

<b>Santiago v New York City Health &amp; Hosps. Corp.</b>
2009 NY Slip Op 30642(U)
March 19, 2009
Supreme Court, New York County
Docket Number: 108037/07
Judge: Douglas E. McKeon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: \_\_\_\_\_  
Douglas E. McKeon, J.S.C. Justice

PART 38

Santiago, Liliانا

INDEX NO. 108037/07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

NUCHHC

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided per annexed memorandum decision.

**FILED**

MAR 23 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/19/09

*Douglas E. McKeon*

J.S.C.

Douglas E. McKeon, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  DEFENDENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK:

-----X  
LILLIANA SANTIAGO, an Infant by her Mother and  
Natural Guardian, METODIA ESPINOBARRO,

Plaintiff, MEMORANDUM DECISION

-against-

NEW YORK CITY HEALTH & HOSPITALS  
CORPORATION (METROPOLITAN HOSPITAL  
CENTER),

Defendant.  
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Index No. 108037/07

**FILED**

MAR 23 2009

COUNTY CLERK'S OFFICE  
NEW YORK

HON. DOUGLAS E. MCKEON:

Plaintiff's motion directing the New York City Health and Hospitals Corporation ("HHC") to produce fetal heart monitor strips created during the labor and delivery of the infant-plaintiff, defendant's cross-motion to dismiss for failure to comply with the notice of claim requirement of General Municipal Law §50-e, and plaintiff's cross-motion for permission to file a late notice of claim are consolidated for disposition and decided as follows:

This claim arises out of the labor and delivery of the infant-plaintiff at Metropolitan Hospital on October 29, 2000. Plaintiff alleges a "failure to do a timely Cesarean section in the face of a prolonged 2nd stage of labor with mal presentation," which allegedly resulted in "anoxic ischemic encephalopathy." The infant's injuries include cerebral palsy and global developmental delays.

On or about October 15, 2006, plaintiff-mother, Metodia Espinobarro, visited the offices of Fitzgerald & Fitzgerald, P.C. and requested that they investigate a potential medical malpractice case on behalf of her daughter, Lilliana. On October 18, 2006, while still investigating the claim, Fitzgerald & Fitzgerald served a late notice of claim on the defendant New York City Health and Hospitals Corporation ("HHC") alleging medical malpractice by defendant in its treatment and management of the prenatal, labor and delivery, gynological, obstetrical, neonatal and pediatric care of the claimants. Two days later, Fitzgerald & Fitzgerald requested the infant's records from the hospital. Ms. Espinobarro retained the firm on October 29, 2006.

This action was commenced with the filing of the Summons and Complaint on June 8, 2007. Issue was joined by service of defendant HHC's answer on or about August 14, 2007. On or about September 10, 2007, plaintiff served defendant with a demand to produce all relevant medical records. With the exception of fetal heart monitor strips, these materials were provided. Subsequently, HHC provided a copy of the relevant strips on or about September 12, 2008, albeit after the making of plaintiff's motion. This court accepts HHC's explanation, supported by two affidavits of Metropolitan Hospital employees, as to the difficulty involved in locating the strips, resulting in a delay in producing them. Plaintiff acknowledges that it possesses all the strips. Hence, there is no basis for a missing document charge or other sanction.

Addressing the cross-motions concerning the late notice of claim, the Legislature established the filing of a notice of claim as a condition precedent to bringing suit against any public corporation. In determining whether to allow a late filing, the court must

consider various factors, including whether the claimant is an infant, whether the petitioner has demonstrated a reasonable excuse for failing to serve a timely notice of claim, whether the public corporation acquired actual knowledge of the facts constituting the claim within 90 days of its accrual or reasonable time thereafter, and whether the delay would substantially prejudice the public corporation in defending on the merits. *See* General Municipal Law §50(e)(5); *Williams v. Nassau County Med. Ctr.*, 6 NY3d 531 (2006). Further, because this application is made within the statute of limitations, tolled by the plaintiff's infancy for ten years from the date of the infant's birth, the court has discretion to consider the various factors set forth in General Municipal Law §50-e.

Based on the entire record before it, the court finds that plaintiff has met the criteria set forth in General Municipal Law §50-e and her application to file a late notice of claim is granted; defendant's cross-motion to dismiss is, therefore, denied.

Infancy alone does not compel the granting of a motion for leave to serve a late notice of claim. *See Williams, supra; Dumancela v. New York City Health and Hospitals Corp.*, 32 Ad3d 515 (2d Dep't 2006). Here, plaintiff asserts that the approximate six year delay in serving a notice of claim was the product of her limited English and her failure to appreciate that her child's disabilities might have been caused by medical negligence, a possibility first made known when she consulted with counsel. While standing alone, these explanations might not constitute a reasonable excuse for delay, plaintiff had other things happening in her life: She gave birth to two other children during this time; fortunately, each was healthy, causing her to question why her first born was not. Further,

there was a two year delay caused by counsel's failure to move to file a late notice of claim, although as noted *supra*, there was the ongoing request for fetal monitor strips.

It is now well settled that where an alleged malpractice is apparent from an independent review of the medical records, those records constitute "actual knowledge of the facts constituting the claim." See *Godoy v. Nassau Health Care Corp.*, 49 AD3d 541 (2d Dep't 2008); *Cifuentes v. New York City Health and Hospitals Corp.*, 43 AD3d 385 (2d Dep't 2007). In support of her quest to serve a late notice of claim, plaintiff submitted medical records and affirmations of two physicians who reviewed the records and concluded that there had been a departure from accepted medical practice. See *Williams, supra*; *Godoy, supra*; *Cifuentes, supra*.

At birth, the infant was noted to have respiratory distress, was limp and had no spontaneous breathing. On October 31, 2000, the infant was reported to have suffered 12 seizures. The medical notes reveal that, during the first days of her life, the baby had no spontaneous movements except for painful stimulation. The infant remained hospitalized approximately 20 days and was discharged on November 17, 2000. She continued to receive her well-child and specialized care at the Hospital's neurology, special care, pediatric, podiatry, ophthalmology and ent/audiology, genetics, rehabilitation, pediatric endocrinology and social work departments and/or clinics. Testing for genetic causes was conducted at New York University's Cytogenetics Laboratory, but no deviations from normal were found. Notably, the newborn admission record contains a radiology report of a CT scan, performed on October 31, 2000, containing an impression consistent with

anoxic ischemic encephalopathy. Moreover, an EEG, recorded on November 17, 2000, also supports the presence of diffuse anoxic ischemic encephalopathy.

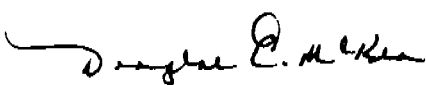
In the opinion of the plaintiff's experts, the medical records indicated, *inter alia*, that an alleged delay in performing a cesarean section, which would have avoided the cumulative effects of the hypoxic state that was causing late decelerations on fetal monitor strips, was a departure from accepted standards of medical care and proximately caused or contributed to the plaintiff's injuries.

Considering the overall circumstances present here, including the nature of the injuries and documentations in the infant's medical records, the delay in serving a notice of claim is excused.

Moreover, there is no indication that the defendant sustained prejudice attributable to the delay. *See Greene v. New York City Health and Hospitals Corp.*, 35 AD3d 206 (1st Dep't 2006).

As such, defendant's cross-motion to dismiss for failure to comply with the General Municipal Law notice of claim requirements is denied; plaintiff's application to serve a late notice of claim is granted and plaintiff is ordered to serve same on HHC within 30 days of the date of this order.

So ordered.

  
Douglas E. McKeon, J.S.C.  
Douglas E. McKeon  
Justice Supreme Court

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NEW YORK