

<b>Matter of Trejo v County of Suffolk</b>
2011 NY Slip Op 33166(U)
November 21, 2011
Supreme Court, Suffolk County
Docket Number: 11-12015
Judge: Joseph C. Pastoressa
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CA

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Supreme Court

MOTION DATE 5-5-11  
ADJ. DATE 9-7-11  
Mot. Seq. # 002 - MG

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IN THE MATTER of the Application of MARIA TREJO,

Petitioner-Claimant,

- against -

THE COUNTY OF SUFFOLK, SUFFOLK COUNTY DEPARTMENT OF HEALTH SERVICES and DIVISION OF PATIENT SERVICES - BRENTWOOD FAMILY HEALTH CENTER,

Respondents.

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Upon the following papers numbered 1 to 14, read on this motion to file a late notice of claim; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers 11 - 12; Replying Affidavits and supporting papers 13 - 14; Other \_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion of the petitioner-claimant for an order granting her leave to serve a late Notice of Claim upon the respondents is granted; and, it is further

**ORDERED** that the proposed Notice of Claim shall be deemed timely served, *nunc pro tunc*.

This is an action to recover damages allegedly sustained by petitioner-claimant Maria Trejo ("petitioner") as a result of medical malpractice committed by the employees and staff at the Brentwood Center, a medical facility owned and operated by respondents The County of Suffolk, Suffolk County Department of Health Services, and Division of Patient Services-Brentwood Family Health Center ("the Brentwood Center"). Petitioner alleges that she suffered severe injuries as a result of the failure to

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timely and properly diagnose and treat cervical cancer while a patient at the Brentwood Center. Petitioner alleges that she was continuously treated at the Brentwood Center from April 20, 2010 through October 2010 for vaginal bleeding and that the respondents departed from the standard of accepted medical care in failing to follow up properly with regard to the abnormal pap smear results which they knew of in April, 2010. After she was diagnosed with invasive squamous carcinoma of the cervix, petitioner underwent radiation and chemotherapy and claims that as a result thereof, she was unable to timely file her notice of claim. She now requests (*i.e.* on April 14, 2011) that the court permit her to file same, *nunc pro tunc*. In support of petitioner's motion for such relief, she submits a proposed Notice of Claim, medical records from the respondent Suffolk County Department of Health Services, Southside Hospital records, expert physician's affidavit, petitioner's affidavit, and Stony Brook University Hospital medical records.

The records of the Brentwood Center indicate that petitioner had a gynecological work-up performed by Dr. Goyal and that she had a ThinPrep PAP smear done thereat on April 20, 2010. The notes indicate that the pelvic exam found a "multiparous" cervix with no lesions. The PAP Smear Report was stamped "Received" on April 28, 2010 and each page initialed on April 29, 2010 by the Brentwood Health Center. The report stated, in pertinent part, "CYTODIAGNOSIS INTERPRETATION/RESULT \*\*\*\* EPITHELIAL CELL ABNORMALITY \*\*\*\* ATYPICAL SQUAMOUS CELLS of UNDETERMINED SIGNIFICANCE ...ABNORMAL CYTOLOGICAL FINDINGS NOTED". The Brentwood Center records do not indicate that petitioner was ever notified of these results, nor do they reveal that any change was made to the original plan to have petitioner return to the center in six months.

On September 16, 2010 petitioner returned to the Brentwood Center with complaints of diffuse abdominal pain and persistent vaginal bleeding since August 27, 2010, but the bleeding was scant on the day of the visit. She indicated that she was using two sanitary pads each days. Dr. Philippe performed a gynecological exam on the September 16th visit and his findings indicated, in part, "no vulva or vaginal lesions, no active bleeding...cervix red beefy...[illegible] polyp ...uterus@ R side possible fibroid. Impression: 36 y.o female G2P2 00 2 LMP 8-22-10 with possible fibroid. R/O anemia. Possible endometric [illegible] Plan: transvaginal sonogram R/O fibroids CBC to R/O Anemia will see family planning in November." On October 6, 2010 petitioner had a transvaginal sonogram at the Brentwood Center, a report of the sonogram dated that same day and addressed to Dr. Philippe indicated "Cervical region is bulky and lobular, spanning about 5 cm. Underlying lesion such as leiomyoma would be suspected. Other etiology cannot be excluded...Clinical correlation and follow up is advised. If warranted CT or MRI could be helpful for further evaluation."

On October 7, 2010, petitioner returned again to the Brentwood Center and Dr. Philippe noted that petitioner had complaints of "mild bleeding" then "for the past 2 days -heavy bleeding reports blood clots [illegible] mild dysmenorrhea". His impression was "36 yo female menorrhagic/dysmenorrhea" and he noted "awaiting results of sono was done 10/6" and his plan was "Provera [illegible] with H/H today F/up in 1 week will start OCPS". When petitioner was seen again by Dr. Philippe on October 13, 2010 his notes reflect that "Patient was seen @ Good Sam Hospital on Sunday 10-9-10 because of fainting- was seen gave IV fluid & released. Today c/o generalized body ache since last visit still bleeding. Changing 10 pads daily Exam: looks pale, uncomfortable." His impression was "1 Symptomatic Anemia 2 hemmorhagia" and the "Plan" was "sent to ED [emergency department] SSH

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[South Side Hospital] for [illegible] & transfusion”.

Petitioner was admitted to Southside Hospital on the 13th of October and discharged the next day after several transfusions and an ultrasound study was conducted that showed a 4.6 cm cervical myoma in the lower uterine segment/cervical region. At the hospital, she was advised to seek an evaluation of the mass at the Brentwood Center. She was seen again at the Brentwood Center on October 19, 2010 where Dr. Philippe indicated that she “needs endometrial sampling or possible biopsy of cervical lesion or possible endometrial crusetage”. On October 20, 2010 a cervical biopsy showed that petitioner was suffering from invasive squamous carcinoma. No notation was made in any of the records of Brentwood Center that the results of the April pap smear were ever discussed with petitioner or that they were considered in petitioner’s treatment after the April visit.

On November 5, 2010, petitioner received the results of a colposcopy performed on October 29, 2010, which confirmed that she was suffering from cervical cancer. She was advised not to have surgery because of the size of the tumor, instead it was suggested that she receive chemotherapy and radiation treatments. On December 6, 2010 petitioner began the treatments which consisted of external radiation for five consecutive days (Monday through Friday), internal radiation once a week from 5 a.m. to 3 p.m. and chemotherapy five days per week. She did not finish this treatment until February 3, 2011 and during this time period she states that she was completely physically disabled, too weak to perform any of her daily activities. She suffered from constant nausea and daily bouts of vomiting and diarrhea, was unable to walk due to abdominal pain, only left her home for medical treatment with help, and was aided by her family members in bathing, dressing and eating. She contends that she was unable to help her attorneys in any meaningful way during this time period.

Petitioner’s expert doctor avers by affidavit that “[a]ccepted standards of gynecological care and treatment in 2010 required that the physicians caring for [petitioner], take all appropriate measures to timely and properly assess the condition of her cervix in light of the abnormal PAP smear received on April 27, 2010. The appropriate gynecological standards required the performance of a colposcopy as soon as practicable after the abnormal PAP smear results were obtained. This was never done. In addition, it [was his] opinion that the pelvic exam performed on April 20, 2010 was not performed properly...it [was] more likely than not that this cervical lesion was present on this date and should have been properly addressed. In addition, the personnel at the BRENTWOOD CENTER failed to address the cervical lesion on October 6, 2010, when a transvaginal sonogram revealed ‘evidence of a bulky, lobular cervical lesion about 5 cm.’ Furthermore, the following day, [petitioner] returned to the BRENTWOOD CENTER and was seen by Dr. Philippe. Despite complaints of mild bleeding ‘but for the past 2 days -heavy bleeding-reports blood clots [illegible]-mild dysmenorrhea’ there is no indication that a pelvic exam was performed that date although proper medical standards required this. These actions by the personnel at the BRENTWOOD CENTER, albeit after April, 2010, were serious deviations from accepted medical practice. The failures to properly perform a pelvic exam on April 20, 2010 and to address the abnormal results of the PAP smear done that day led to a six (6) month delay in the final diagnosis of a cervical cancer that was eventually staged as 3B. It [was his] opinion that the personnel who treated [petitioner] at the BRENTWOOD CENTER departed from accepted gynecological practice and standards by failing to take the steps to properly assess the condition of her cervix timely, including colposcopy and proper pelvic examinations. [Those] actions and omissions

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caused and/or substantially contributed to a six (6) month delay in the final diagnosis of Stage 3B cervical cancer and greatly affected her choices of treatment and survival chances.”

Respondents’ opposition includes only an affirmation of an attorney which alleges that the respondents only became aware of the alleged malpractice claims, and resulting injuries, on April 19, 2011 when they received the within application. Respondents allege that petitioner failed to provide a reasonable excuse for her failure to serve a timely notice of claim and that respondents’ possession of the medical treatment records was not sufficient to put them on notice of the claim.

General Municipal Law 50-c(5) requires the court to consider these factors in determining whether to grant leave to serve a late notice of claim: whether an infant is involved, whether the claimant has demonstrated a reasonable excuse for his failure to timely file the notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within 90 days from its accrual or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits. However, the absence of any one factor is not necessarily fatal to the application to file the late notice of claim, all relevant factors are to be considered (*see* Rivera-Guallpa v County of Nassau, 40 AD3d 1001 [2d Dept 2007] *app denied* 9 NY3d 816 [2007]; Rechenberger v Nassau County Med. Ctr., 112 AD2d 150 [2d Dept 1985]; Williams v New York City Health and Hospitals Corp., 93 AD2d 885 [2d Dept 1983]). Where an affidavit in support of a motion to file a late notice of claim in a medical malpractice matter sets forth a diagnosis of cancer, dates of hospitalizations, chemotherapy and radiation treatments, and facts which state that the claimant was debilitated and unable to attend to her needs as a result of her medical condition, it is sufficient to explain the reason for an inability to timely serve a notice of claim (Olsen v County of Nassau, 14 AD3d 706 [2d Dept 2005] *see also* Cifuentes v New York City Health and Hospitals Corp., 43 AD3d 385 [2d Dept 2007]). Additionally, when considering the overall circumstances present and the predisposition to be concerned about her own medical needs and care after her diagnosis, the slight delay in serving the notice of claim is properly excusable (*see* Godoy v Nassau Health Care Corp., 49 AD3d 541 [2d Dept 2008]). “To provide actual knowledge of the facts constituting the claim, medical records must ‘suggest injury attributable to malpractice’. Where malpractice is apparent from an independent review of the medical records, those records constitute ‘actual notice of the pertinent facts’”and it is a proper exercise of discretion to grant leave to serve a late notice of claim (Cifuentes v New York City Health and Hospitals Corp., *supra* at 386 [*internal citations omitted*]).

Here, where petitioner’s notice of claim is served well within the applicable statute of limitations period (*i.e.* one year and ninety days), where she was treated for cancer with radiation and chemotherapy (and then recovering from the said treatments) during the ninety day period immediately following the alleged malpractice, where the facts constituting the claim are contained in the medical records of the respondent municipality and a medical doctor found that malpractice was apparent from his independent review of those medical records, the respondents had actual notice of the claim and cannot be said to have been prejudiced by a late notice of claim. Petitioner has provided a reasonable excuse for her late filing of the notice of claim and respondents have failed to demonstrate any prejudice to them as a result of the late filing of the notice of claim. Accordingly, petitioner’s motion is granted and the Notice of Claim is deemed to have been served timely, *nunc pro tunc*.

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Dated: November 21, 2011



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HON. JOSEPH C. PASTORESSA

FINAL DISPOSITION     NON-FINAL DISPOSITION