

**Matter of Dumancela v New York City Health &
Hospitals Corp.**

2005 NY Slip Op 30043(U)

March 31, 2005

Supreme Court, Queens County

Docket Number: 0004287/4287

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

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In the matter of the Application of
MARIA DUMANCELA, as Mother and Natural
Guardian of DANIEL ALEJANDRO GUAMAN,
an Infant,
Petitioner,

Index No. 4287/05
Motion Date: 3/30/05
Motion Cal. No. 19

NEW YORK CITY HEALTH & HOSPITALS
CORP.,

-----X
The following papers numbered 1 to 9 read on this application by petitioner for leave to serve a late notice of claim on the NEW YORK CITY HEALTH & HOSPITALS CORP.

	PAPERS NUMBERED
Order to Show Cause-Affirmation-Exhibits.....	1-3
Affirmation in Opposition.....	4-6
Reply Affirmation-Exhibits.....	7-9

Upon the foregoing papers it is ordered that this application by petitioner is denied for the following reasons:

On August 1, 2002, infant petitioner was born at Elmhurst Hospital Center. According to the proposed claims, the newborn infant suffered severe injuries, including brain damage and mental retardation, as a result of the Hospital's negligent handling of his mother's labor and delivery and care and treatment. Petitioner claims to have served the notice of claim on defendant on February 22, 2005 and on March 2, 2005, this application was made for an order pursuant to General Municipal Law §50-e [5] for permission to serve late notice of claim upon the NEW YORK CITY HEALTH & HOSPITALS CORP.

The General Municipal Law allows for the exercise of considerable discretion in determining whether to permit the service of a late notice of claim (*see*, General Municipal Law § 50-e [5]; Matter of Harris v Dormitory Authority, 168 AD2d 560 (2d Dept. 1990.)) The instant application for leave to file a late notice of claim was made after

the expiration of the 1-year-and-90-day period of limitations set forth in General Municipal Law § 50-I (1). It is well settled that in determining whether to permit service of a late notice under General Municipal Law § 50-e, a court should consider all relevant facts and circumstances, including whether an infant is involved, whether there is a reasonable excuse for the delay, whether the public corporation acquired actual knowledge of the facts constituting the claim within 90 days or a reasonable time thereafter, and whether the public corporation's defense would be substantially prejudiced by the delay. Matarrese v New York City Health & Hospitals Corp., 215 AD2d 7 (2d Dept. 1995.) While the toll of infancy is applicable to proceedings pursuant to General Municipal Law § 50-e (5), the fact of infancy alone does not automatically warrant the granting of an extension to the 90-day notice requirement. Matarrese v New York City Health & Hospitals Corp., 215 AD2d 7 (2d Dept. 1995) ; *see also*, Winston v City of New York, 249 AD2d 404 (2d Dept. 1998.) The delay must be the product of the infancy itself. Matarrese v New York City Health & Hospitals Corp., *supra*.

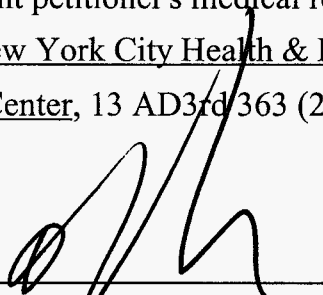
When all the relevant facts and circumstances of this case are taken into consideration, it is clear that it would be an improvident exercise of discretion to grant the petitioner leave to serve a late notice of claim. The petitioner has failed to provide any reasonable excuse for the over three year delay in seeking leave to serve a late notice of claim (*see*, Matter of Plantin v New York City Hous. Auth., 203 AD2d 579), and, although an infant is involved, the delay was unrelated to the infancy since petitioner acknowledges that the condition was apparent to the infant petitioner's mother from the child's birth and yet offers no reasonable excuse for her delay in seeking leave to serve a late notice of claim (*see*, Matter of Andersen v Nassau County Med. Ctr., 135 AD2d 530.) The argument that the infant petitioner's condition required such intensive and exhaustive care by the mother that she was unable to bring suit on his own behalf earlier, is untenable, ignores the laws of guardianship, and is not supported by any law.

Moreover, infancy alone is not sufficient as a matter of law to compel the granting of an application for leave to serve a late notice of claim. *See*, Matter of Kyser v New York City Hous. Auth., 178 AD2d 601. General Municipal Law § 50-e does not grant special dispensation to a claimant merely because he or she is an infant and to merely claim, as petitioner does, that the application is timely because it was made within the 10-year tolling provision for infancy, is insufficient. Matarrese v New York City Health

& Hospitals Corp., supra.

Further, the petitioner has failed to demonstrate a lack of prejudice to the appellant as a result of the three year delay. The ability to properly investigate this claim after such a long delay is manifest, regardless of the ability to contact the medical staff involved with the subject claims. Furthermore, there is nothing in the record which would suggest that the medical records contain the facts and information necessary to conduct an adequate investigation into the claim. Accordingly, the possible existence of medical records in the respondent's possession, that indicate infant petitioner's condition, does not warrant the granting of leave to serve a late notice of claim. *See, Matter of D'Anjou v New York City Health & Hosps. Corp.*, 196 AD2d 818. Furthermore, there is no indication that the respondent received actual knowledge of the claim until the notice of claim was served. The mere possession of the infant petitioner's medical records does not serve as notice of the instant claim. *Matarrese v New York City Health & Hospitals Corp.*, supra. *Williams v Nassau County Medical Center*, 13 AD3rd 363 (2d Dept 2004.)

DATED: March 31, 2005



ORIN R. KITZES, J.S.C.