

**Fernandez-Leon v New York City Health & Hosps.  
Corp.**

2011 NY Slip Op 30152(U)

January 19, 2011

Sup Ct, New York County

Docket Number: 115802/10

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER  
Justice

PART IA PART 16

Avely Fernandez-Leon, et al.

INDEX NO. 115802/10

- v -

NYC Health & Hospitals Corp

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

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~~ petition for leave to  
file a late notice of claim is granted in  
accordance with the accompanying  
memorandum decision.

**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).

JAN 19 2011

Dated: January 19, 2011.

Alice Schlesinger  
ALICE SCHLESINGER  
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

-----X  
ARELY FERNANDEZ-LEON, by her mother and  
natural guardian BRIGIDIA LEON, BRIGIDIA LEON,  
individually, and JORGE FERNANDEZ, individually,

Petitioners,

-against-

Index No. 115802/10  
Motion Seq. No. 001

NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION,

Respondent.

-----  
SCHLESINGER, J.:

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141B).

Petitioners commenced this proceeding seeking leave to serve a late notice of claim, pursuant to General Municipal Law §50-e, subd. 5. In the alternative, they seek to have the notice of claim deemed timely served based on the continuous treatment doctrine. Respondent New York City Health and Hospitals Corporation has not opposed the petition, although timely served. For the reasons set forth herein, the petition is granted.

Background

On May 30, 2010, petitioner Brigidia Leon gave birth to Arely Fernandez-Leon by cesarean section at Metropolitan Hospital. The C-section was performed on an emergency basis in the 35<sup>th</sup> week of the pregnancy due to signs of placental previa (where the placenta grows abnormally in the uterus pressing against or covering the cervix), causing fetal distress and other complications. The infant was born with low Apgar scores and neonatal seizures. She was promptly intubated and transferred to NYU Hospital Center for brain cooling therapy for a period of five days. There the infant was diagnosed with hypoxic ischemic encephalopathy confirmed by a brain MRI. The

infant remained in NYU's neonatal intensive care unit (NICU) until July 6, 2010 when she was transferred to Elizabeth Seton Pediatric Center until she was discharged to the family's home on October 23, 2010. She suffers from a seizure disorder secondary to hypoxic ischemic encephalopathy. Ms. Leon remained at Metropolitan Hospital until her discharge on June 7, 2010.

On August 31, 2010, counsel served a notice of claim on behalf of the infant and both parents. (Exh. A to petition). In the notice petitioners allege injuries to the infant and her mother caused by the negligent prenatal care and delivery of the infant at Metropolitan Hospital. A derivative claim is also asserted on behalf of the father.

By order to show cause signed on December 6, 2010, petitioners seek to have the notice of claim deemed timely served *nunc pro tunc* pursuant to General Municipal Law Section 50-e(5). In a Supplemental Affirmation, counsel asks alternatively to have the Court find that the notice was timely served based on the continuous treatment doctrine. Under the former theory, the time would run from the birth of the infant on May 30, 2010. Under the latter theory, the time would begin to run on July 6, 2010 when the infant was discharged from NYU based on the claim that the care of the infant at Metropolitan and NYU was a continuous course of treatment.

#### Rules Governing a Late Notice of Claim

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. Gen. Mun. 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. Gen. Mun. Law §50-e, subd. 5; *see also Nunez v. The City of New York*, 307 A.D.2d 218, 219 (1st Dep't 2003); *Pierson v. City of New York*, 56 N.Y.2d 950, 954 (1982). Since petitioner filed this motion in December of 2010, the motion was timely made under either theory asserted by petitioners.

The next issue is whether leave should be granted to file a late notice of claim pursuant to General Municipal Law 50-e, subd. 5. In determining whether leave should be granted to serve a notice of claim after the ninety-day period, "the key factors considered are '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 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense. Moreover, the presence or absence of any one factor is not determinative.'" *Velazquez v. The City of New York Health and Hospitals Corp.*, 69 AD3d 441, 442 (1<sup>st</sup> Dept. 2010), quoting *Matter of Dubowy v. City of New York*, 305 A.D.2d 320, 321 (1<sup>st</sup> Dept. 2003).

#### Petitioner has Established a Reasonable Excuse for the Late Filing

Petitioners assert that they should be excused for not timely serving respondent because of the hospital's own delay in responding to counsel's request for medical records. Counsel has documented its repeated requests and respondent's delays. The Court finds that petitioners themselves acted promptly to retain counsel and that counsel made more than reasonable efforts to expeditiously ascertain the merits of the claim before proceeding.

The City had Actual Notice of the Facts and will Suffer No Prejudice

“When considering a motion to extend the time for the service, the court must consider whether the public corporation acquired actual knowledge of the essential facts constituting the claim within the 90-day period or within a reasonable time thereafter, and whether, among other things, the delay in service substantially prejudiced the corporation in defending on the merits.” Gen Mun §50-e(5). This Court finds that respondent did acquire actual knowledge of the essential facts constituting the claim at the time of the delivery and that it will suffer no prejudice.

In support of their motion, petitioners have submitted an expert affirmation from Philip Bresnick, M.D. Dr. Bresnick is board certified in obstetrics and gynecology and licensed to practice medicine in the State of New York. Before preparing the affidavit, he reviewed the various medical records maintained by Metropolitan Hospital Center, NYU, and Elizabeth Seton Pediatric Center in connection with the care and treatment of the infant Brigidia Leon and her mother.

According to Dr. Bresnick, placental previa was diagnosed by Metropolitan during the prenatal care on February 1, 2010. With a reasonable degree of medical certainty, the doctor opines that Metropolitan departed from good and accepted standards of obstetrical and gynecological care by not having serial sonograms, by not advising the mother to reduce her physical activities and get bed rest, and by not instructing her that nothing of any nature could be inserted into the vagina. The hospital further departed by prescribing a cream to be applied with a long vaginal applicator when Ms. Leon developed an infection. In addition, Dr. Bresnick states that the prenatal departures proximately caused the hemorrhaging from the placental previa and the

placental abruption, the oxygen deprivation sustained by the infant that led to hypoxic ischemic encephalopathy and the infant's neurological injuries and developmental delays.

In light of the clear and immediate injuries manifested by the child at birth, Metropolitan's possession of the medical records since the time of the alleged malpractice gave it actual notice of the alleged cause of the infant's injuries and the essential facts underlying petitioners' claims. *See Figueroa v New York City Health and Hospitals Corp.*, 49 AD3d 454 (1<sup>st</sup> Dep't 2008)(hospital's possession of birth records constituted actual notice of the alleged cause of the infant's cerebral palsy from the inception).

What is more, respondent cannot reasonably claim prejudice in light of the fact that the notice of claim was served only three days late when measured from the birth of the child. Indeed, no such claim has been made, nor has any opposition of any nature been interposed. The notice appears to be timely as to the mother's injuries, as she received continuous treatment at Metropolitan through her discharge on June 7, and the notice was served on August 31. Even if analyzed based on the May 30 delivery date, the notice is deemed timely as to both the mother's claims and the father's derivative claims based on the above analysis related to the infant. *See, Laguna v New York City Housing Authority*, 74 AD3d 498 (1<sup>st</sup> Dep't 2010)(father's timely service of notice of claim provided sufficient notice of facts relating to claims later asserted by the infant and mother). In light of these findings, the Court need not reach petitioners' alternative claim that the treatment by Metropolitan Hospital and NYU constituted a continuous course of treatment tolling the time to file the notice of claim.

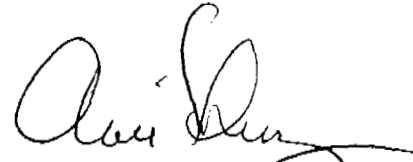
Accordingly, it is hereby

ADJUDGED that petitioners' motion for leave to serve a late notice of claim is granted, and the notice of claim is deemed timely served in the form annexed to the moving papers upon counsel's service of a copy of this order and judgment with notice of entry on the respondent or counsel; and it is further

ORDERED that petitioners shall commence an action and purchase a new index number in the event a lawsuit arising from the notice of claim is filed.

Dated: January 19, 2011

JAN 19 2011

  
\_\_\_\_\_  
J.S.C

ALICE SCHLESINGER

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