

Matter of Schroko v County of Nassau

2010 NY Slip Op 33341(U)

November 22, 2010

Supreme Court, Nassau County

Docket Number: 14145/10

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

<hr/> <p>In the Matter of the Application of RICHARD SCHROKO,</p> <p style="text-align: right;">Petitioner,</p>	<p>TRIAL/IAS PART 32 NASSAU COUNTY</p> <p>Index No.: 14145/10 Motion Seq. No: 01 Motion Date: 09/30/10</p>
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- against -

COUNTY OF NASSAU, NU HEALTH,
NASSAU HEALTH CARE CORPORATION and
NASSAU UNIVERSITY MEDICAL CENTER,

Respondents.

The following papers have been read on this motion:

	Papers Numbered
<u>Amended Notice of Petition, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition</u>	<u>2</u>
<u>Reply Affirmation in Support of Petition</u>	<u>3</u>

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

Petitioner moves for an Order directing that the Notices of Claim heretofore served upon respondents be deemed timely served upon said respondents, *nunc pro tunc*, pursuant to General Municipal Law §50-e (5) and 50 -e(6). Respondents oppose this application.

Petitioner was diagnosed in May 2009 with a condition affecting his eyes called "pseudo-tumor cerebri" which causes an elevation of cerebrospinal fluid pressure causing swelling of the optic nerves and severe headaches and can ultimately lead to blindness. Petitioner was prescribed

a diuretic, Diamox, which was to keep his spinal fluid pressure down. On August 28, 2009, petitioner was sentenced in Nassau County District Court by the Honorable Robert A. Bruno to a period of incarceration at the Nassau County Correctional Center. At the time of his sentencing, petitioner's attorney advised the Court, on the record, of petitioner's above described medical condition and the need for petitioner to take his prescribed medication on a daily basis. Petitioner was incarcerated at the Nassau County Correctional Center from August 28, 2009 through his release on May 21, 2010.

Petitioner submits that, on August 28, 2009, he was interviewed by Irene Ingham, a psychiatric social worker at respondent Nassau University Medical Center ("NUMC"), Forensic Mental Health Service, Nassau Correctional Center. The intake screening from from this interview notes that petitioner was taking Diamox 500 three times a day for eye problems. Petitioner contends that during the first week to ten days that he was incarcerated he received none of his prescribed medication and, as a result of same, on September 6, 2009, he was transported to and examined at respondent NUMC due to his complaints of not being able to see. Petitioner asserts that after this hospitalization his medication was finally started. However, petitioner contends that his medication would continue until it ran out every month and then there would be a gap of approximately one week before his medication would be started up again. The gaps in petitioner receiving his medication resulted in petitioner being seen at least three to four more times at the emergency room at respondent NUMC and eventually required petitioner's admission to respondent NUMC from December 8, 2009 to December 9, 2009 where, among other tests, a spinal tap was performed. Petitioner also was seen approximately three times at respondent NUMC eye clinic. After the December 8, 2009 admission to the hospital, petitioner's attorney wrote to the Nassau County

Correctional Center to reiterate petitioner's medical information provided to the Court at the time of his sentencing as well as to the Correctional Center concerning petitioner's condition and need for treatment via his prescribed medication. On May 24, 2010, within three days after petitioner's release from the Nassau County Correctional Center, petitioner was examined by his physician, Dr. Howard D. Pomeranz, who advised petitioner that, compared to his examination approximately one year earlier, there was now significant loss of vision, loss of peripheral vision, blurriness in both eyes (left worse than right) and that the change in petitioner's sight was permanent and was caused by not being given his medication on a daily basis. Petitioner served his Notice of Claim on respondent County of Nassau on or about June 10, 2010 and served his Notice of Claim on respondents NU Health, Nassau Health Care Corporation and NUMC on or about August 10, 2010.

Petitioner now moves for the Court to deem the Notice of Claim timely served *nunc pro tunc*, arguing that claims for withholding medical treatment to a prisoner accrue when claimant is released from confinement. Petitioner cites the Court's holding in *Laroc v. City of New York*, 46 A.D.3d 760, 847 N.Y.S.2d 677 (2d Dept. 2007) in support of this argument. Petitioner also argues in the alternative that, if the Court decides not to follow the holding in *Laroc*, petitioner be permitted to file a Late Notice of Claim. In support of same, petitioner submits that, by virtue of the written and verbal records in their possession, respondents were aware of the failure to timely and regularly provide petitioner with his prescribed medication. Petitioner asserts that his reasonable excuse in not filing a Notice of Claim within ninety days of each time respondents failed to give him his medication was the fact that he was incarcerated and did not have access to legal counsel regarding such claims. Petitioner further contends that respondents have not been substantially prejudiced by the delay in filing the Notice of Claim as respondents' personnel had actual notice

that they were not giving petitioner his medications which is reflected in their extensive records. Petitioner argues that respondents were on notice of their failure to provide him with his medications on several occasions.

Respondents oppose petitioner's application by claiming that the *Laroc* holding states that *for an infant* (emphasis added) a claim for withholding medical treatment to the claimant accrued when the infant claimant was released from confinement and that the case actually resulted in the dismissal of the claims against the municipalities. Respondents argue that petitioner failed to file a timely Notice of Claim. Respondents also argue that petitioner's contention that he was unaware that he had to file a Notice of Claim within ninety days of each date of injury does not constitute a valid or reasonable excuse for filing a late Notice of Claim. Respondents further contend that the mere fact that they created medical records in conjunction with petitioner's visits do not support the presumption that they were aware of the essential facts underlying petitioner's specific claim. Additionally, respondents state that the mere fact that they are in possession of medical records does not itself support the contention that respondents will not be prejudiced as there is no indication that the respondents were aware of the essential material facts underlying petitioner's lawsuit.

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 of 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).

It is noted that the Court's decision to grant or deny a late Notice of Claim is still purely a discretionary one and the Court remains free to deny an application for an extension in the interests

of fairness to the potentially liable public corporation.

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 respondents’ records, petitioner submits exhibits, attached to his papers, which objectively set forth the facts that constitute his claims against respondents. There is clear indication that petitioner made respondents aware of his medical condition and his need for his prescribed medical on a number of different occasions. Accordingly, the documents submitted by petitioner in support of his application indicate knowledge of the facts underlying his claim.

With respect to the fact that petitioner’s excuse for the delay in filing the Notice of Claim was that he was incarcerated and that he did not have access to legal counsel - an excuse respondents argue does not meet the burden of being a “reasonable excuse” - 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, petitioner established that respondents would not be substantially prejudiced in maintaining their defense on the merits as a result of the delay in seeking leave to serve a late Notice of Claim. Respondents had actual knowledge of the claim or the facts giving rise to the claim because they possessed petitioners' medical records and other documentation concerning his need for his prescribed medication. *See Ramirez v. County of Nassau*, 13 A.D.3d 456, 787 N.Y.S.2d 71 (2d Dept. 2004).

The Court finds that Appellate Division's decision in *Laroc v. City of New York*, *supra*, applies to the matter presently before it. In *Laroc*, the Court stated "[t]he claims asserted by the adult plaintiff against the defendants, which were based on allegations that they withheld medical treatment from her son, the infant plaintiff, between October 19, 2003 and October 20, 2003, accrued on October 20, 2003 when the infant plaintiff was released from confinement (*see Charnis v. Shohet*, 2 A.D.3d 663, 768 N.Y.S.2d 638; *Roche v. Village of Tarrytown*, 309 A.D.2d 842, 766 N.Y.S.2d 46). The adult plaintiff failed to serve her late notice of claim within 90 days after October 20, 2003, and her late notice of service of a notice of claim without leave of court was a nullity." The Court notes that the cases cited in *Laroc - Charnis v. Shohet*, *supra* and *Roche v. Village of Tarrytown*, *supra*, deal with the accrual of statutory time limits due to incarceration.

Additionally, as already stated herein, in view of the respondents' actual knowledge of the essential facts underlying petitioner's claim, they will not be substantially prejudiced as they are in possession of the pertinent records containing the details of petitioner's medical condition, his need for his prescribed medications and the medical problems he encountered while incarceration at the Nassau County Correctional Center due to respondents alleged failure to provide petitioner with his medication. 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).

Accordingly, based upon the above determinations, petitioner's motion is granted and the Notices of Claim heretofore served upon respondents are deemed timely served upon respondents, *nunc pro tunc*, pursuant to General Municipal Law §50-e (5) and 50 -e(6).

This constitutes the Decision and Order of this Court.

ENTER:



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

Dated: Mineola, New York
November 22, 2010

ENTERED
NOV 29 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE