

McGinn v County of Nassau Correctional Ctr.

2011 NY Slip Op 31636(U)

June 3, 2011

Supreme Court, Nassau County

Docket Number: 23453/10

Judge: Jeffrey S. Brown

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X **TRIAL/IAS PART 21**
**MARIA McGINN, as Administratrix of the Estate of
EAMON McGINN, deceased, and EAMON McGINN,
Individually,**

Plaintiffs,

**COUNTY OF NASSAU CORRECTIONAL CENTER,
COUNTY OF NASSAU and NASSAU HEALTH
CARE CORPORATION,**

Defendants.

**Index No. 23453/10
Mot. Seq. # 1
Motion Date 4-14-11
Submit Date 5-24-11**

The following papers were read on this motion:	Papers Numbered
Order to Show Cause, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3

Plaintiff moves by order to show cause for the following relief: an order pursuant to General Municipal Law 50-e(5) and (6), permitting plaintiff to amend her notice of claim upon the COUNTY OF NASSAU and NASSAU HEALTH CARE CORPORATION (hereinafter "Corporation") in the form annexed to the papers in support of this application as "Exhibit 1", a) amending the dates of negligence to commence December 31, 2009 through the date of death of EAMON McGINN (hereinafter "McGinn") on January 3, 2010, while in defendants' care and custody, said care rendered at the Nassau County Correctional Center and Nassau University Medical Center, and b) amending plaintiff's claims to include their failure to properly evaluate and consider plaintiff/decedent's prior drug use and his risk for committing suicide while incarcerated.

The instant action arises out of the death by hanging of Eamon McGinn on January 3, 2010 while in the custody of the Nassau County Correctional Center. On December 31, 2009, McGinn surrendered to agents and officials of defendant, County of Nassau, regarding charges

involving theft. He was incarcerated thereafter at the Nassau County Correctional Center where he remained until his death on January 3, 2010.

On February 8, 2010 a copy of a notice of claim titled in the name of the "intended" administrator was served on the County of Nassau and on the Nassau County Correctional Center wherein it was alleged that the defendants were negligent during the period of the time McGinn was in their custody and prior to his death on January 3, 2010. Also on February 8, 2010, a notice of claim titled in the name of the "intended" administrator was served upon the Corporation alleging negligence in its care of decedent during his incarceration.

After Letters of Administration in favor of plaintiff, Maria McGinn, were awarded, on June 30, 2010, plaintiff re-served notices of claim, now titled in the name of the administratrix of the estate on defendants.

On June 8, 2010, the County of Nassau held a GML 50-h hearing of plaintiff, Maria McGinn. On September 13, 2010, the Corporation held its GML 50-h hearing.

Counsel for plaintiff states that during the pendency of the matter, he became aware that the New York State Department of Corrections was investigating an unusual series of suicides during the calendar year 2010 at the Nassau County Correctional Center. On February 2, 2011, plaintiff submitted a FOIL request to the New York State Commissioner of Corrections requesting the complete file of their investigation pertaining to McGinn's death. The State responded to the FOIL request by way of letter advising that it would inform counsel when the records were ready and available. Counsel states that no records were ever received.

On April 2, 2011, an article appeared in Newsday indicating that the State Commissioner of Correction's report into McGinn's death was released on March 31, 2011. Counsel points out that said report was released to the press and not to him. In the article, the State Commission of Corrections cites a series of errors on behalf of defendants concerning the "intake" of McGinn commencing on December 31, 2009 and until his death on January 3, 2010. The article additionally indicates jail personnel improperly altered entries in a log book concerning actions taken in the supervision of McGinn, and also cites outdated screening forms used to assess McGinn's suicide risk. The article also states that Nassau University Medical Center provided medical and mental health care in jail during the period of McGinn's incarceration.

Based on the disclosure of the above additional facts, and despite counsel's attempt to discover same prior to the Newsday article of April 2, 2011, plaintiff now seeks permission to amend the notices of claim to include the period of December 31, 2009 to the time of McGinn's death on January 3, 2010 as the period of negligence and medical negligence claimed herein. Plaintiff also seeks to further set forth that defendants failed to properly evaluate decedent's suicide risk, and failed to consider and act on his reported drug use prior to confinement. Counsel states he is not looking to change the theories of the negligence and submits that both defendants have had full disclosure of the proposed amendments in that each conducted its own

GML 50-h hearing during which the subject material of the proposed amendment was thoroughly explored.

Defendant Corporation opposes the application while defendant County of Nassau and County of Nassau Correctional Center take no position. The Corporation states that the application is time-barred as it was made more than one year and ninety days from the dates plaintiff seeks to add to her notice (December 31, 2009-January 3, 2010).

The Corporation additionally argues that the proposed amendment would be highly prejudicial to the defendant in that it was put on notice with respect to its resuscitation efforts undertaken at Nassau University Medical Center on January 3, 2010. Whether defendant had other records regarding the plaintiff, or rendered care in the jail, did not put it on notice of the claims plaintiff is now trying to assert. The Corporation argues that it had no responsibility to anticipate what claims plaintiff might raise. Instead, it investigated those claims which were set out in the original notices. The Corporation additionally argues that plaintiff's contention that she only learned of the essential facts from the Newsday article fails to explain the "last minute" request to amend the notice given the fact that she amended her complaint in February, 2011.

In reply, plaintiff argues that the Corporation did not show any prejudice in its opposition to this application, nor can it. All the evidence and information with respect to plaintiff's claims are in the records of the defendants who hold sole dominion and control over such records. The Corporation's claim that their investigation involved an alleged failure to properly resuscitate decedent and did not involve a review of the remainder of its records pertaining to its failure to properly evaluate decedent as found by the New York State Commission of Correction shows the lack of prejudice to the Corporation should this application be granted. The Corporation has records of decedent while he was incarcerated and the presence of such records imputes actual knowledge of the facts of the claim thereby eliminating any claim of prejudice.

Based on the foregoing, the decision of the court is as follows:

"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 (*Matter of Beary v City of Rye*, 44 NY2d 398, 412). The applicable statute should be applied flexibly so as to balance two countervailing interests: on the one hand, protecting municipal defendants from stale or frivolous claims, and on the other hand, ensuring that a meritorious case is not dismissed for a ministerial error (*Matter of Quiroz v City of New York*, 154 AD2d 315, 316). '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' (*DeLeonibus v Scognamillo*, 183 AD2d 697, 698)." *Lomax v. New York City Health & Hosps. Corp.*, 262 A.D.2d 2, 4 (N.Y. App. Div. 1st Dep't 1999)

Pursuant to General Municipal Law § 50-e (6), "a mistake, omission, irregularity or defect made in good faith" in a notice of claim may be corrected in the court's discretion "provided it shall appear that the other party was not prejudiced thereby" (General Municipal Law § 50-e [6];

[* 4]

see, *Halali v City of New York*, 213 AD2d 449, 450; *Seise v City of New York*, 212 AD2d 467, 468). Since there is no allegation of bad faith on the part of the petitioner, the only issue is whether the defendant Corporation can show itself prejudiced by the amendment. The court finds that defendant Corporation has not shown that an amendment to the notice of claim would prejudice the municipality in any way. Plaintiff argues that defendants had notice of the events surrounding McGinn's death as evidenced by the state investigation. Since defendant has records of its treatment to decedent while he was confined to the County of Nassau Correctional Facility, it could readily have uncovered the relevant information while the facts were still fresh, simply by looking into the patient records.

The court finds that the Corporation would not be prejudiced by the proposed amendment to the notice of claim because it was timely apprised of the relevant facts at the GML 50-h hearing and through the investigation conducted by the New York State Department of Corrections. Since the records relating to decedent's treatment while incarcerated are in its dominion and control, the Corporation is presumed to have actual knowledge of the facts leading to plaintiff's claim (see generally, *Lomax v. New York City Health & Hosps. Corp.*, 262 A.D.2d 2; *Lord v New York City Hous. Auth.*, 184 AD2d 406). Moreover, plaintiff made a good faith attempt, to no avail, to gain information relating to the incident as evidenced by her FOIL request.

The court further finds that the instant application was timely made pursuant to GML 50-I in that it was brought within two years after decedent's death.

Accordingly, it is

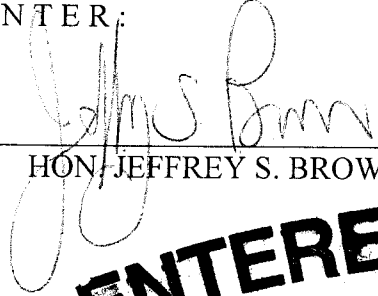
ORDERED, that the application for an order pursuant to GML 50-e(5) and (6), permitting the plaintiff to amend the notice of claim upon all defendants in the form annexed to the moving papers is hereby **GRANTED**.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
June 3, 2011

Attorney for Plaintiff
Sullivan Papain Block McGrath & Connavo, PC
55 Mineola Blvd.
Mineola, NY 11501

ENTER:


HON. JEFFREY S. BROWN, JSC

ENTERED

JUN 08 2011

NASSAU COUNTY
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