

Abraham v Nassau Health Care Corp.

2017 NY Slip Op 33388(U)

October 6, 2017

Supreme Court, Nassau County

Docket Number: Index No. 602081/2017

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 10

DANIEL ABRAHAM and SARAH ABRAHAM,
Individually and as co-administrators of the
ESTATE OF ANITA (ALEAN) ABRAHAM, and
THE ESTATE OF ANITA (ALEAN) ABRAHAM,

Plaintiffs,

-against-

NASSAU HEALTH CARE CORPORATION,
NASSAU UNIVERSITY MEDICAL CENTER,
NuHEALTH and DR. WALTER CHUA,

Defendants.

Index No.: 602081/2017
Motion Sequence...01, 02
Motion Date...08/15/17

Papers Submitted:
Notice of Motion.....X
Notice of Cross-Motion.....X
Affirmation in Opposition and Reply.....X
Reply Affirmation.....X

Upon the foregoing papers, the motion by the Plaintiffs, seeking an Order, pursuant to General Municipal Law § 50-e, for leave to serve a late Notice of Claim upon the Defendants; and the cross-motion by the Defendants, seeking an Order, pursuant to CPLR §3211, General Municipal Law §§50-e and 50-h, dismissing the first and second causes of action in the Plaintiffs' Complaint for the Plaintiffs' alleged failure to timely file a Notice of Claim and failure to submit to a hearing, are determined as hereinafter provided.

The Plaintiffs, DANIEL ABRAHAM and SARAH ABRAHAM, individually and as co-administrators of the ESTATE OF ANITA (ALEAN) ABRAHAM (the "Plaintiffs' decedent"), and THE ESTATE OF ANITA (ALEAN) ABRAHAM (hereinafter collectively referred to as the "Plaintiffs") commenced this medical malpractice and wrongful death action on or about March 9, 2017 against the Defendants, NASSAU HEALTH CARE CORPORATION ("NHCC"), NASSAU UNIVERSITY MEDICAL CENTER ("NUMC"), NuHEALTH and DR. WALTER CHUA ("Dr. Chua").

This action arises out of the alleged negligent care and treatment rendered to the Plaintiffs' decedent, Anita (Alean) Abraham, during a three-day admission at NUMC which allegedly resulted in her demise on December 14, 2015 (*See* Death Certificate, annexed to Plaintiffs' Motion as Exhibit "B").

On February 12, 2016, the Plaintiffs' predecessor counsel sent a letter via certified mail to the Defendant, NUMC, which provides:

Please be advised that this firm represents Ms. Alean Abraham, who sustained personal injuries as a result of an incident which occurred at 2201 Hempstead Turnpike, East Meadow, NY 1155 on December 14, 2015.

Kindly turn this letter immediately over to your insurance carrier and request that they contact the office of the undersigned to discuss this matter.

[*See* Plaintiffs' Exhibit "C"].

On the same date, the Plaintiffs' predecessor counsel also sent a letter to NUMC referencing the "patient" as Alean Abraham (decedent herein); and date of accident

as "12/14/15" [*See* Plaintiffs' Exhibit "D"]. The letter requesting medical records further reads as follows:

Please be advised that this office represents the above-named ALEAN ABRAHAM, with respect to personal injuries sustained on the above date.

Pursuant to PHL Section 18, kindly advise the undersigned of the cost for preparation of a copy of all hospital records for treatment rendered to the above-named patient including, surgical records, operative reports, admission and discharge summaries, physical therapy, lab tests, x-ray reports, etc. **from date of accident to the present** at your earliest convenience, including a copy of your bill for services rendered.

[Plaintiffs' Exhibit "D" (emphasis in original)].

However, NUMC did not provide the decedent's hospital chart from the December 12, 2015 to December 14, 2015 admission until March 1, 2017 [NUMC Medical Records, annexed as Plaintiffs' Exhibit "A"].

On October 21, 2016, the Plaintiffs' decedent's husband, Daniel Abraham, and daughter, Sarah Abraham, served a formal Notice of Claim on the Defendants "as proposed administrators of the decedent's estate." [*See* Plaintiffs' Exhibit "F"].

On February 16, 2017, Daniel Abraham and Sarah Abraham were granted Letters of Limited Administration by the Nassau County Surrogate's Court [*See* Plaintiffs' Exhibit "H"].

Immediately after being duly appointed as administrators of the Plaintiffs' decedent's estate, on February 21, 2017, the Plaintiffs served an Amended Notice of Claim upon the Defendants [*See* Plaintiffs' Exhibit "G"].

This action was commenced by the filing of a Summons and Complaint on March 9, 2017 [See Plaintiffs' Exhibit "I"]. The instant application for leave to file a late Notice of Claim and Amended Notice of Claim, *nunc pro tunc*, followed.

The Defendants cross-move pursuant to CPLR §3211 to dismiss the Plaintiffs' first cause of action sounding in medical malpractice and second cause of action for lack of informed consent based upon the Plaintiffs' alleged failure to timely serve a Notice of Claim pursuant to General Municipal Law §50-e; and based upon the Plaintiffs' alleged failure to submit to an examination pursuant to General Municipal Law §50-h. The Defendants assert that the filing of a Notice of Claim and appearing at a hearing are conditions precedent to commencing an action, the failure of which warrants dismissal of the Plaintiffs' first and second causes of action.

The Defendants do not seek dismissal of the Plaintiffs' third cause of action for wrongful death.

Legal Analysis

General Municipal Law §50-e (1)(a) provides, in pertinent part:

In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation...the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

[See General Municipal Law §50-e.(1)(a)]

However, on a claim for personal injuries asserted against a municipality, the period for giving notice of the claim begins to run from the date of the injury [General Municipal Law §50-e (5); *Joseph v. McVeigh*, 285 A.D.386 (1st Dept. 1955)]. General Municipal Law §50-e (5) governs applications for leave to serve a late notice. Subdivision 5 provides, in pertinent part:

Upon application, the court, in its discretion, may extend the time to serve a notice of claim...[t]he extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim...and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation.

Timely service of a notice of claim is a condition precedent to the commencement of a tort action against a public entity [See General Municipal Law § 50-e[1][a]; § 50-i[1].

“The Court of Appeals has stated that “[w]here [a] notice of claim has not been served within the 90-day period specified in section 50-e (subd. 1) of the General Municipal Law, an individual possessing a potential tort claim against a public corporation may apply

to the court pursuant to section 50-e (subd. 5) for an extension of the time within which to serve such notice upon the defendant' and that 'the application for the extension may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute [of limitations] has been tolled' ” [*Gelpi v. New York City Health & Hospitals Corp.*, 90 A.D.2d 503 (2d Dept 1982), citing *Cohen v. Pearl Riv. Union Free School Dist.*, 51 N.Y.2d 256, 258 (1980) (internal citations omitted)].

An application for extension to file a late notice of claim may be made before or after commencement of the action, but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled [*Pierson v. City of New York*, 56 N.Y.2d 950, 954-955 (1982); *Friedman v. City of New York*, 19 A.D.3d 542 (2d Dept. 2005); *McShane v. Town of Hempstead*, 66 A.D.3d 652, 653 (2d Dept. 2009); *Laroc v. City of New York*, 46 A.D.3d 760, 761 (2d Dept. 2007); *Alston v. Aversano*, 24 A.D.3d 399, 400, 805 N.Y.S.2d 117).

It is well settled that where a petitioner fails to petition the court for leave to serve a late notice of claim within one year and 90 days of the date that the claim accrued, the Supreme Court is deprived of the authority to permit late service of a notice of claim (See *Pierson v. City of New York*, 56 N.Y.2d at 954-956; *McShane v. Town of Hempstead*, 66 A.D.3d at 653; *Small v. New York City Tr. Auth.*, 14 A.D.3d 690, 691 (2d Dept. 2005); *Santiago v. City of New York*, 294 A.D.2d 483 (2d Dept. 2002)].

In this matter, the issue is whether this Court may entertain the Plaintiffs' application, and if so, whether to grant such application based upon the factors enumerated in the General Municipal Law. In calculating the time period between the accrual of the malpractice claim (December 12, 2015) and the filing of the instant application (March 10, 2017), 1 year, 2 months and 26 days has elapsed. Thus, the Court may entertain the Plaintiffs' application for leave to file a late Notice of Claim as it was made within 1 year and 90 days of accrual of the Plaintiffs' medical malpractice and lack of informed consent claims.

In determining whether to grant the Plaintiffs' application, the trial court must focus on whether the movant has demonstrated: (1) a reasonable excuse for its failure to file a timely notice of claim; (2) whether the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days from its accrual or a reasonable time thereafter; and (3) whether the delay would substantially prejudice the municipality in maintaining its defense on the merits [*See Acosta v. City of New York*, 39 A.D.3d 629 (2d Dept. 2007)]. The knowledge of the public corporation of the happening of the event is of great importance when making a determination to grant leave [*See Alexander v. Board of Education*, 18 A.D.3d 654 (2d Dept. 2005)]. This Court is afforded "considerable discretion in determining whether to permit the service of a late notice of claim." *Bollerman v. New York City SCA*, 247 A.D.2d 469 (2d Dept. 1998)].

Here, counsel for the Plaintiffs argues that the letter sent to NUMC by

predecessor counsel two months after the alleged malpractice occurred constitutes actual knowledge of a potential claim arising from the decedent's hospital admission. Counsel further argues that the Plaintiffs' delay is due, in part, to the Defendants' failure to provide the Plaintiffs with a copy of the decedent's medical records.

The case of *Banegas-Nobles v. New York City Health and Hospitals Corp.*, while not binding on this Court, is persuasive. [184 A.D.2d 379 (1st Dept. 1992)]. In *Banegas-Nobles*, the claims arose out of the alleged medical malpractice by the defendant hospital. In reversing the trial court's denial of the petitioner's application for leave to file a late notice of claim, the Appellate Division, First Department, held that "[t]he death or incapacity of the party asserting a claim, in this case a claim for conscious pain and suffering, is a statutory ground upon which leave to file a late notice of claim may be predicated if there is no substantial prejudice to the public corporation" [*Id.* at 380; citing *Rechenberger v Nassau County Med. Ctr.*, 112 A.D. 150 (2d Dept. 1985)]. The Court further found that the facts constituting the claim are entirely discernable from the records that were within the exclusive possession and control of the hospital, and as such, its knowledge of the essential facts constituting the claim was equal or superior to that of the injured party's representative and was acquired contemporaneously with the injury alleged to have been sustained.

The Court finds credible the arguments advanced by the Plaintiffs concerning whether there exists a justifiable excuse for the delay. The delay, in part, is based on the

Defendants' failure to provide the medical records and also, the death of the Plaintiffs' decedent. This, coupled with the letters by the Plaintiffs' predecessor counsel to the Defendants concerning the potential claim, date of the injury and request for medical records, sufficiently establishes that the Defendants may be charged with actual knowledge of the facts constituting the claim and that the Plaintiffs' presented a justifiable excuse for the delay.

Lastly, with regard to the prejudice factor, this Court agrees that the Defendants are not substantially prejudiced by the delay. Indeed, "the mere passage of time normally will not constitute substantial prejudice in the absence of some showing of actual injury" [*Matter of Sarkisian Bros. v. State Div. of Human Rights*, 48 N.Y.2d 816, 818 (1979); see also *Rechenberger, supra* 112 A.D.2d at (the delay in serving notice of claim was not substantially prejudicial to hospital since hospital had actual notice of underlying facts which comprised petitioner's claim; thus even if petitioners had served their notice of claim in timely fashion, information which would have been available to hospital with regard to essential facts of claim would have been substantially the same, if not the same, as that which is now available)].

In *Rechenberger*, the Appellate Division, Second Department excused an unexplained 3-month delay in filing the Notice of Claim from following the petitioner's receipt of the subject medical records. In so finding, the Appellate Division reasoned, "[w]hile the absence of such an explanation is troublesome, we note that 'the presence or

absence of any one factor' listed in subdivision 5 of section 50-e of the General Municipal Law is not necessarily determinative' ” [112 A.D.2d at 152-152].

To the contrary, here, the Plaintiffs filed their Amended Notice of Claim in February 2017, despite not having received the medical records. Further, it is undisputed that the Defendants first provided the Plaintiffs with the relevant medical records on March 1, 2017, and the instant application was made a mere 9 days later on March 10, 2017.

The Defendants urge this Court to consider the case of *Wally G. ex rel. Yoselin T. v. New York City Health and Hosps. Corp.*, 120 A.D.3d 1082 (1st Dept. 2014), as it was decided after *Baeneggas-Nobles* and subsequently affirmed by the Court of Appeals of New York [27 N.Y.3d 672 (2016)]. We find *Wally G.* distinguishable. In that case, the plaintiff's attorney waited approximately 3 years and 10 months to make the motion for leave to file a late notice of claim after its untimely filing because “he needed to receive the medical records from” defendant hospital. [*Id.* at 1082-1083]. Moreover, the evidence presented in that case was insufficient to support the finding that the infant plaintiff's condition upon delivery and subsequent issues developed during his hospital admission were caused by malpractice as opposed to the infant's extremely premature birth, which could not be avoided. [*Id.* at 1084].

In light of the parties' respective arguments, the Court finds that the Plaintiffs demonstrated lack of substantial prejudice to the Defendants from the delay, which the Defendants failed to sufficiently rebut.

With respect to the Defendants' argument that the first and second causes of action should be dismissed based on the Plaintiffs' failure to appear for an examination pursuant to General Municipal Law §50-h, the Defendants failed to proffer sufficient proof in support. The Defendants failed to submit any notices that were served on Plaintiffs to appear for an examination, or letters in similar regard. The record is devoid of any evidence that any efforts were undertaken to examine the administrators of the decedent's estate.

Upon consideration of all the facts and circumstances in this matter and the applicable case law, this Court, in its sound discretion, shall permit the late filing of the Plaintiffs' Notice of Claim and Amended Notice of Claim.

Accordingly, it is hereby

ORDERED, that the Court, in its sound discretion, **GRANTS** the Plaintiffs' application and the Plaintiffs' Notice of Claim dated October 21, 2016, and Amended Notice of Claim, dated February 21, 2017, shall be deemed served *nunc pro tunc*; and it is further

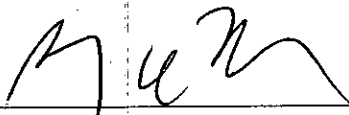
ORDERED, that the Defendants' cross-motion seeking dismissal of the Plaintiffs' first and second causes of action, is **DENIED**; and it is further

ORDERED, that all parties are **directed to appear for a Preliminary Conference in the Preliminary Conference Part of this Court on October 19, 2017 at 9:30 a.m.**

This constitutes the decision and order of this Court.

All applications not specifically addressed herein are **DENIED**.

DATED: Mineola, New York
October 6, 2017



Hon. Randy Sue Marber, J.S.C.

HON. RANDY SUE MARBER

ENTERED

OCT 12 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE