Matter of Slotkin v New York City Health & Hosps. Corp.
2018 NY Slip Op 31452(U)
July 3, 2018
Supreme Court, New York County
Docket Number: 805433/2017
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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In the Matter of the Petition of CHLOE SLOTKIN,
As Mother and Natural Guardian of G.R., and
CHLOE SLOTKIN, Individually,

Index № 805433/2017
Motion Seq. 001

DECISION & ORDER

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

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GEORGE J. SILVER, J.S.C.:

In this medical malpractice action, petitioner Chloe Slotkin, as mother and natural guardian of G.R. and individually (hereinafter "petitioner"), moves for an order, pursuant to Gen. Mun. L. §50-e, permitting petitioner to file a late notice of claim up through the time when the applicable status of limitations runs. Respondent New York City Health and Hospitals Corporation (hereinafter "NYCHHC") opposes the application.

In determining whether to grant leave to serve a late notice of claim, the law sets forth the following factors for courts to consider: (1) whether an infant is involved and whether there is a nexus between that infancy and the delay; (2) whether the movant has demonstrated a reasonable excuse for failing to serve a timely Notice of Claim; (3) whether the municipality acquired actual knowledge of the facts constituting the claim within 90 days from its accrual or a reasonable time thereafter; and (4) whether the delay would substantially prejudice the municipality in maintaining its defense on the merits"(*see Williams v. Nassau County Med Ctr.*, 6 NY3d 531 [2006]).

In support of its motion to serve a late notice of claim, petitioner argues that NYCHHC was aware of the facts and circumstances surrounding the instant action as it generated the only records in existence reflecting the alleged malpractice herein. Indeed, petitioner submits that the medical records generated in this action demonstrate that following petitioner's delivery of her infant son, G.R., the child was admitted into the neonatal intensive care unit at Harlem Hospital and subsequently transferred to Bellevue Hospital for possible brain cooling. Petitioner highlights that the records further reveal that NYCHHC was aware that while the infant was at Bellevue, he was noted as having seizure activity and placed on anti-seizure medication. As such, petitioner claims that NYCHHC was on notice of all the facts that could have constituted a potential malpractice claim. Petitioner further contends that NYCHHC would suffer no prejudice

if its application is granted, since it is the custodian of all relevant medical records and employs all relevant witnesses necessary to the investigation of any alleged malpractice. Petitioner also contends that her excuse for the delay in filing a notice of claim is reasonable considering her son's infancy, as she avers that she only became aware of her son's failure to meet his developmental milestones recently. At oral argument in this matter on March 6, 2018, petitioner also highlighted that her delay in filing was a mere matter of months rather than years since her son was delivered in September 2016.[1] Finally, petitioner contends that the relevant medical records illustrate that she has a potentially meritorious claim rooted in the fact that her infant son may have sustained a birth related injury.

In opposition, NYCHHC argues that there is no support for petitioner's argument that the medical records at issue in this case put it on actual notice of alleged malpractice, as the records do not describe any facts or circumstances by which it would or should have anticipated a medical malpractice claim. At most, NYCHHC submits that the medical records show that the infant developed respiratory distress after delivery and was transferred to a different facility for further treatment. In NYCHHC's view, its mere possession of medical records does not establish notice without knowledge of the facts that underlie the legal theories on which liability is predicated. Therefore, NYCHHC submits that petitioner's claim that it had actual notice of the prospective malpractice claim is wholly unfounded. Similarly, NYCHHC argues that petitioner has not demonstrated a reasonable excuse for the delay in filing a notice of claim and has failed to prove that NYCHHC would not be prejudiced by the delay. At oral argument, NYCHHC stated that it would be prejudiced by its witnesses inability to recall the events underlying this action even though petitioner filed the instant application a mere eight months after the expiration of the relevant time period. Nevertheless, NYCHHC submits that the instant application for leave to file a late notice of claim must be denied.

Petitioner's reply affirmation reiterates her positions that the medical records at issue in this case provided NYCHHC with actual knowledge, that NYCHHC would suffer no prejudice if the instant application is granted, and that petitioner had a reasonable excuse for her delay.

DISCUSSION

A notice of claim must be served in a personal injury suit against an entity such as defendant as a condition precedent to suit (*see* McKinney's Uncons Laws of NY § 7401 (2*); Matter of Daniel J. v New York City Health & Hosps. Corp.*, 77 NY2d 630, 633 [1991]). Notice of claim requirements are intended to protect the municipality and governmental entities from "unfounded claims and to ensure that [they have] an adequate opportunity to timely explore the merits of a

[1] Petitioner's notice of claim would have had to be served by March 31, 2017 to be considered timely. The instant application was filed on November 30, 2017, roughly eight months later.

claim while the facts are still 'fresh'" (*Matter of Nieves v New York Health & Hosps. Corp.*, 34 AD3d 336, 337 [1st Dept. 2006]). The notice of claim provisions of General Municipal Law § 50-e govern the notices required to be served on NYCHHC (McKinney's Uncons Laws of NY § 7401 (2); *Matter of Daniel J.*, *supra*, 77 NY2d at 633). Therefore, such notices must be served within 90 days of a claim's accrual (General Municipal Law § 50-e[1][a]). However, a court has the discretion to extend the filing time, provided that the one year and 90-day statute of limitations, as extended by any applicable toll, has not expired (*Matter of Daniel J.*, supra, at 633-634; General Municipal Law § 50-e[5]).

In determining whether to allow a late filing, the court must consider various factors, including whether the claimant is an infant, whether the petitioner has demonstrated a reasonable excuse for failing to serve a timely notice of claim, whether the public corporation acquired actual knowledge of the facts constituting the claim within 90 days of its accrual or reasonable time thereafter, and whether the delay would substantially prejudice the public corporation in defending on the merits (*see* General Municipal Law §50[e][5]; *Williams*, *supra*, 6 NY3d 531 [2006]).

Because this application is made within the statute of limitations, tolled by the plaintiff's infancy, the court has discretion to consider the various factors set forth in General Municipal Law §50-e. Based on the entire record before it, the court finds that plaintiff has met the criteria set forth in General Municipal Law §50-e and her application to file a late notice of claim is granted.

Infancy alone does not compel the granting of a motion for leave to serve a late notice of claim (*Dumancela v. New York City Health and Hospitals Corp.*, 32 AD3d 515 [2d Dept. 2006]). Here, plaintiff asserts that the approximate eight-month delay in serving a notice of claim was the product of her failure to fully appreciate that her child's inability to hit various developmental milestones might have been caused by medical negligence. Indeed, petitioner submits that for the first year of her son's life, she was tending to his needs and waiting to see if the effects of his delivery were permanent. While standing alone, these explanations might not constitute a reasonable excuse for delay, plaintiff had other complicating factors, including her initial inability to obtain medical records from NYCHHC despite numerous requests. It is now well settled that where an alleged malpractice is apparent from an independent review of the medical records, those records constitute "actual knowledge of the facts constituting the claim" (*see Godoy v. Nassau Health Care Corp.*, 49 AD3d 541 [2d Dept. 2008]); *Cifuentes v. New York City Health and Hospitals Corp.*, 43 AD3d 385 [2d Dept. 2007]). Here, the records before the court reveal that NYCHHC was on notice of the fact that following petitioner's delivery of her infant son, the child had to be admitted into the neonatal intensive care unit and subsequently transferred to Bellevue Hospital for possible brain cooling. Notably, at birth petitioner's son was noted as being in respiratory distress and was diagnosed with hypoxic ischemic encephalopathy (HIE). His Apgars were 1 at 1 minute, 2 at 5 minutes, and 3 at 10 minutes. Additionally, the infant's chart reflects

that "the baby had a tight nuchal cord around the neck. He was born limp, apneic, and without heart rate." Moreover, while the infant was at Bellevue, he was noted as having seizure activity and placed on anti-seizure medication. As such, NYCHHC was on notice of facts that could give rise to a potential malpractice claim. NYCHHC's claims of prejudice rooted in the possibility that the memories of its witnesses may have faded is sharply contradicted by the fact that petitioner's filing delay was less than one year. Indeed, NYCHHC's extensive reliance on *Williams* is misplaced, since the late notice of claim in that case was not filed until ten (10) years after the claim's accrual, which the Court of Appeals noted as being "influential" in its decision (*Williams, supra*, 6 NY3d at 532).

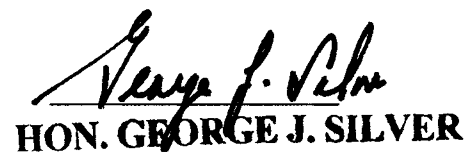
Considering the overall circumstances present here, including the nature of the injuries and documentations in the infant's medical records, the delay in serving a notice of claim is excused. Moreover, there is no indication that NYCHHC sustained prejudice attributable to the delay (*see Greene v. New York City Health and Hospitals Corp.*, 35 AD3d 206 [1st Dept. 2006]). Finally, the Court of Appeals' holding in *Wally G. ex. rel. Yoselin v. New York City Health and Hospitals Corp.*, 27 NY3d 673 (2016), does not require a different result, as plaintiff's medical records annexed herein meet the requisite criteria to establish actual knowledge whereas it was found by the Court of Appeals in that case that the records presented did not.

Accordingly, it is hereby

ORDERED that plaintiff's application to serve a late notice of claim, *nunc pro tunc*, is granted and plaintiff is ordered to serve same on NYCHHC within 30 days of the date of this order.

This constitutes the decision and order of the court.

July 3, 2018



HON. GEORGE J. SILVER