

**Khan v City of New York**

2007 NY Slip Op 32828(U)

August 31, 2007

Supreme Court, Queens County

Docket Number: 0019189/2007

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

-----X  
SYEDUZZAMAN KHAN,

Index  
Number: 19189/07

Petitioner,

Motion  
Date: 08/28/07

- against -

Motion  
Cal. Number: 15

THE CITY OF NEW YORK and  
NEW YORK CITY HEALTH & HOSPITALS  
CORPORATION,

Motion Seq. No. 1

Respondents.

-----X

The following papers numbered 1 to 7 read on this application by petitioner for leave to file a late notice of claim.

	<u>Papers Numbered</u>
Order to Show Cause-Petition-Affirmation-Exhibits..	1 - 4
Affirmation in Opposition-Exhibits.....	5-6
Reply Affirmation.....	7

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

Application by petitioner for leave to file a late notice of claim is denied and the petition is dismissed without prejudice.

Petitioner alleges that he went to the emergency room of Queens Hospital Center on April 8, 2006 complaining of severe abdominal pain. He alleges that no X-ray or CT scan was taken but that he was merely told that he probably was suffering from food poisoning and was discharged with instructions to take pain medication. Petitioner alleges that he returned to the hospital on April 13, 2006 and was given an antibiotic and discharged. He alleges that on April 15, 2006, he went back to the hospital at which time it was discovered that he had a ruptured appendix with peritonitis and that portions of his intestines had to be removed.

He was discharged on April 20, 2006 and returned to the hospital for follow-up care twice, the last time being on May 4, 2006. Petitioner contends that his injuries were due to the negligence of the hospital in failing to diagnose his appendicitis.

Petitioner states that his supervisor at his place of employment recently noticed the scar on his abdomen and, upon being told by petitioner of his illness and treatment at the hospital, advised petitioner that he might have a claim against the hospital for medical malpractice and referred him to the office of his present counsel. Petitioner contends that he was unaware that he was required to serve a notice of claim.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Petitioner seeks to file a notice of claim approximately one year past the ninety-day deadline for filing a notice of claim.

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]).

Petitioner has failed to articulate an adequate excuse for his failure to serve respondents within the statutory period. Petitioner, in his affidavit in support of the application, merely offers as an excuse that he was not made aware that he had a potential claim until he was apprised of such fact by his boss and did not know either that the hospital was owned by HHC or that he had to file a notice of claim within 90 days. However, a lack of awareness of the possibility of a lawsuit or ignorance of the law regarding the necessity of filing a timely notice of claim do not

constitute reasonable excuses (see Anderson v. City University of New York, 8 AD 3d 413 [2<sup>nd</sup> Dept 2004]; D'Anjou v. New York City Health and Hospitals Corporation, 196 AD 2d 818 [2<sup>nd</sup> Dept 1993]).

Counsel for petitioner, in her affirmation, contends that petitioner did not pursue his legal claim in a timely fashion because he was preoccupied with his medical needs and recuperation and to getting back to work. However, petitioner, in his affidavit, does not articulate this excuse. He merely avers that he was not well enough to work for six months following his discharge and remained in bed for a great portion of that time trying to recover. But he does not proffer this as an excuse for failing to file a notice of claim. Indeed, he was not aware that he had a claim, and thus had formed no intention to assert one at all, until after he went back to work and was apprised by his employer that he might have a claim.

He states that he was unable to work for six months after he left the hospital on April 20, 2006. That means that he started to work approximately toward the end of October 2006. Yet he avers that he was only recently alerted by his supervisor, who happened to see his scar and inquired what it was, that he might have a claim. Thus, petitioner had not even formed the intention to pursue a claim until over nine months after he had gone back to work and over one year after his last follow-up visit to the hospital on May 4, 2006.

Therefore, whether or not he was recuperating from and attending to his injuries for six months has no connection to his failure to assert a claim within the 90-day period or a reasonable time thereafter. Even if preoccupation with his medical condition superseded his concern with filing a notice of claim for six months, petitioner proffers no adequate excuse for his failure to pursue his legal remedies over the course of the following approximately nine months.

Even had petitioner averred that he was preoccupied with his medical condition and was physically unable to file a timely notice of claim, such allegation is unsupported by the affirmation of his physician (see Matthews v. New York City Housing Authority, 210 AD 2d 205 [2<sup>nd</sup> Dept 1994]).

Annexed to the order to show cause hereon in support of the petition is a copy of a physician's affirmation which redacts his name and signature in order to protect his identity. Counsel, in her affirmation in support of the order to show cause, stated that an unredacted copy would be provided to the Court. This Court, when it signed the order to show cause hereon, directed petitioner's

counsel to submit the unredacted doctor's affirmation to the Court on the return date of the petition for an in-camera review. This Court has reviewed the unredacted affirmation. Except for the name and signature of the physician, it is identical to the redacted copy annexed to the petition.

The physician's opinion fails to state that petitioner was in any way impaired by reason of his injuries from filing a notice of claim within the 90-day period or reasonably thereafter. (see Matthews v. New York City Housing Authority, supra).

Thus, petitioner has failed to proffer any probative evidence that he was incapacitated to such an extent that he could not have complied with the statutory requirement to file the notice of claim in a timely manner, even had he so alleged, which he did not do (see Bergmann v. County of Nassau, 297 A.D.2d 807 [2d Dept. 2002]).

The only other argument raised by counsel is that respondent acquired actual notice of petitioner's claim within the 90-day period and, therefore, suffered no prejudice. In this regard, petitioner fails to demonstrate, on this record, that respondent had actual notice of the essential facts of the claim within 90 days after the claim arose or within a reasonable time thereafter.

Counsel for petitioner contends that respondent had actual knowledge of the facts underlying his claim by virtue of being in possession of petitioner's hospital records. Moreover, since it had actual knowledge through those records, respondent would not be prejudiced by a late notice of claim.

A hospital may be deemed, under appropriate circumstances, to have acquired actual knowledge of the facts underlying a claim of malpractice by reason of having been in possession of petitioner's medical records since the time of the alleged malpractice (see Kurz v. New York City Health & Hospitals Corp., 174 AD 2d 671 [2<sup>nd</sup> Dept 1991]). However, "[m]erely 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 petitioner" (Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Actual knowledge based upon hospital records may not be found absent a clear showing of a nexus between the alleged malpractice and the injuries (see In Re Fallon v. County of Westchester, 184 AD 2d 510 [2<sup>nd</sup> Dept 1992]).

Petitioner has failed to submit any hospital records. Counsel states that petitioner has not yet obtained a complete copy of all medical records. Therefore, the record on this motion fails to

establish that defendant had actual knowledge of the facts underlying the claim within the 90-day period or a reasonable time thereafter.

In view of the foregoing, this Court need not reach the issue of prejudice, since even if there were none, it would be an abuse of discretion to grant the instant petition where petitioner has failed to demonstrate either that there was a reasonable excuse for his failure to timely file a notice of claim or that respondent acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see Carpenter v. City of New York, 30 AD 3d 594 [2<sup>nd</sup> Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2<sup>nd</sup> Dept 2006]).

Under the totality of the circumstances, it would be an improvident exercise of this Court's discretion to allow the filing of a notice of claim at this late juncture based upon the record presented on this petition.

That branch of the petition seeking an order compelling respondent to provide petitioner with a complete copy of all of petitioner's medical records is also denied. Petitioner has failed to allege or show that he has sought to obtain and was refused his medical records. Petitioner should have availed himself of his remedies in obtaining his medical records prior to commencing the instant proceeding.

Nevertheless, in the interest of justice, petitioner may commence a new proceeding to file a late notice of claim after obtaining his medical records. However, the decision of this Court to grant leave to commence a new proceeding is not to be construed as granting petitioner leave to reargue or renew the instant application. Any new petition shall be limited to the issues of whether respondent had actual notice of the facts underlying the claim based upon the hospital records and, upon a showing of such actual notice, whether respondent would be prejudiced by allowing a late notice of claim.

Accordingly, the application is denied and the petition is dismissed, without prejudice.

The unredacted copy of the affirmation of petitioner's physician has been mailed back to petitioner's attorney.

Dated: August 31, 2007

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KEVIN J. KERRIGAN, J.S.C.