

J.H. v New York City Health & Hosps. Corp.
2017 NY Slip Op 33129(U)
April 4, 2017
Supreme Court, Queens County
Docket Number: 4211/14
Judge: Kevin J. Kerrigan
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FILED
APR 13 2017
COUNTY CLERK
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X
J.H., by his father and natural guardian,
Johny Hossain,
Plaintiff,
- against -

Index
Number: 4211/14

Motion
Date: 3/6/17

New York City Health and Hospitals
Corporation(Elmhurst Hospital Center),
Defendants.

Motion
Cal. Number: 82
Motion Seq. No.: 1

-----X

The following papers numbered 1 to 17 read on this motion by plaintiff for leave to file a late notice of claim; and cross-motion by defendant to dismiss the complaint.

Papers
Numbered

Notice of Motion-Affidavits-Exhibits.....	1-10
Notice of Cross-Motion-Affirmation-Exhibits.....	11-14
Reply-Exhibit.....	15-17

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

Motion by plaintiff for leave to serve a late notice of claim, pursuant to General Municipal Law §50-3(5), deeming the notice of claim that was served on August 29, 2013 as timely served nunc pro tunc, is denied.

It is alleged that infant plaintiff sustained brain damage, including leucomalacia and cerebral palsy resulting from perinatal and neonatal asphyxia caused by the alleged malpractice of physicians at Elmhurst Hospital Center on November 23, 2010 and November 25, 2010. Infant's mother presented to the emergency room of Elmhurst Hospital on November 23, 2010 at 40 weeks and 4 days gestation complaining of leakage since November 21, 2010. She was discharged on said date at 11:30 p.m. It is alleged that notwithstanding that the physicians ruled out leakage of amniotic fluid, they discontinued a culture test to determine whether the

vaginal discharge complained of was due to an infection and discharged her without determining that she had an infection and notwithstanding that the fetal monitoring data was "non-reassuring", the Elmhurst notes indicating that there was diminished variability from 7:15 to 7:50 p.m. and that a doctor who had reviewed the strips found moderate long term variability. It is alleged that it was a departure from good and accepted medical practice to discharge the mother on November 23, 2010 given her symptoms of infection and a non-reassuring fetal heart tracing.

The mother thereafter presented to Elmhurst on November 25, 2010 at 6:01 a.m. complaining of contractions. She was placed on a fetal heart monitor at 6:19 a.m. until 7:11 a.m. The fetal heart rate was initially noted to be 170, with decreased variability. The fetal heart monitor alarm went off, signaling an abnormal heart rate, at 6:25 a.m., 6:44 a.m. 6:54 a.m. and 7:01 a.m., with the hospital notes indicating that at 6:50 a.m. the fetal heart tracing showed that the fetus was experiencing brachycardia as evidenced by decelerations, with the heart rate falling below 110 to as low as 60 bpm. It was then decided to perform an emergency C-section. The mother was prepped for surgery at 7:10 a.m. and infant plaintiff was delivered at 7:14 a.m.

A condition precedent to commencement of a tort action against a municipality or public corporation is the service of a notice of claim upon the municipality or public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 (2006)). Moreover, the Court only has the discretionary authority to allow the filing of a late notice of claim within the period of limitation for commencing tort actions against a municipal entity (see General Municipal Law § 50-e[5]; Pierson v. City of New York, 56 NY 2d 950 [1982]), which is one year and 90 days after the date the cause of action accrued, (see General Municipal Law § 50-i), a non-issue in this case, since plaintiff's infancy served to toll the statute of limitations for 10 years (see CPLR 208).

In the exercise of its discretionary power to allow a late notice of claim, the Court is directed by General Municipal Law §50-e(5) to consider whether petitioner had a reasonable excuse for the delay and, in particular, whether the municipality or municipal entity acquired actual knowledge of the facts underlying the claim within the initial 90-day period or within a reasonable time thereafter. The Court must also consider "all other relevant facts and circumstances", including infancy and whether the delay would cause substantial prejudice to the municipality or public entity.

Infant plaintiff's father fails to offer a reasonable excuse

for his delay in filing a notice of claim on behalf of infant. In his affidavit in support of the motion, infant's father avers, *inter alia*, that he was unfamiliar with the notice of claim requirement, that he had initially consulted with another law firm in 2012 but that "it seemed nothing was being done" and that he was unaware of the need to file a notice of claim and was never apprised about "the specifics about my son's possible case". He avers that he was not made aware of the notice of claim requirement until he consulted with his current counsel in May 2013.

Ignorance of the notice of claim requirement and a lack of awareness of the possibility of a lawsuit do not constitute reasonable excuses (see Anderson v. City University of New York, 8 AD 3d 413 [2nd Dept 2004]; D'Anjou v. New York City Health and Hospitals Corporation, 196 AD 2d 818 [2nd Dept 1993]).

Plaintiff's counsel does not contend that the father's lack of awareness of the notice of claim requirement or the possibility of a lawsuit constituted a reasonable excuse for his failure to serve a timely notice of claim on behalf of infant, but rather argues that the reasonable excuse for the failure to serve a timely notice of claim was the father's additional averment in his affidavit, "My time has been devoted to taking care of him [infant plaintiff] and his health problems, and with supporting my family. He required much more care than a normal child of similar age. I did not think about a lawsuit for his injuries." Counsel contends that the father's averment that he was too preoccupied with caring for his son to serve a notice of claim was a reasonable excuse. However, such excuse is belied by his averment that he was unaware of the notice of claim requirement or that he had a claim and by his additional representation that he did, in fact, consult with an attorney in 2012.

Counsel also annexes to the moving papers an affidavit of infant's mother who avers that she was too preoccupied with attending to her child's medical needs to "think about any potential claim for his injuries". This Court may not consider this affidavit on the issue of whether there was a reasonable excuse for the failure to serve a timely notice of claim since it was not the mother but infant's father who filed the untimely notice of claim and who commenced this action. The mother is not in the caption of this case. Therefore, whether or not she was too preoccupied with her child's medical condition to file a timely notice of claim is irrelevant to the issue of whether the notice of claim filed by the child's father on the child's behalf should be deemed timely filed *nunc pro tunc* so as to fulfill the condition precedent to commencement of this action that was brought by him.

Infant plaintiff's counsel also argues that this Court should allow a late notice of claim nunc pro tunc because HHC had actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter, by virtue of its possession of infant petitioner's hospital records. Moreover, since it had actual knowledge through those records, HHC would not be prejudiced by a late notice of claim.

The Court notes that the acquisition of timely actual knowledge is the one factor that is set apart from all others to be accorded great weight (see Beretey v. New York City Health & Hospitals Corp., 56 AD 3d 591 [2nd Dept 2008]). A hospital may be deemed, under appropriate circumstances, to have acquired actual knowledge of the facts underlying a claim of malpractice in the delivery of an infant by reason of having been in possession of the child's medical records since the time of the alleged malpractice (see Kurz v. New York City Health & Hospitals Corp., 174 AD 2d 671 [2nd Dept 1991]). However, "[m]erely 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 petitioner during the birth process" (Williams v. Nassau County Med. Ctr., 6 NY 3d 531, 537 [2006]). Actual knowledge based upon hospital records may not be found absent a clear showing of a nexus between the alleged malpractice and the injuries (see In Re Fallon v. County of Westchester, 184 AD 2d 510 [2nd Dept 1992]).

The hospital records submitted on this motion do not show a nexus between plaintiff's brain injuries and the alleged malpractice.

As to counsel's contention that HHC would suffer no prejudice if the Court were to allow the service of a notice of claim at this late juncture, it was plaintiff's burden to establish lack of prejudice (see Beretey, supra; Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]). Counsel's argument that HHC would not be prejudiced is based upon his unmeritorious contention that HHC acquired actual knowledge of the facts underlying the claim within the statutory period or a reasonable time thereafter by virtue of being in possession of infant's hospital records. Therefore, the issue of prejudice is irrelevant and may not be considered (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]; Anderson v. City University of New York, 8 AD 3d 413 [2nd Dept 2004]). Even were the Court to consider the issue of prejudice, the Court finds that the lengthy delay substantially prejudiced HHC's ability to investigate the claim (see, Matter of Gofman v. City of New York, 268 A.D.2d 588 [2d Dept. 2000]).

Under the totality of the circumstances, it would be an improvident exercise of this Court's discretion to allow the filing of a notice of claim at this late juncture based upon the record presented on this motion.

Cross-motion by HHC to dismiss the complaint upon the ground that plaintiff failed to serve a timely notice of claim is granted.

This Court notes that the complaint merely recites that a notice of claim was filed, but does not recite that a notice of claim was filed within 90 days after the cause of action arose and that at least 30 days has elapsed and defendant has refused to pay the claim, a required recital in order to state a cause of action against HHC. Since plaintiff's father failed to serve a timely notice of claim, his counsel filed an untimely notice of claim, commenced the action and then moved for leave to serve a late notice of claim and to deem the notice of claim that had been served as timely served nunc pro tunc. This procedure is not improper.

Pursuant to General Municipal Law §50-e(5), an application for leave to serve a late notice of claim may not be denied upon the ground that it was made after commencement of the action. The corollary to this is that an action may be commenced (within the period of limitation for commencement of a tort action against the municipality, which is one year and 90 days from accrual of the cause of action) prior to serving a notice of claim or, in this case, prior to moving for leave to file a late notice of claim and to deem an untimely filed notice of claim served nunc pro tunc. Such procedure would be employed to avoid the running out of the statute of limitations, which would preclude an application for leave to serve a late notice of claim. Since the instant motion for leave to serve a late notice of claim nunc pro tunc is denied, the late notice of claim filed without leave of the Court remained a nullity and, consequently, the complaint fails to state a cause of action and must be dismissed.

Accordingly, the motion is denied, the cross-motion is granted and the action is dismissed.

Dated: April 4, 2017



KEVIN J. KERRIGAN, J.S.C.

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