SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JULIO RODRIGUEZ, III** **PART** **IAS MOTION 62EFM**

Justice

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INDEX NO. 805176/2019

DARRELL LECKIE,

MOTION DATE 10/03/2019

Petitioner,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITAL CORPORATION

DECISION + ORDER ON PETITION

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for LEAVE TO FILE.

This proceeding arises from petitioner's medical treatment while in the custody of the New York City Department of Corrections ("NYC DOC") and Department of Correction of the State of New York ("DOCS") during the period from April 2018 until about December 20, 2018. Petitioner now seeks an order deeming timely notices of claim served upon respondent City of New York ("City") on March 6, 2019, and upon respondent New York City Health and Hospital Corporation ("HHC") on March 13, 2019. Petitioner seeks such order pursuant to CPLR 214-a or alternatively General Municipal Law ("GML") 50-e. Respondents City and HHC oppose the petition.

Pursuant to General Municipal Law ("GML") 50-i (1), service of a notice of claim is a condition precedent to filing a claim against "a city, county, town, village, fire district or school district." Said notice of claim must be served within ninety days after the claim arises (GML 50-i). However, upon application, the court, in its discretion, may extend the time to serve a notice of claim, provided that the extension does not exceed the statute of limitation applicable to actions against a public corporation (GML 50-e [5]).

When evaluating the time period during which a claimant must serve a notice of claim in a medical malpractice action, as here, the continuous treatment doctrine may apply to incorporate treatment that otherwise would be time-barred (*Allende v N.Y.C. Health & Hosp. Corp.*, 90 NY2d 333, 337-338 [1997] ["if otherwise applicable to the facts of this case, the continuous treatment doctrine applies to the time in which to file a notice of claim under General Municipal Law § 50-e"] *citing Borgia v City of New York*, 12 NY2d 151, 155 [1962]; *see* CPLR 214-a). "Under the continuous treatment doctrine, the time in which to bring a malpractice action is stayed when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint" (*Allende* at 338, *citing McDermott v Torre*, 56 NY2d 399, 405 [1982]). The rationale for the foregoing, as noted by the Court of Appeals in

Borgia, lies in the "absurd[ity]" of "requir[ing] a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent or by filing a notice of claim in the case of a city hospital" (*Borgia*, 12 NY2d at 156).

In this case, petitioner alleges that on or about "mid April 2018", after being admitted to NYC DOC, he complained about extreme mouth pain and jaw pain. On or about April 24, 2018, petitioner alleges that he was treated by a medical provider at Correctional Health Services ("CHS") or HHC, who took x-rays and ordered a tooth extraction. Petitioner further alleges that despite his continuous complaints of pain to his right jaw, no extraction was performed. On October 22, 2018, and after treatment with antibiotics, petitioner was transferred to Ellenville Regional Hospital for treatment of sepsis and drainage of abscess from his right jaw area. Petitioner alleges that his injuries, including permanent hearing loss in his right ear, were caused by medical and dental malpractice in failing to extract the tooth upon his earlier complaints of pain.

Whether or not the continuous treatment doctrine applies to petitioner's allegations here, the court may consider the whole set of allegations in its analysis of petitioner's application under GML 50-e to deem his prior served notices of claim timely. The earliest event in the alleged course of conduct is sometime in April 2018; therefore, petitioner was permitted to apply for leave to serve a late notice of claim until at least June 30, 2019 (*see* GML 50-e [5]; GML 50-i [1]). The order to show cause upon which this petition is before the court is dated June 11, 2019 (*see Nieves v Martinez*, 285 AD2d 410 [1st Dept 2001]). Accordingly, the application pursuant to GML 50-e is timely.

A court considering an application for leave to serve a late notice of claim upon a public corporation (or deem a late-served notice of claim timely) must consider various factors, of which the "most important, based on its placement in the statute and its relation to other relevant factors" is whether the public corporation acquired actual knowledge of the essential facts constituting the claim within ninety days of the accrual of the claim or a reasonable time thereafter (*Andrews v Long Is. R.R.*, 110 AD3d 653, 653 [2d Dept 2013] citing *Matter of Felice v. Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 147, [2d Dept 2008]; *see* GML 50-e [5]; *Towson v New York City Health and Hospital Corporation*, 158 AD3d 401 [1st Dept 2018]). The court shall also consider whether the claimant made an excusable error concerning the identity of the public corporation; whether the delay would substantially prejudice the public corporation in its defense; and whether the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim (*id.*). "A court's decision to grant or deny a motion to serve a late notice of claim is 'purely a discretionary one.'" (*Newcomb v Middle Country Cent. School Dist.*, 28 NY3d 455, 465 [2016] citing *Cohen v. Pearl Riv. Union Free School Dist.*, 51 NY2d 256, 265 [1980]). Finally, "[n]one of these enumerated factors is controlling" (*Towson* at 401), and "the lack of excuse is not fatal" (*Rodriguez v City of New York*, 172 AD3d 556 [1st Dept 2019]).

Here, petitioner does not attempt to show a reasonable excuse for the delay. This, however, is not necessarily fatal (*id.*). Petitioner instead relies on the other two factors for consideration—actual knowledge and prejudice.

In a medical malpractice action, "in order for the medical provider to have actual knowledge of the essential facts" based upon medical records, such records "must 'evince that the medical staff, by its actions or omissions, inflicted an [ ] injury on plaintiff'" (*Wally G. v New York City Health & Hosps. Corp.*, 27 NY3d 672, 677 [2016] *quoting Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]).

Addressing this issue of actual knowledge, petitioner annexes as an exhibit HHC medical records showing "Dental Class I Extractions Indicated" on April 24, 2018, and "Hearing loss NOS" on December 20, 2018 (Berezovski aff, Ex F, HHC records at 2). Consequently, the records demonstrate that the need for dental extraction was in fact medically indicated. Petitioner contends, therefore, that the records' indication that the need for such extraction was medically noted but no such extraction was performed gave respondents actual notice of the claims herein. Moreover, petitioner stated in an annexed affidavit that he made continual complaints of severe pain to HHC staff, yet still no extraction was performed (Berezovski aff, Ex E, petitioner's affidavit at ¶¶ 12-15). Petitioner further stated that "[o]n or around October 19, 201[8], the pain became unbearable, [he] was unable to eat and developed a high fever", and on October 22, 2018, he was transferred to Westchester Medical Center "for an emergency treatment of sepsis and extraction of tooth #31" (*id.* at ¶¶ 12-15). Finally, petitioner relies on *Wade v City of New York* for the proposition "that the city had actual notice of the injury since petitioner was injured in the presence of city employees while confined in a city institution" (65 AD2d 534 [1st Dept 1978]).

Petitioner's fundamental claim is that respondents' failure to extract a tooth that warranted extraction caused injuries, including infection, sepsis, and hearing loss. The extraction was medically indicated in HHC records as of April 2018, but no extraction was performed by HHC over a period of months in which petitioner continually complained of pain. It is alleged that the months of delay before eventual emergency extraction caused petitioner's injuries.

In opposition, respondents annex *inter alia* a "Patient Refusal of Treatment" form which notes that petitioner refused "ext[raction of tooth] # 31" (Terrone aff, Ex A, HHC medical records at 39). The same form, dated April 24, 2018, indicates "pain, swelling, gums disease, abscess formation, [and] infection" (*id.*). Additionally, respondents argue that indication in the records of the need for tooth extraction does not intrinsically "suggest that the medical staff by its acts or omissions inflicted any injury on" petitioner (*Cartagena v New York City Health & Hosps. Corp.*, 93 AD3d 187, 190 [1st Dept 2012]).

In reply, petitioner refers to his affidavit in which he stated that "[d]espite the medical order and my repeated complaints to NYC DOC staff and CHS / HHC staff over the course of months about the great pain no extraction was ever performed" and that the staff "told me that I was on a waiting list to get my tooth extracted" (Berezovski aff, Ex E, petitioner's affidavit at ¶¶ 8-9). Moreover, petitioner notes that there is no dispute that he requested dental care on August 23, 2018 (Terrone aff, Ex A, HHC medical records at 43). Petitioner's counsel asserts that petitioner never refused dental treatment and that "to the extent any refusal form was signed, it was not done willingly, voluntarily, or with knowledge of what he was signing" (Berezovski aff in reply, at ¶ 19). Petitioner's affidavit, however, does not comment in any fashion on the form or the issue of refusal of treatment (*see* Berezovski aff, Ex E, petitioner's affidavit).

Notwithstanding respondents' assertions that they had no notice of the essential facts constituting the claim, "the basic facts underlying the malpractice claim"—to wit, that petitioner complained of severe tooth pain, that a tooth extraction was medically indicated, and that there was significant delay in the performance of a tooth extraction, such delay allegedly causing injuries—indeed "can be gleaned from the medical records" (*Katshana H. v New York City Health & Hosps. Corp.*, 173 AD3d 448, 448 [1st Dept 2019]). Additionally, the fact that the extraction was medically indicated on April 24, 2018, but not performed during petitioner's custody with DOC through August 30, 2018, or until emergency transfer to Westchester Medical Center on October 22, 2018, "evince[s] that the medical staff, by its...omissions" may have inflicted injury upon petitioner (*see Wally G. v New York City Health & Hosps. Corp.*, 27 NY3d 672, 677 [2016]). Accordingly, the court finds that petitioner has met their burden to show that respondents had actual knowledge of the essential facts constituting the claim.

As to prejudice, under *Newcomb* (28 NY3d 455 [2016]), a burden shifting framework is utilized by which petitioner must first "present some evidence or plausible argument that supports a finding of no substantial prejudice" (*id.* at 466). Here, petitioner's essential argument is that respondents' knowledge of the essential facts at the time of the occurrence supports a finding of no substantial prejudice (Berezovski aff at ¶54-56; *see Goodall v City of New York*, 179 AD2d 481 [1st Dept 1992]). This court finds petitioner's position to be plausible such that the burden then shifted to respondents to "respond with a particularized evidentiary showing that [respondents] will be substantially prejudiced if the late notice is allowed" (*Towson* at 404 [1st Dept 2018] quoting *Newcomb* at 466-467 [2016] [leave granted upon plaintiff's showing of reasonable excuse and no prejudice despite defendant's lack of actual knowledge]).

In opposition, respondents merely argue that petitioner failed to meet their initial burden under *Newcomb* and makes no attempt at a particularized evidentiary showing of prejudice. Additionally, respondents at this time appear not only to oppose petitioner's instant application to deem the notices of claim timely but also to argue the substantive merits of the claim through the presentation of evidence, including the treatment refusal form. Respondents' ability to address the substance of petitioner's claims impliedly militates against a finding of a substantial prejudice.

Ultimately, due to respondents' failure to demonstrate prejudice through a particularized evidentiary showing, this court finds that respondents will not be substantially prejudiced by deeming petitioner's prior served notices of claim timely.

Having thus considered the factors of reasonable excuse, actual knowledge, and potential prejudice, the court finds that the circumstances herein constitute an appropriate basis to deem the prior served notices of claim timely pursuant to GML 50-e.

Given that the issue presented here is whether petitioner's served notices of claim may be deemed timely, the court's determination under GML 50-e renders the continuous treatment issue moot.

Accordingly, it is ORDERED that petitioner's application pursuant to General Municipal Law 50-e seeking to deem timely *nunc pro tunc* petitioner's notices of claim served upon respondent City of New York on March 6, 2019, and upon respondent New York City Health and Hospital Corporation on March 13, 2019, is granted, and the notices of claim are hereby deemed timely; and it is further

ORDERED petitioner shall serve a copy of this order with notice of entry upon respondents within 30 days of this order.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

December 27, 2019

HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
	X	GRANTED	☐ DENIED	☐ GRANTED IN PART		☐ OTHER	
APPLICATION:	☐	SETTLE ORDER		☐ SUBMIT ORDER			
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE	