SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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ARGENIS HERNANDEZ, an Infant by his Mother and Natural Guardian, ROXANA HERNANDEZ,

Plaintiff,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

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Index No. 805110/12

DECISION/ORDER

Motion Sequence 001

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause, Affirmations, Affidavit & Exhibits Annexed	1, 2, 3, 4, 5, 6
Answering Affirmations & Exhibits	7, 8, 9, 10

By notice of motion dated December 10, 2013, plaintiff Argenis Hernandez (plaintiff), an Infant by his Mother and Natural Guardian, Roxana Hernandez moves for order deeming his previously served notice of claim timely *nunc pro tunc* or granting him leave to serve a new notice of claim. Defendant New York City Health and Hospitals Corporation (defendant) opposes the motion.

In support of the motion, plaintiff contends that there is a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, that defendant acquired actual notice of the facts constituting the claim from its medical records and that, because of this actual knowledge, defendant is not substantially prejudiced by the delay. Plaintiff's mother and guardian avers that she is an immigrant from El Salvador who cannot speak or read English and that she was not aware of the need to file a notice of claim and did not learn of the requirement until she retained her current attorneys in January 2012. She further avers that after the infant's birth on June 8, 2010 she was told by defendant's employees that plaintiff's injuries occurred not during his delivery but weeks before he was born. Plaintiff's mother also contends that she did not seek immediate legal advice because caring for the plaintiff is difficult and time consuming given his inability to walk, feed himself or do any of the things a normal child can do.

Plaintiff's expert, Dr. Edelberg, contends that the medial records, in particular the fetal

heart rate tracings, evince late deceleration and diminished variability and that diminished variability is indicative of the fetus not reacting to changes, including contractions, as a result of a hypoxia insult. Dr. Edleberg claims that in the face of a recorded fetal heart rate pattern significant for the loss of beat to beat variability and worsening decelerations of the fetal heart rate, defendant departed from the applicable standard of care by not delivering the infant via emergency cesarian section.

Plaintiff's other expert, Dr. Thompson, contends that the plaintiff suffers from cerebral palsy spastic quadriplegia and that the spasticity in plaintiff's limbs is the result of periventricular leukomalcia (PVL), a condition where there is softening and necrosis of the white matter in the brain. Dr. Thompson claims that plaintiff's PVL was the result of a hypoxic ischemic injury during labor and delivery. Relying on the fetal heart rate tracing, which he claims suggests ongoing hypoxia with significant deterioration in the period shortly prior to birth, Dr. Thompson argues that in spite of plaintiff's Apgars scores of 9 at one minute and 9 at five minutes following birth, plaintiff sustained the most severe hypoxic ischemic insult later in the labor process and the PVL occurred subsequent to delivery when plaintiff 's brain was reperfused.

In opposition, defendant argues that plaintiff has failed to establish that defendant had actual knowledge of plaintiff's claim through its medical records because plaintiff's injuries are not the result of malpractice by defendant during plaintiff's delivery but are sequelae of plaintiff's prematurity resulting in-utero and/or post delivery. Defendant's expert, Dr. Brightman, opines that defendant did not have actual knowledge of the facts and circumstances underlying plaintiff's malpractice claim. Dr. Brightman contends that it is not the standard of care to interpret fetal heart rate monitoring strips panel by panel, as plaintiff's expert did, because a single panel is not representative of fetal well being and could lead to a variety of improper or unnecessary interventions, including the performance of an unnecessary c-section. Dr. Brightman claims that when read as a whole, plaintiff's fetal heart rate monitoring strips show an overall reassuring Category I tracing with moderate variability and positive accelerations. According to defendant's expert, the tracing reveal areas of short decelerations which were immediately followed by good accelerations and return to baseline. Dr. Brightman claims that severely diminished variability can occur when the baby is going through sleep cycles and that there are ares on plaintiff's heart monitoring strips that are indicative of a fetal sleep cycle. Dr, Brightman further claims that there tends to be less overall reactivity in fetal heart tracing pattern sin premature babies like plaintiff. Dr. Brightman further opines that there was evidence of some variable decelerations and mild variability twenty five minutes prior to plaintiff's birth but contends that these variations are frequently seen during pushing. Dr. Brightman contends that there was never any reason for defendant to consider performing a c-section and argues that the fact that plaintiff was born with excellent 9/9 Apgars and an acceptable pH level and acceptable blood gases are all indicative of a normal atraumatic delivery.

Similarly, Dr. Molofosky, defendant's other expert, opines that defendant had no notice of malpractice at the time of labor and delivery which may have caused injury to plaintiff. According to Dr. Molofosky, at the time of labor and delivery, there were no signs of hypoxia that would have caused or exacerbated plaintiff's injuries, plaintiff's Apgars were excellent and his cord blood gases were all within acceptable limits. Plaintiff's mother was allowed to hold plaintiff immediately following delivery and no resuscitation was performed at the time of

delivery. Dr. Molofosky contends that these factors are all indicative of a normal atrautmatic delivery with no evidence of acute hypoxia.

The intent underlying the notice of claim requirement embodied in General Municipal Law § 50-e is to protect the municipality from unfounded claims and ensure that it has an adequate opportunity to timely explore the merits of the claim while the facts are still "fresh" (*Adkins v City of New York*, 43 NY2d 346, 350, 372 NE2d 311, 401 NYS2d 469 [1977]; *see also Brown v City of New York*, 95 NY2d 389, 392, 740 NE2d 1078, 718 NYS2d 4 [2000] [in order "(t)o enable authorities to investigate, collect evidence and evaluate the merit of a claim, persons seeking to recover in tort against a municipality are required, as a precondition to suit, to serve a Notice of Claim"]).

A notice of claim must set forth, among other things, the time and place of an accident and the manner in which it occurred (General Municipal Law § 50-e [2]). This statutory requirement is designed to enable the governmental entity involved to obtain sufficient information to promptly investigate, collect evidence, evaluate the merit of the claim, and assess the municipality's exposure to liability (*Brown*, 95 NY2d 389). The notice shall be in writing, sworn to by or on behalf of the claimant, and shall set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; and (4) the items of damage or injuries claimed to have been sustained so far as then practicable.

General Municipal Law § 50-e (5) gives a court the discretion to grant leave to serve a late notice of claim after considering "whether the public corporation or its attorneys . . . acquired actual knowledge of the essential facts constituting a claim within the time specified in subdivision one . . . or within a reasonable time thereafter" (*see Caminero v New York City Health & Hosps. Corp.*, 21 AD3d 330, 332 [1st Dept 2005]). "In deciding whether a notice of claim should be deemed timely served under General Municipal Law § 50-e [5)] the key factors considered are 'whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense. Moreover, the presence or absence of any one factor is not determinative'" (*Velazquez v City of N.Y. Health and Hosps. Corp.*, 69 AD3d 441, 442 [1st Dept 2010] *lv denied*, 15 NY3d 711, 936 NE2d 917, 910 NYS2d 36 [2010] *quoting Matter of Dubowy v City of New York*, 305 AD2d 320 [1st Dept 2003]). The statute is remedial in nature and should be liberally construed (*Camacho v City of New York*, 187 AD2d 262, 263 [1st Dept 1992]), such construction should not be taken as carte blanche to file a late notice of claim years after the incident which gave rise to the claim occurred. Such an interpretation would frustrate the purpose of the statute which is to protect the municipality from unfounded claims and ensure that it has an adequate opportunity to explore the claim's merits while information is still readily available (*Matter of Porcaro v City of New York*, 20 AD3d 357, 357-358 [1st Dept 2005]).

Applying this criteria to this case, the court finds that plaintiff has failed to provide a reasonable excuse for the delay. It is well settled that ignorance of the law is not a reasonable excuse (*see Rodriguez v New York City Health and Hosps. Corp. [Jacobi Med. Ctr.]*, 78 AD3d 538, 538-39 [1st Dept 2010], *lv denied* 17 NY3d 718, 959 NE2d 1024, 936 NYS2d 75 [2011]).

Moreover, there has been no excuse proffered for the nearly two year delay between the filing of the late notice of claim and the time this motion was made (*see Torres v New York City Health & Hosps. Corp. (Lincoln Hospital)*, 101 AD3d 463 [1st Dept 2012]). However, the failure to proffer a reasonable excuse for the delay in filing a timely notice of claim, standing by itself, is not sufficient to deny an application for leave to serve and file a late notice of claim (*Flores-Vasquez v New York City Health & Hosps. Corp.*, 112 AD3d 540 [1st Dept 2013] [internal citations omitted]).

Actual knowledge of the essential facts is an important factor in determining whether to grant an extension and should be accorded great weight (*Kaur v New York City Health & Hops. Corp.* 82 AD3d 891 [2d Dept 2011]). "Merely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff during the birth process" (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537, 847 NE2d 1154, 814 NYS2d 580 [2006]). "The relevant inquiry is whether the hospital had actual knowledge of the facts—as opposed to the legal theory—underlying the claim. Where . . . there is little to suggest injury attributable to malpractice during delivery, comprehending or recording the facts surrounding the delivery cannot equate to knowledge of facts underlying a claim" (*id.*). Since it would appear from the diametrically opposed expert opinions that the injuries suffered by plaintiff are just as likely to be consistent with his premature birth and not the result of malpractice by defendant in failing to perform an emergency c-section, it cannot be said that the medical records, on their face, put defendant on notice of the essential facts of the alleged malpractice (*see Arauz v New York City Health & Hosps. Corp.*, 101 AD3d 558 [1st Dept 2012]; *cf Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448 [1st Dept 2011] [defendant did not submit any expert affirmations to challenge the conclusions of plaintiff's medical experts that the medical records, on their face, evinced defendant's failure to provide the infant's mother with proper prenatal and labor care]). To accept plaintiff's expert opinions that the medical records clearly show departures from accepted medical practice and, therefore, gave defendant actual notice of the alleged malpractice and to fail to take into account the conclusions of defendant's experts would result in the court sidestepping the threshold issue in this case, i.e., whether plaintiff meets the criteria that would permit the filing of a late notice of claim (*Plaza v New York Health & Hosps. Corp. (Jacobi Med. Ctr.)*, 97 AD3d 466 [1st Dept 2012]). The court is therefore constrained to find that plaintiff has not established that defendant had actual notice of the essential facts of the claim through its medical records.

On the question of prejudice, proof of actual knowledge, or lack thereof, is an important factor in determining whether a defendant is substantially prejudiced by a delay in the service of a notice of claim (*Williams*, 6 NY3d at 539). However defendant's general claim that plaintiff's delay and the resultant passage of time has created prejudice is insufficient (*Plaza*, 97 AD3d at 471).

Having applied all of the relevant factors that must be considered in determining whether permitting service of a late notice of claim would be a provident exercise of discretion, the court concludes that plaintiff failed to meet the overall requirements and the complaint must therefore be dismissed (*id.*).

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that plaintiff's complaint is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff movant is to serve a copy of this order, with notice of entry, upon defendant within 20 days of entry.

George J. Silver, J.S.C.

Dated: NOV 13 2014
New York County

GEORGE J. SILVER