

**Webb v New York City Health and Hosps.
Corp.**

2007 NY Slip Op 31792(U)

June 19, 2007

Supreme Court, New York County

Docket Number: 0100030/2007

Judge: Karen Smith

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

PRESENT: SMITH
Justice

PART 62

ANTHONY WEBB

INDEX NO. 100030/07

MOTION DATE 3/15/07

MOTION SEQ. NO. 001

NYC HEALTH & HOSPITALS CORP

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this ~~motion~~ ^{petition to serve late} ~~to~~ ^{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, 4</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this ~~motion~~ ^{petition} is decided in accordance with the attached decision, judgment and order.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or party must appear in person at the County Clerk's Office (Room 11B).

Dated: 6/19/07

J.S.S.

J.S.C.

Check one: FINAL DISPOSITION

THIS CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X

ANTHONY WEBB, an Infant under the age of ten
years, by His Mother and Natural Guardian,
EARLENE BRYANT,

Petitioner,

-against-

Index no.: 100030/07

Motion seq.: 001

Motion date: 3/15/07

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

Respondent.

-----X

DECISION, JUDGMENT

AND ORDER

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk
and notice of entry cannot be served until the
obtain entry, counsel or the moving party must
appear in person at the County Clerk's Office (212) 312-1111
11B) X

PRESENT: KAREN S. SMITH, J.S.C.:

The petition brought by order to show cause for leave to file a late Notice of Claim is denied for the reasons set forth more fully below.

Petitioner Earlene Bryant ("Bryant") brought the instant petition by order to show cause seeking leave to file a Notice of Claim against respondent New York City Health and Hospitals Corporation ("HHC") for alleged medical malpractice committed against her son, Anthony Webb ("Webb"), in failing to halt her premature labor and in its performance of several surgeries on Webb in the four years subsequent to his birth. Respondent HHC opposes the petition as untimely.

According to petitioner, Bryant was a patient at Harlem Hospital Center ("Harlem") during her admittedly difficult pregnancy with Webb. At 28 weeks, Bryant went into early labor and went to Harlem for care. Despite Harlem's attempts to stop the early labor through administration of tocolytics, Bryant "broke through" tocolysis and delivered Webb via caesarian section on October 23, 1997. It was clear when he was born that Webb had an intestinal condition (unspecified in the parties' motion papers), for which Harlem performed a "left hemicolectomy" and "temporary colostomy" between the time of his birth and his discharge on January 28, 1998. Webb continued to

have difficulties associated with his intestines, including issues with incontinence and bowel control. On January 8, 1999, Harlem performed surgery involving “anorectal pull through & colostomy closure,” which petitioner claims was “improperly performed.” Petitioner claims that throughout his treatment at Harlem, the hospital employees “repeatedly assured that the infant was intact and normal,” and that he would “outgrow” the difficulties he was experiencing, but that Webb continued to have problems after the surgery. Bryant contends that Webb was a patient at Harlem and in the infant clinic through 2001, at which point she became dissatisfied with the care he received there. HHC contends that 1999 was the last time Webb was treated at Harlem for the medical conditions related to his intestinal problems, and that the only other record of treatment at Harlem is for an emergency room visit in 2001 involving an unrelated medical condition. In her affidavit in support of the petition, Bryant states that she was “eventually” able to have Webb evaluated by doctors at New York Presbyterian Hospital (“NYPH”), but does not specify the date on which Webb was first treated there.

In opposition to the petition, HHC submits two letters written by Philip Kazlow, M.D., director of the Clinical Gastroenterology Service at Children’s Hospital of New York-Presbyterian Hospital, to an unidentified recipient. The letters, dated November 29, 2004 and January 6, 2005 respectively, discuss Kazlow’s care of Webb. The November 29, 2004 letter refers to a “followup” visit by Webb on November 22, 2004, indicating that Webb’s care at NYPH began some time prior to that date.

On September 22, 2006, nearly two years from the first confirmed date of treatment at NYPH, Webb underwent intestinal surgery at NYPH. Bryant claims that it was subsequent to Webb’s 2006 surgery at NYPH, when the doctors at NYPH told her that he “had been damaged by

certain procedures performed at” HHC, that she first became aware of the alleged malpractice by Harlem. (This hearsay statement upon which Bryant bases her claim of malpractice is unsupported by either an affidavit of a physician or any other evidence in an admissible form.)

Bryant claims that after she ceased taking Webb to Harlem, she attempted to obtain Webb’s medical records from Harlem for the NYPH evaluation, but was never provided with a full copy of his records. In addition, she states that doctors at NYPH advised her that they, too, were unable to obtain Webb’s complete record from Harlem, but does not submit any evidence of the dates on which either she or NYPH made such attempts, nor does she specify how such attempts were made.

In her order to show cause and her proposed Notice of Claim, petitioner alleges two separate claims of medical malpractice on behalf of Webb: one, for the failure and the manner in which respondent attempted to arrest her premature labor, and the other with regard to Webb’s surgeries and attendant treatment involving his intestinal problems (which arose as a result of his premature birth). She now seeks leave to file a late Notice of Claim with respondent HHC.

General Municipal Law §50-e makes a notice of claim a condition precedent to commencing a lawsuit against a public corporation. Section 50-e(1) requires that the notice be served within 90 days after a claim arises. Section 50-e(5) gives courts discretion to grant an extension of time, “not [to] exceed the time limited for the commencement of an action by the claimant against the public corporation.” The purpose of the notice of claim requirement is to ensure that it has an adequate opportunity to timely explore the merits of the claim while the facts are still “fresh.” (*Torres v. New York City Housing Authority*, 261 AD2d 273 [1999], *lv denied* 93 NY2d 816 [1999]; *In re Luz Nieves v. New York Health and Hospitals Corporation*, 2006 NY Slip Op 8647 [1st Dept]).

In considering whether to exercise its discretion and grant an extension of time, some of the

key factors § 50-e(5) directs the court to consider are: 1) whether the petitioner has demonstrated a reasonable excuse for failing to file the notice of claim within the statutory time frame; 2) whether the public corporation acquired actual notice of the essential facts within 90 days after the claim arose or a reasonable time thereafter; 3) whether the delay would substantially prejudice the municipality in defending the action on the merits; and 4) whether the claimant was an infant.

(*Williams v. Nassau County Medical Center, et al.*, 6 NY3d 531 [2006], *subsequent appeal*, 2007 NY App. Div. LEXIS 1694 [2nd Dept, Feb. 13, 2007]; *Powell v. City of New York*, 32 AD3d 227 [2006]; *In re Luz Nieves v. New York Health and Hospitals Corp.*, 2006 NY Slip Op 8647 [1st Dept]). The presence or absence of any one factor is not determinative. (*In re Luz Nieves v. New York Health and Hospitals Corp., supra*). Where, as here, the claimant is an infant, that fact alone does not compel the granting of leave to file a late notice of claim. (*Davis v. New York City Housing Authority*, 233 AD2d 110 [1st Dept. 1996]. Rather, infancy is just one factor to be considered in weighing whether the claimant has a reasonable excuse for the delay. In this regard, the Court of Appeals has stated:

In deciding whether to allow late service of a notice of claim the court must consider “all relevant facts and circumstances.” A delay of service caused by infancy would make a more compelling argument to justify an extension. Conversely, the lack of a causative nexus may make the delay less excusable, but not fatally deficient.

(*Williams v. Nassau County Medical Center*, 6 NY3d at 538 [internal citation omitted]).

Bryant contends that she should be granted leave to file a late notice of claim because 1) she was unaware of the alleged malpractice until Webb underwent surgery at NYPH in September 2006; 2) HHC obtained actual notice of the essential facts constituting the claim by virtue of its own medical records; and 3) as HHC had actual notice at the time of the malpractice, it will suffer no substantial prejudice.

HHC opposes the petition and argues that it should be denied because, 1) petitioner has failed to demonstrate that HHC obtained actual knowledge of the facts within the statutory period; 2) Bryant's allegation that HHC failed to properly arrest the pregnancy is without merit; 3) petitioner has not offered a reasonable excuse for the delay; and 4) HHC would suffer substantial prejudice in attempting to investigate the approximately nine year old claims if they are permitted to go forward. The Court evaluates each of petitioner's claims individually.

Petitioner first claims that Webb suffered injuries as a result of HHC's failure to arrest Bryant's premature labor. Petitioner submits medical records from Harlem which show that Bryant was admitted for pre-term labor at 26 or 27 weeks into her pregnancy. Bryant was administered tocolytics in an attempt to arrest or slow labor. The records show that the hospital believed she would require a caesarian section delivery if she "breaks through" the tocolysis - if the attempt to halt labor failed. In a subsequent entry, the records indicate Bryant had "broken through tocolysis" and delivery was accomplished through caesarian section.

Petitioner contends that Harlem deviated from good and acceptable standards of care in their attempt to halt her labor. Petitioner fails, however, to provide a reasonable excuse for her failure to file the notice of claim within the statutory time frame, nor does plaintiff point to anything in the medical records which would have put HHC on notice of the underlying facts which serve as a basis for such claim. While, the Court recognizes that at this stage in the proceedings that the plaintiff is not required to prove her *prima facie* case, in light of the affidavit of David E. Seubert, M.D., submitted by HHC in its opposition papers, in which Dr. Seubert states that "within a reasonable degree of medical certainty based on the allegations alleged in petitioners' papers, respondent hospital provided appropriate treatment to the petitioner-mother" during her labor and delivery, it

behooves plaintiff to point with some specificity what was in the medical record to put defendant on notice of the facts underlying her claim. Plaintiff failed to do this either in her papers or in oral argument.

Bryant's second claim is that one or more of the surgeries performed by Harlem on Webb was performed in a negligent manner, resulting in Webb's continuing injury. Plaintiff submits two sets of medical records. The first set of records notes Webb's admission at birth and subsequent "left hemicolectomy" and "temporary colostomy" between October 23, 1997 and January 28, 1998. The second set of records documents the "anorectal pull through & colostomy closure" on January 8, 1999.

Again, Bryant argues that Harlem's medical records documenting the procedures performed, constitute actual knowledge on the part of HHC. Respondent, however, contends that plaintiff fails to offer a reasonable excuse for the delay and there is no indication in the records of any alleged negligence and, therefore, the records cannot constitute actual knowledge of the essential facts underlying the claim.

Bryant, again, has offered no reasonable excuse for the delay or shown a nexus between Webb's infancy and her delay in pursuing his claims. Her unsupported statement that she did not become aware that respondent committed medical malpractice until after the doctors in NYPH operated on her son in September 2006, leaves unanswered 1) what, if any, efforts she made to discover why her son continued to have serious intestinal problems after the two surgeries performed by respondent, 2) what was her son being treated for in NYPH prior to November 29, 2004, 3) when petitioner first requested respondent to provide her with copies of her son's medical records, and 4) what if any relation does the delay by respondent to provide those records have to

petitioner's delay in her pursuing these claims until five months after she allegedly first learnt of the problem.

More importantly, however, is the fact that the medical records submitted by Bryant merely document what surgical procedures were performed. As with the first claim, petitioner has failed to identify anything in the record which "would have afforded respondent notice of the facts constituting her claim, or to alert it as to any potential negligence on its part." (*In re Luz Nieves v. New York City Health and Hospitals Corporation, supra*). As the Court of Appeals has stated, "Merely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff . . ." (*Williams v. Nassau County Medical Center*, 6 NY3d 531 [2006]. See *In re Luz Nieves v. New York City Health and Hospitals Corporation*, 2006 NY Slip Op 8647 [1st Dept] [nothing in medical records would have alerted respondent to any potential negligence]; cf. *Greene v. New York City Health and Hospitals Corporation*, 2006 NY Slip Op 9129 [1st Dept] [finding that the sonogram record and medical records taken together constituted actual knowledge]; *Caminero v. New York City Health and Hospitals Corporation*, 21 AD3d 330 [1st Dept 2005] [hospital records explicitly described the act of alleged negligence and, therefore, constituted actual knowledge]).

HHC contends that investigating this claim after a delay of at least eight years would be unduly burdensome and perhaps impossible, creating substantial prejudice against it. Although HHC fails to specify whether the doctors who were involved in Webb's surgeries are still employed by HHC or otherwise unavailable, the absence of a reasonable explanation for petitioner's delay in pursuing these claims and the failure by petitioner to point to any evidence of knowledge by

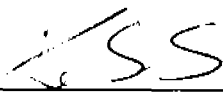
defendant, actual or constructive, of the facts underlying either claim, requires this Court to deny the petition in its entirety.

Accordingly, it is;

ADJUDGED that petitioner is denied leave to serve a late notice of claim for those causes of action relating to injury to petitioner Anthony Webb allegedly caused by respondent New York City Health and Hospital Corporation either for HHC's failure to arrest pre-term labor of petitioner Earlene Bryant or for HHC's negligence in its performance of the surgeries between October 23, 1997 and January 8, 1999.

The foregoing constitutes the decision, judgment and order of this court.

Dated: June 19, 2007
New York, New York



Hon. Karen S. Smith, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or other party responsible must appear in person at the Judgment Clerk's Desk (Room #1B).