

Matter of Rivera v Nuhealth

2010 NY Slip Op 32881(U)

October 7, 2010

Supreme Court, Nassau County

Docket Number: 11450/10

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

In the Matter of the Claim of BRIAN RIVERA, an Infant
by his Mother and Natural Guardian, ELVA ALVIZURES,

TRIAL/IAS PART 32
NASSAU COUNTY

Petitioner,

Index No.: 11450/10
Motion Seq. Nos.: 01, 02
Motion Dates: 07/15/10
08/05/10

- against -

NUHEALTH
(Nassau County Medical Center and Hempstead Health Center),

Respondent.

The following papers have been read on these motions:

	Papers Numbered
<u>Order to Show Cause, Affirmation and Exhibits</u>	1
<u>Notice of Cross-Motion, Affirmations and Exhibits</u>	2
<u>Petitioner's Affirmation in Opposition and Reply</u>	3

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Motion (Seq. No. 01) by petitioner, Brian Rivera, an infant and his mother, Elva Alvizures, for an Order granting petitioners leave to serve late Notice of Claim alleging a medical malpractice cause of action upon municipal respondents, Nassau University Medical Center and its clinic Hempstead Health Center (jointly, "Nuhealth") and deeming said Notice of Claim timely served upon respondents, *nunc pro tunc* pursuant to General Municipal Law §50-e (5) and 50 -e(6), is

granted. Cross motion (Seq. No. 02) by respondents for an Order dismissing the cause of action pursuant to CPLR §3212, General Municipal Law §50-e (i) for failing to timely file a Notice of Claim, and CPLR §3211 (a)(7) for failure to state a cause of action, is denied in its entirety.

FACTS

The infant petitioner, Brian Rivera, was born at the Nassau University Medical Center (“Hospital”) on June 7, 2007. Prior to his birth, Brian’s mother, Ms. Alvizures, had undergone prenatal treatment at the Hospital’s outpatient clinic, the Hempstead Health Center. On June 7, 2007, when Ms. Alvizures failed to detect fetal movement, she presented at the Hospital where she was admitted and Brian was later delivered by way of vacuum extraction. Although Brian was born full term, hospital personnel informed Ms. Alvizures that Brian was “yellow” in color and had to remain in the hospital for a few days. She also noted that his left eye emitted discharge and it was smaller than the other and that his body was shaking. In addition to his birth weight being recorded at 5 pounds, 7 ounces, Brian’s Newborn Nursery Assessment indicated acrocyanosis, cephalohematoma, and transient tremors. Notwithstanding her complaints, the respondent Hospital advised Ms Alvizures that Brian was a “normal” newborn.

Brian was discharged on June 11, 2007 and Ms. Alvizures brought him to the Hospital on June 13, 2007, June 14, 2007 and July 3, 2007 for outpatient treatment where she complained about Brian’s continued tremors, discharge from his eyes, and the size of his left eye. It is noted that the Hospital records dated June 14, 2007 (*see* Notice of Motion, Exhibit G) state that Brian’s tremors were resolved and he had not exhibited such tremors since his discharge from the Hospital; however, the records from the same Hospital dated July 3, 2007 state that, as per Ms. Alvizures, Brian is still exhibiting “tremors of the lower extremities” even during his sleep, while noting that

Ms. Alvizures had a scheduled ophthalmology appointment to further evaluate Brian's "small eyes", and charting observations that his left eye was "hyperpigmented." See Notice of Motion, Exhibit G.

Upon referral by his pediatrician, the infant petitioner was examined by an ophthalmologist at North Shore-Long Island Jewish Hospital System (LIJ) on July 19, 2007. Based on that examination and Ms. Alvizures' complaints of Brian's symptoms, Brian was admitted to LIJ's Schneider Children's Hospital with a diagnosis of a presumed congenital infection which was later confirmed as toxoplasmosis infection, a perinatal infection passed from mother to the fetus. The infection, as averred by his treating physicians, caused damage to Brian's brain and eyes. Brian, after his discharge from Schneider's on July 23, 2007, was treated by various specialists and received physical, occupational and speech therapy.

As a result of the infection, Brian exhibited and continued to exhibit cognitive developmental delays and some motor condition difficulties requiring continued specialized educational services. After two years of continuous treatment, Ms. Alvizures consulted legal counsel and commenced this action against the Hospital and Clinic in May, 2010. She moved, in effect, for leave to serve the Notice of Claim and deem the Notice of Claim timely served *nunc pro tunc*, arguing that the statute of limitations to serve the notice is tolled by Brian's infancy. Respondents cross moved to dismiss the action as untimely, arguing that no nexus exists between the delay and Brian's infancy, that the delay in filing the Notice of Claim is lengthy and consequently they are prejudiced by the delay, and that the claim fails to state a cause of action.

DISCUSSION

General Municipal Law §50-e (1)(a) provides that a notice of claim must be filed with a

municipality within ninety days of the date on which the claim arose. If the Notice of Claim is not filed within that ninety day time period, a claimant must make an application to the Court, within one year and ninety days from the time the cause of action accrued, for permission to file a late notice or claim. *See* General Municipal Law §50-i (1) (c); *Allende v. City of New York*, 69 A.D.3d 931, 894 N.Y.S.2d 472 (2d Dept. 2010). However, when the claimant is an infant, this one year and ninety day Statute of Limitations is tolled for a period of ten years during the period of infancy. *See Russo v. Monroe-Woodbury Cent. School Dist.*, 282 A.D.2d 465, 723 N.Y.S.2d 198 (2d Dept. 2001); General Municipal Law §50-e (5); CPLR § 208.

It is noted that court's decision to grant or deny a late notice of claim is still purely a discretionary one, and the courts remain free to deny an application for an extension in the interests of fairness to the potentially liable public corporation. The incorporation of the toll into the period of limitations specified in General Municipal Law §50-e (5) merely confers upon the courts the authority to entertain the otherwise untimely applications of disabled and/or infant claimants; it does not, however, dictate that such applications automatically be granted. *See Cohen v. Pearl River Union Free School Dist.*, 81 A.D.2d 876, 439 N.Y.S.2d 393 (2d Dept.1981).

In addition to considering whether an infant is involved, this Court, in determining whether to grant leave to serve a late notice of claim, must consider several factors: whether there is a reasonable excuse for the delay; whether the public corporation acquired actual knowledge of the facts underlying the claim within ninety days or a reasonable time thereafter; and whether the late service would result in substantial prejudice to the public corporation defending on the merits. *See* General Municipal Law § 50-e(5); *Russo v. Monroe-Woodbury Cent. School Dist.*, *supra*. Actual knowledge of the essential facts is an important factor in determining whether to grant an extension and "should be accorded great weight. *See Brownstein v. Incorporated Village of Hempstead*, 52

A.D.3d 507, 859 N.Y.S.2d 682 (2d Dept. 2008).

Here, on the issue of actual knowledge to be gleaned from the Hospital's records, the petitioners submit exhibits, attached to their papers, which objectively set forth the facts that constitute the claim of the alleged medical malpractice at the time of Brian's birth with the condition specifically diagnosed a little over a month later after referral to LIJ. There is clear indication that Ms. Alvizures complained of and the infant petitioner exhibited, either at the time of his birth, discharge from the Hospital or upon follow-up visits, symptoms consistent with the diagnosis of toxoplasmosis. Accordingly, the entries in the Hospital's records at the time of the Brian's birth indicate knowledge of the facts underlying his claim. *See Robinson v. Westchester County Medical Center*, 270 A.D.2d 275 (2d Dept. 2000).

The respondents argue that the time period for the delay in filing this motion is two years and eleven months. The petitioners however argue that the delay, in actuality, is about one and a half years. It is noted, according to the petitioners, that it took about six months and several requests to acquire copies of the medical records from the respondents thus contributing to the delay in filing. Notwithstanding whether the time period of the delay is two years and eleven months, or one and a half years, this motion has been filed well within the ten year infancy toll. *See CPLR § 208*. Further, considering the circumstances present here, including the nature of the injuries, the respondents' conduct, and the mother's predisposition to be concerned first with her child's medical condition, the delay in serving the Notice of Claim is reasonable. *See Gallino v. Village of Shoreham*, 222 A.D.2d 506, 634 N.Y.S.2d 550 (2d Dept. 1995).

In addition, Ms. Alvizures sought legal advice immediately after two years of continuous intense treatment of her son. Although she first learned that Brian suffered from the infectious condition shortly after his birth in 2007, she did not learn that the failure of early detection and

diagnosis may have caused and/or contributed to Brian's brain damage, resulting cognitive developmental delays, and motor coordination difficulties until her attorneys investigated the matter. However, the presence or absence of any one of the factors used in determining whether to allow service of a late notice of claim against a municipality is not necessarily determinative, and the absence of a reasonable excuse is not necessarily fatal to the petitioner's motion. *See Jordan v. City of New York*, 41 A.D.3d 658, 838 N.Y.S.2d 624 (2d Dept 2007).

Finally, the petitioners established that the Hospital would not be substantially prejudiced in maintaining its defense on the merits as a result of the delay in seeking leave to serve a late notice of claim as some of the defendants' attending physicians who treated Brian, are still employed and/or affiliated with Nuhealth. *See Place v. Beekmantown Cent. School Dist.* 69 A.D.3d 1035, 892 N.Y.S.2d 638 (3d Dept. 2010), *Cifuentes v. New York City Health and Hospitals Corp.*, 43 A.D.3d 385, 840 N.Y.S.2d 433 (2d Dept. 2007). Moreover, the respondents had actual knowledge of the claim or the facts giving rise to the claim because they possessed the petitioners' medical records. *See Ramirez v. County of Nassau*, 13 A.D.3d 456, 787 N.Y.S.2d 71 (2d Dept. 2004).

In sum, the infancy toll should be applied in this instance as Nuhealth had actual notice of the underlying facts by virtue of its status as a repository of the patients' records and its charting references of the infant petitioner's symptoms and his mother's complaints. Furthermore, the parent's natural preoccupation with her child's condition and treatment warranted excusing the delay in filing this motion.

Nuhealth contends that the petitioners have failed to make the requisite showing that the delay in filing a notice of claim was a product of Brian's infancy, and that absent such a showing, leave to serve a late notice of claim must be denied. The respondents cite authority, *Rowe v. Nassau Health Care Corp.* 57 A.D.3d 961, 871 N.Y.S.2d 330 (2d Dept. 2008), and *Williams v. Nassau*

County Medical Center, 13 A.D.3d 363, 786 N.Y.S.2d 207 (2d Dept. 2004) as stating that the delay in serving the Notice of Claim “[**must be the product of infancy**]” (emphasis added). *See* Notice of Cross Motion, ¶ 21. However, *Rowe* and *Williams* merely set forth that the facts in those particular cases did not indicate a causal connection between the delay and infancy; not that the causal connection is a mandatory requirement for application of the infancy toll as implied by the respondents.

Furthermore, there is no merit to the respondents’ argument as the foregoing requirement existed under a predecessor version of current General Municipal Law § 50-e (5). That predecessor section did indeed contain an express requirement limiting a court’s discretion over late notice applications to situations, *inter alia*, “[w]here the claimant is an infant ... and by reason of such disability fails to serve a notice of claim within the time specified.” *See* General Municipal Law former § 50-e (5). As amended, however, this requirement was deleted (L 1976, ch 745). As such, the petitioner is no longer required to establish that the delay is a product of the infancy. *See Meredith C. v. Carmel Cent. School Dist.*, 192 A.D.2d 952, 597 N.Y.S.2d 199 (3d Dept. 1993), *Matarrese v. New York City Health and Hospitals Corp.*, 215 A.D.2d 7, 633 N.Y.S.2d 837 (2d Dept. 1995).

In light of the foregoing, the Court does note that the infancy of a petitioner, standing alone, does not compel the granting of an application for leave to serve a late notice of claim. *See Berg v. Town of Oyster Bay*, 300 A.D.2d 330, 752 N.Y.S.2d 58 (2d Dept 2006). However, the absence of a causal nexus between the petitioner’s infancy and the delay in serving the notice of claim, while a factor to be considered by the court, is not fatal to the application. *See Williams ex rel. Fowler v. Nassau County Medical Ctr.*, 6 N.Y.3d 531, 814 N.Y.S.2d 580 (2006).

As already stated herein, in view of the respondents’ actual knowledge of the essential facts

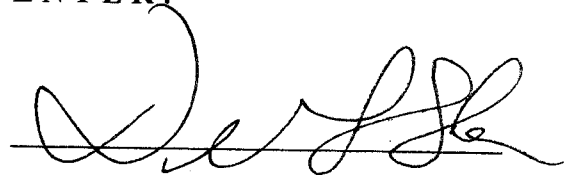
underlying the malpractice claim, it will not be substantially prejudiced by the delay as it is in possession of the pertinent medical records containing the details of the infant petitioner's delivery and post-natal care and of Ms. Alvizures' prenatal care. Therefore, there is no substantial prejudice to the respondents in maintaining a defense to the cause of action. *See Tapia v. New York City Health & Hosps. Corp.*, 27 A.D.3d 655, 811 N.Y.S.2d 768 (2d Dept. 2006). Therefore, the respondents' motion is denied in its entirety.

The Court has considered the respondents' remaining contentions and has determined that they are without merit. *See Vasquez v. City of Newburgh*, 35 A.D.3d 621, 826 N.Y.S.2d 648 (2d Dept. 2006).

Accordingly, petitioners' motion is granted and this Court grants leave to serve the late Notice of Claim and the Notice of Claim as served upon respondents in May, 2010, is deemed timely filed.

This constitutes the Decision and Order of this Court.

ENTER:

A handwritten signature in black ink, appearing to read 'Denise L. Sher', written over a horizontal line.

DENISE L. SHER, A.J.S.C.

ENTERED

OCT 13 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Dated: Mineola, New York
October 7, 2010