

**Giannicos v Bellevue Hospital Medical Center**

2006 NY Slip Op 30450(U)

January 27, 2006

Supreme Court, New York County

Docket Number: 113964/01

Judge: Eileen Bransten

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

PRESENT: EILEEN BRANSTEN  
*Justice*

PART 6

GIANNICOS,

Plaintiff,

INDEX NO. 113964/01

MOTION DATE 1/10/06

- v -

MOTION SEQ. NO. 009

NYCHHC,

Defendants.

The following papers, numbered 1 to 3 were read on this petition confirm referee decision

|   | PAPERS NUMBERED |
|---|-----------------|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | <u>1</u>        |
| Answering Affidavits — Exhibits _____                             | <u>2</u>        |
| Replying Affidavits _____   | <u>3</u>        |

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**  
FEB 01 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 1-27-06

Eileen Bransten  
EILEEN BRANSTEN, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

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

-----X  
FRANCIS GIANNICOS, as guardian of the person  
and property of PETER GIANNICOS, an Incapacitated  
Person and GEORGIA GIANNICOS,

Petitioners,

-against-

Index No.: 113964/01  
Motion Date: 01/10/06  
Motion Seq. No.: 009

BELLEVUE HOSPITAL MEDICAL CENTER,  
NEW YORK CITY HEALTH AND HOSPITAL  
CORPORATION, MIGUEL FIGUEROA,  
NEW YORK EYE & EAR INFIRMARY  
and BARBARA ZEIFER,

Defendants.

**FILED**  
FEB 01 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Plaintiff Francis Giannicos, as guardian of the person and property of Peter Giannicos ("Mr. Giannicos"), an incapacitated person, moves for an order confirming the November 3, 2005 report of Referee Leslie Lowenstein ("Referee Lowenstein") and for permission to serve a late Notice of Claim. Defendants New York City Health and Hospitals Corporation ("HHC") and Miguel Figueroa ("Dr. Figueroa") oppose the motion.

Background

In this medical malpractice action -- commenced on July 20, 2001 -- plaintiff claims that defendants negligently treated Mr. Giannicos for hydrocephalus, a condition causing an excessive accumulation of fluid resulting in enlargement and atrophy of the brain.

On March 21, 2002, Justice Charles Thomas of Supreme Court, Queens County, found that Mr. Giannicos was an incapacitated person and appointed Francis Giannicos as his guardian. Subsequently, on January 7, 2004, defendants moved for dismissal of plaintiff's complaint, arguing that it was untimely pursuant to CPLR 3211(a)(7). Affirmation in Support of Motion ("Aff."), at 2. Plaintiff opposed the motion, claiming that because Mr. Giannicos is incapacitated, he is entitled to a toll under CPLR 208 and his claim is timely. *Id.* Thus, on August 30, 2004, the Court referred the matter to a referee to determine whether Mr. Giannicos is entitled to the insanity toll. *Id.*

On June 2, July 13 and July 19, 2005, Referee Lowenstein held a hearing to ascertain whether Mr. Giannicos was suffering from the disability of insanity at the accrual of the action and, if he was suffering from a disability, the length of time the disability continued. Aff., Ex. A, at 1. At the hearing, both plaintiff and defendants presented extensive evidence, including Mr. Giannicos's entire medical file. Aff., Ex. A, at 2.

On November 3, 2005, Referee Lowenstein issued a report. In his findings of fact, he explains that "Peter Giannicos has been suffering from medical complications since the day he was assaulted [January 10, 1999]." Aff., Ex. A, at 11. He concludes, based on the evidence presented and his determinations of credibility, that Mr. Giannicos suffered a stroke on September 10, 1999 that "caused brain damage to the plaintiff wherein he remains in a state where he cannot function within society." Aff., Ex. A, at 12. Referee Lowenstein

stated, moreover, that Mr. Giannicos “is entitled to take advantage of the tolling provisions of CPLR § 208 by reason of insanity.” *Aff.*, Ex. A, at 12.

Plaintiff now moves for an order confirming Referee Lowenstein’s report and for permission to serve a late Notice of Claim.

By contrast, HHC and Dr. Figueroa request that the Referee’s report be rejected. To begin, they argue that plaintiff failed to produce “conclusive” evidence that Mr. Giannicos was incapacitated at the time the action accrued. *Affirmation in Opposition (“Opp.”)*, at ¶ 2. They contend that Referee Lowenstein never determined the date the disability began because he wrote, “The specific date \*\*\* any malpractice action as against [the] municipal defendants may have accrued \*\*\* is uncertain.” *Aff.*, Ex. A, at 11. Defendants further argue that Referee Lowenstein erred in considering the testimony of Dr. Lambrakis because he is plaintiff’s treating physician and an interested witness. *Opp.*, at ¶ 3. Additionally, defendants take issue with Referee Lowenstein’s determination to discount the testimony of their expert – Dr. Masur – because he never examined Mr. Giannicos and relied solely on the medical records. *Opp.*, at ¶¶ 7, 11. Finally, they claim that, even if Mr. Giannicos is entitled to a toll pursuant to CPLR 208, his time to serve a Notice of Claim has expired because plaintiffs did not serve a notice within 90 days of the appointment of Francis Giannicos as Mr. Giannicos’s guardian. *Opp.*, at ¶ 14.

Based on a careful review of the referee's report, this Court agrees with plaintiff that it must be confirmed.

### Analysis

#### Confirm Referee Report

Case law is clear: the determination of a special referee will generally not be disturbed as long as the referee's findings are substantially supported by the record. *587 Dev. Inc. v. Pizzuto*, 8 A.D.3d 5, 5 (1st Dept. 2004); *RC 27th Ave. Realty Corp. v. New York City Hous. Auth.*, 305 A.D.2d 135, 135 (1st Dept. 2003); *Rasmussen v. Yellow Riv., Inc.*, 298 A.D.2d 322, 323 (1st Dept. 2002); *Vastwin Invs., Ltd. v. Aquarius Media Corp.*, 295 A.D.2d 216, 217 (1st Dept. 2002), *lv. dismissed* 99 N.Y.2d 637 (2003).

Here, Referee Lowenstein determined – after taking three days of documentary and testimonial evidence – that Mr. Giannicos is entitled to a toll pursuant to CPLR 208 because he was insane at accrual of his action against HHC. As evidenced by the length of the hearing transcript, the parties were given ample opportunity to present their arguments and evidence at the hearing. Indeed, both plaintiff and HHC submitted expert medical evidence and had the opportunity to call and cross-examine witnesses who could address Mr. Giannicos's mental state.

Because the record contains substantial evidence that Mr. Giannicos was (and is) unable to protect his legal rights or function in society, Referee Lowenstein's report must be confirmed. *See, McCarthy v. Volkswagen of Amer., Inc.*, 55 N.Y.2d 543, 548 (1982). Furthermore, in accordance with Referee Lowenstein's recommendation, Mr. Giannicos will be permitted to serve a late notice of claim.

#### Notice of Claim

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 insanity. *See, Barnes v. County of Onondaga*, 65 N.Y.2d 664, 666 (1985). In this case, because Referee Lowenstein found that Mr. Giannicos is entitled to an insanity toll,

his motion to serve a late notice of claim, made during his insanity and less than ten years after accrual of his claim, is timely.

Because Mr. Giannicos's action is not *per se* barred by the statute of limitations, the Court has broad discretion to grant him an extension of time to serve a 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 or incompetent; (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").

The first factor to consider in deciding whether to grant leave to serve a late notice of claim is whether the plaintiff is an incompetent. As discussed previously, the Court confirms the determination of Referee Lowenstein that Mr. Giannicos was incompetent pursuant to CPLR 208 at the time his action against HHC accrued. Thus, this factor clearly weighs in favor of granting the motion.

The second factor is whether plaintiff has a reasonable excuse for the delay. In his motion papers, Mr. Giannicos neglects to claim that his delay was reasonable. 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 application. *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”).

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 Mr. Giannicos’s claim because Bellevue Hospital has had possession of his medical records since the time of the alleged malpractice. Therefore, this factor weighs in favor of granting the petition. Additionally, this action was commenced in July 2001; thus, HHC undeniably has had actual notice of Mr. Giannicos’s claims for many years.

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. Interestingly, HHC makes

absolutely no argument that it will be prejudiced at all by the delay; thus, the Court will not infer any 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 Mr. Giannicos's claim to proceed in light of the strong public policy against punishing an incompetent for inability to protect his legal rights. *McCarthy v. Volkswagen of Amer., Inc.*, 55 N.Y.2d, at 548.

Moreover, defendants are incorrect in asserting that Mr. Giannicos is not entitled to a toll pursuant to CPLR 208 because his daughter was appointed guardian to manage his affairs. Defendants disingenuously cite *Smith v. Kelly*, 228 A.D.2d 831 (3d Dept. 1996), *Monaghan v. SZS 33 Assoc.*, 827 F. Supp. 233 (S.D.N.Y. 1993), *rearg. denied* 153 F.R.D. 60 (S.D.N.Y. 1994), *VonBulow v. VonBulow*, 634 F. Supp. 1284 (S.D.N.Y. 1986), and *Beninati v. Oldsmobile Div. of Gen. Motors*, 94 Misc. 2d 835 (Sup. Ct., N.Y. County 1978) for the proposition that the insanity toll ceases upon appointment of a guardian. That reasoning, however, has been rejected by the Court of Appeals in *Henry v. City of New York*, 94 N.Y.2d 275, 279-80 (1999), which held that an infant is entitled to a toll pursuant to CPLR 208 without regard to whether the parents act on the infant's behalf or retain a lawyer. *Henry* has been applied to the competency toll as well, *see, e.g., Costello v. North Shore*

*Univ. Hosp.*, 273 A.D.2d 190, 191 (2d Dept. 2000), and the cases that defendants cite – all pre-*Henry* – are therefore, wholly inapplicable to this case.

The cited cases, moreover, are entirely inapposite. For example, *Smith* and *Monaghan* rely on *Hernandez v. New York City Health and Hosp. Corp.*, 78 N.Y.2d 687 (1991) – a wrongful death case that has since been sharply distinguished by *Henry*. *Smith v. Kelly*, 228 A.D.2d, at 832; *Monaghan v. SZS 33 Assoc.*, 827 F. Supp., at 242. Furthermore, *Beninati* and *Hernandez* are wrongful death cases that address completely different issues from those presented here. See, *Hernandez v. New York City Health and Hosp. Corp.*, 78 N.Y.2d 687; *Beninati v. Oldsmobile Div. of General Motors*, 94 Misc. 2d, at 838.

The law is well-settled: CPLR 208 tolls the statute of limitations “for the period of the disability, and the toll [is] not terminated by the act of a parent, guardian, or legal representative \*\*\*.” *Costello v. North Shore Univ. Hosp.*, 273 A.D.2d, at 191.

In the end, defendants have not demonstrated any reason why Referee Lowenstein’s recommendation is erroneous or why Mr. Giannicos should not obtain the benefit of an incompetency toll pursuant to CPLR 208.

Accordingly, it is

ORDERED that plaintiff’s motion to confirm the referee’s report is granted and the November 3, 2005 report of Referee Leslie Lowenstein is confirmed; and it is further

*Giannicos v. HHC*

Index No. 113964/01  
Page 10

ORDERED that plaintiff's motion to serve a late notice of claim is granted and the notice of claim is deemed served on HHC *nunc pro tunc*; and it is further

ORDERED that the parties are to appear for trial on February 1, 2006.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
January 27 2006

ENTER



Hon. Eileen Bransten

**FILED**  
FEB 01 2006  
NEW YORK  
COUNTY CLERK'S OFFICE