

Moynihan v New York City Health & Hosps. Corp.

2010 NY Slip Op 32753(U)

October 1, 2010

Sup Ct, NY County

Docket Number: 108757/10

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART 52

Nancy Moynihan

INDEX NO. 108757/10

NYC Health & Hospitals Corp, Et Al.

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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 IN ACCORDANCE
WITH THE ATTACHED DECISION.

FILED
OCT 05 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/1/10

CYNTHIA S. KERN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X

NANCY MOYNIHAN,

Petitioner,

-against-

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

Respondents.

-----X

HON. CYNTHIA S. KERN, J.S.C.

Index No. 108757/10-

DECISION/ORDER

FILED

OCT 05 2010

COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner seeks an order deeming her notice of claim timely served against New York City Health and Hospitals Corporation (HHC) *nunc pro tunc* and/or for leave to serve a late notice of claim against HHC. For the reasons set forth below, petitioner's motion for leave to serve a late notice of claim against HHC is granted.

The relevant facts are as follows. Petitioner became employed as a Director within the Office of Clinical and Health Services Research (OCHSR) at HHC on January 7, 2008. In that capacity, petitioner was responsible for performing the final review to ensure that all new and continuing human subject research conducted at HHC hospitals met the applicable federal, state

and city regulations. For example, Principal Investigators (PIs) conducting human subject research at HHC facilities were required to obtain approval from petitioner's office prior to commencing human subject studies at any HHC site. Petitioner alleges that from time to time over the course of her employment, petitioner's efforts to ensure HHC's compliance with federal, state and city laws and regulations pertaining to human subject research were met with resistance from officials at HHC hospitals under her jurisdiction and from HHC officials. For example, petitioner alleges that in or around December 2008, when OCHSR determined to suspend human subject research at Harlem Hospital pending compliance with regulatory requirements, HHC officials objected to the suspension and took actions to avoid implementing the proposed imminent suspension. For another example, petitioner did not give clearance to commence a research project at Bellevue Hospital because it lacked documentation of approval from the local Institutional Research Board (IRB) and returned the research protocols to the PIs. Bellevue's Facility Research Chair objected to petitioner's actions.

Due in part to concerns regarding regulatory non-compliance at Harlem Hospital, a meeting was called for March 24, 2009. Prior to the date of the meeting, petitioner together with her supervisor Nonie Pegoraro, Senior Director of OCHSR prepared audits of five research protocols to be conducted at Harlem Hospital. These audits revealed regulatory non-compliance by the PIs conducting human subject research at Harlem Hospital. The issues raised included failure to obtain proper IRB approval for the studies and failure to provide informed consents. HHC retained special counsel to review these audits. According to petitioner, special counsel opined that these audits were "spot on". Petitioner presented these audits at the March 24 meeting. After the March 24 meeting, petitioner and Pegoraro continued to prepare additional

audits of human subject research studies conducted at Harlem Hospital. Petitioner alleges that after the March 24 meeting, she continued to request that Harlem Hospital send materials to her office relating to the audited human research studies and that she believes Harlem Hospital was directed by its affiliated institution to not comply with petitioner's request. Petitioner further alleges that she and Pegoraro made a request to the Vice-President and General Counsel of HHC asking for permission to schedule follow up meetings at Harlem Hospital to review the research records for the questioned protocols. Pegoraro advised petitioner that she could not get approval from HHC officials. Shortly thereafter, on April 6, 2009, petitioner was terminated without any prior notice for what she alleges was a pretextual reason of "budget cuts". Petitioner was escorted out of the building that day. Pegoraro was also terminated from her position shortly thereafter on May 29, 2009. Pegoraro filed a proper notice of claim against HHC in June 2009 and commenced a lawsuit against it in December 2009 for retaliatory termination.

On June 29, 2009, within ninety days of termination, petitioner filed a notice of claim against the City of New York. In this notice, petitioner identified the "City Agency Involved" as "New York City Health & Hospitals Corporation". She submitted three copies of the Notice of Claim to the Office of the Comptroller in New York. Petitioner alleges that she asked the clerk at the Office of the Comptroller whether she was filing the notice in the correct location and that the clerk on duty accepted it, stamped and returned a copy to her and told her that she would get a receipt in a number of weeks. Petitioner subsequently received a letter dated July 6, 2009 acknowledging receipt of her claim and assigning a claim number. Until petitioner consulted an attorney on June 24, 2010, she was not aware that her Notice of Claim should have been served directly on HHC.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within ninety days after the claim arises. *See* General Municipal Law (“GML”) §50-e(1)(a). However, courts have broad discretion to grant leave to serve a late Notice of Claim pursuant to GML §50-e(5). In determining whether to grant leave, the court must consider whether the petitioner had a reasonable excuse for her delay, whether the delay prejudiced the municipality’s defense and whether the municipality, its attorney or insurance carrier acquired “actual knowledge of the essential facts constituting the claim” within ninety days after the claim arose or within a reasonable time thereafter. The court must also consider other relevant circumstances such as 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. *See* GML §50-(e)(5); *Strauss v New York City Transit Authority*, 195 AD2d 322 (1st Dept 1993). It is petitioner’s burden to prove each of these elements, including lack of prejudice to the respondent. *See Delgado v City of New York*, 39 A.D.3d 387 (1st Dept 2007); *Ocasio v New York City Health and Hospitals Corporation*, 14 A.D.3d 361 (1st Dept 2005). Although no one factor is dispositive, the court must give particular consideration to whether the respondent, its attorney or insurance carrier acquired actual knowledge of the claim within the 90-day statutory period or shortly thereafter. *See* GML §50-(e)(5).

Considering all of the above factors together, petitioner’s motion to serve a late notice of claim is granted. First, petitioner states a reasonable excuse for her mistake in serving the Office of the Comptroller instead of the HCC directly. Petitioner asked the clerk for confirmation that she was at the right place, wrote HHC as the “city agency” being sued and received a confirmation from the City of New York acknowledging receipt of the notice. Given the above

coupled with the fact that HHC is a City affiliated organization, the court finds petitioner's excuse to be a reasonable one. *See Tadros v. New York City Health and Hospitals Corp*, 112 A.D.2d 85, 86 (1st Dept 1985)(mistaken belief that HHC was a city agency found to be an excusable error).

Additionally, HHC acquired actual knowledge of the facts underlying the claim within the statutory period of ninety-days or a reasonable time thereafter. Petitioner claims that she was terminated from her position in retaliation for bringing to light HHC's non-compliance with federal, state and/or city regulations. HHC officials were well aware of petitioner's concerns regarding HHC's non-compliance, as just prior to her termination, petitioner communicated her concerns to HHC officials. In fact, a meeting between petitioner, Pegoraro and HHC officials was held on March 24, 2009 – just weeks before petitioner's termination – where petitioner addressed her concerns regarding Harlem Hospital (an HHC hospital)'s non-compliance with relevant regulations. After this meeting, petitioner sought approval from HHC officials to schedule follow-up meetings at Harlem Hospital to review its research protocols. HHC denied this request and terminated petitioner shortly thereafter without any prior notice. Given that HHC terminated petitioner from her position without prior notice shortly after she communicated her concerns regarding HHC's non-compliance with federal state and /or city regulations at a meeting with HHC officials, the court finds that HHC had actual knowledge of essential facts constituting petitioner's claim of retaliatory termination.

Moreover, petitioner's delay will not prejudice HHC's defense. Petitioner's supervisor Pegoraro filed a timely notice of claim and commenced a lawsuit in federal court entitled *Pegoraro v. Marrero et al*, 10 CV 00051 against HHC for retaliatory termination. Pegoraro's

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suit is for a similar claim resulting from the same set of events. As HHC was put on timely notice of Pergoraro's claim and it is based on the same underlying events as petitioner's claim, it is presumed that HHC preserved documents and other evidence in defending against Pergoraro's claim. In fact, investigators from HHC's Inspector General's office interviewed petitioner regarding Pergoraro's claims. Since the evidence that would have to be investigated for petitioner's claim is the same as that which has already been investigated and preserved for Pergoraro's claim, petitioner's delay will not prejudice HHC's defense.

The City's argument that petitioner's claims are time-barred is without merit as the one year and ninety-day statute of limitations for claims against HHC outlined in the Health and Hospitals Corporation Act (HHC Act)(McKinney's Uncons. Law of NY §§ 7381 to 7406) takes precedence over other statutes of limitations. *See Wright v. City of Newburgh*, 259 A.D.2d 485, 486 (2d Dep't 1999); McKinney's Uncons. Law of N.Y. § 7401. Moreover, the HHC Act specifically states "insofar as the provisions of this act are inconsistent with provisions of any other law, general, special or local, the provisions of this act shall be controlling" *See* McKinney's Uncons. Law of N.Y. § 7405. Also, the court will not address the City's arguments addressing the merits of petitioner's claim as the opposition to a motion for leave to serve a late notice of claim is not the proper forum to address the merits of the underlying claim.

Accordingly, petitioner's motion to serve a late Notice of Claim is granted. This constitutes the decision and order of the court.

Dated: 10/1/10

FILED
OCT 05 2010
COUNTY CLERK'S OFFICE
NEW YORK

Enter: _____

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J.S.C.
CYNTHIA S. KERN
J.S.C.