Matter of Kruger v New York City Health & Hosps. Corp.
2015 NY Slip Op 32377(U)
November 19, 2015
Supreme Court, Bronx County
Docket Number: 260550/2012
Judge: Douglas E. McKeon
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FILED Dec 01 2015 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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In the Matter of the Claim of AIDEN KRUGER, an infant, by his mother and natural guardian, HILDA FERNANDEZ,

Plaintiff(s)

- against -

INDEX NO: 260550/2012

NEW YORK CITY HEALTH & HOSPITALS CORPORATION,

DECISION/ORDER

Defendant(s)

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HON. DOUGLAS E. MCKEON

Plaintiff's motion for an Order pursuant to CPLR § 2221 granting renewal and/or reargument of the motion pursuant to General Municipal Law § 50-e(5), deeming the Notice of Claim served upon NYCHHC as served or granting plaintiff leave to serve and file a Late Notice of Claim against NYCHHC is decided as follows.

On or about July 18, 2012 claimant filed a Notice of Claim with the New York City Law Department alleging that malpractice occurred between February 2007 and October 18, 2007. Claimant also served a motion seeking to have the Notice of Claim deemed served or granting permission to file a Late Notice of Claim and requesting leave to serve Summons and Complaint upon respondent. On or about December 7, 2012 respondent opposed the motion and served a cross-motion to dismiss. The court heard oral argument in the matter on July 9, 2013. By

order of this court dated October 15, 2013 the court denied plaintiff's motion for leave to serve and file a Late Notice of Claim. The court found claimant's physician's affirmation to be too vague and conclusory to establish notice and granted permission to renew upon a proper showing that respondent had actual knowledge of the essential facts constituting the claim within a reasonable time period. The cross-motion was not addressed. Thereafter, on September 30, 2014 the court issued a second order modifying the earlier decision again denying claimant's application and granting the cross-motion to dismiss. The court noted that between the decision of October 15, 2013 and the September 30, 2014 decision that claimant failed to renew the application despite having almost a full year to do so. The respondent served claimant with Notice of Entry of the decision and order on October 9, 2014. On or about November 4, 2014 the claimant filed this motion to renew.

As pointed out in respondent's affirmation in opposition, the notice of motion to renew or reargue references the courts October 15, 2013 decision and not the courts September 30, 2014 decision which modified it. In support of the application to renew the original order, claimant has now provided the court with a more comprehensive and specific affirmation of a board certified physician to demonstrate that NYCHHC acquired actual knowledge of the facts constituting the instant claim. Originally, the court found that the physician's affirmation provided by claimant in support of the motion was too vague to establish notice to respondent.

The court found that the expert's own choice of words reflected uncertainty so that the court could not find that NYCHHC acquired actual knowledge of the facts constituting the claim. Movant argues that because the new affirmation demonstrates that NYCHHC did, in fact have knowledge of the essential facts of this claim, because the claimant is an infant, and because there is no substantial prejudice in considering this cause of action the motion should be granted. Claimant has explained that the decision of October 15, 2013 was not received by either party until on or about May 28, 2014. They further argue that Notice of Entry of the October 15th decision was never served or filed. In opposition to the instant motion to renew.

Respondent argues that claimant relies upon the same facts that were originally available to him which are the records of North Central Bronx Hospital and Jacobi Medical Center. The claimant merely attempts to use a second expert to tailor the same facts to be more specific and less vague in order to satisfy this courts October 15, 2013 decision and order. In support of their opposition, counsel directs the court to the decision of Ulster Savings Bank vs. Goldman, 705 N.Y.S.2d 880(2000) where the court denied an application to renew, finding that the movant failed to offer new facts to overcome the burden.

The court notes that it is only due to the failure to have the entire submitted cross-motion before it prior to it's original decision that this matter has become problematic. Had this expert affirmation been submitted initially, the motion

would have been granted. The second expert opinion is a clear review of the records which specifically references various examples of knowledge of essential facts of the case and departures from the standard of care. Clearly, the court annexed October 15th decision left the door open for plaintiff to renew the motion because the physician affirmation as submitted was insufficient based on the vague language although that physician did in fact state that there were signs in the hospital record which indicated departures from accepted medical practice. After that, there was a series of clerical failures which led to the court not receiving the initial cross-motion and correspondence which should have been in the motion file going directly to the court file. Nonetheless, in light of the entire record before it, the court grants the motion to renew further to the decision and order of this court dated October 15th, and, upon renewal, grants the motion to serve a Late Notice of Claim and recalls and vacates the September 30, 2014 decision.

So ordered.

Dated: 11/19/15

Douglas E. McKeon, J.S.C.