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. 805110-2012

DECISION/ORDER

Motion Sequence 002

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, Affirmation & Collective Exhibits Annexed.....	1, 2, 3
Answering Affirmation & Collective Exhibits.....	5, 6
Reply Affirmation & Collective Exhibits Annexed.....	7, 8

By order dated November 13, 2014 this court denied the motion of plaintiff Argenis Hernandez, an infant, by his Mother and natural Guardian, Roxanne Hernandez (plaintiff) for an order deeming a previously served notice of claim timely *nunc pro tunc* and dismissed the complaint holding that plaintiff had not set forth a reasonable excuse for the delay in serving the notice of claim and had failed to establish that defendant New York City Health And Hospitals Corporation's (defendant) medical records provided it with actual knowledge of the essential facts constituting the claim. Plaintiff now moves pursuant to CPLR § 2221 [d] [2] for leave to reargue the motion and, upon reargument, for an order deeming the notice of claim timely filed *nunc pro tunc*. Defendant opposes the motion to reargue.

Under CPLR § 2221 [d] [2], reargument "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." No appeal from denial of motion to reargue (*see Rivera v Cambridge Mut. Ins. Co.*, 136 AD2d 688 [2d Dept 1988]).

In determining whether a notice of claim should be deemed timely served under General Municipal Law § 50-e [5], a court should consider, *inter alia*, whether the municipality acquired actual knowledge of the facts underlying the claim within 90 days after the claim arose or a

reasonable time thereafter, whether the claimant is an infant, whether there exists a reasonable excuse for the failure to serve the notice timely and whether the delay in serving the notice would substantially prejudice the municipality in its defense (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 535, 847 NE2d 1154, 814 NYS2d 580 [2006]; *Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [1st Dept 2003]). The presence or absence of any one factor is not determinative (*Dubowy*, 305 AD2d at 321), and since the notice statute is remedial in nature, it should be liberally construed (*Pearson v New York City Health & Hosps. Corp. [Harlem Hosp. Ctr.]*, 43 AD3d 92, 94 [1st Dept 2007], *affd* 10 NY3d 852, 889 NE2d 493, 859 NYS2d 614 [2008]).

On the question of reasonable excuse this court held in its prior order that plaintiff's mother's status as an immigrant from El Salvador with a fifth grade education, an inability to speak or read English and ignorance of the law was not a reasonable excuse (*Rodriguez v New York City Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 78 AD3d 538 [1st Dept 2010]). While the court did not address in its prior order plaintiff's mother's claim that she was unaware that her son's injuries had been caused by defendant's malpractice because defendant informed her that the infant's injuries occurred weeks prior to his birth, this is also not a reasonable excuse (*Wally G. New York City Health & Hosps. Corp. [Metro Hosp.]*, 120 AD3d 1082 [1st Dept 2014] [infant's mother's excuse that she was unaware that her son's injuries were caused by defendant's malpractice is not reasonable). The court, however, also held that plaintiff's failure to offer a reasonable excuse was not fatal to the application for leave to serve a late notice of claim (*Flores-Vasquez v New York City Health & Hosps. Corp.*, 112 AD3d 540 [1st Dept 2013] [internal citations omitted]). Accordingly, the court did not misapprehend or overlook any matters of law or fact in finding that plaintiff did not offer a reasonable excuse for the delay in serving a notice of claim.

The real issue here is not whether plaintiff offered a reasonable excuse but whether plaintiff sufficiently established that defendant, through its medical records, had actual knowledge of the facts -as opposed to the legal theory-underlying the malpractice claim. 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]). In support of the underlying motion plaintiff's expert, Dr. Edelberg, contended that the medial records, in particular the fetal heart rate tracings, evinced late deceleration and diminished variability and that the diminished variability was indicative of the infant plaintiff not reacting to changes, including contractions, as a result of a hypoxia insult. Dr. Edleberg claimed 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 (c-section).

Plaintiff's other expert, Dr. Thompson, contended 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 claimed that plaintiff's PVL was the result of a hypoxic ischemic injury during labor and delivery. Relying on the fetal heart rate tracings, which he claimed were indicative of ongoing hypoxia with significant deterioration in the period shortly prior to birth,

Dr. Thompson argued 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. Moreover, Dr. Thompson argued that the later onset of the deterioration of infant plaintiff's respiratory status on June 10, 2010, hours after birth on June 9, 2010, was the result of hypoxic ischemic encephalopathy and not prematurity because if such deterioration had been caused by the infant's prematurity or an injury that occurred well before birth, it would have manifested at the time of birth. According to Dr. Thompson, defendant had incontrovertible evidence of plaintiff's brain injury when a head ultrasound taken on the second day of life showed evidence of increased echogenicity in bilateral periventricular white matter and on June 14, 2010 when an MRI showed bilateral intraventricular hemorrhage and extensive periventricular leukomalacia,

In opposition, defendant argued that plaintiff failed to establish that defendant had actual knowledge of plaintiff's claim through its medical records because plaintiff's injuries were not the result of malpractice by defendant during plaintiff's delivery but were sequelae of plaintiff's prematurity resulting in-utero and/or post delivery. Defendant's expert, Dr. Brightman, opined 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 claimed that when read as a whole, plaintiff's fetal heart rate monitoring strips showed an overall reassuring Category I tracing with moderate variability and positive accelerations. According to defendant's expert, the tracings revealed areas of short decelerations which were immediately followed by good accelerations and return to baseline. Dr. Brightman claimed that severely diminished variability can occur when the baby is going through fetal sleep cycles and that there are areas on plaintiff's heart monitoring strips that are indicative of plaintiff being in such a sleep cycle. Dr. Brightman further claimed that there tends to be less overall reactivity in fetal heart tracing patterns in premature babies like plaintiff. Dr, Brightman also conceded that there was evidence of some variable decelerations and mild variability twenty five minutes prior to the infant plaintiff's birth but argued that these variations are frequently seen during pushing. Dr. Brightman contended that there was never any reason for defendant to consider performing a c-section and argued that the fact that plaintiff was born with an excellent 9/9 Apgars score, an acceptable pH level and acceptable blood gases were indicative of a normal atraumatic delivery.

Similarly, Dr. Molofosky, defendant's other expert, opined 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. Dr. Molofosky also noted that plaintiff's mother was allowed to hold the infant plaintiff immediately following delivery and no resuscitation was performed at the time of delivery. Dr. Molofosky contended that these factors were indicative of a normal atrautmatic delivery with no evidence of acute hypoxia.

In holding that plaintiff did not meet his burden of establishing actual knowledge through the medical records, the court, in its prior order, stated:

> 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 reargument, plaintiff contends that the court held plaintiff to standard higher than the standard set forth in the General Municipal Law when it used the phrase "knowledge of the alleged malpractice" as opposed to the statutory standard "actual knowledge of the essential facts constituting the claim" (General Municipal Law § 50-e (5)). Plaintiff contends that the expert affirmations submitted by defendant in opposition to the underlying motion do not contest the issue of actual notice but instead provide alternate interpretations as to the significance of the facts set forth in the medical records. Plaintiff argues that by offering a defense on the merits based upon the information set forth in the medical records, defendant admitted that the medical records provided it with notice of the essential facts. Defendant argues that the court correctly held, based upon the varying interpretations of the medical records offered by the parties, that it was impossible to conclude that defendant had actual notice of any type of negligence that would have made it aware of a pending lawsuit.

The relevant inquiry on a motion to serve late notice of claim is whether defendant's medical records provided it with actual knowledge of the facts, not the legal theory, underlying plaintiff's claim (*Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 847 NE2d 1154, 814 NYS2d 580 [2006]). "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" (*id.*). The essential facts underlying the instant claim are that the infant plaintiff experienced decelerations and diminished variability during the labor process as documented by the fetal heart rate tracings. Plaintiff's legal theory is that when faced with documented decelerations and variability defendant should have performed an emergency cesarian section and committed malpractice by not doing so. Defendant's expert, Dr. Brightman, does not dispute that the fetal heart rate

tracings show evidence of decelerations and variability but instead offers an interpretation as to the cause and severity of the decelerations and variability that differs markedly from the interpretations offered by plaintiff's experts. However, the differing interpretations offered by defendant's experts regarding the cause of the decelerations and variability documented on the fetal heart rate strips and their opinions that a cesarian section was not required do not establish that defendant lacked actual knowledge of the essential facts underlying plaintiff's claim. Instead, defendant's experts' opinions show that there are issues as to the merits of plaintiff's claim which must be resolved by a jury. Moreover, while the infant plaintiff's Apgar scores were normal like the infants in *Williams* and *Plaza v New York Health and Hosps. Corp. (Jacobi Med. Ctr.)*, 97 AD3d 466 [1st Dept 2012]), and the infant plaintiff had normal pH and blood gas levels and was held by his mother immediately following birth, unlike the infants in *Williams* and *Plaza*, the infant plaintiff herein exhibited signs of injury not years or months after birth, but within hours of being born (*cf Williams*, 6 NY3d at 537 [infant's Apgars scores were satisfactory and two years later his EEG was normal]; *Plaza*, 97 AD3d at 469 [infant was discharged with no apparent issues and was doing well and meeting developmental milestones two months after birth]; *Brown v New York City Health & Hosps. Corp. (N. Cent. Bronx Hosp.]*, 116 AD3d 514 [1st Dept 2014 [hospital records did not put defendant on notice of the alleged malpractice where the infant was delivered at and released from the hospital in a healthy condition without apparent injury]).

Therefore, because the fetal heart rate tracings demonstrate that defendant had actual notice of the decelerations and variability that serve as the underlying facts of plaintiff's claim (*Bowser v New York City Health & Hosps. Corp.*, 93 AD3d 608 [1st Dept 2012]; *Perez v New York City Health & Hosps. Corp.*, 81 Ad3d 448 [1st Dept 2011]; *Figueroa v New York City Health & Hosps. Corp. [Jacobi Med. Cen.]*, 49 AD3d 454 [1st Dept 2008]; *Lisandro v New York City Health & Hosps. Corp.*, 50 AD3d 304 [1st Dept 2008]) plaintiff's motion to reargue is granted and, upon reargument, plaintiff's motion for an order deeming the previously served notice of claim timely *nunc pro tunc* is granted[1].

In accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion to reargue is granted and, upon reargument, the court vacates its prior order dated November 13, 2014 and grants plaintiff's motion for an order deeming a previously served notice of claim timely *nunc pro tunc*; and it is further

ORDERED that the action to is to be restored to the Part 10 calendar; and it is further

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[1] In light of the fact that defendant had actual notice of the essential facts underlying the claim and was not prejudiced by the delay in serving the notice of claim, the lack of a reasonable excuse is of minimal significance and does not warrant denial of plaintiff's motion (*Matter of Lopez v City of New York*, 103 AD3d 567 [1st Dept 2013]) particularly since plaintiff, as an infant, should not deprived of a remedy (*Bayo v Burnside Mews Assoc.*, 45 AD3d 495 [1st Dept 2007]).

ORDERED that the parties are to appear for a preliminary conference on November 17, 2015 at 9:30 a.m. in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; 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: 8/6/15
New York County

GEORGE J. SILVER