Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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In the Matter of the Application of FATEMA ZOHRA and her husband Md. Moniru Zzaman for permission to serve a late Notice of Claim and other relief,

Petitioners,

- against -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, ELMHURST HOSPITALS CENTER,

Respondent.

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Index Number: 13195/07

Motion Date: JULY 17, 2007

Motion Cal. Number: 24

Motion Seq. No. 1

The following papers numbered read 1 to 13 on this petition by petitioners for leave to serve a late notice of claim and for pre-action discovery.

	Papers Numbered
Notice of Petition-Affirmation-Exhibits	1-4
Affidavit of Service	5
Affidavit in Opposition	6-7
Supplemental Affirmation	8-10
Reply Affirmation	11-13

Upon the foregoing papers it is ordered that the petition is decided as follows:

Petition by petitioners for leave to serve a late notice of claim, pursuant to General Municipal Law §50-e(5) is granted.

Petitioner contracted the Hepatitis-C virus allegedly as a result of a transfusion of tainted blood she received from Elmhurst Hospital on April 30, 2006 after she had given birth by Cesarean section at said hospital on April 26, 2006.

On or about October 1, 2006, she was notified by Elmhurst

Hospital shortly after having been given a blood test that she had contracted Hepatitis-C, most likely from the blood transfusion. She was advised that she would have to undergo a treatment regimen consisting of weekly injections for six months. Concerned that she would not be able to take care of her baby if the explained side-effects of the treatment manifested themselves, she went to Bangladesh to stay with family members. She returned in January 2007 and has had 10 to 15 appointments at Elmhurst Hospital related to the Hepatitis-C infection. Her last appointment was on April 12 and she alleges that she had another scheduled appointment on June 7. She avers that it has yet to be determined when her course of injections will begin. Petitioner first sought the advice of and retained counsel on May 11, 2007, on which date counsel drafted a notice of claim and served it upon the Health and Hospitals Corporation that same day.

As a prerequisite to commencement of a tort action against respondent, a notice of claim must be filed within 90 days after the claim arises (see General Municipal Law §50-e(1)(a); McKinney's Uncons. Laws of NY §7401[2]; New York City Health and Hospitals Corporation Act §20[2]).

As a general rule, a claim against the City arises and the 90-day period for filing a notice of claim commences from the date of discovery of the injury (see Pierson v. City of New York, 20 AD 3d 357 [1st Dept 2005]). It is undisputed that petitioner was first apprised that she had contracted Hepatitis on or about October 1, 2006. The City contends that since the claim arose at the latest on October 1, 2006, petitioner is late by seven months in filing a notice of claim and proffers no excuse for her delay.

Petitioner contends that since she has been under continuous treatment for the Hepatitis infection, her time to file a notice of claim has not expired.

It is well-settled that the 90-day period for serving a notice of claim is tolled by a continuous course of medical treatment relating to the original condition or complaint (see Allende v. New York City Health and Hospitals Corporation, 90 NY 2d 333 [1997]; Grellet v. City of New York, 118 AD 2d 141 [2nd Dept 1986]).

The City does not dispute that petitioner has received treatment for her Hepatitis infection since Elmhurst Hospital diagnosed her as having the virus in October 2006 and does not dispute petitioner's exposition of the law that the statutory period for serving a notice of claim is tolled during the period of continuous treatment. It contends that the continuous treatment doctrine does not apply to the facts of this case.

Counsel for the City contends, "The diagnosis of Hepatitis C, in October of 2006, has led to treatment of such. There is no

allegation whatsoever that any aspect of that care was a departure from good and accepted practice – rather, whatever departure exists, which we challenge, goes back to the supplying and administration of blood products in April 2006, solely. While treatment from October 2006 onwards may represent 'resumption' of treatment, it in no way represents continuous treatment of the focal care to the Petitioner, i.e., administration of blood, since April 2006."

This Court is of the opinion that counsel's view of the continuous treatment doctrine is overly restrictive. Counsel's argument that since the allegedly negligent event that gave rise to petitioner's claim was the administration of the transfusion, continuous treatment would mean continued transfusion and not corrective treatment of the harm caused by the transfusion finds no support in the law.

On the contrary, the very rationale upon which the Court of Appeals based its continuous treatment rule in Borgia v. City of New York (12 NY 2d 151 [1962]) was that "[i]t would be absurd to require a wronged patient to interrupt corrective efforts by . . . filing a notice of claim in the case of a city hospital. . . . the city's argument that the 90 days ran from the last malpractice would mean that if the child had remained in the hospital a few days longer than he did, the 90-day period would have expired while he was still a patient receiving care and treatment related to the conditions produced by the earlier wrongful acts and omissions of defendant's employees" (12 NY 2d at 156).

Since Elmhurst Hospital and petitioner, in October 2006, discovered petitioner's infection which is suspected by Elmhurst Hospital to have been caused by the administration by it of tainted blood products, petitioner has been receiving continuing care from Elmhurst Hospital representing corrective efforts to treat the consequences of the allegedly negligent transfusion. The medical care petitioner is currently receiving is clearly related to the same condition or complaint underlying her claim.

Moreover, as stated by the Court of Appeals in Richardson v. Orentreich (64 NY 2d 896, 898 [1985]), "The 'continuing trust and confidence' which underlies the 'continuous treatment doctrine' . . . does not necessarily come to an end upon a patient's last personal visit with his or her physician . . . , when further treatment is explicitly anticipated by both the physician and patient as manifested in the form of a regularly scheduled appointment for the near future . . . . Thus, a patient remains under the 'continuous treatment or care' of a physician between the time of the last visit and the next scheduled one where the latter's purpose is to administer ongoing corrective efforts for the same or related condition. Regardless of the absence of physical or personal contact between them in the interim, where the

physician and patient reasonably intend the patient's uninterrupted reliance upon the physician's observation, directions, concern, and responsibility for overseeing the patient's progress, the requirement for continuous care and treatment for the purpose of the Statute of Limitations is certainly satisfied" (citations omitted).

Application of these principles to the totality of the facts as presented on this record lead to no other conclusion but that the ongoing care petitioner is receiving from Elmhurst Hospital directly relates to the alleged negligent transfusion and, thus, constitutes a continuous course of care and treatment so as to toll the 90-day period for filing a notice of claim.

Moreover, there is nothing on this record to indicate that petitioner and her physician at Elmhurst Hospital considered that her care had at any time terminated so that the treatment being received by her after October 2006 could be characterized as a "resumption" of treatment rather than a continuation of treatment.

Therefore, since the 90-day period has been tolled, service of a notice of claim at this juncture would not be untimely.

Accordingly, that branch of the petition for leave to file a "late" notice of claim nunc pro tunc is granted to the extent that the notice of claim annexed to the petition is deemed timely served as of May 11, 2007.

Even if the continuous treatment doctrine were not applicable to the present case and petitioner's time to file a notice of claim expired on October 1, 2006, it would not be an improvident exercise of this Court's discretion to allow the late filing of a notice of claim nunc pro tunc.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General

Municipal Law § 50-e[5]).

Although the act which gave rise to plaintiff's claim was the administration of possibly tainted blood on April 30, 2006, respondent concedes that the 90-day period for filing a notice of claim, in this instance, would properly commence from on or about October 1, 2007, the date petitioner discovered that she was infected probably by tainted blood administered by Elmhurst Hospital. Therefore, the deadline for filing a notice of claim would have been approximately December 31, 2006.

Respondent contends that petitioner has failed to demonstrate a reasonable excuse for the delay of six months beyond the deadline in seeking to file a notice of claim. This Court agrees with respondent in this regard, assuming, arguendo, that there was no continuous treatment. Petitioner's excuses that she was unaware of the law regarding the requirement of serving a notice of claim within 90 days and that she only had a ninth grade education do not constitute a reasonable excuse for the delay (see D'Anjou v. New York City Health and Hospitals Corporation, 196 AD 2d 818 [2nd Dept 1993]).

However, the lack of a reasonable excuse is not, in and of itself, fatal to an application for leave to file a late notice of claim when weighed against other relevant factors (see Johnson v. City of New York, 302 AD 2d 463 [2nd Dept 2003]). Here, petitioner has presented other facts or circumstances that would weigh in favor of allowing the filing of a late notice of claim.

Petitioner has demonstrated that respondent had actual knowledge of the essential facts underlying the claim. Elmhurst Hospital knew that petitioner was infected with Hepatitis-C and the records indicate that the hospital suspected that the source of the infection was the blood transfusion it administered to petitioner. In fact, it was the hospital that so apprised petitioner. In addition, the hospital has been engaged in a course of corrective treatment of the infection. Moreover, the hospital had such actual knowledge since the first day of the 90-day period since the claim did not arise until discovery of the injury.

Although no single factor is determinative of whether the Court should allow a late notice of claim, actual knowledge is singled out for special consideration.

"The statute enumerates various factors relevant to an application for an extension, but it sets one apart from all the others: 'the court shall consider, in particular, whether the public corporation acquired actual knowledge of the essential facts constituting the claim within the [90-day period or within a

reasonable time thereafter.' Other factors, listed under the category 'all other relevant facts and circumstances' . . . essentially require a reasonable excuse for the delay and a showing of lack of prejudice" (citation omitted) (Narcisse v. Incorporated Village of Cent. Islip, __AD2d__, 2007 NY Slip Op 00652, *1 [2nd Dept, January 30, 2007]). Thus, although no single factor is necessarily determinative, the acquisition of actual knowledge must be accorded great weight (see James v. City of New York, 242 AD 2d 630 [2nd Dept 1997]) and is the one factor that must be given special consideration.

Respondent does not dispute that it had actual knowledge of the facts underlying the claim and, under the facts presented, there is no conceivable argument that may be advanced that respondent did not have such knowledge.

Moreover, since respondent had actual knowledge of the facts of the claim since day one and has been continuously treating petitioner with respect to the same condition or claim, it cannot claim prejudice. Respondent fails to show how it could possibly be hampered by the passage of time from properly investigating the claim. It fails to allege or show, for example, that the physicians who treated her are no longer employed at the hospital or that the medical records are no longer available. Respondent does not, in fact, claim that it would be in any way prejudiced by allowing a notice of claim.

Respondent's sole opposition to the instant motion is that petitioner has not set forth a reasonable excuse for the delay. Since lack of a reasonable excuse alone is not determinative, and since the record on this motion establishes that respondent had actual knowledge of the facts of the claim within the statutory 90-day period and was not prejudiced by the delay, petitioner should be allowed to file a late notice of claim even if there were no continuous treatment after discovery of the infection.

That branch of the petition seeking pre-action discovery, pursuant to CPLR 3102(c) is denied. Petitioner has failed to set forth a sufficient reason to allow such a remedy.

Dated: July 30, 2007

KEVIN J. KERRIGAN, J.S.C.