

White v New York City Health & Hosps. Corp.

2004 NY Slip Op 30352(U)

December 14, 2004

Supreme Court, Kings County

Docket Number: 8917/04

Judge: Joseph S. Levine

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**Supreme Court of the State of New York
County of Kings**

-----X **Hon. Joseph S. Levine**
JEAN WHITE, an Infant by his Mother and Natural
Guardian, MARIE WHITE, and MARIE WHITE,
Individually,

Plaintiff,

**Memorandum
and Order**

-against-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION (Woodhull Medical and Mental Health
Center),

Defendants.

Index No. 8917/04

-----X

THE FOLLOWING PAPERS NUMBERED 1 to 5 READ ON THIS MOTION

	Papers Numbered
NOTICE OF MOTION - ORDER TO SHOW CAUSE - PETITION(S) AFFIDAVIT(S) - AFFIRMATION(S)	1,3
ANSWERING AFFIDAVIT(S) - AFFIRMATION(S)	2,4
REPLY AFFIDAVIT(S) - AFFIRMATION(S)	5
AFFIDAVIT(S) - AFFIRMATION(S)	
EXHIBITS AND OTHER PAPERS	

In this action, defendant, New York City Health and Hospitals Corporation (“NYCHHC”), moves for an order dismissing plaintiffs’ complaint as untimely pursuant to NY Unconsolidated Law § 7401(2), General Municipal Law § 50-i and § 50-e, CPLR §§ 208, 214-a, and 3211(a)(8). In opposition, plaintiffs argue that the action is timely as the infancy toll applies and move for leave to file a late Notice of Claim pursuant to General Municipal Law § 50-e(5) or alternatively deeming the Notice of Claim timely served *nunc pro tunc*.

The infant plaintiff was born at Woodhull Hospital on August 14, 1989 and suffers from cerebral palsy. The plaintiffs allege that defendant departed from good and accepted medical practice between April 1989 through August 14, 1989, as follows: (1) in its monitoring and treatment of Marie White's obstetric care, including running tests and taking a proper history; (2) in failing to implement proper obstetric protocols and procedures; and (3) in failing to implement proper protocols and procedures to ensure adequate obstetric training of its medical personnel. Plaintiffs filed a Notice of Claim on February 11, 2004 and commenced the action on March 18, 2004.

Defendant maintains that plaintiffs' claims are time-barred due to plaintiffs' failure to (1) file a Notice of Claim within 90 days and (2) commence an action within one year and 90 days. Defendant argues that the action is one for medical malpractice based upon defendant's alleged negligence in monitoring and treating plaintiff Marie White, but plaintiffs are trying to circumvent the statute of limitations by categorizing the current action as ordinary negligence. In opposition, plaintiffs insist that the current action is for ordinary negligence, not for medical malpractice, and therefore, the infancy toll provided by CPLR § 208 allows plaintiffs to proceed with their claims.

By statute, a Notice of Claim must be served upon the municipal corporation within 90 days after accrual of the cause of action and commenced within one year and 90 days. New York Unconsolidated Law § 7401(2); General Municipal Law § 50-e(1)(a) and 50-i. The current action accrued in April through August 14, 1989. More than fourteen years later, plaintiffs filed a Notice of Claim and commenced the action. Therefore, both the Notice of Claim and the complaint are time-barred unless a toll is applicable. In addition, the plaintiff mother's claims are time-barred.

In the instant case, the infancy tolling provisions of CPLR § 208 apply to the period for filing a Notice of Claim and commencing an action. In an action for ordinary negligence, the statute of limitations is three years and may be tolled for the period of infancy plus three years. CPLR § 214(5).

However, in a medical malpractice action the statute of limitations is two years and six months and may not be tolled beyond 10 years. CPLR § 214-a.. Under General Municipal Law § 50-e(5), the Court has discretion to authorize service of a late Notice of Claim, provided that the statute of limitations has not expired. Plainly, if this case is found to be one of ordinary negligence, the court would have discretion to grant a late filing of Notice of Claim. However, if this matter is found to be one arising out of medical malpractice the court has no discretion because it has been more than 10 years from the accrual date.

In support of defendant's allegation that this is a medical malpractice action, defendant opines that plaintiffs' Notice of Claim is classic medical malpractice with its references to failure to properly manage the mother's obstetric care, failure to perform specified tests and failure to take a proper history. In addition, defendant argues that plaintiffs' own expert is not an obstetrician and was not even licensed to practice medicine in New York until 1990, after the delivery in question, and therefore, could not claim to have knowledge of accepted practices in 1989. In opposition and in support of the argument that is one of ordinary negligence, plaintiffs contend that defendant was negligent in the hiring and retention of health care personnel, failed to implement proper obstetric protocols and procedures, and failed to implement proper protocols and procedures to ensure proper obstetric training of its health care personnel.

In a general sense, a hospital is always furnishing medical care, however, not every act of negligence toward a patient is medical malpractice. Medical malpractice is distinguished by the "diagnosing, treating, operating or prescribing for any human disease, pain, injury, deformity or physical condition." *Bleier v. Bodnar*, 65 NY2d 65 (1985) citing Education Law § 6521. Failure to take a proper medical history, an act or omission by a nurse that constitutes medical treatment or bears a substantial relationship to rendering medical treatment by a licensed physician constitutes malpractice.

Id. at 72. The Court finds that plaintiffs' claims regarding the mother's obstetric care and treatment, performing certain tests and to take a proper history involve medical judgment and fall under medical malpractice, therefore those claims are time-barred.

Ordinary negligence has been found in claims for breach of duty to use due care in the selection of doctors and nurses, to furnish competent medical personnel, and failure to promulgate proper rules and regulations. *Bleier v Bodnar*, 65 NY2d 65, supra; *Staveley v St. Charles Hospital*, 173 FRD 49 (EDNY 1997). The Court opines that plaintiffs' claims regarding defendant's failure to furnish competent medical personnel and to implement proper obstetric protocols and procedures fall under ordinary negligence and are not time-barred due to the infancy toll.

Plaintiffs argue that an infant plaintiff is accorded special rights that are not altered by the action or inaction of the infant's guardians. Plaintiffs maintain that the defendant municipal corporation had actual knowledge of the essential facts constituting the claim within 90 days from its accrual by virtue of holding the hospital records and that the 14 year delay cannot cause prejudice to the defendant when the issue is the adequacy of written policies. In opposition, defendant asserts that the 14 year delay would unfairly prejudice defendant because defendant no longer has whatever obstetric and gynecological rules, regulations, policies and protocols in effect in 1989 and would be unable to reconstruct the 1989 rules because they have been amended several times.

In assessing whether the Court should exercise its discretion to extend the time to serve a Notice of Claim, key factors include whether the plaintiff is an infant or mentally or physically incapacitated; whether there is a reasonable excuse for the failure to file a timely Notice of Claim; whether the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days from its accrual or a reasonable time thereafter; and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits. General Municipal Law § 50-e(5); *Birnbaum v*

City of New York, 2 Misc 3d 1010(A), 2004 NY Slip Op. 50246(u) (Kings County 2004); *Berg v Town of Oyster Bay*, 300 AD2d 330 (2nd Dept 2002). While an infant's special status is not altered by the action or inaction of his guardian, infancy alone will not suffice as a basis for granting plaintiff leave to file a late Notice of Claim and it is incumbent upon the claimant to demonstrate a nexus between the delay and the infancy. *Birnbaum v City of New York*, 2 Misc 3d 1010(A); *Berg v Town of Oyster Bay*, 300 AD3d 330; *Knightner v City of New York*, 269 AD2d 397 (2nd Dept 2000). While the defendants may have acquired knowledge of the alleged negligence by virtue of holding the medical records, the 14 year delay would substantially prejudice the defendants in defending against alleged inadequate rules and regulations existing at infant plaintiff's birth. The Court finds that plaintiffs have not established any nexus between infancy and the 14 year delay, and have not satisfied its burden of showing that the defendant has not been substantially prejudiced by their delay in moving for leave to file a late Notice of Claim.

After oral argument and upon the papers filed herein, the Court finds that the mother plaintiff's claims are time-barred and that infant plaintiff's claims regarding the obstetric treatment and care of the plaintiff mother up to the infant's birth, including the running of tests and the taking of a proper medical history are medical malpractice claims in nature and therefore time-barred. However, plaintiffs' claims regarding the proper promulgation of rules and regulations of the obstetric department, and training of obstetric medical personnel are claims sounding in ordinary negligence. Under the General Municipal Law § 50-c(5), the Court finds that plaintiffs have failed to show any nexus between the plaintiff's infancy and the 14 year delay or that defendant has not been substantially prejudiced by the 14 year delay. Consequently, plaintiffs have not established their burden of showing that a late filing of Notice of Claim is warranted. Hence, defendant's motion to dismiss pursuant to CPLR § 3211(a)(8) for failure to timely commence this action is granted and plaintiff's motion for leave to file a late Notice of Claim

pursuant to General Municipal Law § 50-e(5) is denied.

The foregoing constitutes the Decision and Order of the Court.



J.S.C.

Hon. Joseph S. Levine

December 14, 2004