J.H. v New York City Health & Hosps. Corp.
2018 NY Slip Op 31927(U)
August 7, 2018
Supreme Court, New York County
Docket Number: 805168/16
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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J.H., an infant by his Mother and Natural Guardian, RANIQUA BOLTON,

Petitioner,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

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Index No.: 805168/16

Motion Seq. No.: 001

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

In this medical malpractice action, petitioner J.H., an infant by his mother and natural guardian Raniqua Bolton ("Petitioner") moves pursuant to General Municipal Law ("GML") § 50-e (5) ["Section 50-e (5)"] for leave to serve a late notice of claim upon the respondent the New York City Health and Hospitals Corporation ("Respondent") by deeming the proposed Notice of Claim attached to the instant Petition as timely served *nunc pro tunc* (Motion Sequence Number 001). Respondent opposes the Petition.

BACKGROUND FACTS

On or about June 23, 2014, without leave of the Court, Petitioner served a Notice of Claim alleging medical malpractice arising out of the pre-natal and post-natal care received by Petitioner between December 1, 2012 and April 15, 2013 at Harlem Hospital Center (the "Hospital") in connection with the birth of infant J.H. (the "Infant") on April 1, 2013 (Order to Show Cause, Exhibit "1").[1] Petitioner claims that the physician who attended Petitioner, prematurely performed a Caesarean Section, and failed to appropriately use medication to halt

[1]Although the date of birth is redacted on the Notice of Claim, Petitioner's motion papers provide the date of the Infant's birth as April 1, 2013.

labor and delay delivery. Petitioner also claims that it was a departure from good and accepted medical practice not to use the full dose of a medication to increase the Infant's lung capacity. It is undisputed that the Infant was born prematurely at a little over 33 weeks gestation. Petitioner contends that as a result of the alleged medical malpractice by the Hospital, the Infant sustained brain damage, and has delayed milestones of growth and impaired cognitive functioning (Order to Show Cause, Affirmation at "2"). According to Petitioner's expert affirmation of Douglas R. Phillips, MD ("Dr. Phillips"), dated April 9, 2016, he reviewed an August 27, 2013 note of pediatrician Dr. Batul S. Ladek which stated that at almost five months of age, the Infant was delayed in social, communication, motor and adaptive skills, due to "prematurity and perinatal complications" (Order to Show Cause, Exhibit "2").

Petitioner's counsel claims that Infant's mother Raniqua Bolton ("Bolton") retained the law firm of Fink & Platz which filed a Notice of Claim on Infant's behalf on June 23, 2014.[2] Petitioner's counsel further states that after the Notice of Claim was filed:

> "[i]t was the intent of the law firm to make a motion to file a late notice of claim at that time. The firm of Fink & Platz, however, dissolved on July 31, 2014 and The Fink Law Firm was retained to continue prosecution of the claim. In the transition from one firm to the other, the making of a motion to file a late notice of claim was overlooked" (Order to Show Cause, Affirmation at 7-8).

It is undisputed that on May 17, 2016, Petitioner moved for leave to serve a late Notice of Claim, which is two years and ten months beyond the ninety-day statutory deadline for serving a notice of claim. Petitioner should have filed a Notice of Claim for the alleged injuries no later than July 14, 2013 (ninety days beyond April 15, 2013, the end of the period of the alleged

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[2]Petitioner's counsel states that Bolton had failed to obtain counsel in a timely manner (Order to Show Cause, Affirmation at 7).

malpractice).

DISCUSSION

Notice of Claim

Pursuant to GML § 50–e (1) (a), a party seeking to sue a public corporation must serve a notice of claim on the prospective respondent "within ninety days after the claim arises" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d 455, 460 [2016]; *see Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d 672, 674 [2016]; *Matter of Townson v New York City Health & Hosps. Corp.*, 158 AD3d 401, 402 [1st Dept 2018]. The instant proceeding for leave to serve a late notice of claim was commenced on or about May 17, 2016, over three years after Respondent's alleged malpractice arose (December 1, 2012 to April 15, 2013) and two years and ten months after the 90-day notice of claim period expired.

GML Section 50-e (5) which governs applications to file a late notice of claim, permits a court in its discretion to extend the time for a petitioner to serve a notice of claim. Under that section, a court is required to consider factors, including as is pertinent here, "whether there was (1) a nexus between petitioner's [child's] infancy and the delay in service, (2) a reasonable excuse for the delay [in service], (3) actual knowledge on the part of [the respondent] of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter, and (4) substantial prejudice to [the respondent] due to the delay" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 463).

"The lower courts have broad discretion to evaluate the factors set forth in General Municipal Law § 50-e (5). At the same time, a lower court's determinations must be supported by record evidence" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 465

[internal citations omitted]). "[W]hile the presence or the absence of any one of the factors is not necessarily determinative, whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance" (*Matter of Townson v New York City Health & Hosps. Corp.*, 158 AD3d at 402 [internal quotation marks and citation omitted]).

It is well established that "the absence of a reasonable excuse is not, standing alone, fatal to [an] application" to file a late notice of claim (*Matter of Richardson v New York City Hous. Auth.*, 136 AD3d 484, 485 [1st Dept 2016] [internal quotation marks and citation omitted]). The actual knowledge requirement of Section 50-e (5) "'contemplates 'actual knowledge of the essential facts constituting the claim,' not knowledge of a specific legal theory" (*Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d at 677 *quoting Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]; *Matter of Townson v New York City Health & Hosps. Corp.*, 158 AD3d at 403).

In addition, a court is allowed to consider other relevant factors including whether the claimant is an infant (*see* GML Section 50-e (5); *Williams v Nassau County Med. Ctr.*, 6 NY3d at 538). However "infancy carries little weight [when] there is no connection between the infancy and the delay in moving to file [a] late notice of claim" (*Plaza v New York Health & Hosps. Corp. (Jacobi Med. Ctr.)*, 97 AD3d 466, 471 [1st Dept 2012] *citing Williams v Nassau County Med. Ctr.*, 6 NY3d at 538).

Regarding the prejudice showing required under Section 50-e (5), a petitioner must "make an initial showing that the public corporation will not be substantially prejudiced and then [t]he public corporation [must] rebut that showing with particularized evidence" (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 467).

Reasonable Excuse

Petitioner's counsel argues inaccurately that a Notice of Claim was served within one year of the Infant's birth and that the within application was made within one year thereafter. In fact, a Notice of Claim was initially filed on June 23, 2014, without leave of the court, over fourteen months after the Infant's birth, and the within application for leave to file a late notice of claim was not filed until almost two years thereafter. It is well settled that "service of a late notice of claim without leave of court is a nullity" (*Plaza v New York Health & Hosps. Corp. (Jacobi Med. Ctr.)*, 97 AD3d 466, 467 [1st Dept 2012]).

Petitioner fails to offer a reasonable excuse for the delay in moving to serve a late notice of claim given that Petitioner's excuse amounts to ignorance of the law and law office failure. Petitioner states that Bolton failed to obtain an attorney in a timely manner. "Ignorance of the law is not a reasonable excuse" (*Basualdo v Guzman*, 110 AD3d 610, 610 [1st Dept 2013]). In addition, Petitioner's excuse that the predecessor law firm had an "intent" to file a motion for leave to file a late notice of claim, and new counsel overlooked the making of such motion, amounts to law office failure which likewise does not constitute a reasonable excuse for failing to timely serve a notice of claim (*Alladice v City of New York*, 111 AD3d 477, 478 [1st Dept 2013]). Petitioner offers no other excuse for the additional delay between the Fink Law Firm taking over the subject case from Fink & Platz after Fink & Platz allegedly dissolved in July 2014 and the making of the instant motion in May 2016 (*see Basualdo v Guzman*, 110 AD3d at 610). Petitioner has also failed to demonstrate that there is any nexus between claimant's infancy and the delay. Although lack of a "causative nexus" between infancy and delay in serving a notice of claim is not fatally deficient, it makes the delay less excusable (*Williams v*

Nassau County Med. Ctr., 6 NY3d at 538).

Furthermore, the foregoing failure of Petitioner to demonstrate a reasonable excuse for failure to file a timely Notice of Claim and for the delay in moving for leave to file a late Notice of Claim is compounded by the failure of Petitioner to respond to Respondent's letters seeking a date to continue the hearing pursuant to GML § 50-h (the "50-h Hearing") which was commenced on February 11, 2015 but not concluded.[3] According to Respondent, as Petitioner was unable to continue with the hearing late in the afternoon, the parties agreed to continue the hearing at a later date.

By letter, dated February 24, 2015, sent to Petitioner's counsel, Respondent requested that the hearing be rescheduled (Respondent's Opposition to Petitioner's Motion, Exhibit "D"). The continuation of the 50-h Hearing was rescheduled for April 13, 2015 (*Id.*, Exhibit "E") and subsequently adjourned at Petitioner's request to June 11, 2015. On that date Petitioner was allegedly not able to appear due to illness (*see* Respondent's Supplemental Affirmation in Opposition, Exhibits "E", "F"). By letters, dated June 12, 2015 and July 22, 2015 sent to Petitioner's counsel, Respondent again requested rescheduling of the hearing (*Id.*) There is no evidence in the record that Petitioner responded to Respondent's June 12, 2015 or July 22, 2015 letters, or that the continuation of the 50-h Hearing was otherwise rescheduled. In fact, Respondent states that it had no further communication from Petitioner until the subject Order to

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[3]Respondent presents proof that a notice of a 50-h Hearing was served by Respondent on Petitioner on July 25, 2014 for a 50-h Hearing to be held on October 10, 2014 (Respondent's Opposition to Petitioner's Motion, Exhibit "B"). At Petitioner's request, the hearing was adjourned to December 12, 2014, January 15, 2015 and then again to February 11, 2015 when the hearing was commenced (Respondent's Supplemental Affirmation in Opposition, Exhibits "A", "B", "C"; Respondent's Opposition to Petitioner's Motion, Exhibit "C" [tr of 50-h Hearing]).

Show Cause was filed on May 17, 2016, almost one year after Petitioner's last request to schedule a continued hearing date. Having received no communication from Petitioner, Respondent deemed the subject claim abandoned (Respondent's Supplemental Affirmation in Opposition at 8-9).

Petitioner has failed to proffer any excuse for the delays beyond law office failure which is compounded by Petitioner's failure to respond to Respondent's attempts to reschedule the continuation of the 50-h Hearing, or to otherwise appear at such hearing. As such, Petitioner has failed to demonstrate a reasonable excuse for her failure to serve a timely Notice of Claim or for her delay in moving for leave to serve a late notice of claim.

Actual Knowledge

"The actual knowledge requirement contemplates actual knowledge of the essential facts constituting the claim not knowledge of a specific legal theory" (*Matter of Townson v New York City Health & Hosps. Corp.*, 158 AD3d at 403 [internal quotation marks and citations omitted]). "[K]nowledge of the facts underlying an occurrence does not constitute knowledge of the claim" (*Matter of Schifano v City of New York*, 6 AD3d 259, 260 [1st Dept 2004] [internal quotation marks and citation omitted). "[K]nowledge that [plaintiff] was allegedly injured does not establish actual notice of her claim that defendant[s] [was] negligent" (*Ifejika-Obukwelu v New York City Dept. of Educ.*, 47 AD3d 447, 447 [1st Dept 2008]).

Petitioner maintains that Respondent had actual notice of the essential facts constituting her claim based on Respondent's possession of hospital records which document the alleged malpractice. However, [a] medical provider's mere possession or creation of medical records does not ipso facto establish that it had '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 plaintiff during the birth process'" (*Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d at 677 *quoting Williams v Nassau County Med. Ctr.*, 6 NY3d at 537; *see Hudson v Patel*, 146 AD3d 758, 759-760 [2d Dept 2017]). "[T]he medical records must do more than 'suggest' that an injury occurred as a result of malpractice" (*Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d at 677).

Here, there is no evidence in the medical records that evince that the medical staff at the Hospital by any acts or omissions, inflicted injury on the Infant. Petitioner's argument that Respondent had notice of Petitioner's claim due to a pediatric neurology note documenting the Infant's developmental delays five months after delivery that "appear to be due to prematurity and perinatal complications", is unavailing. This note is insufficient to give notice to Respondent of medical malpractice relating to labor and delivery (*see* Order to Show Cause, Exhibit "2" [Dr. Phillips Affirmation] at 4).

Furthermore, in his Affirmation Dr. Phillips opines that Respondent Hospital departed from good and accepted medical practice by prematurely performing a Cesarean section on Bolton prior to signs of fetal risk or active labor. Dr. Phillips states that delaying delivery would have permitted four does of Dexamethasone to increase fetal lung maturity (Order to Show Cause, Exhibit "2"). However, "mere assertions that a different course of treatment could have been followed do not address whether [Respondent] had actual knowledge of the essential facts necessary to properly defend itself in the underlying action" (*Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d at 677). Dr. Phillips' assertions amount to nothing more than an opinion that a different course of treatment could have been followed, and do not address

whether the medical records evince malpractice giving Respondent actual knowledge of the essential facts of the claim (*see Basualdo v Guzman*, 110 AD3d at 610).[4] "While [Dr. Phillips] interpreted the hospital records to support [Petitioner's] theory of liability, the records do not, on their face, evince that the [H]ospital deviated from good and accepted medical practice, and thus do not provide [Respondent] with timely knowledge of the underlying claim" (*Id.*).

Prejudice

In *Matter of Newcomb v Middle County Cent. Sch. Dist.*, the Court of Appeals clarified the burden of proof regarding substantial prejudice which a court must consider in determining whether to extend the time for a petitioner to serve a Notice of Claim. The Court held "that the burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation. Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice" (28 NY3d at 466). "Once this initial showing has been made, the public corporation must respond with a particularized evidentiary showing that the corporation will be substantially prejudiced if the late notice is allowed" (*Id.* at 467). "The rule [the court] endorse[s] today-requiring a petitioner to make an initial showing that the public corporation will not be substantially

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[4]In opposition, Respondent's expert Nancy Wolfert Kirshenbaum, MD, opines that there is no discernable indication in the subject medical records that would have given Respondent actual notice of wrongdoing or improper treatment. Further, Dr. Kirshenbaum states that Bolton had a complicated medical history which included prior preterm deliveries, at least five miscarriages and five abortions, and depression and bipolar disorder necessitating medication. Dr. Kirshenbaum stated "it was correct to proceed to a Cesarean delivery given the patient's high risk for uterine rupture, as well as progressing pre-term labor. . . the patient's prior history of Cesarean delivery in 2009 and multiple voluntary abortions increased her risk for uterine rupture which is a life threatening event for both mother and infant that requires immediate intervention" (Respondent's Opposition to Petitioner's Motion, Exhibit "E").

prejudiced and then requiring the public corporation to rebut that showing with particularized evidence-strikes a fair balance" (*Id.*).

In her moving Petition and supplemental submissions, Petitioner maintains that there is no prejudice to Respondent occasioned by the delay in serving the subject late Notice of Claim. Petitioner's argument of lack of prejudice relies on the most part upon the assertion that (1) Respondent had actual knowledge of the essential facts of her claim as a result of its possession of the medical records; and (2) the doctors involved in both the subject delivery and the Hospital's neonatal intensive care unit are currently attending physicians at Respondent hospitals. To support its argument that there is no prejudice because all of Petitioner's treating physicians are presently attending physicians in Respondent hospitals, Petitioner submits information obtained from a website [www.nydoctorprofile.com] (Petitioner's Supplemental Affirmation Exhibits "1" - "6").

However, Petitioner has failed to present "some evidence or plausible argument" supporting its argument that Respondent was not substantially prejudiced by the subject delay (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 466). As discussed above, Petitioner failed to establish that Respondent had actual notice of the essential elements constituting the claim. In addition, Petitioner's argument that Respondent will not be substantially prejudiced by a late notice of claim based on information gleaned from the subject website allegedly revealing that the physicians who treated Petitioner and the Infant are presently attending physicians at Respondent hospitals is unavailing. The evidence obtained from the

website www.doctorprofile.com is not competent evidence.[5] In addition, Petitioner fails to address how Respondent would not be prejudiced by the almost three year delay between the Infant's delivery and the filing of the instant Petition. In addition, nowhere does Petitioner dispute Respondent's allegation that after Petitioner requested an adjournment of the continuation of the 50-h Hearing that had been rescheduled for June 11, 2015, Respondent received no communication from Petitioner for almost one year until the subject Petition was filed. In addition, at the 50-h Hearing that was held on February 11, 2015, although Petitioner was questioned about her medical history, Respondent had not yet obtained testimony from Petitioner regarding the treatment at issue herein.

As such, Petitioner's assertions that Respondent would not be substantially prejudiced by the delay in serving a notice of claim are conclusory and without more fail to satisfy Petitioner's minimal burden (*see Matter of Maldonado v City of New York*, 152 AD3d 522, 523 [2d Dept 2017]. Given that Petitioner has failed to satisfy her burden to present "some evidence or plausible argument" to support a finding of lack of substantial prejudice to Respondent, the burden does not shift to Respondent to make a particularized evidentiary showing that it would be substantially prejudiced if a late notice of claim is allowed (*see Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 466; *Matter of Cruz v Transdev Servs., Inc.*, 160 AD3d 729, 731 [2d Dept 2018]).

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[5]The site itself contains a disclaimer that the Department of Health cannot assure that the information contained therein is up-to-date. Respondent argues that much of the information from the website submitted by Petitioner is outdated and cannot be relied upon (Respondent's Supplemental Affirmation in Opposition at 6).

CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the Petition of Petitioner J.H. an Infant by his Mother and Natural Guardian Raniqua Bolton pursuant to General Municipal Law § 50-e (5) for leave to serve a late Notice of Claim upon Respondent the New York City Health and Hospitals Corporation by deeming the proposed Notice of Claim attached to the instant Petition as timely served *nunc pro tunc*, is denied and the proceeding is dismissed.

The Clerk shall enter judgment accordingly.

Dated: August 7, 2018

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.