

Matter of Zhumi v County of Suffolk

2008 NY Slip Op 31165(U)

April 11, 2008

Supreme Court, Suffolk County

Docket Number: 0039850/2007

Judge: John J.J. Jones

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file a late notice of claim; Notice of Motion/Order to Show Cause and supporting papers 1-21; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 22-29; Replying Affidavits and supporting papers 30-31; Other 32; it is

ORDERED that this application by petitioner, Julio Zhumi, as father and natural guardian of Nayeli Zhumi, an infant, for an order granting leave to serve a late notice of claim against the County of Suffolk, South Brookhaven Family Health Center West, Lawrence J. Minei, M.D. and Hiramani Pardanani, M.D. and to deem the notice of claim timely served *nunc pro tunc* is granted.

Petitioner seeks to assert a claim that Lawrence J. Minei, M.D., Hiramani Pardanani, M.D. and Brookhaven Memorial Hospital Medical Center (Brookhaven Hospital), its agents, servants and employees failed to properly treat petitioner's wife, Maria Centeno, during labor and delivery of the infant, Nayeli Zhumi, at Brookhaven Hospital on October 10-11, 2005, and that they failed to properly treat fetal distress, resulting in severe injuries and complications to the infant, including cerebral palsy. It is alleged that Drs. Minei and Pardanani were affiliated with South Brookhaven Family Health Center West (Health Center) at the time of treatment, and that the Health Center is a facility owned by the County of Suffolk and operated by Brookhaven Hospital. Dr. Pardanani is identified as the admitting and attending obstetrician in the hospital record, while Dr. Minei is identified as the surgeon for the Cesarean section delivery.

When Centeno presented to the hospital in the early morning hours on October 10, 2005, she indicated that she had contractions since 12:30 that morning, and the record contains notes indicating the absence of membranes and the presence of blood with mucus. In addition, the record maintained for the infant notes thick meconium stained fluid and that augmentation of labor with Pitocin for twenty hours yielded little progress, with fetal tracing "flat" throughout. It is petitioner's claim that fetal heart monitoring revealed fetal desaturation, lack of beat-to-beat variability and late decelerations, and that respondents continued to administer Pitocin in the face of fetal distress. At birth the infant had respiratory problems and experienced a seizure about one hour later. Records maintained by the Health Center note the infant's respiratory problems and transfer to Stony Brook University Hospital for complications following birth. The infant received follow-up care at the Health Center.

It was reported following a neurological evaluation of the infant at four months at Stony Brook University Health Sciences Center that the infant was showing early signs of cerebral palsy. The diagnosis of cerebral palsy was confirmed at an office visit with the infant's pediatrician on July 29, 2006. Petitioner and his wife consulted with counsel on or about December 4, 2006, at which time they indicated that pre-natal care was provided at "Patchogue Health Center." The proper name of the facility was later identified, however, and the records of the Health Center were received on January 17, 2007. On January 19, 2007, a Notice of Claim against the County of Suffolk was filed, but

it was rejected by defense counsel on behalf of the County on February 13, 2007. Retrieval of additional medical records pertaining to the examination and treatment of the infant was not completed until April 20, 2007. According to petitioners' counsel, a review of the records show that the Health Center is owned by the County, and that the doctors involved in the delivery of the infant were affiliated with the Health Center and Brookhaven Hospital.

Once the medical and hospital records were received, they were forwarded to a board-certified obstetrician and gynecologist, Dr. Martin Gubernick. Dr. Gubernick prepared an affirmation dated November 19, 2007 in which he sets forth his opinion that Dr. Minei, Dr. Pardanani and Brookhaven Hospital departed from good and accepted medical practice in the management of labor and the delivery of the infant. No direct claim against the Health Center for the pre-natal care of the infant's mother is asserted. It is claimed, however, that the County and the Health Center are potentially vicariously liable for the acts and omissions of Drs. Minei and Pardanani for treatment rendered at Brookhaven Hospital. An action to recover damages in medical malpractice was commenced against Dr. Minei, Dr. Pardanani and Brookhaven Hospital on August 20, 2007. An answer was interposed on behalf of the individual physicians by the same defense counsel who had previously served a notice of rejection of the notice of claim on behalf of the County. Failure to comply with the condition precedent of General Municipal Law §§ 50-D, 50-E, 50-H and 50-I was asserted as an affirmative defense. By letter from defense counsel dated October 15, 2007, however, it is asserted that Dr. Minei had advised his attorneys "that he does not have a contract with either the County or Brookhaven Memorial Hospital" but that "he is an employee of Brookhaven Memorial Hospital Medical Center." Nevertheless, a separate answer that does not include the same affirmative defense was interposed on behalf of Brookhaven Hospital by other defense counsel. Petitioner now seeks an order granting leave to file a late Notice of Claim, deeming the Notice of Claim that was filed on January 19, 2007 and a subsequent Notice of Claim filed on December 19, 2007 to be timely filed *nunc pro tunc*. Respondents have opposed the application.

In exercising its discretion in determining whether to permit the service of a late notice of claim, the court is to consider: (1) whether an infant is involved; (2) whether the petitioner has a reasonable excuse for the failure to serve a timely notice of claim; (3) whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or within a reasonable time thereafter; and (4) whether the delay would substantially prejudice the municipality's maintaining its defense on the merits (see General Municipal Law § 50-e [5]; see also *Matter of Williams v County of Suffolk*, 31 AD3d 778, 818 NYS2d 459 [2d Dept 2006]; *Resto v City of New York*, 240 AD2d 499, 658 NYS2d 416 [2d Dept 1997]; *Alvarenga v Finlay*, 225 AD2d 617, 639 NYS2d 115 [2d Dept 1996]). While the general rule is that an application to extend the time within which to serve a notice of claim may be made before or after commencement of an action but not more than one year and 90 days after the cause of

action accrued, the statute of limitations and the time within which to seek leave to file a late notice of claim may be tolled by infancy (*Carter v City of New York*, 38 AD3d 702, 832 NYS2d 630 [2d Dept 2007]).

Here, both parents of the infant submitted affidavits in which they averred that there was a delay in seeking legal assistance because they were preoccupied with their daughter's medical needs, and neither parent appreciated that their daughter's impairment or cerebral palsy may have been the result of malpractice. In addition, the infant's parents do not speak English and are not medically trained. Once the infant's parents sought legal assistance, further delays were occasioned by the need to obtain the records pertaining to pre-natal treatment, labor and delivery, and subsequent care, and the need to have those records reviewed by a medical expert to determine whether a claim exists and to identify the nature of the alleged malpractice. In addition, in view of the written representation by defense counsel that Dr. Minei was not an employee of the County but, rather, was employed by Brookhaven Hospital, the respondent himself contributed to any confusion that existed about the County's involvement in the birth of the infant. Considering the circumstances, the delay in serving a notice of claim is excusable.

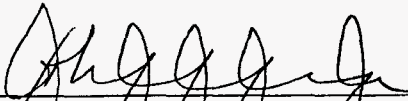
In medical malpractice cases, when the medical records themselves contain facts that detail both the procedures used and the claimant's injuries, and suggest that the relevant public corporation may be responsible for those injuries, the public corporation will be held to have had actual knowledge of the essential facts constituting the claim (*Matter of Felice v Eastport/South Manor Cent. School Dist.*, ___ AD3d ___, 851 NYS2d 218 [2d Dept 2008]). Where the alleged malpractice is apparent from an independent review of the medical records, those records constitute "actual notice of the pertinent facts" (*Cifuentes v New York City Health and Hosp. Corp.*, 43 AD3d 385, 840 NYS2d 433 [2d Dept 2007]). Here, petitioners seek to protect any claim of vicarious liability against the County for the actions and omissions of the individual physicians in the event it is determined that the physicians were County employees, and it is noted that defense counsel who were retained by the County have also appeared on behalf of Drs. Minei and Pardanani. Although respondents argue that the County did not have actual notice of the records prepared at Brookhaven Hospital, an independent medical facility, records pertaining to the labor and delivery of the infant were prepared by Drs. Minei and Pardanani. Moreover, Health Center records dated October 28, 2005 note that the infant had problems at birth, including the post-natal seizure.

Respondents argue that they are severely prejudiced in maintaining a defense by virtue of the delay because Dr. Pardanani took a medical leave from working at County clinics on April 7, 2007 and resigned on August 18, 2007. While it is alleged by defense counsel that, "upon information and belief, Dr. Pardanani no longer has a full recollection of the treatment rendered prenatally, during the hospitalization or postnatally," it can be concluded that Dr. Pardanani's whereabouts are known, even

though she may no longer be in the control of the County. It is also asserted that the absence of a record of the analysis of cord blood gases in the Brookhaven Hospital record prejudices the County because cord blood gas analysis is important in determining the timing of an alleged insult to a fetus in utero. Given that the County had actual knowledge of the facts constituting the medical malpractice claim, any limitation on its opportunity to investigate resulted from its own conduct, not from any delay in service of the notice of claim by petitioners (see *Matter of Godoy v Nassau Health Care Corp.*, ___ AD3d ___, 2008 NYAppDivLEXIS 1963 [2d Dept 2008]).

Considering all the relevant factors and the circumstances of this case, it is the determination of this Court that the notices of claim should be deemed to have been timely served *nunc pro tunc*.

DATED: 11 April 2008



HON. JOHN J. JONES, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION