

Steele v New York City Health & Hosp. Corp.

2014 NY Slip Op 32951(U)

November 10, 2014

Supreme Court, New York County

Docket Number: 805360/2013

Judge: Martin Schoenfeld

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 28

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SHARON STEELE, As Administrator of the
Estate of EULA LEE STEELE, Deceased and
SHARON STEELE, Individually,

Petitioner,

DECISION AND ORDER

- against -

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

Index No. 805360/2013

Respondent.

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Martin Schoenfeld, J.:

Petitioner moves by Notice of Petition for an order granting leave to serve and file a late notice of claim pursuant to General Municipal Law §50-e(5) and deeming the notice of claim timely filed *nunc pro tunc*. Respondent, the New York City Health and Hospitals Corporation (HHC), opposes the relief requested. For the reasons stated below, the motion is granted.

Based upon the submissions before this Court, Eula Lee Steele (decedent) was brought to Harlem Hospital on Monday, October 1, 2012 by ambulance complaining of abdominal pain and vomiting. Decedent was 79 years old and suffered from, among other things, end stage renal disease and diabetes. Ms. Steele was admitted to the hospital. During her stay she received various medications and a dialysis treatment. Although the records show that at one point during her stay her medical plan included a CT scan, no CT scan was performed. Ms. Steele was discharged from Harlem Hospital Center (Harlem Hospital) on Wednesday, October 3, 2012. The next day, October 4th, Ms. Steele was taken to St. Luke's Roosevelt Hospital (St. Luke's) complaining of abdominal distress. An X-Ray showed a small bowel obstruction. Ms. Steele was sent to have a CT scan but died of cardiac arrest while drinking liquid given to her for the CT

scan.

Ms. Steele's daughter, Sharon Steele, became the administrator of her mother's estate on January 3, 2013. According to petitioner's papers, Sharon Steele suspected that St. Luke's was responsible for her mother's death. Accordingly, her attorneys made several requests to St. Luke's for the decedent's medical records before receiving them on or about August 2013. Petitioner contends that these records showed a small bowel obstruction which according to petitioner may have been present during the decedent's Harlem Hospital visit. Petitioner then requested decedent's medical records from Harlem Hospital. These records were received on September 19, 2013.

Thereafter, all of the records were reviewed by a gastroenterologist, Dr. William Bisordi, who in an affidavit of merit dated September 30, 2013 concludes that Harlem Hospital "departed from good and accepted medical practice" by failing "to perform adequate imaging studies and therefore fail[ing] to diagnose a small bowel obstruction."

Petitioner now seeks to bring malpractice and wrongful death actions against HHC contending that decedent's pain and suffering and death were caused by Harlem Hospital's failure to diagnose and treat decedent's small bowel obstruction. Annexed to the petition are the medical records from both hospitals. Also included is Dr. Bisordi's affidavit. Based upon these claims, the Petitioner seeks a court order granting leave to serve and file a late notice of claim and deeming its notice of claim of October 1, 2013 timely filed *nunc pro tunc*.

General Municipal Law §50-e(1)(a) requires that a notice of claim be served on a public corporation within 90 days after the claim arises. In wrongful death actions, the 90 days runs from the appointment of the administrator of the estate. *Id.* A court, in its discretion and upon application by the petitioner, may extend the time to serve said

notice. General Municipal Law §50-e(5). In determining whether to grant leave to file a late notice of claim, a court must consider the key factors of “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.” *Velazquez v. City of New York*, 69 AD3d 441, 442 (1st Dept. 2010) (internal citations and quotations omitted). “[T]he presence or absence of any one factor is not determinative.” *Id.* In addition, “[t]he statute is remedial in nature and, therefore, should be liberally construed.” *Porcaro v. City of New York*, 20 AD3d 357, 358 (1st Dept. 2005) (internal citations omitted).

While the petitioner does not dispute that the 90-day period has lapsed for both causes of action, she maintains that Harlem Hospital had actual notice of the facts attributable to the alleged malpractice within the medical records. In this regard, she points to the affidavit of Dr. Bisordi, a board certified internal medicine and gastroenterology physician, and the medical records, which in support of her allegations of inadequate diagnostic testing, include in several places a notation of the possibility of bowel obstruction and the direction for an abdominal CT scan that was never performed.

Defendant disputes the claim that the medical records provided actual notice as contemplated by General Municipal Law §50-e(5). The defendant relies upon, among other cases, the Court of Appeals decision in *Williams v. Nassau County Medical Center*, 6 NY3d 531, 537 (2006), in which it was held that “[m]erely having or creating hospital records, without more, does not establish actual knowledge of a potential injury

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where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff.”

This court finds in the present case, that the “defendant’s possession of the medical records constituted actual notice of the pertinent facts.” *Talavera v. NYCHHC*, 48 AD3d 276 (1st Dept. 2008) (citations omitted). Unlike the plaintiff in *Williams*, ten years after the fact, the petitioner here submitted an affidavit from a board certified internal medicine physician and gastroenterologist stating within a reasonable period of time and with a reasonable degree of medical certainty, that the medical records, on their face, reveal a deviation from the proper standard of care. See *Talavera*, 48 AD3d at 277. The doctor explains that Harlem Hospital’s failure to perform the proper imaging on the patient was a deviation from good and acceptable medical practice. Specifically, he emphasizes that “[a]dequate imaging would have diagnosed decedent’s true condition and provided her an opportunity for a cure.” He concludes that if Harlem Hospital had “not departed from good and accepted medical practice, it is more likely than not that decedent’s true condition would have been diagnosed, treated and her death prevented.” He also notes that “the pain and suffering associated with a persistent or progressing small bowel obstruction would have been minimized” if Harlem Hospital had diagnosed the obstruction.

Here, respondent fails to challenge Dr. Bisordi’s medical conclusions with its own expert affidavit. Instead, in its affirmation in opposition respondent’s attorney offers his thoughts and determinations about the decedent’s hospital stay by referring to the medical records. As in *Perez v. NYCHHC*, 81 AD3d 448, 449 (1st Dept. 2011), “the defendant relied solely on the opinions of its attorney, a non-medical professional, who drew her own conclusions from the records.” The medical issues in this action,

however, "are not within the ordinary knowledge and experience of a layperson." *Id.* Thus, in such cases, "to refute the opinions of plaintiffs' experts" and to show that the hospital did not have actual notice, respondent should have offered an expert affidavit to support its contentions. *Id.*

The respondent also argues that petitioner has not shown lack of prejudice and that, in fact, petitioner's delay (6 month for the wrongful death action and 9 months for the malpractice claim) is prejudicial because respondent was unable to conduct a prompt and efficient investigation and time has diminished the recollections of potential witnesses. The court finds, however, that respondent's own affirmation in opposition contradicts this contention. Using the voluminous records provided by Harlem Hospital, respondent's counsel provides a detailed picture of the decedent's two-day stay at the hospital, including the names of the doctors who evaluated the decedent, their impressions of her, the various diagnoses made, medical plans suggested, and the treatments she actually received. In addition, this case is very different than *Kelley v. NYCHHC*, 76 AD3d 824 (1st Dept. 2010), cited by respondent. In that case petitioner's motion for late notice of claim was denied for, among other reasons, the prejudice to the defendant caused by petitioner only being seen once in a busy ER with swelling and bruising on his face. *Id.* at 828-29. Here the plaintiff, after coming to the ER, was admitted to the hospital and was hospitalized for two days for abdominal distress and vomiting. She was seen by several doctors and nurses who kept detailed notes of their observations and treatments as evidenced by the medical records. Thus, the court sees no prejudice to respondent in petitioner's delay of less than a year in filing the notice of claim.

Finally, the respondent asserts that the petitioner has not offered a reasonable

excuse for her failure to comply with the requirements of §50-e(1). The absence of a reasonable excuse is not fatal to the granting of the relief sought. See *Renelique v. New York City Hous. Auth.*, 72 AD3d 595, 596 (1st Dept. 2010). Nevertheless, the court finds that petitioner's relatively short delay in serving the notice of claim was reasonable under the circumstances of this case. Petitioner has explained that she was not appointed to be the estate administrator until three months after her mother's death. Moreover, once petitioner received the delayed records from St. Luke's and discovered the diagnosis of a small bowel obstruction, she expediently requested the medical records from Harlem Hospital, had them evaluated by an expert and brought this petition.

Although in this Court's view the present case is rather tenuous for various reasons, nevertheless, petitioner met the criteria for §50-e(5) relief. Therefore, based upon the above findings, the petitioner's motion for leave to serve and file a late notice of claim and to deem the notice of claim timely filed *nunc pro tunc* is granted.

In accordance with the foregoing, it is

ORDERED that petitioner's motion for leave to serve and file a late notice of claim is granted; and it is further

ORDERED that petitioner's motion that its notice of claim of October 1, 2013 be deemed filed *nunc pro tunc* is granted.

The foregoing constitutes the decision and order of this court.

Dated: New York, New York

November 10, 2014



Martin Schoenfeld, J.S.C.