Springer v New York City Health & Hosps. Corp.
2020 NY Slip Op 33713(U)
November 5, 2020
Supreme Court, New York County
Docket Number: 805198/2020
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10
----------X
PEGGY A. SPRINGER, as Proposed Guardian for
IRENE SPRINGER **Index №. 805198/2020**

Petitioner,

-against-

THE NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION

Respondent
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In this medical malpractice action, petitioner PEGGY A SPRINGER ("petitioner"), as proposed guardian for IRENE SPRINGER ("patient"), moves pursuant to General Municipal Law ("GML") §50-e (5) ["Section 50-e (5)"] for leave to serve a late notice of claim upon the respondent the New York City Health and Hospitals Corporation ("respondent") by deeming a proposed notice of claim, and subsequently amended notice of claim, attached to the instant petition as timely served, *nunc pro tunc*. Respondent opposes the petition.

BACKGROUND

Patient received treatment at Harlem Hospital Center, one of respondent's facilities, in August 2019. A notice was claim was not filed until several months later, on March 9, 2020. After the initial filing of the notice of claim, petitioner's counsel was advised that Shirley Springer was not patient's proposed guardian, and that petitioner should be named instead. On June 22, 2020, an amended notice of claim was filed that indicated the correct proposed guardian. Respondent does not challenge petitioner's amended notice of claim. Rather, respondent argues that petitioner's original untimely filing of the March 9, 2020 notice of claim warrants denial of the instant application. In support of the instant application, petitioner annexes the affidavit of petitioner, who states that she was unaware of time constraints because at the time she was totally focused on the care of patient.

DISCUSSION

Pursuant to GML § 50-e (1) (a), a party seeking to sue a public corporation must serve a notice of claim on the prospective respondent "within ninety days after the claim arises" (*Matter of Newcomb v Middle County Cent. Sch. Dist*., 28 NY3d 455, 460 [2016]; *see Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d 672, 674 [2016]; *Matter of Townson v New York City Health & Hosps. Corp*., 158 AD3d 401, 402 [1st Dept 2018]. The instant proceeding for leave to serve a late notice of claim was commenced on or about July 8, 2020, nearly a year after respondent's alleged malpractice arose (August 2019).

GML Section 50-e (5) which governs applications to file a late notice of claim, permits a court in its discretion to extend the time for a petitioner to serve a notice of claim. Under that section, a court is required to consider factors, including as is pertinent here, "whether there was…(2) a reasonable excuse for the delay [in service], (3) actual knowledge on the part of [the respondent] of the essential facts constituting the claim within the 90-day statutory period or within a reasonable time thereafter, and (4) substantial prejudice to [the respondent] due to the delay" (*Matter of Newcomb v Middle County Cent. Sch. Dist*, 28 NY3d at 463, *supra*).

"The lower courts have broad discretion to evaluate the factors set forth in General Municipal Law § 50-e (5). At the same time, a lower court's determinations must be supported by record evidence" (*Matter of Newcomb v Middle County Cent. Sch. Dist*., 28 NY3d at 465, *supra* [internal citations omitted]). "[W]hile the presence or the absence of any one of the factors is not necessarily determinative, whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance" (*Matter of Townson v New York City Health & Hosps. Corp*., 158 AD3d at 402, *supra* [internal quotation marks and citation omitted]).

It is well established that "the absence of a reasonable excuse is not, standing alone, fatal to [an] application" to file a late notice of claim (*Matter of Richardson v New York City Hous. Aut*h., 136 AD3d 484, 485 [1st Dept 2016] [internal quotation marks and citation omitted]). The actual knowledge requirement of Section 50-e (5) "'contemplates 'actual knowledge of the essential facts constituting the claim,' not knowledge of a specific legal theory" (*Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 27 NY3d at 677 *quoting Williams v Nassau County Med. Ctr*., 6 NY3d 531, 537 [2006]; *Matter of Townson v New York City Health & Hosps. Corp.*, 158 AD3d at 403).

In addition, a court is allowed to consider other relevant factors including whether the claimant's delay in moving to file a late notice of claim was occasioned by claimant's condition itself (*Plaza v New York Health & Hosps. Corp. (Jacobi Med. Ctr.),* 97 AD3d 466, 471 [1st Dept 2012] *citing Williams v Nassau County Med. Ctr*., 6 NY3d at 538, *supra*).

Regarding the prejudice showing required under Section 50-e (5), a petitioner must "make an initial showing that the public corporation will not be substantially prejudiced and then [t]he public corporation [must] rebut that showing with particularized evidence" (*Matter of Newcomb v Middle County Cent. Sch. Dist*, 28 NY3d at 467, *supra*).

Reasonable Excuse

As an initial matter, here petitioner has failed to set forth a reasonable excuse for failing to timely serve a notice of claim or to demonstrate that respondent acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and that it would not be substantially prejudiced by the delay (*see Nairne v. N.Y. City Health & Hosps. Corp.*, 303 AD2d 409 [2d Dept. 2003]; *see* General Municipal Law § 50-e[5]). Petitioner fails to offer a reasonable excuse for the delay in moving to serve a late notice of claim given that petitioner's excuse amounts to ignorance of the law insofar as petitioner argues that tending to patient's needs prevented petitioner from knowing that a statutory precondition to commencing a lawsuit existed. "Ignorance of the law is not a reasonable excuse" (*Basualdo v*

Guzman, 110 AD3d 610, 610 [1st Dept 2013]). Petitioner offers no other excuse for the delay. In addition, petitioner has also failed to demonstrate that there is any nexus between patient's condition and the delay. To be sure, petitioner does not specifically describe patient's condition within the petition. When pressed for details at oral argument, petitioner's counsel asserted that patient had sacral scars that respondent was aware of. This declaration alone does not make petitioner's delay any more excusable (*Williams v Nassau County Med. Ctr*., 6 NY3d at 538, *supra*). This is particularly true where petitioner's counsel's only contention is that respondent acquired actual knowledge of petitioner's claim by virtue of the Harlem Hospital records even though petitioner does not specify facts regarding that claim from which respondent's notice can be imputed. Respondent's mere knowledge of patient's treatment at Harlem Hospital "on or about August 2019 prior and subsequent thereto," is not sufficient to impute actual knowledge of facts underlying petitioner's claim (*see Bullard v. New York*, 118 AD2d 447, 450-451 [1st Dept. 1986]).

Actual Knowledge

A hospital may be deemed, under appropriate circumstances, to have acquired actual knowledge of the facts underlying a claim of malpractice by reason of having been in possession of the plaintiff's medical records since the time of the alleged malpractice (*see Kurz v. New York City Health & Hospitals Corp*., 174 AD 2d 671 [2d Dept 1991]). However, "[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 NY 3d 531, 537 [2006]). Actual knowledge based upon hospital records may not be found absent a clear showing of a nexus between the alleged malpractice and the injuries (*see In Re Fallon v. County of Westchester*, 184 AD 2d 510 [2d Dept 1992]). Such nexus may only be shown "[w]here malpractice is apparent from an independent review of the medical records" (*Cifuentes v New York City Health and Hosp Corp*, 43 AD 3d 385, 386 [2d Dept 2007]). It is notable here that patient was consigned to the care of a nursing home subsequent to respondent's observations of petitioner in August 2019. Petitioner's counsel does not present evidence that discounts the possibility that patient's alleged injuries were the result of care rendered at the nursing home rather than in respondent's custody.

Since the court is not qualified to evaluate medical records to determine whether they indicate on their face that physicians committed malpractice causing injury, the petitioner, in order to establish that the hospital had timely actual knowledge of the essential facts of the claim through its own medical records, not only must annex those records to the petition to demonstrate that they exist, but must often submit an affirmation of a medical expert to interpret those records and opine within a reasonable degree of medical certainty, supported by a presentation of objective medical facts, that the records demonstrate on their face that there were departures from good and accepted medical practice on the part of hospital staff, and that those departures proximately caused the injuries alleged. No affirmation of a physician interpreting the medical records is annexed to the moving papers. Petitioner's counsel's own reference to purported entries in patient's medical records does not satisfy petitioner's burden. "[T]he medical records must do more than 'suggest' that an injury occurred as a result of malpractice" (*Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp)*, 27 NY3d at 677, *supra*). Here, no medical records have been submitted to

support the conclusions drawn by petitioner's counsel. Rather, petitioner's counsel merely suggests that the medical records *would* show evidence of the hospital's purported acts and omissions.

As there is no evidence submitted to evince that the medical staff at Harlem Hospital, by any acts or omissions, inflicted injury on patient, petitioner's argument that respondent had notice of petitioner's claim is unavailing.

Prejudice

Finally, petitioner has failed to meet her affirmative burden of demonstrating lack of prejudice (*see Felice v. Eastport/South Manor Central School Dist*., 50 AD 3d 138 [2d Dept 2008]). In *Matter of Newcomb v Middle County Cent. Sch. Dist.*, the Court of Appeals clarified the burden of proof regarding substantial prejudice which a court must consider in determining whether to extend the time for a petitioner to serve a notice of claim. The Court held "that the burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation. 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" (28 NY3d at 466). "Once this initial showing has been made, the public corporation must respond with a particularized evidentiary showing that the corporation will be substantially prejudiced if the late notice is allowed" (*id*. at 467). "The rule [the court] endorse[s] today-requiring a petitioner to make an initial showing that the public corporation will not be substantially prejudiced and then requiring the public corporation to rebut that showing with particularized evidence-strikes a fair balance" *(id)*.

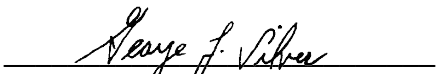
In her moving petition and supplemental submissions, petitioner maintains that there is no prejudice to respondent occasioned by the delay in serving the subject late notice of claim. Petitioner's argument of lack of prejudice relies, for the most part, upon the assertion that respondent had actual knowledge of the essential facts of her claim as a result of its possession of the medical records. However, petitioner has failed to present "some evidence or plausible argument" supporting the position that respondent was not substantially prejudiced by the subject delay (*Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 466). As discussed above, petitioner failed to establish that respondent had actual notice of the essential elements constituting the claim. Petitioner's remaining assertions that respondent would not be substantially prejudiced by the delay in serving a notice of claim are conclusory, and without more, fail to satisfy petitioner's minimal burden (*see Matter of Maldonado v City of New York*, 152 AD3d 522, 523 [2d Dept 2017]. Given that petitioner has failed to satisfy her burden to present "some evidence or plausible argument" to support a finding of lack of substantial prejudice to respondent, the burden does not shift to respondent to make a particularized evidentiary showing that it would be substantially prejudiced if a late notice of claim is allowed (*see Matter of Newcomb v Middle County Cent. Sch. Dist.*, 28 NY3d at 466; *Matter of Cruz v Transdev Servs., Inc.*, 160 AD3d 729, 731 [2d Dept 2018]).

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition of petitioner PEGGY A. SPRINGER, as proposed guardian for IRENE SPRINGER, pursuant to General Municipal Law § 50-e(5) for leave to serve a late notice of claim upon respondent the New York City Health and Hospitals Corporation by deeming the proposed notice of claim attached to the instant petition as timely served *nunc pro tunc*, is denied and the proceeding is dismissed.

The Clerk shall enter judgment accordingly.

Dated: November 5, 2020



GEORGE J. SILVER, J.S.C.