

**Rojas v New York City Health & Hosps.  
Corp. (Bellevue Hosp. Ctr.)**

2007 NY Slip Op 33083(U)

September 14, 2007

Supreme Court, New York County

Docket Number: 0113959/2006

Judge: Joan B. Carey

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

PRESENT: Honorable Joan B. Carey  
Justice

PART 40 D

KEVIN ROJAS, An Infant by his Mother  
and Natural Guardian FABIOLA SANTIAGO,  
INDIVIDUALLY,

INDEX NO. 113959/06

Plaintiffs,

-v-

NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION (BELLEVUE HOSPITAL  
CENTER),

Defendant.

**FILED**  
SEP 24 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, 1- 29, were read on this motion by plaintiff to, *inter alia*, deem the notice of claim previously served upon defendant New York City Health and Hospitals Corporation timely served, *nunc pro tunc*, or, in the alternative, granting leave to serve a late notice of claim; and a cross motion by defendant New York City Health and Hospitals Corporation to dismiss the complaint on the ground that plaintiff failed to satisfy the notice of claim requirement.

Notice of Motion - Affidavits - Exhibits -Memorandum Of Law  
Cross-Motion - Opposition -  
Affirmation in Further Support of Plaintiffs' Motion  
Replying Affirmation on Defendant's Cross-Motion

<u>Papers Numbered</u>	
1-22	_____
23-26	_____
27-28	_____
29	_____

Cross-Motion:  Yes  No

The instant medical malpractice action involves allegations that defendant, *inter alia*, failed to prevent and properly treat infant plaintiff, Kevin Rojas', lead poisoning<sup>1</sup>. Fabiola Santiago gave birth to Kevin Rojas on September 5, 2000 at Bellevue Hospital, a facility owned by defendant New York City Health and Hospitals Corporation ("NYCHHC"). Kevin was a patient of the pediatric clinic at Bellevue Hospital from the time he was born through November of 2006, making periodic health examination visits. Kevin was diagnosed as having severe lead poisoning on September 9, 2003, for which he was hospitalized on September 17, 2003 for six days of chelation therapy. His blood lead levels were elevated above 10 µg/dL for approximately two years following his initial diagnosis. Plaintiffs allege that as a result of Kevin's lead poisoning he has learning disabilities, is speech delayed, is hyperactive, has trouble concentrating and has behavioral issues.

<sup>1</sup>The New York City Health Code § 11.03 provides that "lead poisoning [is] to be defined as a blood level of 10 micrograms per deciliter (µg/dL) or higher." Kevin Rojas had a blood lead level of 53 µg/dL at the time his lead poisoning was discovered on September 9, 2003.

In March of 2001, when Kevin was approximately six (6) months old, his family took up residence in an apartment located at 35-23 89th Street, Queens, New York ("the subject apartment"). According to plaintiffs, at the time the family moved into the subject apartment it was in "bad condition," as the walls had holes and peeling paint. After Kevin was diagnosed as having lead poisoning, the subject apartment was inspected by The Department of Health and found to contain unlawful lead based paint. Consequently, the Department of Health issued an order to abate.

From the time Kevin first moved into the subject apartment (March 2001) through September 9, 2003, the date on which Kevin's lead poisoning was discovered, he had made approximately thirty (30) visits to Bellevue for pediatric care, starting on March 22, 2001. It is alleged that Bellevue Hospital, through its employees, failed to perform a necessary lead poisoning risk assessment. As a result, Bellevue Hospital was unable to determine that Kevin was at high risk for developing lead poisoning, and consequently did not provide Kevin's mother with the Anticipatory Guidelines For Lead Poisoning, or perform any blood lead tests.

A blood lead test was eventually performed on August 14, 2002. This test revealed that at that time Kevin had a blood lead level of 6  $\mu\text{g}/\text{dL}$  (micrograms per deciliter), which, according to plaintiffs' medical expert, is sufficient to cause cognitive impairment in young children.<sup>2</sup> Despite this finding, Kevin's mother was not provided with the Anticipatory Guidelines For Lead Poisoning, at that time. Furthermore, it does not appear that another blood lead test was performed until September 9, 2003, at which time Kevin had a severely elevated blood lead level of 53  $\mu\text{g}/\text{dL}$ .

From September 9, 2003 to March 8, 2006, which was the date of Kevin's last treatment for lead poisoning at Bellevue Hospital, Kevin's blood lead levels were as follows:

09-09-03	53 $\mu\text{g}/\text{dL}$
09-16-03	48 $\mu\text{g}/\text{dL}$
09-17-03	47 $\mu\text{g}/\text{dL}$
09-25-03	21 $\mu\text{g}/\text{dL}$
10-24-03	19 $\mu\text{g}/\text{dL}$
11-08-03	17 $\mu\text{g}/\text{dL}$
11-28-03	15 $\mu\text{g}/\text{dL}$
12-24-03	21 $\mu\text{g}/\text{dL}$
02-04-04	12 $\mu\text{g}/\text{dL}$
03-24-04	15 $\mu\text{g}/\text{dL}$
05-25-04	18 $\mu\text{g}/\text{dL}$
06-23-04	12 $\mu\text{g}/\text{dL}$
08-18-04	12 $\mu\text{g}/\text{dL}$
07-14-05	16 $\mu\text{g}/\text{dL}$
07-23-05	15 $\mu\text{g}/\text{dL}$
10-12-05	23 $\mu\text{g}/\text{dL}$
10-17-05	16 $\mu\text{g}/\text{dL}$
01-09-06	8 $\mu\text{g}/\text{dL}$
03-08-06	7 $\mu\text{g}/\text{dL}$

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<sup>2</sup> A record of the August 14, 2002 blood test appears in a progress note dated September 18, 2003. However, this information does not appear in the chart review printout relating to Kevin's visit of August 14, 2002.

It appears that Kevin's mother consulted with an attorney soon after Kevin was found to have lead poisoning. However, since the owners of the subject premises had no insurance, the attorney would not take the case. Thereafter, in 2004, Kevin's mother consulted with another law firm, which, similarly, would not take the case because the owners of the subject premises did not have insurance. According to plaintiffs, these attorneys did not mention anything about a potential medical malpractice action against NYCHHC or the requirement to file a notice of claim. Plaintiffs retained the law firm of Fitzgerald and Fitzgerald on June 8, 2005, to represent them in connection with the instant medical malpractice action. After receiving and reviewing the infant plaintiff's medical records from Bellevue, plaintiffs served a notice of claim upon NYCHHC on February 6, 2006. Thereafter, on July 21, 2006, NYCHHC conducted the examination of Ms. Santiago pursuant to Gen. Mun. L. §50-h. Plaintiffs commenced the instant action with the filing of a summons and complaint on or about September 28, 2006, and service of same on defendant October 2, 2006.

The gist of plaintiffs' action is that infant plaintiff was clearly at high risk for lead poisoning on March 22, 2001, when he presented to Bellevue Hospital for his pediatric well baby visit at the age of six (6) months, in that the apartment where he was residing at that time had peeling paint; and Bellevue's failure to perform a risk assessment, its failure to provide infant plaintiff's mother with Anticipatory Guidelines for Lead Poisoning, and the failure to perform a blood lead level test on the visit of March 22, 2001, when he was six (6) months old, were departures from good and accepted medical practice.<sup>3</sup> Plaintiff further contends, *inter alia*, that Bellevue Hospital was negligent, and departed from good and accepted medical practice in failing to perform a risk assessment and in failing to provide Anticipatory Guidelines for Lead Poisoning on each of the visits thereafter, i.e., from the time infant plaintiff was six (6) months old up to the pediatric visit of September 9, 2003 when his blood lead level was 53  $\mu\text{g}/\text{dL}$ , as well as failing to perform blood lead level tests during this period, with the exception of the one performed on August 14, 2002. According to plaintiffs, the aforementioned departures were the proximate cause of the lead poisoning that Kevin Rojas suffered and the concomitant injuries, to wit, brain damage, learning disabilities, speech disorders, hyperactivity, failure of concentration and behavioral issues; said symptoms requiring special education.

Plaintiffs presently move for, *inter alia*, an order deeming the notice of claim previously served upon defendant on February 6, 2006, timely served, *nunc pro tunc*, or, in the alternative, granting leave to serve a late notice of claim. By way of cross motion, defendant New York City Health and Hospitals Corporation seeks to dismiss the complaint on the ground that plaintiffs failed to satisfy Gen. Mun. L. §50-e(1), which requires that a notice of claim be served 90 days after a claim arises.

Plaintiffs first contend that the notice of claim served on February 6, 2006 is timely because infant plaintiff, Kevin Rojas, received continuous treatment at Bellevue until March 8, 2006. It appears that plaintiffs contend that because the infant plaintiff received frequent and continuous treatment at Bellevue from the time his family moved into the subject residence in March of 2001 through March 8, 2006, the 90-day period within which a notice of claim must be filed, under General Municipal Law §50-e, was tolled until after Kevin's final treatment at Bellevue relating to his lead poisoning.

Defendant, in its cross motion to dismiss, concedes that the continuous treatment doctrine

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<sup>3</sup> The medical records of March 22, 2001 contain a note that a lead test was ordered; there is no record that the test was, in fact, performed.

is applicable to any claims relating to treatment subsequent to September 9, 2003, the date on which Kevin's lead poisoning was discovered. However, it is argued that the continuous treatment doctrine does not apply to treatment on or before September 9, 2003, because Kevin Rojas was not being treated for the condition which gave rise to the alleged acts of malpractice *i.e.*, lead poisoning, on or before that date.

CPLR §214-sets forth, in pertinent part, that "[a]n action for medical ... malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." Generally, a medical malpractice action accrues on the date of the alleged wrongful act. *See Plummer v. New York City Health and Hospitals Corporation*, 98 NY2d 263 [2002], citing *Nykorchuck v Henriques*, 78 NY2d 255, 258-259 [1991]. However, where there is a continuous course of treatment for the conditions giving rise to this malpractice action, the running of the applicable statutory period is tolled during the period of continuous treatment (*see Young v New York City Health & Hosps. Corp.*, 91 NY2d 291 [1998]; *Langsam v. Terraciano*, 22 A.D.3d 414 [1st Dept. 2005]. Additionally, the doctrine of continuous treatment will also toll the 90-day period within which a notice of claim must be filed under General Municipal Law § 50-e. *See Plummer v. New York City Health and Hospitals Corporation, supra*, citing *Davis v City of New York*, 38 NY2d 257, 259 [1975]; *Borgia v. City of New York*, 12 NY2d 151 [1962]; *see also Young v New York City Health & Hosps. Corp., supra*.

The policy reasoning underlying the continuous treatment doctrine is that "a patient should not be required to interrupt corrective medical treatment by a physician and undermine the continuous trust in physician - patient relationship in order to ensure the timeliness of a medical malpractice action." *See Young v New York City Health & Hosps. Corp., supra*. However, "[a] patients continuing general relationship with a physician, or routine, periodic health examinations will not satisfy the doctrine's requirement of 'continuous treatment' of the condition upon which the allegations of medical malpractice are predicated" *Id.*, citing *Massie v. Crawford*, 78 NY2d 516 [1991]; *McDermott v. Torre*, 56 NY2d 399 [1982]; *see also Plummer v. New York City Health and Hospitals Corporation, supra* "[r]outine examinations of a seemingly healthy patient, or visits concerning matters unrelated to the condition at issue giving rise to the claim, are insufficient to invoke the benefit of the doctrine". "Essential to the application of the continuous treatment doctrine is 'a course of treatment established with respect to the condition that gives rise to the lawsuit'." *Plummer v. New York City Health and Hospitals Corporation, supra*, quoting *Nykorchuck v Henriques, supra*.

As previously set forth, plaintiffs allege that Kevin's lead poisoning and disabilities were the result of negligence on the part of Bellevue Hospital in their failure, *inter alia*, to perform risk assessments, their failure to provide Anticipatory Guidance and their failure to perform blood lead tests going back to March 22, 2001, when he was six (6) months old. According to plaintiffs, the continuous treatment doctrine applies to the period beginning on March 22, 2001, the date on which they contend that their cause of action accrued, *rather than from the date that Kevin Rojas was first diagnosed with an elevated blood lead level*.

In support of their motion, plaintiff's submitted the expert affidavit, dated February 23, 2007, of a physician duly licensed to practice medicine in the State of New York and who is board certified in pediatrics. Plaintiff's expert first sets forth the standard of care as it relates to care,

treatment and prevention of infant lead poisoning.<sup>4</sup> In summary, the standard of care requires pediatric health care providers to assess the risk of lead poisoning and provide anticipatory guidance on lead poisoning prevention as part of the routine care of the child when treating children between the ages of six (6) months to six (6) years old. The health care provider is also required to perform blood screening when a child is around one (1) year in age and again at two (2) years in age. It appears that the standard of care requires that children found to be at high risk for high dose lead exposure should be screened as part of the routine examination. Upon a review of the infant plaintiff's medical records, plaintiffs' expert opined that Bellevue failed to perform a risk assessment and failed to provide Anticipatory Guidance for Lead Poisoning prior to the time the infant plaintiff was found to be poisoned with a blood lead level of 53  $\mu\text{g}/\text{dL}$ , and that such failures were departures from good and accepted medical practice.<sup>5</sup> Additionally, the failure to perform timely blood tests during the period from March 22, 2001 (infant plaintiff's six (6) month visit) to the time the lead poisoning was diagnosed on September 9, 2003 was also a departure from good and accepted practice. According to the expert, the above departures substantially contributed to the infant plaintiff's lead poisoning. The expert further opined that Bellevue departed from good and accepted medical practice by permitting the infant plaintiff to remain chronically lead poisoned for two (2) years following his chelation therapy, and that this departure substantially contributed to his brain injury.

Plaintiffs' expert addressed continuous treatment in his affidavit that was annexed to plaintiffs' initial moving papers, opining that within a reasonable degree of medical certainty that the treatment Kevin received during his final visit to Bellevue on March 8, 2006, was directly connected to and related to his 53  $\mu\text{g}/\text{dL}$  blood lead level diagnosed on September 9, 2003, the chelation therapy and subsequent treatment relating to his elevated blood lead levels that lasted for two years. Plaintiffs' expert specifically sets forth that it was his opinion, "within a reasonable degree of medical certainty, that the March 8, 2006 visit constituted continuing medical treatment for the infant's 53  $\mu\text{g}/\text{dL}$ ; his chelation therapy; and for the child's subsequent high blood lead levels that last[ed] over two years."

Plaintiffs' expert further states in this affidavit that "it is disturbing to see that Kevin had been presenting to Bellevue with symptoms of lead poisoning long before he was tested and found to have such a high blood lead level." According to this expert, Kevin was seen at Bellevue several times for symptoms of lead poisoning, such as constipation, fever, vomiting, stomach pain, decreased appetite and diarrhea, prior to being diagnosed with the condition. Despite same, the expert fails to state or demonstrate that the treatment provided to Kevin with respect to these conditions constituted or amounted to continuous treatment with respect to lead poisoning. Similarly, in their affirmation in support of this motion, plaintiffs state in a conclusory manner that the infant plaintiff "presented at Bellevue several times with classic symptoms of Lead Poisoning yet no one at Bellevue saw fit to conduct a Risk Assessment, provide Ms. Santiago with any

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<sup>4</sup> According to plaintiffs' expert, the standard of care as set forth in his affidavit "flows" from, *inter alia*, the following sources: (1) the October 1991 Statement by the Federal Centers for Disease Control entitled "Preventing Lead Poisoning In Young Children"; (2) the American Academy of Pediatrics; and (3) 10 N.Y.C.R.R. Part 67-1.

<sup>5</sup> In addition to plaintiffs' expert stating that the Bellevue medical records indicate that no risk assessment was performed or Anticipatory Guidance given prior to the infant plaintiff's lead poisoning, infant plaintiff's mother stated, in an affidavit annexed to the moving papers, that no risk assessment was performed or Anticipatory Guidance given prior to Kevin's lead poisoning.

Anticipatory Guidance for Lead Poisoning or test Kevin's Blood Lead Level." However, plaintiffs' counsel fails to state or demonstrate that the treatment that was provided in connection with these "classic symptoms" amounted to continuous treatment with respect to Kevin's lead poisoning.

In plaintiffs' affirmation in further support of the instant motion, plaintiffs argue that from March 21, 2001 to September 9, 2003, Kevin visited Bellevue on at least ten (10) occasions for treatment relating to symptoms associated with lead poisoning<sup>6</sup>. According to plaintiffs, since Kevin was treated at Bellevue approximately ten (10) times for recurring lead poisoning symptoms, he was receiving treatment for the underlying cause, *i.e.*, lead poisoning, during this period, and, thus, the continuous treatment doctrine dates back to the visit of March 22, 2001. Annexed to plaintiffs' affirmation in further support of the motion was a second affidavit of their medical expert, dated May 15, 2007, in which he again states that Kevin was seen at Bellevue several times for symptoms of lead poisoning prior to being diagnosed with the condition. However, again, absent from this affidavit is any opinion made within a reasonable degree of medical certainty that the treatment provided to Kevin with respect to these conditions constituted or amounted to continuous treatment with respect to his lead poisoning.

The Court acknowledges "that the failure to make the correct diagnosis as to the underlying condition while continuing to treat the symptoms does not mean, for purposes of continuity, that there has been no treatment." *Hein v. Cornwall Hospital*, 302 AD2d 170 [1st Dept. 2003], citing *Marun v. Coleburn*, 291 AD2d 340 [1st Dept. 2002]; *Dellert v. Kramer*, 280 AD2d 438 [1st Dept. 2001]; *Bonanza v. Raj*, 280 AD2d 948 [4th Dept. 2001]; *Green v. Varnum*, 273 AD2d 906 [4th Dept. 2000]. However, plaintiffs herein have not demonstrated that a course of treatment was established with respect to any symptoms of lead poisoning exhibited by the infant plaintiff prior to September 9, 2003. Infant plaintiff's visits to Bellevue prior to, and including, September 9, 2003, are outlined below:

- From March 22, 2001 through December 20, 2001, Kevin made seven (7) visits to Bellevue Hospital. Six (6) of these seven (7) visits were for routine physical examinations (well baby visits). However, the visit of December 6, 2001 appears to be a follow-up visit relating to the treatment of phimosis and redundant prepuce<sup>7</sup>, which was initially diagnosed during the well baby visit of November 16, 2001. There was no lead poisoning consult, *i.e.*, assessment, guidance or blood lead test, performed during this period, nor was there any treatment provided for lead poisoning or symptoms thereof.
- On January 20, 2002, at the age of sixteen (16) months, Kevin was hospitalized for seven (7) days for diarrhea, vomiting and fever, which, according to plaintiffs' expert are symptoms of lead poisoning. A single follow up with respect to these conditions was conducted on January 31, 2002. There was no lead poisoning consult performed during this hospitalization or the follow up visit of January 31, 2002.

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<sup>6</sup> In addition to the symptoms that were mentioned by plaintiffs' expert in the affidavit annexed to the initial moving papers, which consisted of constipation, fever, vomiting, stomach pain, decreased appetite and diarrhea, plaintiffs' argue that Kevin was also seen at Bellevue during this period for acute otitis media (ear infection), which is also a symptom of lead poisoning.

<sup>7</sup> These conditions relate to the foreskin of the infant plaintiff's penis, and is not alleged to be connected to his lead poisoning.

- From February 28, 2002 through April 25, 2002, Kevin made six (6) visits to Bellevue. The bulk of these visits were made to address a forearm fracture sustained by Kevin on February 6, 2002. There was no treatment provided for lead poisoning or symptoms thereof during this period, nor was a lead poisoning consult performed.
- On May 22, 2002, Kevin visited Bellevue with complaints of ear pain and was diagnosed with acute otitis media (ear infection). There was no lead poisoning consult performed during this visit.
- On June 7, 2002, Kevin visited Bellevue for what appears to be a well baby visit. There was no treatment provided for lead poisoning or symptoms thereof during this visit, nor was a lead poisoning consult performed.
- It appears that on August 14, 2002, Kevin had a blood lead level of 6  $\mu\text{g}/\text{dL}$ . This information was recorded in a progress note dated September 18, 2003. However, this information does not appear in the chart review printout relating to Kevin's visit of August 14, 2002.
- From September 25, 2002 through October 25, 2002, Kevin visited Bellevue on four (4) occasions. Other than the visit of October 24, 2002, which related to Kevin's forearm, he presented with complaints of ear pain/infection and constipation. There was no lead poisoning consult performed during these visits.
- On January 8, 2003, Kevin was again treated at Bellevue for an ear infection. He was noted to have fever, ear pain, coughing and decreased appetite at that time. No lead poisoning consult was performed during this visit.
- From March 18, 2003 through June 24, 2003, Kevin made four (4) visits to Bellevue. During this period there was no treatment provided for lead poisoning or symptoms thereof. There was no lead poisoning consult performed during these visits.
- On June 25, 2003, Kevin again presented with complaints of ear pain/ infection - eight (8) months since last receiving any treatment for this condition. There were also complaints of fever and coughing during this visit. There was a follow-up visit in connection with this ear pain and fever on July 15, 2003. During the follow-up visit diarrhea and stomach pain was noted. There was no lead poisoning consult performed during these visits. It does not appear that another follow-up was scheduled with respect to Kevin's ear pain/infection or other complaints of July 15, 2003.
- On September 9, 2003, during a well baby visit, Kevin's lead poisoning was discovered - he had a blood lead level of 53  $\mu\text{g}/\text{dL}$ .

Although Kevin received treatment on a number of occasions relating to what plaintiffs label as "classic symptoms" of lead poisoning, there is no evidence that plaintiff was suffering from lead poisoning while exhibiting these symptoms, nor any evidence that they were in any way connected. Further the record does not reflect that a continuing course of treatment was established with respect to these symptoms. The bulk of Kevin's visits during this period were for routine examinations, or were in connection with a forearm injury unrelated to lead poisoning or the symptoms thereof, as alleged by plaintiffs. When Kevin did present to Bellevue with what plaintiffs' contend are symptoms of lead poisoning, these visits constituted discreet and complete

visits, or a visit requiring a single follow-up to check the status of the infant plaintiff. It does not appear that these symptoms were believed to be part of a chronic condition requiring a continuous course of treatment or continual medical monitoring. As a result of the foregoing, the continuous treatment doctrine is applicable only to treatment subsequent to September 9, 2003, the date on which Kevin's lead poisoning was discovered. Accordingly, that portion of plaintiffs' motion seeking to have the notice of claim served on February 6, 2006, deemed timely under the continuous treatment doctrine is granted only with respect to treatment subsequent to September 9, 2003, and denied with respect to any treatment prior to that date.

Notwithstanding the foregoing, the court, in its discretion, grants that portion of plaintiffs' motion seeking an order deeming the notice of claim served upon defendant New York City Health and Hospitals Corporation timely served, *nunc pro tunc*, with respect to claims relating to the alleged malpractice occurring between March 22, 2001 through September 9, 2003. Gen. Mun. L. §50-e(5) reads in pertinent part:

"Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits."

The Legislature expressly set forth in Gen. Mun. L. §50-e(5) that a court, *in its discretion*, may extend the time to serve a notice of claim after considering the several factors set forth in the statute, *i.e.*, actual knowledge of the facts, infancy of plaintiff, reasonable excuse and substantial prejudice. The presence or absence of any one of the factors set forth in Gen. Mun. L. §50-e(5) is not determinative. See *Semyonova v. New York City Housing Authority*, 15 AD3d 181 [1st Dept. 2005].

First, with respect to actual knowledge, plaintiffs contend that defendants, through Bellevue employees, acquired actual knowledge of the essential facts constituting this claim within the 90 day period specified in Gen. Mun. L. §50-e or a reasonable time thereafter. According to plaintiffs, the essential facts constituting this claim are contained in the medical records relating to Kevin's treatment, and such records have been in the possession and control of defendants. In opposition to plaintiffs' motion and in support of its cross-motion to dismiss, defendant, relying on the Court of Appeals decision in *Williams v. Nassau County Medical Center*, 6 NY3d 531 [2006], argues that merely because it possessed defendants medical records does not establish that it had actual knowledge of the facts constituting the claim.

In *Williams v. Nassau County Medical Center*, a case in which the plaintiff alleged that his epilepsy and developmental disabilities were the result of the negligence of the defendant hospital in connection with his birth, the hospital's records revealed that the birth was difficult, and resulted in a broken clavicle. However, nothing in those records indicated that there would be any lasting harm to the child. The Court found that "[t]he infant's Apgar scores were satisfactory, and even two years later his EEG was normal. Under these circumstances defendants could well have concluded that when plaintiff left the hospital there was nothing wrong with him beyond a broken clavicle." *Id.* As a result, the Court stated that "[w]here, as here, there is little to suggest injury attributable to malpractice during delivery, comprehending or recording the facts surrounding the delivery cannot equate to knowledge of facts underlying the claim," and ultimately held that "[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 plaintiff . . . ."

In the instant action, however, medical records relating to the defendant's treatment of the infant plaintiff indicate that defendant did not perform a risk assessment or provide Anticipatory Guidance for Lead Poisoning prior to the time he was found to be poisoned with a blood lead level of 53  $\mu\text{g}/\text{dL}$ . The records also indicate that the only blood tests performed during the period from March 22, 2001 (infant plaintiff's six (6) month visit) to the time of the diagnosis of the lead poisoning on September 9, 2003, occurred on August 14, 2002 (6  $\mu\text{g}/\text{dL}$ )<sup>8</sup>, and again on September 9, 2003 (53  $\mu\text{g}/\text{dL}$ ). Therefore, these records afforded defendant actual knowledge of the essential facts constituting plaintiffs' claims; that it negligently failed to perform a risk assessment or provide anticipatory guidance for lead poisoning and failed to perform timely blood screening. It is important to point out that, based upon a review of Kevin's medical records by this court, it appears that when Kevin was diagnosed with lead poisoning, his prior medical records were reviewed by the medical staff at Bellevue to determine his past medical history. Therefore, at the moment the infant plaintiff was diagnosed as being severely lead poisoned, the defendant became aware of what it had done, and not done, with respect to the care, treatment and prevention of Kevin's lead poisoning. Accordingly, this court finds that defendant acquired actual knowledge of the essential facts constituting the claim within the 90 day period specified in Gen. Mun. L. §50-e or a reasonable time thereafter.

With respect to whether defendant is substantially prejudiced as a result of plaintiffs' delay in serving its notice of claim, plaintiffs also argue that based upon the fact that defendant has been in possession and control of the medical records relating to Kevin's treatment they will not be prejudiced by the delay. Defendant argues, however, that because of the passage of time its ability to defend this action is seriously prejudiced.<sup>9</sup> According to defendant, because of the delay in service of the notice of claim, it was unable to conduct a timely investigation with respect to plaintiffs' claim, and, as a result, is now prejudiced.

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<sup>8</sup> As stated above, it appears that Kevin had a blood lead level of 6  $\mu\text{g}/\text{dL}$  on August 14, 2002. However, this information appears in a progress note dated September 18, 2003, not in the chart review printout relating to Kevin's visit of August 14, 2002.

<sup>9</sup> Defendant initially argued that it was substantially prejudiced because the physician who treated the infant plaintiff on approximately half of his visits to Bellevue was now retired and could not be located. However, before the instant motion and cross-motion was fully submitted defendant was able to locate this physician and withdrew its argument that its inability to locate her would result in substantial prejudice.

Whether a defendant had actual knowledge of the essential facts constituting a claim is an important factor in determining if that defendant will be substantially prejudiced by a delay in filing a notice of claim. *See Williams v. Nassau County Medical Center, supra*. An equally important factor is the length of the delay. *See Id.* As stated above, defendant herein has been in possession and control of the medical records relating to Kevin's treatment, and, thus, had actual knowledge of the essential facts constituting this claim. With respect to the length of the delay, the malpractice alleged by plaintiffs in the instant action occurred on March 22, 2001, and on many dates thereafter. Plaintiffs, after consulting with other lawyers, retained the law firm of Fitzgerald and Fitzgerald, with respect to this malpractice action, on June 8, 2005. After receiving and reviewing the infant plaintiff's medical records from Bellevue, plaintiffs served a notice of claim upon NYCHHC on February 6, 2006, *approximately five (5) years following the alleged malpractice of March 22, 2001.*<sup>10</sup> Thereafter, on July 21, 2006, NYCHHC conducted the examination of Ms. Santiago pursuant to Gen. Mun. L. §50-h. Plaintiffs commenced the instant action with the filing of a summons and complaint on or about September 28, 2006, and service of same on defendant on October 2, 2006. The instant motion was filed and served on or about February 23, 2007, approximately one (1) year following the service of the notice of claim upon NYCHHC on February 6, 2006.

The five (5) year delay in serving the notice of claim, and the subsequent one (1) year delay in filing the instant motion, is insufficient to establish prejudice to defendants. *See De La Cruz v. NYCHHC*, 13 AD3d 130 [1st Dept. 2004][defendant did not demonstrate that substantial prejudice resulted from an approximately ten (10) year delay]; *McMillan v. City Of New York*, 279 AD2d 280 [1st Dept. 2001][seven (7) year delay insufficient to establish prejudice where defendant has been in the possession of plaintiff's medical records since the time of the alleged malpractice]. Additionally, it is important to note that at the time the notice of claim was eventually served upon defendant on February 6, 2006, infant plaintiff was still a patient at the defendant's facility enabling defendant to thoroughly investigate plaintiffs' claims while Kevin was still under the care of that facility.

With respect to infancy, plaintiffs contend that Kevin's infancy at the time the claim arose is a factor in favor of granting leave to file a late notice of claim.<sup>11</sup> Although plaintiffs do not demonstrate that the late filing of a notice of claim was caused by Kevin's infancy, the fact that Kevin was an infant at the time the claim arose is a factor to be considered in determining whether to grant leave to file a late notice of claim. "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, supra; see also Vasquez v. City of Newburgh*, 35 AD3d 621 [2d Dept. 2006]. This court takes the position similar to the First Department in *McMillan v. City Of New York, supra*, that an infant claiming to have been injured as a result of medical malpractice should not be penalized for

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<sup>10</sup> Defendant argues that the notice of claim served upon NYCHHC on February 6, 2006, was served untimely, without leave of court, and, thus, was a nullity. However, the notice of claim served by plaintiff on February 6, 2006 in the instant action cannot be said to be a nullity as it was, as conceded by defense counsel, timely served with respect to treatment subsequent to September 9, 2003.

<sup>11</sup> While Kevin's infancy would toll the statute of limitations, under CLPR § 208, such infancy toll does not relieve plaintiffs of the notice of claim requirement. *See Harris v. City of New York*, 297 AD2d 473 [1st Dept. 2002]; *see also Ocasio v. New York City Health and Hospitals Corporation*, 14 Ad3d 361 [1st Dept. 2005].

any delays occasioned by a parent or an attorney, where the defendant has been in the possession of the relevant medical records from the time of the alleged malpractice and has not been prejudiced by the delay.

With respect to whether plaintiffs have a reasonable excuse for the delay in service of the notice of claim, the fact that infant plaintiff's mother was unaware of their potential medical malpractice claim against Bellevue or of the notice of claim requirement *does not* amount to a sufficient excuse for the delay in filing a notice of claim. *See Harris v. City of New York, supra; Embury v. City, 250 AD2d 611 [2d Dept. 1998]; Gaudio v. City of New York, 235 AD2d 228 [1st Dept. 1997].* However, as stated above, based upon the infancy of the plaintiff, it would be unfair and unjust to deprive Kevin a remedy as a result of his mother's ignorance of the law, where, as here, defendant has been in possession of medical records affording it actual knowledge of the essential facts constituting the claim, and has not been prejudiced by the delay. *See Pearson v. NYCHHC, 2007 NY Slip Op 05483 [1st Dept. July 5, 2007]; De La Cruz v. NYCHHC, supra; McMillan v. City Of New York, supra.*

Lastly, if defendant has not yet provided plaintiffs with the infant plaintiff's entire medical file relating to his treatment at Bellevue, it is directed to provide same within twenty-one (21) days from the date of this decision and order.

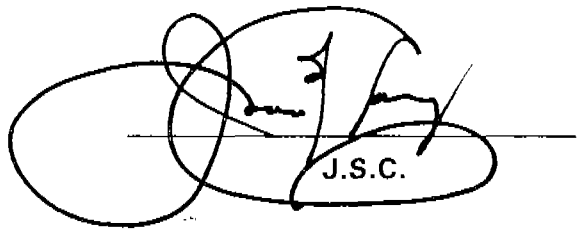
Based on the foregoing, it is hereby

ORDERED that defendant's motion to dismiss is denied; and it is further

ORDERED that that portion of plaintiffs' motion seeking to have the notice of claim served on February 6, 2006, deemed timely under the continuous treatment doctrine is granted only with respect to treatment subsequent to September 9, 2003, and denied with respect to any treatment prior to that date; and it is further

ORDERED that that portion of plaintiffs' cross-motion seeking an order deeming the notice of claim served upon defendant New York City Health and Hospitals Corporation timely served, *nunc pro tunc*, pursuant to Gen. Mun. L. §50-05), with respect to claims relating to the alleged malpractice occurring between March 22, 2001 through September 9, 2003 is granted.

Dated: 9/14/2007



Check one:  FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

NON- FINAL DISPOSITION  
 REFERENCE

**FILED**  
SEP 24 2007  
NEW YORK  
COUNTY CLERK'S OFFICE