

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

2011 NY Slip Op 31985(U)

July 14, 2011

Supreme Court, New York County

Docket Number: 116748/09

Judge: Douglas E. McKeon

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

PRESENT: Douglas E. McKeon, J.S.C.  
*Justice*

PART 38

Jonathan Lambert, et al.

INDEX NO. 116748/09

- v -

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

MCHC

MOTION SEQ. NO. 1

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

is decided per annexed Memorandum Decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

JUL 15 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/14/11

Douglas E. McKeon  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

-----X  
In The Matter of the Claim of JONATHAN LAMBERT (formerly  
known as Jonathan Avila), an infant under the age of 14 years,  
by his Mother and Natural Guardian, SAYDI AVILA, and SAYDI  
AVILA, Individually,

Petitioners,

MEMORANDUM DECISION

-against-

Index No. 116748/09

NEW YORK CITY HEALTH & HOSPITALS  
CORPORATION,

**FILED**

Respondent.

**JUL 15 2011**

-----X  
HON. DOUGLAS E. MCKEON:

NEW YORK  
COUNTY CLERK'S OFFICE

Petitioners' application, by Order to Show Case, for an order seeking leave to file a late notice of claim and setting an immediate date for an examination of the claimant pursuant to General Municipal Law §50-h is denied.

This is a claim for medical malpractice against the New York City Health and Hospitals Corporation ("HHC") brought by Saydi Avila, individually and on behalf of her son Jonathan Lambert. Jonathan was born on April 8, 2005 at Harlem Hospital. Petitioners allege that the infant sustained meconium aspiration syndrome and hypertonia as a result of Harlem's mismanagement of the labor and delivery. Though the infant was transferred to another hospital on April 9, 2005 for almost two weeks, he was transferred back to Harlem Hospital where he remained until May 24, 2005. Thereafter, he treated at Harlem Hospital through 2006. It is alleged that Jonathan suffers from brain damage and severe developmental delays.

At the outset, this court lacks jurisdiction to grant leave to file a late notice of claim as to Ms. Avila's individual claims because her application is made more than one year and ninety days from the accrual of this action.

As to the infant's claims, based on the dates of the alleged malpractice, a notice of claim should have been served on HHC by June 7, 2005 but the infant is the beneficiary of a C.P.L.R. §208 infancy toll. Thus, this court may consider the application pursuant to General Municipal Law §50(e). *See Pearson v. New York City Health and Hospitals Corp.*, 43 AD3d 92 (1st Dep't 2007).

In determining whether to allow a late filing, the court must consider various factors: whether the petitioner has demonstrated a reasonable excuse for failing to serve a timely notice of claim, whether the public corporation acquired actual knowledge of the facts constituting the claim within 90 days of its accrual or reasonable time thereafter, and whether the delay would substantially prejudice the public corporation in defending on the merits. *See General Municipal Law §50(e)(5); Williams v. Nassau County Med. Ctr.*, 6 NY3d 531 (2006).

Although the infant had a complicated course in the hospital following delivery, *Williams v. Nassau County Med. Ctr.*, *supra* and its progeny stand for the proposition that a difficult hospital course, as evidenced by entries in the Hospital's records at the time of the petitioner's birth, does not, standing alone, provide notice of the facts underlying a malpractice claim. *Id. See also Beretey v. New York City Health and Hospitals Corp.*, 56 AD3d 591 (2d Dep't 2008).

Further, entries in the medical records reveal that the infant was developing normally at the time of discharge and there is no indication of a long term injury. In her supporting affidavit, Ms. Avila admits to being aware of this conclusion by noting that at the age of three months her son had met all developmental milestones. A July 20, 2006 neurology visit note supports this conclusion. Ms. Avila also stated that in October of 2006, about 17 months post delivery, her son had once again met all milestones. Ms. Avila stated that she did not learn of her son's alleged delays until "some point thereafter" and that it was not until 2008 that more findings led her to believe that her son's "damages...were in fact related to his birthing process." It is evident that the respondent could not have been aware of any injury attributable to the delivery within 90 days of the date of accrual, or a reasonable time thereafter, as there was no indication that the infant suffered any alleged delays until "later". Thus, the subject medical records alone, on their face, do not evince that respondent, by its acts or omissions, inflicted injuries on the infant petitioner and that respondent should have been aware of same within the applicable 90 days, or a reasonable time thereafter.

Although this is not a case in which the petitioner or his attorneys waited until the eve of trial to file a notice of claim or seek leave to file same, the mother's excuse for not being aware that her son's problems could have been caused by malpractice is that she only has a high school education and was 23 years old at the time of her son's birth. Ignorance of the law requiring that a notice of claim be filed is not an acceptable excuse. *See e.g., Harris v. City of New York*, 297 AD2d 473 (1st Dep't 2002). Furthermore, there is no support for the assertion that the delay was the product of infancy or of the need to

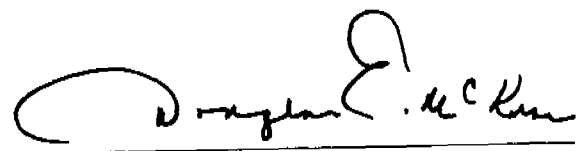
provide the infant with extraordinary care. See *Nieves v. New York City Health and Hospitals Corp.*, 34 AD3d 336 (1st Dep't 2006); *Lucero v. New York City Health and Hospitals Corp.*, 33 AD3d 977 (2d Dep't 2006); *Rios v. Westchester County Healthcare Corp.*, 32 AD3d 540 (2d Dep't 2006). Thus, petitioner fails to offer a reasonable excuse for the delay in filing the notice of claim.

Finally, the petitioner's expert opines in a conclusory manner that the hospital committed medical negligence and malpractice by failing to timely deliver the infant, resulting in damages. Petitioner's expert fails to offer the necessary nexus between the act of the respondent and any injury to petitioner that would put the hospital on notice that a claim would be filed with regard to the delivery at issue.

As the facts documented in the chart would not place respondent on notice of a claim, the application is denied. Merely asserting that because the infant suffered a difficult neonatal course, the respondent was on notice of a malpractice claim is rejected. To prevail on this application, petitioner must establish that HHC had notice that the hospital departed from the standard of care in treating the infant, and that those departures caused the infant's injuries. See *Webb v. New York City Health and Hospitals Corp.*, 50 AD3d 265 (1st Dep't 2008). Here, petitioner has not established these elements, and thus, the application is denied.

So ordered.

DATED: New York, New York  
July 14, 2011



Douglas E. McKeon, J.S.C.

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