

**Patarkatsishvili v New York City Health & Hosps.
Corp.**

2010 NY Slip Op 32919(U)

October 4, 2010

Sup Ct, NY County

Docket Number: 106689/10

Judge: Emily Jane Goodman

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 106689/2010
PATARKATSISHVILI, MANANA
 VS.
NYC HEALTH & HOSPITALS CORP.
 SEQUENCE NUMBER : 001
 LEAVE SERVE LATE NOTICE OF CLAIM

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

petition is denied

per attached

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

UNFILED JUDGMENT
 This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/4/10

EMJ
J.S.C.

EMILY JANE GOODMAN

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 17

-----X
PATARKATSISHVILI, MANANA

Petitioner,

Index 106689/10
Motion Seq. No. 001

Against

NEW YORK CITY HEALTH & HOSPITALS
CORPORATION AND SOFIA PANAGI, M.D.

Respondent(s)

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 413).

-----X
EMILY JANE GOODMAN, J.S.C:

Petitioner moves for leave to serve a late Notice of Claim, pursuant to General Municipal Law §50-e, subd. 5. The New York City Health and Hospitals Corporation (NYCHHC) opposes the Petition, contending that there has been at least a six month delay in filing the Notice of Claim against NYCHHC, and, more than one year ninety day delay in filing the Notice of Claim against Respondent Panagi, who NYCHHC claims, and Petitioner does not dispute, last saw Petitioner on May 9, 2008.

Petitioner states she was recently diagnosed with stomach cancer by Beth Israel Hospital, after undergoing an endoscopy, after staff at Metropolitan Hospital Center and Elmhurst Hospital Center, who saw Petitioner on many occasions through 2009, failed to make that diagnosis or perform any diagnostic testing. Petitioner claims that the delay in diagnosing her cancer allowed the cancer to progress and adversely affect her prognosis. For the reasons set forth herein, Petitioner's motion is granted as to Respondent NYCHHC and denied as to Respondent Panagi.¹

¹Petitioner provides a non-responsive answer to NYCHHC's argument that any claim against Respondent Panagi is time barred. She states that if "Dr. Panagi was an independent attending physician, the time by which an action for medical malpractice must be commenced against her would actually be two years and six months" and if she was "employed by NYCHHC at the time of the alleged malpractice, NYCHHC remains liable for her actions as an employee." If Panagi was an independent physician, then no notice of claim is required; if she was an employee, any individual claim against her is time barred.

Pursuant to General Municipal Law §50–e, subd. 1(a), a claimant commencing a tort action against a public corporation must serve and file a proper Notice of Claim within ninety days after the claim arises. The related action or proceeding must be commenced within one year and ninety days of the event. General Municipal Law §50–i. An application for an extension of time to serve a Notice of Claim may be made before or after the action has been commenced, but not after the one-year and ninety-day statute of limitations has run, unless the statute has been tolled. *Pierson v. City of New York*, 56 N.Y.2d 950, 954 (1982).

In determining whether to grant leave to file a late Notice of Claim pursuant to General Municipal Law §50-e, subd. 5., a court must consider the key factors of “whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within ninety days after the claim arose or within a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense.” *Velazquez v City of New York Health and Hospitals Corp.*, 69 AD3d 441 (1st Dept 2010) (internal citations and quotations omitted). The presence or absence of any one factor is not determinative. *Id.*

1. Actual Notice of Petitioner’s Claim

NYCHHC correctly maintains that merely having access to a plaintiff’s medical records is usually insufficient to satisfy this prong in a medical malpractice context. In *Williams v Nassau County Medical Center* (6 NY3d 531, 537 [2006]), the Court of Appeals held that “[m]erely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff during the birth process.” Thus, while

agreeing with the plaintiff that General Municipal Law 50-e , subd. 5, only requires actual knowledge of the essential facts constituting the claim, and not knowledge of a legal theory, the Court of Appeals held that “[w]here, as here, there is little to suggest injury attributable to malpractice during delivery, comprehending or recording the facts surrounding the delivery cannot equate to knowledge of facts underlying a claim.” *Id.* The Court pointed out that when the malpractice allegedly occurred (which was when the infant was delivered), the infant’s Apgar scores were satisfactory, and two years later, his EEG was normal. *Id.* Thus, the records actually revealed nothing wrong with the delivery, beyond a broken clavicle. As a result of this case, subsequent First Department cases (mostly involving allegations of malpractice in connection with birth) have focused on the presence of an expert affidavit to support the granting of a motion for leave to serve a late notice. Here, no affidavit is proffered to establish that the hospital records contain sufficient information about the facts constituting the claim so as to constitute actual knowledge.² However, contrary to NYCHHC’s argument, the failure to supply such an affidavit is not fatal; actual notice is merely one element of the analysis.³

²Petitioner’s counsel states that she does not have the medical records, but has requested them. Petitioner expects that the records will reference her complaints, made to hospital staff, of unexplained bruising, excruciating stomach pain, difficulty eating, feelings of fullness after eating, abdominal swelling and weight loss.

³ Petitioner’s counsel states that “petitioner has been advised by her physicians that the delay in diagnosis allowed the cancer to progress and has adversely affected her prognosis. She has been further advised that if the cancer had been detected earlier, pursuant to tests that could have and should have been performed earlier, she would not have the advanced, spreading, terminal cancer from which she is now suffering.” Petitioner should have submitted an affidavit from these physicians. However, the Court does not find this failure fatal. Had that been the case, in the interests of justice, Petitioner would have been granted leave to submit an affidavit, and NYCHCC, a response. Although the purpose of a Notice of Claim is “to allow the municipal defendant to make a prompt investigation of the facts and preserve the relevant evidence” the statute should nevertheless “be applied flexibly”

2. Petitioner has a Reasonable Excuse for her Filing Delay

Although Petitioner failed to demonstrate that NYCHHC had actual notice, the failure is not fatal in this case as Petitioner has a reasonable excuse for this short six month delay and NYCHHC is not prejudiced as a result. Unlike the many cases involving NYCHHC, where no reasonable excuse for delay was found, here it was excusable that Petitioner filed her Notice of Claim on May 12, 2010. She only received the diagnosis of stomach cancer in March 2010; she had surgery on March 22, 2010; she stayed one week in the hospital; and she had chemotherapy and radiation treatment immediately thereafter. It is not reasonable to expect that Petitioner would have served the Notice of Claim on NYCHCC within 90 days of her last treatment at NYCHCC's hospitals-- as NYCHHC claims she should have--- given that she, as a layperson, would not have known that any malpractice occurred.

3. Prejudice

NYCHHC's position is that Petitioner should have served her Notice of Claim no later than November 2009. Instead the notice was served six months thereafter on May 12, 2010. NYCHHC makes the conclusory argument that it will be substantially prejudiced by the late filing because a prompt investigation was not done, due to lack of timely notice. NYCHHC states that "Respondent cannot be certain that relevant staff members are still employed" and even if they

so as to avoid the dismissal of meritorious claims based on ministerial errors. *Lomax v NYCHHC*, 262 AD2d 2, 4 (1st Dept 1999). General Municipal Law §50-e was not meant as a sword to cut down honest claims, but merely as a shield to protect municipalities against spurious ones. *Id.* Thus, because this application is unlike that in *Williams v Nassau County Medical Center*, and subsequent First Department cases, where the medical records actually established that little, or nothing, suggested injury attributable to malpractice, the Court would have permitted Petitioner to submit an affidavit because Petitioner's persistent ongoing, unabated, complaints of excruciating stomach pain might be sufficient to alert NYCHHC to malpractice.

are, it will be “difficult for them to remember events occurring as far back as 2007.” However, Petitioner made complaints to both hospitals through 2009. No effort has been made to ascertain whether staff members are still employed, and given that medical records are kept in the ordinary course of business, memories--if lost--can be refreshed by the records. Further, this application is unlike the one made in *Kelly v New York City Health and Hospitals Corp.* (907 NYS2d 11 [1st Dept 2010]), where the petitioner was seen in the emergency room only once, with some swelling and bruising on his face, which was “hardly an incident likely to have been burned into the memories of the hospital staff who treated him.” Here, Petitioner alleges, and NYCHHC does not dispute, that she saw Metropolitan Hospital staff numerous times between 2007 through 2009 and Elmhurst Hospital staff numerous times in August 2009.

Exercising its discretion, this Court concludes that the Petition should be granted because although it has not been demonstrated, at this point, that NYCHHC had actual knowledge of the facts constituting Petitioner’s claim, Petitioner has a reasonable excuse for the delay in serving the Notice of Claim, and the delay will not substantially prejudice NYCHHC.⁴

It is hereby

ORDERED AND ADJUDGED that the Petition for leave to serve a late Notice of Claim is granted against Respondent New York City Health & Hospitals Corporation only, and the Notice of Claim, as amended, is deemed timely served on Respondent New York City Health & Hospitals Corporation only, in the form annexed to the moving papers; and it is further

⁴Petitioner seeks to amend the Notice of Claim served on May 12, 2010 to expand the first date where she presented herself to Metropolitan Hospital Center staff from January 2008 to September 2007 and to amend the last date of treatment to July 2009, instead of June 2009. As the notice is otherwise the same and does not change the Court’s analysis, amendment is granted (see General Municipal Law §50-e, subd. 6).

ORDERED that Petitioner serve a copy of this Decision, Order and Judgment of the Court, with Notice of Entry, on Respondents forthwith.

This constitutes the Decision, Order and Judgment of this Court.

Dated: October 4, 2010



Emily J. Goodman
J.S.C.

EMILY JANE GOODMAN

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).