

**Matter of Grant v New York City Health and Hosps.
Corp.**

2019 NY Slip Op 31330(U)

April 22, 2019

Supreme Court, New York County

Docket Number: 805407/2018

Judge: George J. Silver

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

**In the Matter of the Petition of MUSHTAQ
GRANT,**

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Petitioner

-against-

**NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,**

Respondent

**Hon. GEORGE J. SILVER
Justice Supreme Court**

HON. GEORGE J. SILVER:

In this action, petitioner MUSHTAQ ("petitioner") moves, unopposed, for an order granting petitioner leave to serve a late notice of claim upon respondent NEW YORK CITY HEALTH AND HOSPITALS CORPORATION ("respondent"). Respondent does not oppose the instant application.

BACKGROUND

On April 30, 2018, petitioner retained counsel to investigate a potential medical malpractice on his behalf. On September 8, 2017, petitioner was admitted to respondent's Jacobi Medical Center for treatment of facial injuries that occurred as a result of an assault. Petitioner was admitted on September 8, 2017, and was given a diagnosis of multiple acute displaced right facial fractures involving the zygomatic arch, orbit, maxillary sinus and right nose. Petitioner was discharged on September 9, 2017, with instructions to return to the clinic, for a further surgical consult. Petitioner returned to respondent's Jacobi Medical Center via ambulance on September 17, 2017 for a preoperative consultation.

On September 26, 2017, petitioner returned to respondent's Jacobi Medical Center with severe complaints associated with his right facial region. He was admitted and underwent surgery on September 27, 2017. The surgery consisted of an open reduction internal fixation of the right zygomaticomaxillary complex fracture with Medpor implant placement. Petitioner was discharged the next day on September 28, 2017. Petitioner was readmitted to respondent's Jacobi Medical Center on October 2, 2017 for increasing pressure in his right eye. He was given antibiotics, and a possible diagnosis of cellulitis v. abscess. Petitioner was discharged October 3, 2017 with instructions to return to the eye clinic. Petitioner returned to the ophthalmology clinic on October 6, 2017. Petitioner was seen again in respondent's ophthalmology clinic on October 26, 2017 for continued swelling on his right eye and diplopia.

On November 17, 2017, petitioner returned to the ophthalmology clinic with complaints of limitation in movement in his right eye, and diplopia. He was advised to return in one month. Petitioner returned to the ophthalmology clinic on January 8, 2018 for continued swelling and discomfort in his eye, as well as the fact

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that his right eye appeared to be sunken.

Petitioner was advised that this was normal healing. On January 18, 2018, petitioner returned to respondent's facility again with complaints of asymmetry of his eyes. The note indicates that "further surgery may not be covered by insurance because it would be more toward aesthetic changes."

On February 16, 2018, petitioner returned to respondent's Jacobi Medical Center with continued concerns that his right eye was sunken in. Petitioner was advised at this visit that his orbital floor may not have been repaired in the initial surgery, and that further surgery may be necessary.

DISCUSSION

Actions against a municipal entity such as defendant are governed by McKinney's Unconsolidated Laws of N.Y. § 7401(2) which, in relevant part, provides that such action may not be commenced "unless a notice of intention to commence such action and of the time when and the place where the tort occurred and the injuries or damage, were sustained [...] shall have been filed with a director or officer of the corporation within ninety days after such cause of action shall have accrued." Pursuant to General Municipal Law (GML) § 50-e, the timely filing of a notice of claim is a statutory precondition to the initiation of personal injury suits against a municipality. Thus, a party has 90 days from the date the claim arises to file a notice of claim and when a notice of claim is served beyond the required ninety-day period, without leave of court, it is deemed a nullity (*see McShane v. Town of Hempstead*, 66 AD3d 652 [2009]; *Fuschsia Sun et al. v. New York City Health and Hosps. Corp. et al.*, 13 AD3d 151, 152 [1st Dept 2004]); *Potts v. City of New York Health and Hosps. Corp.*, 270 AD2d 129, 130 [1st Dept 2000]). The failure to comply with this condition precedent is grounds for dismissal of the action (*see generally Silberstein v. County of Westchester*, 92 AD2d 867 [2d Dept 1983], *aff'd* 62 NY2d 675 [1984]).

GML §50(e)(2) requires that a written notice sworn to, by, or on behalf of the claimant set forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; (4) and the items of damage or injuries claimed to have been sustained so far as then practicable.

The purpose of the statutory notice of claim requirement is to provide a municipality or public corporation with an adequate opportunity to investigate and to explore the merits of the claim while the information is fresh and readily available (*Cruz v. New York City Housing Authority*, 269 A.D.2d 108 [1st Dept. 2000]; *Rosenbaum v. City of New York*, 8 NY3d 1, 11 [2006]). Indeed, "[t]he test of the sufficiency of a notice of claim is merely whether it includes information sufficient to enable the city to investigate" (Rosenbaum, 8 NY3d at 7, *citing to Brown v City of New York*, 95 NY2d 389 [2000] [internal quotation marks and citations omitted]). Therefore, the notice of claim must contain a sufficient description of "the place," "the time," and "the nature" of the claim (*see id.*).

Courts have broad discretion to grant permission to file a late notice of claim (*Ali v. Bunny Realty Corp.*, 253 AD2d 356, 357 [1st Dept. 1998]). In deciding whether to grant a motion to file a late notice of claim, the court must look to the factors enumerated in General Municipal Law § 50-e(5) for guidance. More specifically, the court must consider all the facts and circumstances, with special attention to (1) whether an infant plaintiff is involved, (2) whether there is a reasonable excuse for the delay, (3) whether the municipal defendant acquired actual knowledge of the pertinent facts constituting the claim, and (4) whether the delay has prejudiced the defendant's ability to defend the claim (Gen. Mun. L. § 50-e[5]; *see Frith v. New York City Housing Authority*, 4 AD3d 390, 391 [2d Dept. 2004]; *Ali v. Bunny Realty Corp.*, 253 AD2d, at 357, *surpa*). No single factor is determinative (*see Matter of Dubowy v. City of New York*, 305 AD2d 320 [1st Dept. 2003] ["presence or absence of any one factor is not determinative"]).

The instant matter does not involve an infant, and therefore is outside the ambit of comparisons to the Court of Appeals' decision in *Wally G. ex rel. Yoselin T. v. New York City Health and Hospitals Corp.*, 27

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NY3d 672 (2016), wherein the Court denied an infant leave to serve late notice of claim against a medical center, based on the center's alleged negligence which led to injuries sustained after the infant was born prematurely. Even if it did fall within the parameters of *Wally G.*, that case is inapposite to the facts contained herein.

In *Wally G.*, the Court's concern was not rooted in the length of the delay, but rather in whether the medical records that were at issue provided respondent with sufficient notice of the petitioner's potential claims. In resolving that issue, the Court noted that the medical records at issue in the case were bereft of any indication that respondent or its staff were fully aware that any of their actions were potentially attributable to malpractice. As such, the Court reasoned that the medical records were insufficient to provide notice insofar as they required more than a mere suggestion that the alleged injury was the result of malpractice (*Wally G. ex rel. Yoselin T.*, 27 NY3d 672, *supra*).

Here, petitioner treated with respondent Jacobi Medical Center through February 16, 2018. Under the continuous treatment doctrine, petitioner would have until May 17, 2019, in which to file an application to serve a late notice of claim (*see Hill v New York City Health & Hosps. Corp.*, 147 AD3d 430 [1st Dept. 2017]). However, petitioner avers that out of an abundance of caution petitioner submitted the instant application.

Petitioner has submitted the affirmation of Howard Spinelli, M.D. ("Dr. Spinelli"), a board-certified plastic surgeon and ophthalmologist, who has opined that based upon his review of the records, the September 27, 2017 surgery was not performed correctly. Dr. Spinelli has opined that petitioner has a meritorious cause of action against respondent. Moreover, the February 16, 2018 note from Jacobi Medical Center demonstrates that respondent was aware that the September 27, 2017 surgery, but did not properly correct the injuries petitioner sustained and that further surgery would be necessary. To be sure, petitioner's un rebutted affidavit affirms that respondent's employees administered treatment to petitioner in September 2017 through February 2018, and that at all relevant times, respondent was aware of the facts and circumstances surrounding the claim, and. Jacobi Medical Center generated the only records in existence reflecting the malpractice herein. As such, it is axiomatic that respondent was on notice of petitioner's potential claim.

In addition, respondent will not be substantially prejudiced if this court grants the requested relief. To be sure, all of the relevant witnesses are either employees of respondent, or contractees of respondent. As relatively little time has elapsed since the alleged malpractice, those witnesses likely have retained a recollection of the facts underlying petitioner's claims. Thus, respondent is not prejudiced in its investigation of this claim.

Finally, petitioner has a reasonable excuse for delay in filing a notice of claim. Indeed, petitioner did not become aware that a second surgery was the only option to correct his injuries until February 2018. Petitioner had been initially informed that his injuries would resolve over time. Moreover, petitioner was not in possession of his medical records until August 2018, well after his September 27, 2017 surgery. Thereafter, petitioner's counsel had the records reviewed to determine if petitioner had a meritorious case.

As such, this court finds ample reason to grant the instant application. Therefore, on this record, the court will allow petitioner to serve a late notice of claim, *nunc pro tunc*. Indeed, the analysis weighs heavily in favor of permitting the notice and allowing petitioner's claims to proceed. The scale tips decidedly in favor of going forward in light of the strong policy against punishing petitioner for a delay as short as the one occasioned here, especially given the lack of prejudice and the actual knowledge of the facts with which respondent can fairly be charged (*see Rodriguez*, 270 AD2d at 110, *supra*; *Williams v. Bronx Municipal Hosp. Center*, 205 AD2d at 421, *supra* [nine year delay excusable because of knowledge of facts and lack of prejudice]; *contrast, Harris v. City of New York*, 297 AD2d 473, 474 [1st Dept. 2002][holding lack of notice and the passage of time will prejudice city because it won't be able to find witnesses or conduct a proper investigation], *lv. denied* 99 NY2d 503 [2002]).

Accordingly, based on the foregoing, it is hereby

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ORDERED and ADJUDGED that petitioner's motion for leave to file a late notice of claim, is GRANTED; and it is further

ORDERED and ADJUDGED that the petition of MUSHTAQ GRANT, pursuant to General Municipal Law § 50-e(5) for leave to serve and file a late notice of claim on respondent the New York City Health and Hospitals Corporation is granted; the late notice of claim annexed to the petition herein is deemed to have been served *nunc pro tunc*; and it is further

ORDERED that the Clerk of the Court, New York County, is directed to make any and all appropriate notations to facilitate this court's directives; and it is further

ORDERED that the parties are directed to appear for a conference before the court on Tuesday June 25, 2019 at 9:30 AM at 111 Centre Street, Room 1227 to ensure compliance with this court's order, as previously directed.

This constitutes the decision and order of the court.

Dated: *April 22, 2019*

ENTER:

George J. Silver
HON. GEORGE J. SILVER

GEORGE J. SILVER
J.S.C.