

**Pearson v New York City Health & Hospitals Corp.**

2006 NY Slip Op 30197(U)

January 6, 2006

Supreme Court, New York County

Docket Number: 0108731/2004

Judge: Eileen Bransten

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 — NEW YORK COUNTY

PRESENT: Eileen Bransten  
Index Number : 108731/2004  
PEARSON, SHANICE  
vs  
HEALTH AND HOSPITALS  
Sequence Number : 002  
LEAVE SERV LATE NOT. OF CLAIM

PART 6

INDEX NO. 108731/04  
MOTION DATE 10/18/05  
MOTION SEQ. NO. 02  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion to/for Date notice of claim

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

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

appear in person at the Judgment Clerk's Desk (Room 141B).  
Obtain entry, contact or assigned representative must  
appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1-6-06

Eileen Bransten  
EILEEN BRANSTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

-----X  
SHANICE PEARSON, an Infant by her Mother and  
Natural Guardian, MICHELLE PEARSON,

Plaintiff,

-against-

Index No. 108731/04  
Motion Date: 10/18/05  
Motion Seq. No.: 002

NEW YORK CITY HEALTH & HOSPITALS  
CORPORATION (HARLEM HOSPITAL CENTER),  
NEVILLE MORGAN and LILLETH MORGAN,

Defendants.

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

Pursuant to General Municipal Law § 50-e, Michelle Pearson (“Mrs. Pearson”), as Mother and Natural Guardian of Shanice Pearson (“Shanice”), an infant, petitions for permission to serve a late notice of claim against respondent New York City Health and Hospitals Corporation (“HHC”). HHC opposes the petition and cross-moves for dismissal of the action for failure to comply with General Municipal Law § 50-e.

Background

On December 2, 2000, Mrs. Pearson gave birth to Shanice. Affirmation in Support of Motion (“Aff.”), at ¶ 10. In March of 2001, the family moved to 673 Cauldwell Avenue, 3rd Floor in Bronx, New York, where they continued to live until November 2002. Aff., at ¶ 11. During this period – specifically, from April 12, 2001 to August 7, 2003 – Shanice received all her medical treatment at Harlem Hospital Center (“Harlem”). Aff., at ¶ 12. In

particular, on several occasions, staff at Harlem tested Shanice's blood, which revealed that her blood-lead level was high. Aff., at ¶ 13. According to Mrs. Pearson, staff at Harlem never performed Risk Assessment for Lead Poisoning or informed her of Shanice's risk for lead exposure. Aff., at ¶¶ 14-23.

In this medical malpractice action – commenced on June 9, 2004 – Mrs. Pearson alleges that HHC negligently failed to perform a Risk Assessment or provide Anticipatory Guidance for Lead Poisoning, and as a result, she was not aware that the peeling and chipping paint in her apartment was dangerous. Aff., at ¶ 16. Furthermore, Mrs. Pearson claims that HHC's failure to advise her significantly contributed to the presence of lead in Shanice's blood. Aff., at ¶ 33.

On February 20, 2004, plaintiff served a notice of claim on HHC. Affirmation in Opposition ("Opp."), at ¶ 5.

On June 29, 2005, Mrs. Pearson brought this petition for permission to serve a late notice of claim. Aff., at ¶ 58. In support of her request, she submits the affirmation of Robert S. Shaiman, M.D. ("Dr. Shaiman"), who opines to a reasonable degree of medical certainty that HHC's failure to provide Anticipatory Guidance for Lead Poisoning to Mrs. Pearson constituted a departure from good and accepted medical practice and substantially contributed to Shanice's high blood-lead level. Affirmation of Dr. Shaiman, at ¶¶ 1, 44, 46.

She argues that she should be granted permission to serve a late notice of claim because HHC had ample notice of the claim by way of possession of Shanice's medical records. Aff., at ¶ 38. She claims, moreover, that HHC will suffer no prejudice if she is granted permission to serve a late notice of claim because the statute of limitations has not run. Aff., at ¶ 42. Finally, she points out that Shanice is an infant, which militates in favor of granting the motion because Shanice should not be punished for her mother's failure to timely serve HHC. Aff., at ¶ 46.

HHC opposes the petition, arguing that Mrs. Pearson has not presented any reasonable excuse for the delay. Opp., at ¶¶ 21-22. It claims, furthermore, that Shanice's medical records are insufficient to provide notice of the claim because they do not demonstrate that Shanice suffered any injuries. Opp., at ¶ 13. Finally, HHC avers that it will be severely prejudiced by the delay because some witnesses are no longer in their employ and the memories of possible witnesses will fade over time. Opp., at ¶ 25.

#### Analysis

Pursuant to General Municipal Law § 50-e, a notice of claim in a medical malpractice action against a city must be served within 90 days of the alleged malpractice. Section 50-e(5) authorizes a court, "in its discretion" to extend the time to serve a notice of claim. The extension, however, may 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”).

The limitation period prescribed by the General Municipal Law, however, is subject to a toll for infancy. *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 Dept. 2003), *lv. denied* 1 N.Y.3d 506 (2004). In this case, because Shanice is entitled to the benefit of the infancy toll, the petition to serve a late notice of claim, made during her infancy and less than ten years after accrual of her claim, is timely.

Because Shanice’s action is not *per se* barred by the statute of limitations, the court has broad discretion to grant her an extension of time to serve the notice of claim. *Davis v. City of New York*, 250 A.D.2d 368, 369 (1st Dept. 1998). In determining whether to grant an extension, the court must consider several factors: (1) whether the claimant is an infant; (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 defendant’s ability to defend the claim. General Municipal Law § 50-e(5). No single factor is determinative. *See, Matter of Dubowy v. City of New York*, 305

A.D.2d 320, 321 (1st Dept. 2003) (“presence or absence of any one factor is not determinative”).

### Infancy

The first factor to consider in deciding whether to grant leave to serve a late notice of claim is whether the plaintiff is an infant. Because Shanice is, and was at the time of the alleged malpractice, an infant, this factor clearly weighs in favor of granting the motion. Plaintiff compellingly argues that Shanice should not be denied her day in court because of her mother’s failure to timely serve a notice of claim. This Court fully agrees. It would be unfair and unjust to deprive Shanice of a remedy based on her mother’s ignorance of the particularities of medical malpractice law. *Cf., Henry v. City of New York*, 94 N.Y.2d 275, 283 (1999) (“An interpretation of the infancy toll which measures the time period of infancy based on the 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 well-settled that it is not fatal to the petition that the infant cannot show a nexus between the failure to timely serve a notice of claim and the infancy. *Harris v. City of New York*, 297 A.D.2d 473, 473 (1st Dept. 2002), *lv. denied* 99 N.Y.2d 503; *see also, Nairne v. New York City Health and Hosp. Corp.*, 303 A.D.2d 409, 410 (2d Dept. 2003); *Kurz v. New York City Health and Hosp. Corp.*, 174 A.D.2d 671, 673 (2d Dept. 1991).

### Reasonable Excuse for the Delay

The second factor is whether Shanice has a reasonable excuse for the delay. HHC argues that there has been no excuse for the delay, especially because Shanice's elevated blood-lead levels were apparent in 2001. Mrs. Pearson attests, however, that she did not know of the potential for suit against HHC until she consulted with her attorneys shortly before they served the late notice of claim. Nonetheless, ignorance of the law is an insufficient excuse. *Ocasio v. New York City Health and Hosp. Corp.*, 14 A.D.3d 361, 362 (1st Dept. 2005); *Harris v. City of New York*, 297 A.D.2d 473, 473 (1st Dept. 2002), *lv. denied* 99 N.Y.2d 503. Although this factor weighs in favor of denying the motion for leave to serve a late notice of claim, lack of a reasonable excuse, by itself, is not a valid basis for denying the petition. *Ansong v. City of New York*, 308 A.D.2d 333, 334 (1st Dept. 2003); *Matter of Dubowy v. City of New York*, 305 A.D.2d 320 (1st Dept. 2003) ("absence of a reasonable excuse is not fatal").

### Actual Knowledge of Facts

The third factor is whether HHC acquired actual knowledge of the pertinent facts underlying the claim. The First Department has repeatedly held that a defendant's possession of medical records can be sufficient to provide actual notice. *See, McMillan v. City of New York*, 279 A.D.2d 280, 281 (1st Dept. 2001); *Rodriguez v. New York City Health and Hosp.*

*Corp.*, 270 A.D.2d 110, 110 (1st Dept. 2000); *Spaulding v. New York City Health and Hosp. Corp.*, 210 A.D.2d 128, 128 (1st Dept. 1994). *Contra, Ocasio v. New York City Health and Hosp. Corp.*, 14 A.D.3d 361 (1st Dept. 2005) (denying motion to serve late notice of claim because medical records, upon examination, showed no causal connection between HHC actions and plaintiff's injuries). HHC must be charged with actual notice of the facts underlying Shanice's claims because Harlem has had possession of the medical records since the time of the alleged malpractice and it was clear, by HHC's own admission, that Shanice's blood showed high levels of lead while she was still under HHC's care. Therefore, this factor weighs in favor of granting the petition.

Prejudice to Defendant

Finally, the Court must consider whether HHC will be prejudiced in defending the suit because of plaintiff's delay in serving the notice of claim. HHC argues that it will be severely prejudiced because some witnesses relevant to plaintiff's claim are no longer in their employ and other witnesses' memories have faded. The delay, by itself, is insufficient to establish prejudice to HHC. *See, McMillan v. City of New York*, 279 A.D.2d 280, 280-81 (1st Dept. 2001) (seven-year delay insufficient to establish prejudice); *see also, Kurz v. New York City Health and Hosp. Corp.*, 174 A.D.2d 671, 672 (2d Dept. 1991) (almost 10-year delay insufficient to establish prejudice).

On this record, the Court will allow plaintiff to serve a late notice of claim. The analysis weighs heavily in favor of permitting service of the notice and allowing infant Shanice's claim to proceed in light of the strong public policy against punishing an infant for the actions – or in this case inactions – of those responsible for her. *See, McMillan v. City of New York*, 279 A.D.2d, at 280-81 (“infant ... should not be penalized for the two-year delay of her mother in seeking legal counsel”). Four years is certainly a significant delay, but much longer delays have been excused in the interests of justice. *See, e.g., Tomlinson v. City of New York*, 190 A.D.2d 806 (2d Dept. 1993) (nine-year delay); *Kurz v. New York City Health and Hosp. Corp.*, 174 A.D.2d, at 675 (almost ten-year delay).

Accordingly, it is ORDERED and ADJUDGED that plaintiff's petition to serve a late notice of claim is granted and the notice of claim is deemed served on HHC *nunc pro tunc*.

This constitutes the Decision and Judgment of the Court.

Dated: New York, New York  
January 6, 2006

ENTER

  
\_\_\_\_\_  
Hon. Eileen Bransten

This judgment is enforceable by the County Clerk and Justice of the Peace or their authorized person. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).