

**Moody v New York City Health & Hospitals
Corporation**

2004 NY Slip Op 30224(U)

September 14, 2004

Supreme Court, New York County

Docket Number: 0102499/2004

Judge: Eileen Bransten

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

PRESENT: EILEEN BRANSTEN
J.S.C.
Justice

PART 6

Moody, Moody

- v -

NYC HAC

INDEX NO. 102499/04
MOTION DATE 6/29/04
MOTION SEQ. NO. 01
MOTION CAL. NO. 13

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Reply on cross-mom

Cross-Motion: Yes No

PAPERS NUMBERED	
1	
2	
3	
4	

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 16 2004
NEW YORK
COUNTY CLERK'S OFFICE

**IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM**

Dated: 9-14-04

Eileen Bransten
EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

-----X
MOODY T. MOODY, an Infant by Her Mother and Natural
Guardian DELISSER MOODY,

Plaintiffs,

-against-

Index No. 102499/04
Motion Date: 6/29/04
Motion Seq. No.: 01

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION (RENAISSANCE HEALTH CARE
NETWORK),

Defendant.

FILED

SEP 16 2004

NEW YORK
COUNTY CLERK'S OFFICE

-----X
PRESENT: EILEEN BRANSTEN, J.

Plaintiffs Moody T. Moody ("Moody") and Delisser Moody ("Ms. Moody") move for an order deeming the notice of claim previously served as timely filed, *nunc pro tunc*, or in the alternative, for leave to file a notice of claim on defendant New York City Health and Hospitals Corporation ("NYCHHC").

NYCHHC cross-moves pursuant to General Municipal Law § 50-i for an Order dismissing plaintiffs' complaint, or in the alternative, pursuant to General Municipal Law § 50-e, for an order denying plaintiffs' application to file a late Notice of Claim. NYCHHC also moves for an Order directing that plaintiffs purchase a new index number in the event that leave to file a late notice of claim is granted.

Background

Moody T. Moody was born at Harlem Hospital Center on June 8, 1994. Affirmation in Support of Order to Show Cause (“Aff. in Support”), at ¶ 5. Moody was taken to the pediatric clinic at Renaissance Health Care Network (“Renaissance”) for medical care on December 12, 1994 (age six months); January 27, 1995 (age seven months); and February 10, 1995 (age eight months). During her fourth visit to Renaissance on May 26, 1995, Moody was given her first blood lead test and was diagnosed with a blood lead level of 7.5 ug/dL. *Id.*, at ¶ ¶ 20-21. Subsequent to this visit, Moody was taken to Renaissance seventeen more times before her blood lead level was tested again. *Id.*, at ¶ 26. When her blood was tested again on May 31, 1996, her blood lead level had risen to 21.7 ug/dL. Two more tests were taken on June 7, 1996 and October 15, 1996, and the blood lead levels were 17 ug/dL and 9 ug/dL respectively. *Id.*, at ¶ 29.

Sometime in or around February 1997, Ms. Moody retained the law firm of Levy, Philips and Konigsberg. The firm represented her and her daughter in a negligence action against 49 Terrace Corp. and Heights Management Company. In that action, plaintiffs alleged that because of defendants’ negligence and recklessness, Moody inhaled and ingested lead paint and dust, causing her and her mother injury. Affirmation in Support of Cross-Motion & In Opposition (“Opp. Aff.”), at ¶ 6, Exhibit A. The action was commenced on February 4, 1997, and was ultimately dismissed after Levy, Phillips, and Konigsberg

were relieved as counsel. *Id.*, *see also*, Opp. Aff., Exhibits A, B, C, D. At some point in 1998, while the case was still active, Levy, Phillips, and Konigsberg obtained Moody's medical records from NYCHHC. Opp. Aff., at ¶ 6.

Sometime in or around 2000, Ms. Moody retained the firm of Fitzgerald and Fitzgerald. In April 2000, Fitzgerald and Fitzgerald requested a copy of Moody's medical records, and NYCHHC forwarded the records on July 14, 2000. Opp. Aff., at ¶ 7, *see also*, Exhibit E. On January 3, 2003, Ms. Moody, on behalf of herself and her daughter, filed a complaint naming 49 Terrace Corp. and Renaissance Health Care Network as defendants. Opp. Aff., at ¶ 8, *see also*, Opp. Aff., Exhibit F.

Because Renaissance is part of NYCHHC, it is not a legal entity that can be sued. Rather, a malpractice complaint arising from the alleged negligence of a NYCHHC entity must name NYCHHC as a defendant.

Realizing that their complaint erroneously named Renaissance as a defendant and that NYCHHC was the proper party, on December 3, 2003, plaintiffs served a notice of claim on NYCHHC. Opp. Aff., at ¶ 9, *see also*, Opp. Aff., Exhibit G. By letter dated January 28, 2004, NYCHHC rejected the notice of claim. Opp. Aff., at ¶ 9, *see also*, Opp. Aff., Exhibit H.

On February 18, 2004, plaintiffs filed a summons and complaint in this matter, and only a few days later--on February 23, 2004--made this motion to, among other things, have

their notice of claim deemed timely served. Opp. Aff., at ¶ 10, *see also*, Opp. Aff., Exhibit I.

NYCHHC opposes plaintiffs' motion. Additionally, it cross-moves to dismiss the complaint, arguing that plaintiffs' noncompliance with a statutory precondition to suit-- timely filing a notice of claim-- warrants dismissal of the action. Opp. Aff., at ¶¶ 40-41.

NYCHHC further argues that in the event plaintiffs are granted leave to file a late notice of claim, they should be compelled to purchase a new index number. The rationale proffered is that plaintiff has improperly put the cart before the horse by filing a complaint and then belatedly using the same index number for the defective action to make this motion. Opp. Aff., at ¶¶ 42-44.

Analysis

A. Late Notice of Claim

General Municipal Law § 50-e(1) requires that a notice of claim, which does not involve wrongful death, be served on a public corporation within 90 days after the cause of action arises. Section 50-e(5) further authorizes a court, "in its discretion" to extend the time to serve a notice of claim. The extension, however, "shall not exceed the time limited for the commencement of an action by the claimant against the public corporation." General Municipal Law § 50-e(5). Thus, a court generally has discretion to grant a motion to serve a late notice of claim provided that it is made within the one-year-and-90-day statute of

limitations. *See*, General Municipal Law § 50-i (action against public corporation must be commenced “within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death”).

The one-year-and-90-day limitation period prescribed by the General Municipal Law is subject to a toll for infancy of up to ten years. *See*, *Henry v. City of New York*, 94 N.Y.2d 275, 283 (1999); *Sarjoo v. New York City Health and Hosp. Corp.*, 309 A.D.2d 34, 38 (1st Dep’t 2003), *lv. denied* 1 N.Y.3d 506 (2004); *Tomlinson v. New York City Health and Hosp. Corp.*, 190 A.D.2d 806, 807 (2d Dep’t 1993); *Kurz v. New York City Health and Hosp. Corp.*, 174 A.D.2d 671, 673 (2d Dep’t 1991). Here, because Moody T. Moody is an infant--and is therefore entitled to the benefit of the ten-year infancy toll--it is uncontroverted that the motion to file a late notice of claim is timely. As to any claims by Delisser Moody, by contrast, there is no infancy toll and the Court is without discretion to extend her time to file a late notice of claim. Thus, Ms. Moody’s causes of action must be dismissed.*

It is well settled that this Court has broad discretion to grant permission to file a late notice of claim. *Ali v. Bunny Realty Corp.*, 253 A.D.2d 356, 357 (1st Dep’t 1998). In deciding whether to grant a motion to file a late notice of claim, the Court must look to the

* *See*, *Birnbaum v. City of New York*, 2 Misc. 3d 1010(A), 2004 WL 829437 (Sup. Ct. Kings County 2004).

factors enumerated in General Municipal Law § 50-e(5) for guidance. More specifically, the Court must consider all the facts and circumstances, with special attention to (1) whether an infant plaintiff is involved, (2) whether there is a reasonable excuse for the delay, (3) whether the municipal defendant acquired actual knowledge of the pertinent facts constituting the claim, and (4) whether the delay has prejudiced the defendant's ability to defend the claim. Gen. Mun. L. § 50-e(5); see, *Frith v. New York City Housing Authority*, 4 A.D.3d 390, 391 (2d Dep't 2004) (citations omitted); *Ali v. Bunny Realty Corp.*, *supra*, 253 A.D.2d, at 357. No single factor is determinative. See, *Matter of Dubowy v. City of New York*, 305 A.D.2d 320 (1st Dep't 2003) ("presence or absence of any one factor is not determinative").

1. Infancy

The first factor to consider in deciding whether to grant leave to file a late notice of claim is whether the plaintiff is an infant. Because Moody T. Moody is, and was at the time of the alleged malpractice, an infant, clearly this factor weighs in favor of granting the motion. Plaintiffs compellingly argue that Moody should not be denied her day in court because of her mother's ignorance of the claim against NYCHHC and the resulting failure to timely file a notice of claim. This court fully agrees. It would be unfair and unjust to deprive Moody of a remedy based on her mother and former counsel's failure to timely file a notice of claim. Cf., *Henry v. City of New York*, *supra*, 94 N.Y.2d, at 283 ("An interpretation of the infancy toll which measures the time period of infancy based on the

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conduct of the infant's parent or guardian cuts against the strong public policy of protecting those who are disabled because of their age”).

Moreover, it is now well settled that an infant petitioner no longer needs to show a nexus between the failure to timely file a notice of claim and the infancy. *Harris v. City of New York*, 297 A.D.2d 473, 473 (1st Dep’t 2002), *lv. denied* 99 N.Y.2d 503 (2002); *Kurz v. New York City Health and Hosp. Corp.*, *supra*, 174 A.D.2d, at 673.

2. Reasonable Excuse for the Delay

The second factor is whether Moody has a reasonable excuse for the delay. NYCHHC argues that there has been no excuse for the delay, especially since current counsel was obtained in 2000 and this motion was not made until 2004. Reply Affirmation (“Reply Aff. Opp.”), at ¶ 9, *see also*, ¶ 10. Ms. Moody attests that she did not know of the potential for suit against NYCHHC until 2000. Ignorance of the law, however, is an insufficient excuse. *Harris v. City of New York*, *supra*, 297 A.D.2d, at 473 (citations omitted). Although this factor weighs in favor of denying the motion for leave to file a late notice of claim, lack of a reasonable excuse is not by itself enough to deny the motion. *Ansong v. City of New York*, 308 A.D.2d 333, 334 (1st Dep’t 2003); *Matter of Dubowy v. City of New York*, *supra*, 305 A.D.2d 320 (1st Dep’t 2003) (“absence of a reasonable excuse is not fatal”).

3. Actual Knowledge of Facts

The third factor is whether the defendant acquired actual knowledge of the pertinent facts underlying the claim. Plaintiffs argue that in medical malpractice cases, the making and keeping of medical records constitutes actual notice. *Aff. in Support*, at ¶¶ 49-52; *see also*, Affirmation of John M. Daly in Further Support of Motion and in Opposition to Cross-Motion to Dismiss (“Reply *Aff.*”), at ¶¶ 53-60. NYCHHC, by contrast, argues that the First Department has held that medical records are insufficient to put a defendant on notice. *Opp. Aff.*, at ¶¶ 23-24. NYCHHC is mistaken. The First Department, like the Second Department, has repeatedly held that medical records are sufficient to provide actual notice to a defendant. *See, McMillan v. City of New York*, 279 A.D.2d 280, 281 (1st Dep’t 2001); *Rodriguez v. New York City Health and Hosp. Corp.*, 270 A.D.2d 110, 110 (1st Dep’t 2000); *Spaulding v. New York City Health and Hosp. Corp.*, 210 A.D.2d 128, 128 (1st Dep’t 1994); *Williams v. Bronx Municipal Hosp. Center*, 205 A.D.2d 420, 421 (2d Dep’t 1994); *Kurz v. New York City Health and Hosp. Corp.*, *supra*, 174 A.D.2d, at 673 (citations omitted). NYCHHC must be charged with actual notice of the facts underlying Moody’s claims since Renaissance has had possession of the medical records since the time of alleged malpractice.

The Court additionally agrees with Moody that Renaissance’s notice to the Department of Health of Moody’s elevated lead blood levels lends further support to the

contention that NYCHHC received actual notice. *See*, Aff. in Support, at ¶ 58, *see also*, Exhibit 6. Therefore, this factor weighs in favor of granting the motion.

4. Prejudice to Defendant

Finally, the Court must consider whether defendant will be prejudiced in defending the suit because of the delay in filing the notice of claim. NYCHHC argues that it will be severely prejudiced since there has been a nine year delay. *See*, Opp. Aff., at ¶¶ 33-34. NYCHHC asserts that it would be prejudiced because it would be virtually impossible to reconstruct events and conversations that occurred nine years ago. *Id.*, at ¶ 36. NYCHHC's argument that the treating physicians (hypothetically) may not be able to remember conversations is insufficient. *See, McMillan v. City of New York, supra*, 279 A.D.2d., at 280-81 (seven-year delay and doctors no longer being employed by defendant insufficient to establish prejudice); *Kurz v. New York City Health and Hosp. Corp., supra*, 174 A.D.2d, at 672 (almost 10-year delay and "purely speculative argument that employees with knowledge of the facts may no longer work at the hospital" insufficient to establish prejudice).

NYCHHC's remaining argument is that it is prejudiced because it will not have the opportunity to conduct its own investigation or inspect the residence containing the lead paint since the Moodys no longer reside in the building. Reply Opp. Aff., *Id.*, at ¶¶ 12-14. In *Ali* and *Stanley*, the Appellate Division, First Department, allowed late notices of claim because

there were Department of Health records available that evidenced the lead levels. In those two cases, late notices of claim were allowed because records regarding the lead levels of the premises were in existence. *Ali v. Bunny Realty Corp.*, *supra*, 253 A.D.2d, at 357; *see also*, *Stanley v. City of New York Housing Auth.*, 257 A.D.2d 497, 498 (1st Dep't 1999). Based on settled law, NYCHHC has failed to establish the requisite prejudice.

On this record, the Court will allow Moody to serve a late notice of claim. The analysis weighs heavily in favor of permitting the notice and allowing infant Moody's claim to proceed. The scale tips decidedly in favor of going forward in light of the strong policy against punishing an infant for the actions--or in this case inactions--of those purporting to represent her. *See, McMillan v. City of New York*, *supra*, 279 A.D.2d, at 280-81 (“*The infant ... should not be penalized for the two-year delay of her mother in seeking legal counsel and the ensuing five-year delay caused by counsel’s law-office failure ...*”) (emphasis added); *see also*, Aff. in Support, at ¶ 59. Nine years is certainly a significant delay, but similar delays have been excused in the interests of justice. *See, e.g., Tomlinson v. City of New York*, *supra*, 190 A.D.2d, at 807 (nine year delay); *Kurz v. New York City Health and Hosp. Corp.*, *supra*, 174 A.D.2d, at 675 (almost ten year delay).

Moody's infancy, NYCHHC's lack of prejudice and the actual knowledge of the facts with which NYCHHC can fairly be charged, justifies granting the motion to serve a late notice of claim. *See, e.g., Rodriguez v. New York City Health and Hosp. Corp.*, *supra*, 270

A.D.2d, at 110 (holding defendant's knowledge coupled with plaintiff's infancy justified granting leave to permit a late notice of claim); *Williams v. Bronx Municipal Hosp. Center*, *supra*, 205 A.D.2d, at 421 (nine year delay excusable because of knowledge of facts and lack of prejudice); *contrast, Harris v. City of New York*, 297 A.D.2d 473, 474 (1st Dep't 2002) (holding lack of notice and the passage of time will prejudice city because it won't be able to find witnesses or conduct a proper investigation), *lv. denied* 99 N.Y.2d 503 (2002).

Cross-Motion to Dismiss

NYCHHC cross-moves for dismissal of Moody's action because of noncompliance with the statutory prerequisites of General Municipal Law §§ 50-e and 50-i. Reply Aff. Opp., at ¶¶ 3-4. It also argues that because it will be prejudiced and because plaintiffs have not established a reasonable excuse for the untimeliness, the case should be dismissed. *Id.*, at ¶¶ 13-14. Because this court is granting Moody leave to file a late notice of claim, NYCHHC's motion to dismiss Moody's claims is denied. Significantly, Moody "is not required to establish conclusively the merits of the claim at this stage in the litigation ..." and summary judgment dismissal of her action is unwarranted. *See, Ali v. Bunny Realty Corp.*, *supra*, 253 A.D.2d, at 358. To the extent that the cross-motion seeks dismissal of Ms. Moody's claims, however, which are untimely, the cross-motion is granted.

New Index Number

NYCHHC further asks the Court to Order Moody to purchase a new index number.

“It is well settled that *in the absence of a pending action*, an application for leave to file a late notice of claim must be brought as a special proceeding.” *Lennon v. Roosevelt Union Free School District*, 6 A.D.3d 713, 714 (2d Dep’t 2004) (emphasis added). Here, the action was commenced--albeit prematurely--on February 18, 2004 upon the filing of the summons and complaint. In this case, unlike those cited by NYCHHC, a complaint was already filed. *Contrast, Otero v. New York City Housing Authority*, 94 N.Y.2d 800, 800-801 (1999) (pre-complaint petition); *Rybka v. New York City Health and Hospitals Corp.*, 263 A.D.2d 403, 403-404 (1st Dep’t 1999); *Allianz v. City of New York*, 2 Misc. 3d 750 (Sup. Ct. N.Y. Cty. 2003).

Indeed, General Municipal Law § 50-e(5) explicitly provides that an “application for leave to file a late notice shall not be denied on the ground that it was made after the commencement of an action against the public corporation.” Certainly, had the summons and complaint not already been filed, a new index number would be required because this application would have been made through a pre-action special proceeding. Since this action has already been commenced, however, the Court sees no reason to require a new Index Number under the circumstances.

Accordingly, it is

ORDERED that plaintiffs' motion to deem the notice of claim previously served on NYCHHC as timely, *nunc pro tunc*, is DENIED; it is further

ORDERED that plaintiffs' motion for leave to serve a late notice of claim on NYCHHC is granted to the limited extent of permitting the infant Moody T. Moody to file a late notice of claim within 14 days of Notice of Entry of this Decision and Order; it is further

ORDERED that to the extent that this motion can be construed as seeking permission for Delisser Moody to file a late notice of claim it is denied; it is further


ORDERED that NYCHHC's cross-motion to dismiss plaintiffs' complaint is granted in limited part in that all claims asserted by Delisser Moody are hereby severed and dismissed. In all other regards the cross-motion is denied and Moody T. Moody's action against NYCHHC is to proceed; it is further

ORDERED that to the extent that the cross-motion by NYCHHC seeks to require that Moody T. Moody purchase a new index number, the cross-motion is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
September 14, 2004

ENTER


Hon. Eileen Bransten

FILED

SEP 16 2004

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