

**Matter of Oliveira v New York City Health & Hosps.
Corp.**

2011 NY Slip Op 30370(U)

January 24, 2011

Supreme Court, Queens County

Docket Number: 22296/10

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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In the Matter of the Application of Valda
Oliveira and Edmundo Oliveira,

Index
Number: 22296/10

Petitioners,

- against -

Motion
Date: 12/14/10

New York City Health & Hospitals
Corporation,

Motion
Cal. Number: 18

Respondent.

Motion Seq. No.: 3

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The following papers numbered 1 to 10 read on this petition
for leave to serve a late notice of claim.

	<u>Papers Numbered</u>
Order to Show Cause-Petition-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply-Exhibits.....	8-10

Upon the foregoing papers it is ordered that the petition is
decided as follows:

Application by petitioners for leave to serve a late notice of
claim, pursuant to General Municipal Law §50-e(5), is granted.

Petitioner Valda Oliveira allegedly sustained injuries as a
result of medical malpractice committed between March 6, 2008 and
May 21, 2010 by physicians at Queens Hospital Center (the hospital)
in Queens County who allegedly misinterpreted mammograms and
sonograms of her resulting in a delay of a diagnosis of breast
cancer.

It is uncontested, and the medical records indicate, that
petitioner first presented to the hospital on March 6, 2008
complaining of a lump in her left breast. A bilateral mammogram was
performed, which was interpreted as being negative, and nothing was
done except that petitioner was instructed to return in six months
for a follow-up examination. On August 19, 2008, petitioner
returned to the hospital complaining that the lump had increased in

size. A sonogram was performed and notwithstanding that a lump was noted, petitioner was reassured that it was not abnormal and was instructed to return in a few months. She returned on November 25, 2008 for another mammogram, which again was interpreted as being negative and petitioner was again reassured and merely instructed to return for a further follow-up examination. Between March 6, 2008 and May 21, 2010, seven mammograms and sonograms were performed upon petitioner. All of these examinations revealed a palpable lump that was increasing in size and thickening of tissue. There are also physicians' comments stating that notwithstanding the negative breast ultrasounds, the lump should be evaluated clinically. On April 21, 2010, petitioner underwent a sonogram core biopsy. On April 27, 2010, the biopsy report found that the lump was nothing more than atypical ductal hyperplasia and adenosis. However, since the biopsy was not taken from the mass itself, it was determined that petitioner should undergo a needle biopsy of the mass itself to determine whether there was malignancy. On June 2, 2010, an excisional biopsy of the lump was performed and petitioner was informed on June 11, 2010 that the biopsy was malignant. On July 30, 2010, petitioner underwent a total mastectomy.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Petitioner originally filed, through her counsel, an order to show cause and petition for leave to serve a late notice of claim on September 1, 2010. The order to show cause was signed by this Court on September 7, 2010 setting a return date of September 21, 2010. The order to show cause was served upon the HHC on September 9, 2010. At the calling of the calendar on September 21, 2010, the petition was marked fully submitted without opposition. The Court, pursuant to its order issued on September 30, 2010, granted petitioner's application, there appearing no opposition, and gave petitioner leave to serve a notice of claim within 30 days.

Unbeknownst to the Court, counsel for the parties had previously executed two stipulations adjourning the order to show cause from September 21, 2010 to October 5, 2010 and further to October 19, 2010. However, neither stipulation had been filed with or brought to the attention of the Court. On October 20, 2010, HHC moved by order to show cause to vacate the Court's September 30th order, based upon excusable default, and to give HHC the opportunity to oppose the petition. On the return date of the order to show cause, on November 9, 2010, HHC withdrew its motion, resolving it by stipulation entered into with counsel for petitioner, which was so-ordered by the Court, in which the

Court's order of September 30th was vacated and petitioner was given leave to re-file and re-serve its order to show cause and petition for leave to serve a late notice of claim, and the HHC agreed to pay petitioner \$45 as and for the filing fee to re-file her order to show cause and petition. Pursuant thereto, petitioner filed the instant order to show cause and petition on November 23, 2010.

Petitioner does not state the precise date or dates when she alleges her cause of action for malpractice accrued, except to say that she is seeking leave to serve a late notice of claim "for claims arising prior to May 25, 2010." Moreover, no explanation is given as to the significance of the date of May 25, 2010. However, the Court gleans from the record on this petition that petitioner is alleging malpractice as a result of the HHC's mis-diagnosis of her cancerous lump on and about the dates of her mammograms and ultrasounds and the interpretations thereof by HHC and the ongoing monitoring of petitioner's condition and, therefore, that her cause of action accrued between March 6, 2008 and May 21, 2010. Therefore, the 90-day period for commencing a claim against the HHC expired on August 19, 2010. The HHC, in its affirmation in opposition, contends that petitioner's treatment (and therefore, presumably, her cause of action) accrued on April 14, 2010 (the date that counsel for HHC erroneously stated in its affirmation as being the date when the first sonogram biopsy was performed).

Petitioner contends that leave to serve a late notice of claim should be given because petitioner has shown a reasonable excuse for the delay in serving a notice of claim, the HHC acquired timely actual notice of the essential facts underlying petitioner's claim by virtue of its possession of the relevant medical records and it would suffer no prejudice by the granting of leave to serve a late notice of claim. The HHC argues that petitioner has failed to set forth a reasonable excuse for the delay, failed to establish that the HHC acquired timely actual knowledge of the facts underlying the claim and failed to demonstrate that no prejudice would result by the filing of a late notice of claim.

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether

the municipality is substantially prejudiced by the delay (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]). No one factor is determinative (see id.).

Petitioner has articulated an adequate excuse for her failure to serve the City within the statutory period. It is undisputed that petitioner, from March 6, 2008 to May 21, 2010, was told that her mammograms and sonograms were negative and her breast lump was not abnormal. It is also undisputed that the malignancy of the lump was not diagnosed until after the HHC performed the biopsy on June 2, 2010 and that petitioner was not informed of such results until June 11, 2010. Therefore, petitioner could not have filed a notice of claim until after she knew or reasonably could have known that she had one. She could not have known that her breast lump was malignant until June 11, 2010, and such delay in discovering her breast cancer was allegedly the result of the HHC's own affirmative acts of malpractice. She subsequently had a total mastectomy on July 30, 2010. Under the circumstances, petitioner's failure to serve a timely notice of claim by August 19, 2010, which was 90 days from May 21, 2010, was reasonable, and her delay in hiring legal counsel and serving an order to show cause and petition for leave to serve a late notice of claim until September 1, 2010, less than two weeks after the expiration of the 90-day time limit, was also reasonable under the totality of the circumstances.

In addition, it is the opinion of the Court, based upon the record on this petition, that the HHC has not been substantially prejudiced by the delay, since the medical records setting forth the details of petitioner's examination and treatment are in the possession of the HHC (see Tapia v. New York City Health and Hospitals Corp., 27 AD 3d 655 [2nd Dept 2006]). The record on this petition does not show that there has been either an inordinate passage of time or any changed conditions that would prevent an accurate reconstruction of the circumstances existing at the time of the alleged malpractice (see Rabanar v. City of Yonkers, 290 AD 2d 428 [2nd Dept 2002]).

Counsel for the HHC also raises the issue of continuous treatment, arguing that there was no course of continuous treatment so as to toll the statute of limitations pursuant to CPLR 214-a. Counsel for the HHC does not elaborate upon or explain whether and in what respects the statute of limitations has expired in this case or in what other respect CPLR 214-a applies. However, the Court finds that there was a course of continuous treatment of petitioner between March 6, 2008 and May 21, 2010 so as to toll

both the statute of limitations and the 90-day period for filing a notice of claim until May 21, 2010 for all the alleged acts of malpractice commencing with the initial mammogram and its diagnosis on March 6, 2008.

An action against a municipal corporation or entity must be commenced within one year and 90 days after the date plaintiff's cause of action accrued, which is the date the event occurred upon which plaintiff's claim is based (see General Municipal Law § 50-i). The Court only has the discretionary authority to allow the filing of a late notice of claim within the statute of limitations period (see General Municipal Law § 50-e[5]; Pierson v. City of New York, 56 NY 2d 950 [1982]). Therefore, the issues presented herein are whether petitioner may base her malpractice claim upon the alleged departures of the HHC from good and accepted medical practice committed more than one year and 90 days before the service of petitioner's order to show cause and petition on September 1, 2010 and whether the 90-day period for filing a notice of claim, regarding all alleged acts of malpractice going back to March 6, 2008 was tolled until May 21, 2010.

It is well-settled that both the 90-day period for serving a notice of claim and the statute of limitations for commencement of an action are tolled by a continuous course of medical treatment relating to the original condition or complaint (see Allende v. New York City Health and Hospitals Corporation, 90 NY 2d 333 [1997]).

CPLR 214-a provides that the applicable statute of limitations in a medical malpractice action does not begin to run until the date of "the act, omission or failure complained of or last treatment where there is a continuous treatment for the same illness, injury or condition which gave rise to said act, omission or failure." Therefore, CPLR 214-a applies only if the course of treatment "has run continuously and is related to the same original condition or complaint" (Borgia v City of New York, 12 NY 2d 151, 155 [1962]).

The argument of HHC that petitioner's mammograms and sonograms constituted merely routine breast cancer examinations and follow-ups to her annual examinations and did not constitute treatment within the meaning of CPLR 214-a is without merit. Equally without merit is the HHC's argument that the continuous treatment doctrine is inapplicable because more than 90 days elapsed between treatments.

Petitioner's visits to the hospital were not mere annual routine breast cancer screenings and follow-ups initiated by petitioner merely to have her general breast health checked. Neither the initial mammogram nor the subsequent mammograms and sonograms were routine. She presented to the hospital with a

complaint of a specific condition, a palpable breast lump, and she was treated and monitored specifically for that abnormality to determine the presence or onset of cancer.

"The monitoring of an abnormality to ascertain the presence or onset of a disease or condition may constitute treatment for purposes of tolling the Statute of Limitations" (Oksman v City of New York, 271 AD 2d 213, 215 [1st Dept 2000]). Moreover, the monitoring involved the active observation by petitioner's physicians at the hospital based upon contemporaneous complaints by petitioner, and the follow-up monitoring, which may be deemed to be a course of treatment, was related to the original complaint as well as petitioner's ongoing complaints that the lump was increasing in size.

As for the HHC's argument that there was no continuous treatment because petitioner's visits to the hospital were more than 90 days apart, petitioner's visits were in accordance with a specific monitoring regimen directed by her physicians at the hospital and, thus, may be deemed to be a course of continuous treatment. "[A]n agreement between physician and patient to continue observation of suspicious breast tissue may constitute sufficient monitoring to support a finding of continuous treatment" (id. At 215; see also Cherise v Braff, 50 AD 3d 724 [2nd Dept 2008] [quoting Oksman]; Texeria v BAB Nuclear Radiology, P.C., 54 AD 3d 1022 [2nd Dept 2008]).). As stated by the Court of Appeals in Richardson v. Orentreich (64 NY 2d 896, 898 [1985]), "The 'continuing trust and confidence' which underlies the 'continuous treatment doctrine' . . . does not necessarily come to an end upon a patient's last personal visit with his or her physician . . . , when further treatment is explicitly anticipated by both the physician and patient as manifested in the form of a regularly scheduled appointment for the near future Thus, a patient remains under the 'continuous treatment or care' of a physician between the time of the last visit and the next scheduled one where the latter's purpose is to administer ongoing corrective efforts for the same or related condition. Regardless of the absence of physical or personal contact between them in the interim, where the physician and patient reasonably intend the patient's uninterrupted reliance upon the physician's observation, directions, concern, and responsibility for overseeing the patient's progress, the requirement for continuous care and treatment for the purpose of the Statute of Limitations is certainly satisfied" (citations omitted).

Thus, the record, on this petition, clearly supports a finding that petitioner's visits to the hospital were part and parcel of a continuing course of treatment so that both the statute of limitations as well as the 90-day period for filing a notice of claim did not begin to run until the last alleged act of malpractice on May 21, 2010. As such, petitioner's application for

leave to file a late notice of claim was brought within the applicable statute of limitations period with respect to all alleged medical departures from March 6, 2008 through May 21, 2010.

Since petitioner has set forth a reasonable excuse for her delay in filing a notice of claim and since no perceived prejudice will result to HHC, the Court finds that it would not be an improvident exercise of its discretion in allowing the late filing of a notice of claim. Therefore, the Court does not reach, and will not decide, the issue of whether the HHC acquired actual knowledge of the facts underlying the claim by virtue of being in possession of petitioner's medical records.

Accordingly, the petition is granted and petitioner is granted leave to serve a notice of claim, in the form annexed to the petition, within 20 days after entry of a copy of this order.

Serve a copy of this order with notice of entry without undue delay.

Dated: January 24, 2011

KEVIN J. KERRIGAN, J.S.C.