Townson v New York City Health & Hosps. Corp.
2016 NY Slip Op 30942(U)
May 19, 2016
Supreme Court, New York County
Docket Number: 805103/2016
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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JOHN TOWNSON,

Petitioner,

-against-

Index No. 805103/2016

Decision and Order

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

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JOAN B. LOBIS, J.S.C.:

Currently, petitioner seeks leave to file a late notice of claim. Petitioner, an electrician, sustained injuries – the laceration of his right thumb – when he attempted to cut through an electric cable. He received treatment at Bellevue Hospital that day, after his arrival at the hospital's emergency room. He contends that Dr. Trudy Cloyd, who treated him on that date, sutured the wound without further examination once the x-rays revealed that petitioner's bone was not broken and there was no metal under his skin. When he discovered he could not bend or flex his thumb, he treated with another doctor and underwent twelve weeks of physical therapy. When there was no improvement, his doctor referred him to an orthopedist who, on March 19, 2015, discovery through an MRI that petitioner's flexor tendon was torn. Shortly thereafter, on April 6, 2015, petitioner retained counsel to represent him in a lawsuit.

Petitioner's counsel promptly requested a copy of the emergency room records for petitioner but received no response. Counsel states that respondent also did not respond with his subsequent letters, which he sent in in May, June, and August of 2015. His letters, which he includes as an exhibit, all refer to the fact that counsel represents petitioner in connection with an

accident which occurred on December 12, and notes that petitioner received treatment at Bellevue's emergency room. In addition, he included HIPAA release forms which included petitioner's name, the date of his treatment, and his address, date of birth, and social security number (which petitioner improperly failed to redact in exhibit C). Several months later, on the eve of the expiration of the one-year-and-ninety day limitations period by which petitioner had to seek leave to file a late notice of claim, petitioner commenced this proceeding.

Petitioner states that this Court should allow him to file the claim nunc pro tunc for several reasons. He cites Kellel B. v. New York City Health and Hosp. Corp., 122 A.D.3d 495, 496 (1st Dep't 2014) for the proposition that hospital records are sufficient to constitute notice of the underlying facts. He states that Rojas v. New York City Health and Hosp. Corp., 127 A.D.3d 870, 872 (2nd Dep't 2015) supports his argument that the hospital's failure to provide his records despite his numerous requests is a reasonable excuse for the delay. He points out that in Rojas the petitioner received the autopsy report eight months late and submitted her application promptly thereafter, whereas in this proceeding petitioner has yet to receive the medical records. He states that an additional reasonable excuse is the fact that petitioner did not realize the severity of his injury immediately. He says that estoppel should apply. He asserts that there is no prejudice to respondent as a result of the delay in serving the late notice because the medical records reveal that he was not fully evaluated at the hospital and the hospital therefore did not properly treat him.

In opposition, respondent contends that petitioner has not provided a reasonable excuse for his delay. It argues that, contrary to petitioner's position, the fact that petitioner did not realize he had a torn tendon does not render the delay reasonable because petitioner retained

counsel eleven months before he served the notice and brought this proceeding. It cites to Aviles v. New York City Health and Hosp. Corp., 172 A.D.2d 237 (1st Dep't 1991), in which the petitioner prepared a notice of claim but did not file it for over a year, mandates a finding that petitioner's delay here was unreasonable. It cites Wally G. v. New York City Health & Hosp. Corp., 120 A.D.3d 1082, 1082-83 (1st Dep't 2014) to show that its own delay does not constitute an excuse for petitioner's delay in filing this application. It argues petitioner could have begun this application without the records as he was aware of the resulting injuries months earlier. It annexes petitioner's medical records and the affidavit of a Bellevue employee stating that petitioner only treated at Bellevue on December 12, 2014. It argues that estoppel does not apply because its delay in providing the records was unintentional and no other excuses for petitioner's delay exist. It contends it lacked actual knowledge of the underlying facts because the hospital records, without more, are insufficient to constitute knowledge of the claim and all subsequent treatment, including the diagnosis of petitioner's torn tendon, occurred outside the hospital. It states that it is petitioner's burden to show lack of prejudice, and that petitioner did not satisfy this threshold burden. It states that petitioner's failure to provide medical records to support his contentions is fatal to his application.

Under General Municipal Law 50-e a party seeking to sue the City must file a notice of claim within ninety days. Section e of the statute, however, gives courts the discretion to grant an application to file a late notice of claim as long as a petitioner makes the application within one-year and ninety days. Courts must consider whether there was excusable error, whether the agency received notice of the essential facts of the claim in a reasonable period, and whether there is substantial prejudice as a result of the delay. Richardson v. New York City Housing Auth., 136

A.D.3d 484, 484-85 (1st Dep't 2016). Where there is no substantial prejudice courts have the discretion to grant leave to file the late notice even absent the existence of a reasonable excuse or actual notice. Id. at 485; see Thomas v. City of New York, 118 A.D.3d 537, 538 (1st Dep't 2014).

In the proceeding at hand, the Court exercises its discretion and grants the application. Contrary to respondent's contention, where the municipality contributes to the delay due to its delayed response to a request for records, the petitioner's concomitant delay in filing the notice of claim is reasonable. See Rojas, 127 A.D.3d at 872-73. In addition, although respondent argues that petitioner could have commenced the proceeding without the medical records, petitioner was prudent to seek to review them. The failure of respondent to provide these records until petitioner commenced this proceeding should not prejudice him here, where he filed the claim within the requisite one-year-and-ninety-day period. The cases on which respondent relies are distinguishable. In Aviles, for example, the petitioner prepared a notice of claim but took over a year to file it; and in Wally G., the infant plaintiff's mother waited for three-and-a-half years to apply for leave to file a late notice of claim. See also Basualdo v. Guzman, 110 A.D.3d 610 (1st Dep't 2013)(delay of five years and records did not provide notice to hospital). Finally on this issue, respondent's contention that in this case petitioner should have supported his claim with medical evidence regarding his subsequent treatment contradicts its own argument. The evidence of the alleged malpractice, moreover, was in the hands of the hospital. Under the circumstances and in light of respondent's failure, the Court finds that petitioner's affidavit stating he was not diagnosed with or treated for a torn tendon and ultimately received this diagnosis from another doctor is sufficient.

Respondent is correct that its medical records only provide actual notice if the records contain the essential underlying facts. See Cartagena v. New York City Health and Hosp. Corp., 93 A.D.3d 187, 190 (1st Dep't 2012). Records which do not suggest that the medical facility committed malpractice and inflicted injury on a petitioner do not provide notice. See Basualdo v. Guzman, 110 A.D.3d 610, 610 (1st Dep't 2013). The Court agrees that the records here do not provide notice of wrongdoing. Lack of notice is not fatal to this petition, however. Courts have discretion to consider a "nonexhaustive list of factors" which they weigh in light of the relevant facts and circumstances. Berete v. New York City Helath and Hosp. Corp., 48 A.D.3d 327, 328 (1st Dep't 2008)(citation and internal quotation marks omitted). Here, respondent's arguments regarding prejudice have no merit. Its suggestion that any delay beyond ninety days is prejudicial and that its inability to more promptly investigate the claim prejudiced it are generic and do not show that prejudice has occurred in the instant matter. Contrary to respondent's contention, "prejudice will not be presumed." Thomas v. New York City Hous. Auth., 132 A.D.3d 432, 433-34 (1st Dep't 2015). Instead, the agency arguing prejudice must show that it was hindered in its attempt to investigate. Id. at 434. Therefore, despite the lack of notice, based on the totality of the circumstances the Court grants the application. Accordingly, it is

ADJUDGED that the petition for leave to serve a late notice of claim is granted; and it is further

ORDERED that [petitioner/claimant] shall commence an action and purchase a new index number in the event a lawsuit arising from this notice of claim is filed.

Dated: May 19, 2016

ENTER:

JOAN B. LOBIS, J.S.C.