Sekhniashvili v Coney Is. Hosp. Ctr.
2019 NY Slip Op 33174(U)
October 21, 2019
Supreme Court, Kings County
Docket Number: 517640/2019
Judge: Marsha L. Steinhardt
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At an IAS Term, Part MMESP-7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of October 2019.

P R E S E N T:

HON. MARSHA L. STEINHARDT,
Justice

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REVAZI SEKHNIASHVILI, individually and as parent of ANDRIA SEKHNIASHVILI, an infant under the age of 2, ANA ELKIKASHVILI, individually and as parent of ANDRIA SEKHNIASHVILI, an infant under the age of 2, and ANDRIA SEKHNIASHVILI, an infant under the age of 2

Plaintiff,

DECISION AND ORDER
Index No. 517640/2019

-against-

CONEY ISLAND HOSPOTAL CENTER, NEW YORK CITY HEALTH AND HOSPITALS CORP., THE CITY OF NEW YORK, GRIGOL ADEISHVILI, M.D., MAIMONIDES MEDICAL CENTER (a non-for-profit corporation), "JOHN" HOLDER (OB/RN, registered nurse, MAIMONIDES, etc.), "JOHN" BERNOL (OB/RN, registered nurse, MAIMONIDES, etc.), "JOHN" BERKA (OB/RN, registered nurse, MAIMONIDES, etc.), JOHN "DOE" 1 and JOHN "DOE" 2,

Defendants.

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The following papers numbered 1 to 3 read herein:	Papers Numbered
Notice of Motion	1
Opposition	2
Reply	3

This is a motion brought on by the Plaintiffs requesting an Order permitting them to file a late Notice of Claim. Defendants, Coney Island Hospital and New York City Health and Hospitals Corporation (HHC) oppose.

This is an action sounding in medical malpractice wherein Plaintiffs allege that antibiotic treatment rendered by Municipal Defendants to Ana Elikashvili, from on or about May 30, 2018 through on or about June/July 2018, during the course of her pregnancy with infant Plaintiff, resulted in a claim for personal injuries on behalf of both mother and child, in addition to a claim for the wrongful life of the child. Infant, Andria, was born on September 25, 2018. It is alleged that the Plaintiffs' discovered the purported malpractice on or about January 7, 2019. The Notice of Claim was served on January 22nd of the same year. The action was commenced by the electronic filing of a Summons with Notice on August 11, 2019, although same has not been served on Defendants.

Adult Plaintiffs allege, in the Notice of Claim, that the Municipal Defendants failed to inform them of the "high risks of using antibiotics and the deformity and/or defects that the antibiotics would cause were serious … and that an abortion was an alternative…." (The Court notes that although Plaintiffs claim this is an action for "wrongful life," and concedes, based on the mother's 50-h Hearing testimony, that the child has had a rocky course and suffers from hydronephrosis, he is still in possession of both kidneys, and the Court finds it beyond credulity that an abortion would be preferable to an apparently, mostly, healthy child.) At the 50-h hearing, Ana Elikashvili testified that she became aware of the infant's underlying condition (difference in the size of his kidneys) on June 22, 2018 when she began her pre-natal treatment at Maimonides Medical Center. Andria was born approximately two months later, on September 25th. Plaintiff concedes that the statute of limitations for service of the Notice of Claim with reference to the "wrongful life" claims and personal injury claims of Ms. Elikashvili and the infant Plaintiff ran out in late December 2018. It is their contention that they did not learn of the tortious conduct of the Defendants until January 7, 2019 and that the Notice of Claim that forms

the subject matter of this motion was served within three weeks thereafter. The Plaintiffs further allege that they did not receive the relevant records until April of 2019.

General Municipal Law §1(a) provides "that [i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action … against a public corporation, … the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises …."

Subdivision (5) continues to discuss an application to serve a "late" notice of Claim:

> "Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one of this section, whether such service was made upon a public corporation or the secretary of state. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of this section or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; …"

"In General Municipal Law § 50-e, the Legislature enacted a protocol for serving a notice of claim as a condition precedent to a suit against a public corporation (*Williams v. Nassau County Medical Center*, 6 NY3d 531 [2006]. "Section 50-e (1) requires that the notice be served within 90 days after the claim arises" (*id.* at 535). "The Legislature, however, gave courts discretion to extend the time and devised criteria for determining whether to grant extensions (*id.* at 535; *see Cohen v Pearl Riv. Union Free School Dist.*, 51 NY2d 256, 265-266 [1980]). "Section 50-e (5), the late-notice statute, directs the court to consider, in particular, whether within 90 days or a reasonable time thereafter the public corporation (or its attorney or insurance carrier) acquired actual knowledge of the facts underlying the claim" (*Williams v. Nassau County Medical Center*, 6 NY3d at 535). "In deciding whether to grant an extension, the court must also

consider a host of factors, including infancy and whether allowing late filing would result in substantial prejudice to the public corporation" (*id.* at 535).

The Plaintiffs present a very "sketchy" scenario of the facts. They do not submit a medical affidavit/affirmation setting forth the basis of their malpractice theory. A clear recitation of the medicine and/or the basis for the lawsuit would be helpful to ascertain what the Defendant did and to determine if they had knowledge of the facts surrounding their alleged actions. It is apparent, however, that at some point during her pregnancy, April 29, 2018, Plaintiff presented to Coney Island Hospital suffering from a urinary tract/kidney infection, remained in the hospital for several days, and was sent home with a prescription for oral antibiotics. The next date of significance is Plaintiff's first appointment at Maimonides, which occurred on June 22, 2018, at which time she was told of the difference in size of the fetus' kidneys and advised to discontinue the antibiotic therapy. It is not clear why Plaintiff transferred from one health care provider (Coney Island Hospital) to another (Maimonides Medical Center) for pre-natal care. Further, from this outline of the facts it is impossible to conclude that the Health and Hospitals Corporation would have knowledge of the underlying facts that surround the claim(s). No documentation is presented to lead the Court to conclude that defendant HHC had knowledge of any of the facts underlying Plaintiffs' allegations.

"Merely 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 the claimant" (*Argueta v. New York City Health & Hosp. Corp.*, 74 AD3d 713, 714 [2d Dept 2010], citing *Williams v. Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006] [internal quotations omitted]).

Plaintiffs have not established that the Defendants will not be prejudiced by the granting of this application. "[T]he burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation (*Newcomb v. Middle Country Central School District*, 28 NY3d 455, 466 [2016]. "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" (*id.* at 466). Based on the facts and circumstances and the facts before it, the Court holds that the Defendants had no notice of the underlying facts or that a potential lawsuit was in the making. To permit service of the Notice of Claim in question would result in substantial prejudice to the Defendants.

Lastly, it is not clear that the infancy of Andria Sekhniashvili was a substantial factor in causing the delay in filing the Notice of Claim. The parents were aware of the discrepancy in the size of the infant's kidneys prior to his birth.

For all the foregoing reasons, Plaintiffs' motion to serve a late Notice of Claim is denied. This constitutes the decision, opinion and order of this court.

ENTER,

MLP

HON. MARSHA L. STEINHARDT
J.S.C.

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