SCAN

SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

GAEL B. TRUJILLO AVILES, an infant under the age of 14 years, by his mother and natural guardian, MARIA LUISA AVILES,

Claimant,

MOTION DATE: 7/1/10

SEQUENCE NO.:001

-against-

INDEX NO.:2972/10

NASSAU HEALTH CARE CORPORATION,

Respondent.

The following papers read on this motion:

Order to Show Cause..... 1
Affirmation in Opposition..... 2
Reply Affirmation..... 3

Claimant's motion for an order permitting service of a late notice of claim upon the NASSAU HEALTH CARE CORPORATION ("respondent") pursuant to **Section 50-e, subd. 5** of the **General Municipal Law** of the State of New York is determined as follows.

Infant claimant ("GAEL") was born on May 15, 2009 at Nassau University Medical Center ("NUMC") operated by the respondent. GAEL was treated for hypertonia/hypotonia, metabolic disorder, hypoglycemia, presumed sepsis and hyperbilirubinemia for about 3 weeks until being discharged on June 5, 2009. GAEL's mother MARIA LUISA AVILES ("MARIA") maintains that NUMC departed from accepted medical practice during her delivery of GAEL to provide GAEL with necessary oxygen and blood and that the departure caused serious injury of panhypopituitarism on GAEL, requiring lifelong treatment with hydrocortisone, synthroid and chlorothiazide. Specifically, MARIA alleges that the respondent committed medical malpractice by failing to (i) provide proper prenatal care; (ii) properly and/or timely diagnose and treat the deprivation of oxygen and blood to GAEL; (iii) take appropriate diagnostic tests; and

(iv) properly monitor the pregnancy and delivery of GAEL, thereby causing the injuries described above.

In support of her application, claimant submits (i) medical records from NUMC covering MARIA from the date of admission on May 13, 2009 until the date of discharge on May 15, 2009; (ii) EMS record, dated April 4, 2009, noting that MARIA complained of "abdominal pain after she fell to the floor during a fight with her boy friend" and that she had "little or no prenatal care."; (iii) medical records of GAEL including discharge summary note dated June 5, 2009; and (iv) one page note about GAEL from the Division of Pediatric Endocrinology of North Shore-LIJ Health System, dated July 17, 2009.

Respondent is a municipal entity owned by Nassau County and a public benefit corporation operating Nassau University Medical Center. As a precondition to filing a lawsuit for damage caused by negligence, claimant is required to serve a notice of claim within 90 days after the claim arises. *See* **New York General Municipal Law §50-e** ("Section 50-e"). However, it is undisputed that the claimant failed to give a timely notice to the respondent before the expiration of the 90-day period, namely on or before Aug. 13, 2009. To overcome this procedural defect, claimant filed an Order to Show Cause on Feb. 18, 2010, seeking leave to serve a late notice of claim approximately six months after the expiration of the 90-day period.

In general, the trial court has broad discretion to permit a late notice of claim. **Section 50-e (5)**. In exercising its discretion, the Court considers various factors, including: (i) whether the claimant is an infant, (ii) whether the claimant offers a reasonable excuse for failing to timely file notice of claim, (iii) whether the respondent acquired actual knowledge of the essential facts constituting the claim within the 90-day period or a reasonable time thereafter, and (iv) whether granting the claimant's application would substantially prejudice the respondent. *See* **Section 50-e (5)**; **Williams ex rel. Flower v. Nassau County Medical Center**, 6 NY3d 531; **Rowe v. Nassau Health Care Corp.**, 57 AD3d 961; **Chambers v. Nassau County Health Care Corp.**, 50 AD3d 1134; **Arias v. New York City Health and Hospital Corp.**, 50 AD3d 830; **Aceitumo v. Lai On Chan**, 46 AD3d 716; **Bucknor v. New York City Health & Hospitals**, 44 AD3d 811; **Dumancela v. New York City Health and Hospitals Corp.**, 32 AD3d 515.

INFANCY

Claimant's status of infancy alone does not compel the Court to grant this motion for leave to serve a late notice of claim. *See* **Williams v. Nassau County Med. Ctr.**, 13 AD3d 363; **Matter of Flores v. County of Nassau**, 8 AD3d 377; **Matter of Cotton v. County of Nassau**, 307 AD2d 965. Rather, when the claimant's status of infancy caused the delay of service of notice of claim, the claimant would have a more compelling ground to extend the time for service of notice of claim. **Williams ex rel. Flower v.**

Nassau County Medical Center, *supra* at 538. Even though the lack of causative nexus between the infancy and the delay in notice of claim may make the delay less excusable, it is not a fatal defect and the court must consider all other relevant facts and circumstances. *Id.* When the Order to Show Cause was filed on Feb. 18, 2010, GAEL was about 9 months old. Considering the age of the claimant and his various health problems, the Court finds the status of infancy to be a significant and persuasive factor in determining claimant's motion.

REASONABLE EXCUSE

Claimant MARIA argues that the delay should be excused considering her lack of awareness of the notice requirement, reliance on the medical advice from the respondent and preoccupation with taking care of GAEL's ongoing serious medical conditions. Considering the situation of the new borne infant and the delay of a relatively short period of 6 months after the termination of 90-day period, the Court finds that the claimant has presented a reasonable excuse for her delay.

ACTUAL KNOWLEDGE OF ESSENTIAL FACTS

Actual knowledge of the essential facts constituting the claim within the 90-day period or a reasonable time thereafter is an important factor in determining whether to grant an extension and should be accorded great weight. **Argueta v. New York City Health & Hospital Corp.**, 74 AD3d 713; **Beretey v. New York City Health & Hosps. Corp.**, 56 AD3d 591, 593; **Mararrese v. New York City Health & Hosps. Corp.**, 215 AD2d 7, 9. Specifically, "merely 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 staffs, by their acts or omissions, inflicted any injury" on the plaintiff. **Contreras v. KBM Realty Corp.**, 66 AD3d 627, 630; *See* **Williams v. Nassau County Med. Ctr.**, 6 NY3d 531, 537. "The municipality must have knowledge of specific claim and not general knowledge that a wrong has committed." **Rowe v. Nassau Health Care Corp.**, 57 AD3d 961, 963; *See* **Matter of Brown v. County of Westchester**, 293 AD2d 748, 749.

While the merits of a claim ordinarily are not considered on a motion for leave to serve a late notice of claim, leave should be denied where the proposed claim is patently without merit. **Chambers v. Nassau County Health Care Corp.**, 50 AD3d 1134, 1135; *See* **Matter of Catherine G. v. County of Essex**, 3 NY3d 175; *See also* **Matter of Besedina v. New York City Tr. Auth.**, 47 AD3d 924. In this case, the Court finds that the proposed claim is not patently without merit. An examination of the records, which the court determines to be the source of actual notice as hereafter discussed, provides sufficient information to demonstrate that the asserted claim of medical malpractice is at least a colorable one. The standard does not contemplate that the claimant should demonstrate an assurance of ultimate success. If such a standard were adopted, granting

of the 50-e extension would require something tantamount to demonstrating a hit-in-the-rear or the removal of the patently incorrect organ. Though the respondent maintains that the claimant was obligated to supply a medical affidavit opining that the respondent committed medical malpractice, the assertion is based on the single authority of **Andersen by Andersen v. Nassau County Medical Center**, 135 AD2d 530. **Anderson**, *supra*, held that 9 years 10 months was too great a delay to permit leave to serve a late notice of claim, absent a supporting medical affidavit demonstrating the nexus between the incident and the alleged permanent disability. *Id* at 531. Few courts would disagree with that proposition, particularly this Court. With no further discussion about the merits, this Court decides that the claimant has met her minimum burden of demonstrating facial showing of merit and determines that respondent's presentation of an affidavit of an expert does not require claimant to respond in kind with an expert's affidavit.

Additionally, the Court recognizes that the various facts in the medical records suggest the presence of a serious medical condition of GAEL. GAEL stayed in the hospital for about 3 weeks after birth which, to say the least, is unusual for a normal new born baby. GAEL's discharge summary indicates abnormal signs of hypertonia/hypotonia, metabolic disorder, hypoglycemia, presumed sepsis and hyperbilirubinemia. It also notes that the cause of GAEL's metabolic disorder is not clarified after consulting with Dr. Bialer in North Shore University Hospital. Even though the prognosis is remarked as "good," GAEL is categorized as a "high risk" patient to be followed within 2 weeks after discharge. Such conditions place the hospital on notice by their very nature and because of the stated ambiguity of diagnosis of the perceived condition and meet the obligation to show actual knowledge.

ABSENCE OF PREJUDICE TO THE MUNICIPALITY

Claimant must show that the municipality would not be substantially prejudiced in maintaining a defense on the merits as a result of the delay. **Argueta v. New York City Health & Hospitals Corp.**, *supra* at 714; *see* **Williams v. Nassau County Med. Ctr.**, supra at 539; **Matter of Barnes v. New York City Health & Hosps. Corp.**, 69 AD3d 934; **Matter of Ali v. New York City Health & Hosps. Corp.**, 61 AD3d 860, 861. When the delay is not unreasonable, the court generally does not infer prejudice. *See* **Matter of Strevell v. South Colonie CSD,** 144 AD2d 733 (5 months); **Matter of Tortorici v. East Rockaway Public SD.**, 191 AD2d 495 (4 months); **Gilley v. New York City Housing Authority**, 217 AD2d 493 (11 months). In this case, the delay is about 6 months after the expiration of 90-day period. In addition, there is no evidence in the respondent's opposition showing loss of relevant records or unavailability of essential witnesses which can be detrimental to its defenses. Considering those facts and evidence, the Court does not find any substantial prejudice to the respondent by the relatively short period of a 6 months delay in serving the notice of claim.

CONCLUSION

The Court finds that the claimant GAEL's status as an infant is a relevant factor for the delay in serving notice to the municipal entity, that there is a reasonable excuse for the delay because of the claimant MARIA's preoccupation of taking care of GAEL's serious condition, that the municipal entity had actual knowledge of the essential facts for the claim because of the medical condition of GAEL at the time of discharge from the entity and that there will be no substantial prejudice to the municipal entity by the delay of 6 months beyond the statutory period of 90 days under Section50-e.

Accordingly, the claimant's application to file a late notice of claim is hereby **granted**. Claimant shall serve a copy of this Order upon respondent within 15 days after entry.

The foregoing constitutes the Order of the Court.

Dated: Nov 30, 2010

J.S.C.