz v New York City Health and Hosp. Corp., 174 AD2d 671, 672 [2d Dept 1991]). Nor is the fact that there has been no showing of a meritorious cause of action fatal to the infant petitioner's present application (see, Matter of Buddenhagen v Town of Brookhaven, 212 AD2d 605 [2d Dept 1995]). While all relevant factors should be considered, the key factors in determining whether leave to serve a late notice of claim should

be granted are: 1) whether the claimant has demonstrated a reasonable excuse for failing to serve a timely notice of claim; 2) whether the municipality acquired actual knowledge of the essential facts constituting the claim within ninety days after its accrual, or a reasonable time thereafter; and 3) whether the delay would substantially prejudice the municipality in maintaining its defense on the merits (Id.; GML § 50-e[5]).

In support of the instant petition, the infant petitioner submits the affidavit of his mother wherein she states the following:

> 2. That on February 24, 1992, at about 7:30 p.m., I was admitted to Metropolitan Medical Center, complaining that my water had broken and I was experiencing labor contractions.
>
> 3. That I was put on a stretcher, that the doctor told me I was only about 2 cm dilated, and that thereafter I was not attended to until the next afternoon. At about 3:30 p.m. the next afternoon, my sister visited me and found I was having trouble breathing. That when she told the nurses about my breathing difficulty, the doctors rushed me at once to the delivery room.
>
> 4. That my son, Giovanni, was then delivered, that he looked almost black, and was also having problems breathing. That although my son was discharged from the hospital some three days later, he appeared very nervous and jittery at home, and would not eat.
>
> 5. That I then took my baby son back to Metropolitan Hospital where he was re-admitted for about three weeks, the doctors telling me he was suffering from seizures, and giving him medicine for the same.
>
> 6. That, after being discharged from Metropolitan Hospital, my son was again re-admitted shortly

thereafter, remaining in Metropolitan for about two months.

7. That the doctors did not tell me the cause of my son's seizures and subsequent brain damages, but led me to believe it was something he was born with. That I believe my son's condition is due to the failure of the doctors to adequately care for me at the time of his birth, and to deliver him before he had breathing problems. My son recently had a genetic work-up, at Metropolitan Hospital, which I was told was negative.

8. That my son, today, still suffers from seizures, and falls frequently from seizures, and falls frequently from seizures, that he is very delayed in all areas of development, and requires physical, occupational, speech and language therapy, and that he attends special education program.

Based on the foregoing, the totality of the infant petitioner's condition and what his mother was led to believe with respect to his disability provide a sufficient basis upon which to find that a reasonable excuse exists for the delay in serving a notice of claim.

Respondent HHC claims that it will be prejudiced insofar as the employees with knowledge of the facts may no longer be in its employ. This contention, without more support, is merely speculative and is, therefore, insufficient to demonstrate prejudice (see, Matter of Kurz v New York City Health and Hosp. Corp., supra, 174 AD2d at 673).

As to the other factor, namely, actual knowledge, the Court observes that respondent HHC did not in any manner challenge the accuracy of the mother's version as to what transpired prior to and after the birth of the infant petitioner. Nor does respondent HHC claim that it no longer has in its possession the

infant petitioner's medical records. Under these circumstances, given that respondent HHC has in its possession the infant petitioner's medical records, which, based on the mother's statements, would indicate that the infant petitioner had an apparent disability that might have been related to his birth, the Court finds that respondent HHC had actual notice of the claim and the underlying facts within the limitation period (see, Matter of Kurz v New York City Health and Hosp. Corp., supra, 174 AD2d at 673; see also, Matter of Tomlinson v New York City Health and Hosp. Corp., 190 AD2d 806, 807 [2d Dept 1993]).

Respondent HHC's reliance on Matter of Matarrese v New York City Health and Hosp. Corp., 215 AD2d 7 (2d Dept 1995) for the proposition that possession of medical records is insufficient to demonstrate actual knowledge is misplaced. A closer reading of Matarrese, in which the Appellate Division, Second Department, denied the application for leave to serve a late notice of claim, reveals that where there are no other mitigating circumstances possession alone will not suffice to demonstrate actual knowledge. Here, in addition to possession, the infant petitioner has demonstrated a reasonable excuse for the delay and the lack of prejudice. In any event, the holding in Matarrese is not as compelling given that on appeal after remand the Appellate Division, Second Department, ultimately granted the application and permitted service of a late notice of claim (see, Matter of

Matarrese v New York City Health and Hosp. Corp., 247 AD2d 475 [2d Dept 1998]).

Accordingly, the petition is granted. Upon service of a copy of this order with notice of entry, the proposed notice of claim annexed to the moving papers (Ex. B) shall be deemed served nunc pro tunc. Further, within 30 days after service of a copy of this order with notice of entry, respondent HHC is directed to turnover a copy of the infant petitioner's entire medical record. Notwithstanding that a GML 50-h hearing has not been conducted, the infant petitioner is permitted to commence an action against respondent HHC.

This memorandum opinion constitutes the decision and judgment of the Court.

Dated: 2/13/02

HON. WALTER B. TOLUB, J.S.C.