

Gutierrez v New York City Health & Hosps. Corp.
2012 NY Slip Op 30190(U)
January 26, 2012
Supreme Court, New York County
Docket Number: 110543/08
Judge: Douglas E. McKeon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Douglas E. McKeon
Justice Supreme Court
Justice

PART 38

Wally Gutierrez 2

INDEX NO. 110543/08

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

- v -

New York City Health and Hospitals Corporation

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

Motion is decided as per the annexed Memorandum Decision.

FILED

JAN 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/26/12

Douglas E. McKeon
Justice Supreme Court

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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
WALLY GUTIERREZ, an infant by his mother and
natural guardian, YOSSELIN TERRERO,

Plaintiffs,

-against-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION (METROPOLITAN HOSPITAL),

Defendant.

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

MEMORANDUM DECISION

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Plaintiff's motion pursuant to General Municipal Law § 50-e seeking leave to file a late notice of claim is denied and cross-motion by defendant New York City Health and Hospitals Corporation's ("NYCHHC") pursuant to General Municipal Law § 50-e(5) to dismiss for failure to timely file a notice of claim is granted to the following extent:

In this medical malpractice action, plaintiff alleges that negligence and medical malpractice occurred at Metropolitan Hospital beginning when the infant's mother received prenatal care through the infant-plaintiff's birth on June 15, 2005 and his discharge from Metropolitan Hospital on August 10, 2005. Plaintiff alleges that the defendant failed to assess utero placental sufficiency and fetal well being, failed to admit the plaintiff into the hospital, failed to diagnose and treat placental abruption and failed to render appropriate neonatal care. As a result thereof, plaintiff claims that the infant suffers from global developmental delays, brain damage, mental retardation, neurological/cognitive deficits, and seizure disorder. Notably, it is undisputed that the infant was delivered at 26 weeks gestation on June 15, 2005 and that this premature delivery was necessary due to the mother's condition at that time. Upon delivery, the infant was admitted to the Neonatal Intensive Care Unit at Metropolitan Hospital and discharged on August 10, 2005.

Significantly, this court must now decide whether plaintiff is in compliance with the notice of claim requirements of the General Municipal Law, pre-conditions to allowing this action to be maintained. Thus, the most relevant question at this time is whether there is documentary evidence in the medical records that puts defendant on actual notice as to negligent conduct by the hospital staff. This court acknowledges that if this motion were made on summary judgment grounds, it would be denied in light of the conflicting expert testimony. However, a summary judgment motion is not before this court, rather an application for leave to file a late notice of claim and cross-motion to dismiss for failing to file a late notice of claim is one based on procedural grounds and will be decided accordingly as follows:

Based on the dates of the alleged malpractice, a notice of claim should have been served on NYCHHC by November 8, 2005 at the latest, ninety (90) days from the date of the infant's discharge from the hospital. See CPLR § 214(a); General Municipal Law § 50-e. The notice of claim was received by NYCHHC on January 22, 2007, one and a half years after the infant was discharged from the hospital. The instant application was made on or about January 31, 2011, five (5) years and seven (7) months after the alleged claim arose.

Plaintiff sets forth that in considering all factors when deciding a motion seeking leave to file a late notice of claim, as set forth in *Williams v. Nassau County Med. Ctr.*, 6 NY3d 531 (2006), this court should grant the instant motion because the key factor, actual knowledge of the essential facts constituting the claim is established here, supported by plaintiffs' experts' affirmations. Plaintiff sets forth that because the hospital was aware of the infant's potential for poor outcome (which defendant acknowledges is accurate, though attributes the poor outcome to prematurity), they were aware of a potential claim for malpractice.

Defendant argues in support of its cross-motion and in opposition to plaintiff's motions that dismissal is warranted as plaintiff failed to comply with the statutory preconditions to suit against NYCHHC by not serving a timely notice of claim. Additionally, without establishing that the purported departures are sufficiently evident in the hospital chart or that the hospital chart contains any evidence that these purported departures were the cause of the infant's condition, plaintiff's application must be denied.

Although this case is distinguishable from *Williams v. Nassau County Medical Ctr.*, *supra* in that there is predictable lasting harm to the child, this court finds that plaintiff failed to prove that the medical records alone evince that defendant, by its acts or omissions, inflicted injuries on the infant-plaintiff. *See Webb v. New York City Health and Hosps. Corp.*, 50 AD3d 265 (1st Dep't 2008); *Seymor v. New York City Health and Hosps. Corp.*, 21 AD3d 1025 (2d Dep't 2005); *Koster v. Greenburg*, 120 AD2d 644 (2d Dep't 1986). There is insufficient evidence to support the finding that the infant's condition upon delivery and the subsequent issues that developed during his admission to the NICU were caused by any malpractice as opposed to the infant's extremely premature birth, which could not have been avoided. Finally, the assertions that the hospital staff's departures from the standard of care are documented in the chart, and thus, the defendant was provided with actual notice as to the negligent conduct by the staff which caused the infant-plaintiff to suffer injury is unsupported. Plaintiff's expert affirmations interpret the hospital chart in a manner consistent with plaintiff's theory of liability but do not address the latter issue.

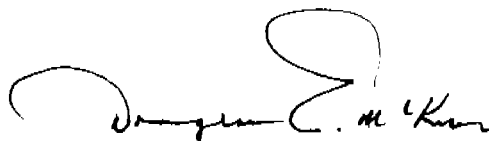
Finally, this court is less concerned with plaintiff's delay in filing the notice of claim and bringing the instant motion, however, plaintiff fails to offer a reasonable excuse for his more than four year delay (from the time he filed a notice of claim) in making the instant application. Although the lack of reasonable excuse is not fatal by itself, plaintiff has also failed to demonstrate actual

notice of the pertinent facts underlying the claim within 90 days or a reasonable time thereafter. The lack of a reasonable excuse for the delay and the fact that defendant did not have actual knowledge of the essential facts underlying the claim amounts to prejudice here, thus warranting dismissal.

Accordingly, plaintiff's motion is denied, defendant's cross-motion is granted and plaintiff's complaint is dismissed in its entirety as against NYCHHC.

This constitutes the decision and order of the court.

Date: January 26, 2012
New York, New York



Douglas E. McKeon, J.S.C.

Douglas E. McKeon
Justice Supreme Court

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