

Francisco v Westchester County Health Care Corp.
2018 NY Slip Op 34065(U)
June 26, 2018
Supreme Court, Westchester County
Docket Number: 67849/2017
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MANUEL FRANCISCO and MARIA FRANCISCO,

Plaintiffs,
-against-

DECISION and ORDER
Sequence Nos. 1, 2 and 3
Index No. 67849/2017

WESTCHESTER COUNTY HEALTH CARE CORPORATION d/b/a WESTCHESTER COUNTY MEDICAL CENTER, WESTCHESTER MEDICAL ADVANCED PHYSICIANS SERVICES and JOHN GALENO, M.D.,

Defendants.

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RUDERMAN, J.

The following papers were considered in connection with plaintiffs' motion pursuant to CPLR 3215 for a default judgment against Westchester County Health Care Corporation d/b/a Westchester County Medical Center (sequence 1), plaintiff's motion pursuant to General Municipal Law § 50-e for leave to serve a late notice of claim (sequence 2), and the cross-motion by defendant the Westchester County Health Care Corporation d/b/a Westchester County Medical Center pursuant to General Municipal Law § 50-d and 50-e, dismissing the complaint as against it based on plaintiffs' failure to timely serve their notice of claim (sequence 3):

<u>Papers - Sequence 1</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - B	1
<u>- Sequence 2</u>	
Notice of Motion, Affirmation, Exhibits 1 - 5	2
<u>- Sequence 3</u>	
Notice of Cross-Motion, Affirmation, Exhibits A - G	3
Affirmation in Opposition, Exhibits 1 - 4	4
Reply Affirmation, Exhibits H - I	5

In this medical malpractice action, plaintiff Manuel Francisco¹ claims that in the course of his spinal surgery, defendants caused a dural leak, and then, in the course of his care and treatment thereafter, they failed to detect the problem, resulting in neurological injuries. Specifically, under the care of defendant John A. Galeno, M.D., plaintiff was admitted to defendant Westchester County Medical Center (“WMC”) on September 14, 2016 for spinal surgery. He was discharged from the hospital on September 27, 2016, with instructions to follow up with Dr. Galeno.

However, plaintiff returned to WMC’s Emergency Department on October 14, 2016 with complaints of back pain. He again returned to WMC on December 23, 2016 for an MRI of the brain, indicated based on complaints of pain after recent lumbar puncture. On January 24, 2017 an MRI of his lumbar-sacral spine was performed at WMC, the indications for which was “cerebrospinal fluid (CSF) leak,” and on April 19, 2017 plaintiff had an MRI with contrast of the lumbar-sacral spine at WMC, the reported indications for which was to “evaluate for fluid collection.”

Plaintiff asserts that on October 18, 2017, plaintiff underwent another surgery, at Mount Sinai Hospital West, in order to repair a “massive” leak of the dura.

Plaintiffs served their notice of claim on WMC on March 1, 2017. They commenced this action on October 23, 2017 by the filing of a summons and verified complaint. No answer having been served by WMC, plaintiff moved for a default judgment against it; by a second notice of motion they also moved for leave to serve a late notice of claim. WMC cross-moved to

¹ Because plaintiff Maria Francisco’s claim is derivative in nature only, references to plaintiff will refer to plaintiff Manuel Francisco.

dismiss the complaint as against it due to plaintiffs' failure to timely serve their notice of claim.

Analysis

GML § 50-e (1) requires that a claimant serve a notice of claim against a public corporation within 90 days after a tort claim arises. The court may grant an application extending the time to serve a notice of claim as long as the application is made within the relevant limitations period for commencing the action. In exercising its discretion to allow leave to serve a late notice of claim, the court must consider whether “(1) the movant has demonstrated a reasonable excuse for failing to serve a timely notice of claim, (2) the public corporation acquired actual knowledge of the facts constituting the claim within 90 days of its accrual or a reasonable time thereafter, and (3) the delay would substantially prejudice the public corporation in defending on the merits” (GML § 50-e [5]; *Arias v New York City Health and Hosps. Corp. [Kings County Hosp. Ctr.]*, 50 AD3d 830, 831 [2d Dept 2008]; see also *Bramble v New York City Dept. of Educ.*, 125 AD3d 856, 857-58 [2d Dept 2015]). The municipal corporation must have notice or knowledge of the specific claim and not merely some general knowledge that a wrong has been committed” (*id.*; citing *Arias v New York City Health and Hosps.*, 50 AD3d at 830). “In order for a report to provide actual knowledge of the essential facts, one must be able to readily infer from that report that a potentially actionable wrong had been committed by the defendants” (*Wright v City of New York*, 66 AD3d 1037, 1038 [2d Dept 2009])

Here, while WMC correctly observes that the notice of claim was not served within 90 days of his discharge after surgery, plaintiffs have demonstrated why they did not serve a notice of claim until March 1, 2017. Until the leak of CSF was diagnosed through the MRI on January 24, 2017, plaintiff lacked knowledge of facts supporting a claim of malpractice. Accordingly,

plaintiffs demonstrated a reasonable excuse for failing to serve a timely notice of claim.

The medical records submitted by WMC as its Exhibit E to its cross-motion, along with the additional WMC record submitted by plaintiffs as Exhibit 1 to their opposition to the cross-motion, establish that WMC possessed actual knowledge of the facts constituting plaintiffs' claim that a significant dural leak was caused, and not properly discerned or repaired, during the September 14, 2016 surgery, and that it had that information either within 90 days of the claim's accrual or a reasonable time thereafter.

As to the delay of a little more than two months from the 90-day mark of December 26, 2016 to the service of the notice of claim on March 1, 2017, there is no substantial prejudice to WMC. WMC relies on the contention that witnesses such as residents who were present for the relevant events have since moved on to other locations; however, WMC was on notice of the claim since March 1, 2017, and had the ability at that time to inquire of any possible witness who might subsequently become unavailable.

Plaintiffs have established grounds to grant their motion sequence 2 by treating the already-served notice of claim as timely filed nunc pro tunc. WMC's cross-motion to dismiss on the ground of untimely notice of claim is therefore denied. However WMC's alternative request that it be given an opportunity to conduct 50-h hearings and file an answer is granted, and plaintiffs' motion sequence 1 for a default judgment against WMC is accordingly denied.

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for a default judgment against WMC (sequence 1) is denied; and it is further

ORDERED that plaintiffs' motion for leave to serve a late notice of claim (sequence 2) is

granted to the extent of holding that the notice of claim served on March 1, 2017 shall be treated as timely nunc pro tunc; and it is further

ORDERED that the cross-motion by defendant WMC (sequence 3) is denied, except to the extent that WMC is permitted to conduct 50-h hearings and to file its answer within twenty days of service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear in the Preliminary Conference Part on Monday, September 10, 2018 at 9:30 a.m., at the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, room 811, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
June 26, 2018


HON. TERRY JANE RUDERMAN, J.S.C.