

<b>Majuste v Jamaica Hosp. Med. Ctr.</b>
2014 NY Slip Op 34057(U)
April 30, 2014
Supreme Court, Queens County
Docket Number: Index No. 701652/13
Judge: Kevin J. Kerrigan
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN  
Justice

Part 10

-----X  
Ketlie Majuste,

Index  
Number: 701652/13

Plaintiff,

Motion  
Date: 4/9/14

- against -

Jamaica Hospital Medical Center,  
Queens Hospital Center,

Motion  
Cal. Number: 24

Defendants.  
-----X

Motion Seq. No.: 1

The following papers numbered 1 to 10 read on this motion by defendants to dismiss; and cross-motion by plaintiff for leave to serve a late notice of claim.

FILED

MAY -2 2014

Papers  
Numbered

Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-8
Affirmation in Opposition.....	9-10

COUNTY CLERK  
QUEENS COUNTY

As a preliminary matter, this Court is deciding the instant motion and cross-motion since they were referred to this Court pursuant to the memorandum issued by Justice Peter J. O'Donoghue on April 23, 2014. The papers were received in chambers on April 24, 2014.

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by the New York City Health and Hospitals Corporation (HHC) to dismiss the complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7), is granted. Cross-motion by plaintiff for leave to serve a late notice of claim and for an order deeming the summons and complaint as the notice of claim is denied.

The Court notes, in the first instance, that Jamaica Hospital Medical Center and Queens Hospital Center, being municipal hospitals, are not proper parties, but rather, the proper party in

a suit against a municipal hospital is the HHC (see Unconsolidated Laws §7385; Binyard v City of New York, 151 AD 2d 712 [2<sup>nd</sup> Dept 1989]). Although the within action does not lie against the named defendants, HHC has not moved for dismissal upon this ground but upon the ground that plaintiff failed to serve HHC with a notice of claim pursuant to General Municipal Law §50-e and is now precluded from seeking leave to file a late notice of claim since the statute of limitations has expired.

Plaintiff alleges that she sustained injuries as a result of medical malpractice committed by Jamaica Medical Hospital Center and Queens Hospital Center while in their care from August 22, 2012 to August 31, 2012.

A condition precedent to commencement of a tort action against the HHC is the service of a notice of claim upon it within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Unconsolidated Laws §7401; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). In addition, an action against the HHC must be commenced within one year and 90 days after the plaintiff's cause of action accrues (see General Municipal Law §50-i; Unconsolidated Laws §7401).

Since plaintiff's cause of action accrued on August 31, 2012, she was required to serve a notice of claim no later than November 29, 2012 and commence an action no later than November 29, 2013. Plaintiff never filed a notice of claim but commenced this action on May 8, 2013.

Although plaintiff commenced this action within the applicable one year and 90-day period of limitation, she did not seek leave of the Court to serve a late notice of claim until March 28, 2014, by way of cross-motion, which was beyond the one year and 90-day statute of limitations period for commencing an action against HHC.

Since the service of a timely notice of claim was a condition precedent to commencement of this action against HHC, and since plaintiff has not sought, prior to the expiration of the statute of limitations period, leave to serve a late notice of claim, the underlying action was never properly commenced against HHC, and, therefore, must be dismissed (see Davis v. City of New York, 250 AD 2d 368 [1<sup>st</sup> Dept 1998]).

An extension of time to serve a late notice of claim "shall not exceed the time limited for the commencement of an action by the claimant against the public corporation" (General Municipal Law §50-e[5]). The Court has no authority to entertain an application for leave to file a late notice of claim made beyond the one year

and 90-day period of limitations for commencement of an action (see Hochberg v. City of New York, 63 NY 2d 665 [1984]). Moreover, it does not matter that the action was commenced within the statute of limitations period. Where the action is commenced within the one year and 90-day statute of limitations period but a cross-motion for leave to serve a late notice of claim is not made until after the passage of said period, the Court is precluded from exercising judicial discretion to allow the filing of a late notice of claim (see Cintron v City of New York, 82 AD 2d 796 [2<sup>nd</sup> Dept 1981]; Kellogg v Office of Chief Med. Examiner of City of New York, 24 AD 3d 376 [1<sup>st</sup> Dept 2005]).

Therefore, plaintiff's cross-motion for leave to serve a late notice of claim must be denied. Indeed, plaintiff's counsel does not even annex to his cross-moving papers a proposed notice of claim. Instead, he asks the Court, as an additional branch of his cross-motion, to deem the summons and complaint a timely notice of claim. Said remaining branch of the cross-motion must also be denied, as there is no basis in law for such relief, and none is proffered.

Even had plaintiff timely moved for leave to serve a late notice of claim, she has failed to demonstrate the presence of any factor that would constitute a basis for the Court to exercise its discretion to grant leave to file a late notice of claim.

In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is substantially prejudiced by the delay (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

Plaintiff's counsel's sole excuse of law office failure for not filing a notice of claim does not constitute a reasonable excuse for the failure to serve a timely notice of claim, as a matter of law (see Belenky v. Nassau Community College, 4 AD 3d 422 [2<sup>nd</sup> Dept 2004]; Baglivi v. Town of Southold, 301 AD 2d 597 [2<sup>nd</sup> Dept 2003]; King v. New York City Housing Authority, 274 AD 2d 482 [2<sup>nd</sup> Dept 2000]).

Counsel's additional argument that HHC acquired actual

knowledge of the facts underlying plaintiff's claim by virtue of its possession of his hospital records is also without merit. Mere possession by a hospital of medical records, without more, is insufficient to establish actual knowledge (see Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). Plaintiff has failed to demonstrate that the medical records annexed to her opposition papers apprised HHC of any medical malpractice on the part of any of its employees (see id.).

Finally, counsel contends that leave to serve a late notice of claim should be granted because HHC would suffer no prejudice. However, plaintiff has failed to meet her affirmative burden of demonstrating lack of prejudice (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2<sup>nd</sup> Dept 2008]). Even if there were no prejudice, it would be an abuse of discretion to grant leave to serve a late notice of claim where plaintiff has failed to demonstrate either that there was a reasonable excuse for her failure to timely file a notice of claim or that HHC acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see Carpenter v. City of New York, 30 AD 3d 594 [2<sup>nd</sup> Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2<sup>nd</sup> Dept 2006]). Indeed, counsel's contention that HHC would suffer no prejudice is based upon his unmeritorious argument that HHC acquired timely actual knowledge of the facts constituting the claim by virtue of being in possession of plaintiff's records.

However, the foregoing is academic in light of plaintiff's failure to seek leave to serve a late notice of claim within the one year and 90-day period of limitation. Even if plaintiff had set forth a reasonable excuse, demonstrated that HHC acquired timely actual knowledge of the essential facts constituting her claim and shown that HHC would suffer no prejudice, her failure to move for leave to serve a late notice of claim within the statute of limitations period precludes her from seeking leave to do so now. Since plaintiff has failed to serve a timely notice of claim and is now precluded from doing so, the action was never properly commenced and must be dismissed.

Accordingly, the action is dismissed.

Dated: April 30, 2014

  
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KEVIN J. KERRIGAN, J.S.C.