

**Vega v New York City Health & Hosps. Corp.**

2018 NY Slip Op 32097(U)

August 27, 2018

Supreme Court, New York County

Docket Number: 805099/2018

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

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Delia Vega,

Index No.  
805099/2018

Petitioner,

DECISION  
and  
ORDER

-against-

New York City Health & Hospitals Corp.,

Mot. Seq. 001

Respondent.

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HON. EILEEN A. RAKOWER, J.S.C.

Relief Sought

Petitioner Delia Vega (“Petitioner” or “Vega”) moves by Order to Show Cause for an order (a) deeming the Notice of Claim served upon respondent New York City Health and Hospitals Corporation (“Respondent” or “HHC”) as timely filed *nunc pro tunc*; (b) directing HHC to produce a copy of Vega’s medical records; (c) permitting Vega 60 days from receipt of records to supply a physician’s affidavit should this Court require such an affidavit. After the Order to Show Cause was filed and before its return date, HHC produced a copy of Vega’s medical records to Vega and Vega submitted a physician affidavit. Therefore, those portions of the Order to Show Cause which relate to records and time to supply a physician’s affidavit are rendered moot.

Factual Allegations

As alleged in the Petition, “This is an action for medical malpractice wherein on or about April 1, 2016 and for a course of continuous treatment to on or about September 28, 2017 and prior/subsequent thereto at Bellevue Hospital Center located at 462 First Avenue, New York, New York, the care of the petitioner Delia Vega was effectuated in an inadequate, improper manner so as not to conform to accepted standards of medical practice.”(Petition, ¶3). As further alleged in the

Petition, “As a result, Ms. Vega sustained personal injuries, including but not limited to requirement for additional surgeries of her lower left extremity. The Continuous treatment doctrine under CPLR 214(a) is applicable.” (*Id.*)

According to Vega’s supporting affidavit, Respondent provided her medical treatment from April 1, 2016 through September 28, 2017, which departed from accepted standards of medical practice and caused her to sustain personal injuries including additional surgeries of her lower left extremity. (Vega Aff., ¶3). On March 9, 2018, Vega retained counsel to represent her in this matter. (Vega Aff., ¶4). On March 13, 2018, Vega filed a Notice of Claim with HHC. (Vega Aff., ¶5). Vega states that she “was not aware of the time limits necessary to file a Notice of Claim and [her] condition did not permit [her] to seek adequate consultation.” (*Id.*). She states that she “was suffering from severe pain and [her] doctors at Bellevue advised [her] that this pain was ‘in her head.’” (*Id.*). She further states:

“It was not until I sought treatment outside of Bellevue [at Brooklyn Methodist Hospital Center] in September, 2017 that I was made aware of the problems and deficiencies in the care which was provided to me. I then had a revision surgery of my left knee on February 1, 2018 and have been completely absorbed in recovering from this surgery until the present time. I am still using a walker and I am immobile.”

(Vega Aff., ¶5).

Vega submits an Expert’s Affidavit of a physician who has “been practicing in the field of Orthopedic Surgery since 2009.” (Expert Aff., ¶1). The physician states that he or she has reviewed Vega’s records from Bellevue and Brooklyn Methodist Hospital Center. The physician states:

“The relevant diagnostic studies do not indicate that Ms. Vega was a candidate for total left knee replacement on April 28, 2016. To the extent surgical intervention was deemed necessary, less invasive procedures could have, and should have been performed to treat Ms. Vega’s left knee. Moreover, as described below, Ms. Vega did not derive any benefit from the total left knee replacement surgery that was performed on April 28, 2016, including her persistent pain in the joint and the necessity for

subsequent surgical intervention. For the foregoing reasons, it is my opinion with a reasonable degree of medical certainty that the performance of total left knee replacement upon Ms. Vega on April 28, 2016 was a departure from good and accepted medical practice.”

(Expert Aff., ¶4).

The physician further states, “At each post-surgical Bellevue visit, Ms. Vega exhibited symptoms of derangement of her left knee arthroplasty. Despite these complaints Bellevue at Ms. Vega's treating physicians at Bellevue failed to diagnose the cause of Ms. Vega's left knee pain and failed to adequately treat Ms. Vega's left knee pain.” (Expert Aff., ¶4).

### Legal Standard

Pursuant to General Municipal Law § 50-e, a notice of claim in a medical malpractice action against a city must be served within 90 days after the claim arises. Section 50-e[5] authorizes a court, in its discretion, to extend the time to serve a notice of claim. The extension may not exceed the time limited for the commencement of an action by the claimant against the public corporation. “It is well-settled that both the 90-day period for serving a notice of claim and the statute of limitations for commencement of an action are tolled by a continuous course of medical treatment relating to the original condition or complaint.” *Oliveira v. New York City Health & Hosps. Corp.*, No. 22296/2010, 2011 WL 601401 [Supreme Court, Queens County 2011] (citing to *Allende v. New York City Health and Hospitals Corporation*, 90 N.Y.2d 333, 337-338 [1997]).

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 claim while the facts are still ‘fresh.’” *Matter of Nieves v New York Health & Hosps. Corp.*, 34 A.D. 3d 336, 337 [1st Dept 2006].

“In deciding whether a notice of claim should be deemed timely served under General Municipal Law § 50-e [5], the key factors considered are “[1] whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, [2] whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable

time thereafter, and [3] whether the delay would substantially prejudice the municipality in its defense. Moreover, the presence or absence of any one factor is not determinative.” *Velazquez v. City of New York Health and Hosps. Corp. (Jacobi Med. Ctr.)*, 69 A.D. 3d 441, 442 [1st Dept 2010]. “The failure to set forth a reasonable excuse is not, by itself, fatal to the application.” *Velazquez*, 69 A.D. 3d at 442.

Specific to medical malpractice claims, “[t]he relevant inquiry on a motion to serve late notice of claim is whether defendant’s medical records provided it with actual knowledge of the facts, not the legal theory, underlying plaintiff’s claim.” *Hernandez v. New York City Health and Hospitals Corp.*, 2015 WL 4698763, at \*3 [N.Y. County Sup. Ct. 2015]. “[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 plaintiff...” *Williams v. Nassau County Med. Ctr.*, 6 N.Y.3d 531, 537 [2006]. To demonstrate that a defendant’s medical records provided it with actual knowledge of the facts underlying a plaintiff’s claim, a plaintiff may submit affirmations from physicians establishing that the medical records, on their face, evinced that defendants failed to provide proper care. *See Talvera ex rel. Rios v. New York City Health and Hospitals Corp.*, 48 A.D. 3d 276, 277 [1st Dept. 2008]; *Lisandro v. New York City Health and Hospitals Corp.*, 50 A.D. 3d 304, 304 [1st Dept. 2008]; *Bayo v. Burnside Mews Associates*, 45 A.D. 3d 495, 495 [1st Dept. 2007].

A plaintiff must demonstrate that the plaintiff’s delay would not substantially prejudice the defendant so that “failure to serve a timely notice of claim” does not deprive “defendant of the opportunity to conduct a prompt investigation of the merits of the allegations against it that the notice provision of General Municipal Law § 50-e was designed to afford.” *Velazquez*, 69 A.D. 3d at 442. “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.” *Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466 [2016], *reargument denied*, 29 N.Y.3d 963 [2017].

#### Factual Background/Parties’ Contentions

Here, according to the Notice of Claim, the dates of alleged negligence are April 1, 2016 through September 28, 2017. Therefore, the deadline to file the Notice of Claim was December 27, 2017. Vega served the Notice of Claim upon HHC on

March 13, 2018, and therefore failed to serve a Notice of Claim within the requisite 90 day period. Vega brought the pending motion for leave to serve a late Notice of Claim on April 5, 2018, which is within one year and 90 days of the date the claim allegedly accrued and within the applicable statute of limitations.

Vega contends that her application for leave to serve a late notice of claim should be granted because there is no prejudice to HHC. Vega contends that HHC has knowledge of the essential facts underlying this matter. More specifically, Vega contends that since Bellevue Hospital has been in possession of Vega's medical records since the time of the malpractice, it has had actual notice of the claim and its underlying facts. Additionally, she contends that she was not aware of Bellevue Hospital's malpractice because of the misrepresentations that made to her regard the purportedly "successful" treatment the facility had provided to her.

In opposition, HHC argues that it did not have notice of the essential facts constituting the claim within 90 days or a reasonable time thereafter. HHC argues that "[w]hile the claimant had ongoing complaints of knee pain postoperatively, there is no evidence whatsoever provided in the affidavit that these complaints were anything other than normal postoperative pain in a patient with arthritis in her left knee." HHC further contends that Vega's expert failed to mention "the numerous postoperative x-rays mentioned above that revealed no evidence of hardware complication and proper anatomic alignment after the knee replacement." HHC contends that, "Petitioner fails to demonstrate that the injuries were the result of a commission or omission on the part of Bellevue Hospital, as opposed to the natural course of events in a patient with a well-documented history of years of knee pain or due to a postoperative injury that may have been suffered." HHC contends that therefore Petitioner "fail[s] to demonstrate that NYCHHC had notice of the claim by virtue of Bellevue's own records."

HHC further contends that Vega has failed to demonstrate a lack of prejudice. HHC contends that furthermore, there is prejudice. HHC contends that Vega testified at her 50-h hearing to facts that contradicted the record. HHC contends that these are issues that Bellevue Hospital could have investigated and resolved if HHC had been timely informed of Vega's claims.

Lastly, HHC contends that Vega has acted in bad faith in refusing to provide records from her treatment at Methodist Hospital, where she received subsequent care. HHC contends that these records are needed to determine whether there was a continuous course of treatment.

### Discussion

Here, Petitioner asserts that she failed to serve a Notice of Claim within the prescribed time because she was not aware of the Bellevue Hospital's malpractice until she sought care from another provider in September 2017. She states that the additional delay was because she had a revision surgery of her left knee on February 1, 2018 and has been recovering from the surgery. Even if this is not a reasonable excuse, "The failure to set forth a reasonable excuse is not, by itself, fatal to the application." *Velazquez*, 69 A.D. 3d at 442.

Furthermore, Petitioner establishes that HCC acquired "actual notice of the facts constituting the claim" based upon the hospital records in HCC's possession. *Rodriguez*, 97 A.D.3d at 467. Petitioner submits an affirmation from a physician "establishing that the medical records, on their face, evince that defendant failed to provide proper care to plaintiff." *Talavera*, 48 A.D.3d at 277. The physician states that based on the face of the medical records of Bellevue Hospital, it is apparent that HHC departed from good and accepted medical standards by determining that Vega was a candidate for total knee replacement and in their post surgical care of her.

Furthermore, Petitioner has demonstrated that her "failure to serve a timely notice of claim" does not deprive "defendant of the opportunity to conduct a prompt investigation of the merits of the allegations against it that the notice provision of General Municipal Law § 50-e was designed to afford." *Velazquez*, 69 A.D. 3d at 442. HHC's argument that the delay would prejudice it in defending the action because these are issues that Bellevue Hospital could have investigated and resolved if it had been timely informed of Vega's claims to be unconvincing. To the extent that HHC seeks additional records from Methodist Hospital in order to determine whether there was a continuous course of treatment, that is a separate issue from whether Petitioner has met the "the basic criteria that would warrant the exercise of this Court's discretion to permit her to file a late notice of claim." *Rodriguez*, 97 A.D.3d at 467.

Wherefore, it is hereby

ORDERED that this motion to deem the Notice of Claim served upon Respondent as timely filed *nunc pro tunc* is granted.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: AUGUST 27, 2018



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EILEEN A. RAKOWER, J.S.C.