

**Thigpen v Wyoming County Community Hosp.**

2008 NY Slip Op 31527(U)

May 31, 2008

Supreme Court, Wyoming County

Docket Number: 0039757/2008

Judge: Michael F. Griffith

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STATE OF NEW YORK  
SUPREME COURT COUNTY OF WYOMING

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**TYRONE THIGPEN,**  
Plaintiff

**ORDER**  
**Index No. 39757**

vs.

**WYOMING COUNTY COMMUNITY HOSPITAL**  
Defendant

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The above-named plaintiff having moved for an order granting leave to serve a late notice of claim pursuant to General Municipal Law § 50-e(5), and said motion having duly come on to be heard.

Now, upon reading and filing the notice of motion, dated March 7, 2008, supported by the affidavit of Tyrone Thigpen, *pro se*, sworn to on March 7, 2008, together with the annexed exhibits; and the opposing affidavit of Sharyn G. Rogers, Esq., sworn to on May 8, 2008; and upon consent of the parties and counsel, the matter was referred for determination by the undersigned upon submission of the papers without the necessity of oral argument, and due deliberation having been had, the following decision is rendered.

Plaintiff alleges that while he was an inmate at the Wyoming Correctional Facility, he was taken to the defendant hospital to have an improperly healed right ring finger repaired that had been previously broken. The finger was re-broken and the bone was reset and a pin was inserted to hold the bones during the healing process. The plaintiff further alleges that after

enduring three weeks of pain, the inserted pin broke through the skin of the finger and had come completely out from the finger. The plaintiff was transported to defendant hospital for further treatment to correct the problem.

Thereafter, on October 23, 2007, the defendant filed a claim to recover damages for alleged negligence and medical malpractice against the defendant in the Court of Claims. Counsel for the defendant filed a motion to dismiss that claim based on the defendant not being a state agency subject to suit in the Court of Claims. That action was ultimately dismissed on January 15, 2008 on the grounds the Court lacked jurisdiction to hear the claim against the defendant. The plaintiff filed the pending Notice of Motion to Serve a Late Notice of Claim on March 21, 2008. The plaintiff alleges the delay in filing the late notice of claim is because he was not aware of the procedures to be followed in making a claim for negligence against the municipality and its hospital and relied upon information received in the Correctional Facility.

During the 90 days directly following the plaintiff's treatment, plaintiff failed to file a Notice of Claim pursuant to General Municipal Law 50-e, a condition precedent to the commencement of an action against a municipal entity. However, the record reflects that during the 90-day time frame in which the claim accrued, plaintiff filed a claim against the defendant in the wrong court. In light of this claim, the Hospital put its insurance carrier, as well as the Hospital's attorney, Sharyn G. Rogers, Esq., on notice of a possible claim. It thus appears that the defendant did have actual knowledge of the facts underlying a potential claim within the time the claim accrued. The court has discretion to grant leave to serve late notice under GML 50-e(5) based on several factors, the most important of which is actual knowledge of the claim acquired by a municipality, its insurance company or its attorney during the specified time. Notice given

by the Hospital to its insurance carrier and attorney further illustrates the actual knowledge of a potential claim acquired by the Hospital within a reasonable time frame.

Plaintiffs' excuse for the failure to file timely Notice of Claim, namely that he was told by an employee of the Correctional facility where to file his claim, is insufficient. However, the inadequacy of plaintiffs' excuse for failure to file timely notice does not preclude the court from granting leave to serve late notice, as the Hospital had actual knowledge of the potential claim. (see, Rechenberger v. Nassau County Med. Ctr., 112 AD2d 150 (1985); Sloan v. County of Westchester, 175 AD2d 838 (1991); Williams v. Bronx Municipal Hospital Ctr., 205 AD2d 420 [1994]). Furthermore, although the court may consider "excusable error concerning the identity of a public corporation" as grounds to grant late service of notice under GML 50-e (5), "the presence or absence of any one factor listed in subdivision 5 of section 50-e of the General Municipal Law is not necessarily determinative" (Rechenberger, 112 AD2d 150, 152). The Hospital's knowledge of the claim and possession of medical records makes service of late Notice of Claim proper even in the absence of excusable error concerning the municipal status of the Hospital.

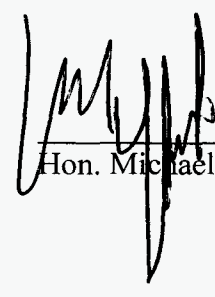
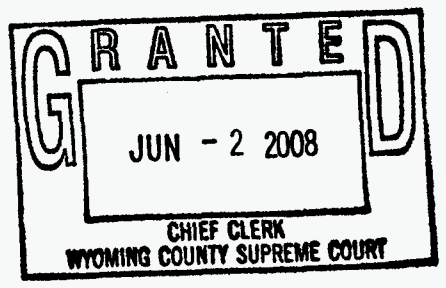
The actual knowledge acquired by the Hospital and its agents ensure that late service of notice will not prejudice the Hospital from defending on the merits. The sole purpose of the Notice of Claim is to prompt a thorough investigation into the claim in order to preserve the underlying facts (see, Matter of Beary v. City of Rye, 44 NY2d 398, 412 [1978]). Even in the absence of a formal Notice of Claim, "actual knowledge of the facts within 90 days or shortly thereafter makes it unlikely that prejudice will flow from a delay in filing that does not reach beyond the statutory period of a year" (Ruiz v. New York City Health and Hospitals Corp., 165

AD2d 75, 81 [1991]).

**NOW, THEREFORE**, it is hereby

**ORDERED**, that the plaintiff's application to serve a late Notice of Claim against Wyoming County Community Hospital shall be granted.

Dated: Warsaw, New York  
May 31, 2008

  
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Hon. Michael F. Griffith