

<b>Shun Mao Ma v New York City Health &amp; Hosp. Corp.</b>
2015 NY Slip Op 31153(U)
July 7, 2015
Supreme Court, Kings County
Docket Number: 501036/2015
Judge: Laura Lee Jacobson
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At an IAS Term, Part 21 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Borough of Brooklyn, City and State of New York, on the 11<sup>th</sup> day of May 2015.

PRESENT:  
HON. LAURA L. JACOBSON  
Justice

SHUN MAO MA as Administrator of the Estate of  
HUAN HUA CHEN, Deceased,

Petitioner,

-against-

NEW YORK CITY HEALTH & HOSPITAL CORP.  
and CONEY ISLAND HOSPITAL,

Respondents.

Decision/Order

Cal. No.: 21

Index No.:501036/2015

The following papers numbered 1 to 4 read on this motion

Papers	Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed _____	1-2 _____
Answering Affidavit (Affirmation) _____	3 _____
Reply Affidavit (Affirmation) _____	4 _____
_____ Affidavit (Affirmation) _____	_____
Pleadings-Exhibits _____	_____
Stipulations - Minutes _____	_____
Filed Papers _____	_____

By Order to Show Cause dated March 16, 2015, petitioner moves for an order pursuant to Article 4 of the CPLR and General Municipal Law §50-e(5), granting petitioner leave to serve a late notice of claim against the New York City

Health and Hospitals Corporation (hereinafter "NYCHHC") for the claims premised upon the decedent's conscious pain and suffering and deeming the notice of claim timely filed *nunc pro tunc*; and pursuant to CPLR § 3102( c), compelling respondents to produce and disclose copies of petitioner Huan Hua Chen's entire medical records for any and all treatment rendered to petitioner's decedent at Coney Island Hospital, including laboratory results. Petitioner's decedent was 74 years old when according to respondent, she presented at Coney Island Hospital complaining of severe abdominal pain, abdominal distension, constipation, and vomiting. A laparoscopic right nephrectomy for a nonfunctioning right kidney had been performed on petitioner's decedent 2 to 3 weeks prior at New York University Hospital. Petitioner's decedent died at Coney Island Hospital on January 18, 2014.

Petitioner is the decedent's son and he was issued Letters of Administration on December 4, 2014. On January 13, 2015, petitioner filed a notice of claim with respondent NYCHHC. Petitioner contends that the wrongful death allegations contained in the notice of claim were timely since pursuant to GML § 50-e(1)(a), a wrongful death actions the notice of claim must be filed within ninety (90) days of the appointment of a representative. However, petitioner is seeking an Order deeming the notice of claim timely filed *nunc pro tunc* as to the actions premised upon the decedent's conscious pain and suffering. Petitioner claims that he was unable to file the notice of claim earlier because he had been suffering great pain and emotional turmoil as a result of his mother's death. Petitioner also contends that although he filed a petition for Letters of Administration in February of 2014, the Letters of Administration were not issued until December 2014. Petitioner further asserts that the delay in filing the notice of claim has not prejudiced the respondent. Petitioner claims that respondent has actual knowledge of their negligence and malpractice and the essential facts underlying the claim in that respondent is in possession of the decedent's medical records.

Petitioner also requests a copy of decedent's medical records in order to properly investigate this matter. In furtherance of petitioner's request for records, petitioner attached a HIPPA compliant authorization enabling respondents to release the requested records.

Respondent NYCHHC opposes the motion, alleging that the petitioner failed to meet his burden of showing a reasonable excuse for the delay. Respondent NYCHHC argues that petitioner failed to provide any medical documentation to support his claim of mental incapacity. Respondent NYCHHC further contends that any delay in obtaining Letters of Administration is an insufficient excuse because petitioner did not need Letters of Administration in order to file a notice of claim which is not a pleading in a lawsuit. Respondent NYCHHC claims that petitioner has failed to explain the delay of almost 11 months in moving for leave to file a late notice of claim, or why he waited over three (3) months from when the Letters of Administration were issued to file the instant application. Respondent NYCHHC alleges that the delay in filing amounts to law office failure which the courts have repeatedly found to be an inadequate excuse for failing to timely file a notice of claim. Respondent NYCHHC further asserts that petitioner has failed to establish that respondent had actual knowledge of the essential facts underlying the claim. Respondent NYCHHC argues that petitioner failed to provide any evidence that respondent had knowledge of facts constituting the decedent's pain and suffering. Respondent NYCHHC contends that petitioner's speculation that respondent acquired knowledge from Coney Island Hospital medical records is insufficient to meet petitioner's burden. Respondent NYCHHC alleges that it will be substantially prejudiced if petitioner is permitted to serve a late Notice of claim more than a year and almost two (2) months after the alleged malpractice since respondent has not been afforded an opportunity to conduct a prompt investigation of the facts surrounding the claim.

Finally, respondent NYCHHC contends that the portion of petitioner's Order to Show Cause which seeks medical records is moot because while the Order to Show Cause was pending, respondent sent petitioner's counsel an invoice letter for decedent's medical records on April 8, 2015.

In reply, petitioner asserts that respondent does not dispute that petitioner's wrongful death action is timely. Petitioner contends that the instant application for leave to serve a late notice of claim premised upon decedent's conscious pain and suffering is timely because it was brought within a year and ninety days, the time limit for commencement of an action against the public corporation. Petitioner argues that GML § 50-e(5) requires courts to consider among other

things, whether as in this instance, the claimant died before the deadline for filing a notice of claim. Petitioner claims that the fact that the decedent died before she could file her notice of claim weighs in favor of granting the instant application. Petitioner asserts that respondent acquired actual knowledge of the essential facts of the claim because respondent created the decedent's medical records contemporaneous with the medical treatment that forms the basis of this claim. As such, petitioner argues that respondents are just as knowledgeable, if not more aware of the facts involving the alleged malpractice than the petitioner. Petitioner alleges that the claims for the decedent's conscious pain and suffering are premised upon the same facts as petitioner's wrongful death claim. Consequently, respondents had notice of the essential facts constituting the claims premised upon decedent's conscious pain and suffering at the very latest when petitioner filed his notice of claim on January 13, 2015. Petitioner further asserts that there has been no demonstrable prejudice to respondents in this instance where the delay was relatively short and respondents ability to investigate the matter has not been impeded. Petitioner argues that not only are the respondents in possession of the decedent's medical records, respondents have also already conducted a 50-h hearing and have obtained testimony about petitioner's claims.

The decision to grant or deny a petition to serve a late notice of claim rests in the sound discretion of the trial court, upon consideration of all relevant factors (*Katsiouras v. City of New York*, 106 AD3d 916, 917 [2<sup>nd</sup> Dept. 2013]). Among the factors to be considered by a court in determining whether leave to serve a late notice of claim should be granted are whether the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or within a reasonable time thereafter; whether the delay would substantially prejudice the municipality in maintaining its defense; and whether the claimant had a reasonable excuse for the failure to serve a timely notice of claim (*Joy v. County of Suffolk*), 89 AD3d 1025, 1026 [2<sup>nd</sup> Dept. 2011]). However, the presence or absence of any one of these factors is not necessarily determinative ... and the absence of a reasonable excuse is not necessarily fatal (*Leeds v. Port Washington Union Free School District*, 55 AD3d 734, 734-735 [2<sup>nd</sup> Dept. 2008]). Furthermore, death is a statutory ground for granting leave to file a late notice of claim provided there is no substantial prejudice to the public

corporation (*Sosa v. City of New York*, 124 AD3d 546, 546-547 [1<sup>st</sup> Dept. 2015]). Here, petitioner timely served a notice of claim for wrongful death (see GML § 50-e[1][a]) and the instant proceeding for leave to serve a late notice of claim upon respondents was timely commenced within one year and ninety (90) days after the happening of the event upon which the claim arose (see GML § 50-1 [1]). Furthermore, the petitioner has established that respondents acquired timely knowledge of the essential facts constituting the petitioner's claim. Respondents possessed the decedent's medical records which documented the alleged injuries to the decedent as well as the care and treatment provided at the time of the alleged malpractice. Consequently, respondents had actual knowledge of the essential facts underlying the claim (see *Corvera v. Nassau County Health Care Corporation*, 38 AD3d 775 [2<sup>nd</sup> Dept. 2007]); and as such, petitioner met his initial burden of showing a lack of prejudice. Furthermore, petitioner has provided a reasonable excuse for failing to timely file the notice of claim based upon the inordinate delay in the issuance of Letters of Administration. However, even if petitioner's excuse were deemed insufficient, in this instance, "where there is actual notice and absence of prejudice, the lack of a reasonable excuse will not bar the granting of leave to serve a late notice of claim" (*Joy v. County of Suffolk*, supra at 1027).

Accordingly, petitioner's application for leave to serve a late notice of claim against respondent NYCHHC for the claims premised upon the decedent's conscious pain and suffering and deeming the notice of claim timely filed *nunc pro tunc* is granted; and it is further ORDERED that respondent produce copies of the decedent's medical records, if respondent has not already done so, within thirty (30) days of service of a copy of this order.

This constitutes the decision and order of the court.

ENTER  
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 J.S.C.  
 HON. LAURA JACOBSON

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