SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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JORGE MATOS,

Plaintiff,

- v -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.

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INDEX NO. 805333/2019

MOTION DATE 04/16/2020

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 ,13, 14 15, 17, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30 (Motion 001)

were read on this motion to/for LEAVE TO SERVE LATE NOTICE OF CLAIM/CONSOLIDATION/AMEND CAPTION/CROSS MOTION TO DISMISS COMPLAINT.

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to General Municipal Law § 50-e(5) and McKinney's Unconsolidated Laws of N.Y. § 7401(2) (New York City Health & Hosps. Corp. Act § 20[2], L 1969, ch 1016, § 1, as amended) for leave to serve a late notice of claim upon the New York City Health and Hospitals Corporation (NYC HHC), and pursuant to CPLR 602 to consolidate this action with an action entitled *Matos v City of New York*, pending in the Supreme Court, New York County, under Index No. 158026/2019 (hereinafter the City action).

The NYC HHC opposes the motion, and cross-moves pursuant to CPLR 3211(a) to dismiss the complaint on the ground that the limitations period applicable to the plaintiff's cause of action lapsed before he made the instant motion and, thus, the court lacks authority to consider the motion. The NYC HHC thus contends that, inasmuch as the plaintiff is unable to obtain leave to serve a late notice of claim, he has not and cannot satisfy a condition precedent to the maintenance of this action, and the complaint accordingly must be dismissed.

That branch of the plaintiff's motion that seeks leave to serve a late notice of claim is granted, and that branch of the motion that seeks consolidation is granted upon the condition that the plaintiff file a Request for Judicial Intervention (RJI) with the New York County Clerk and pay the appropriate RJI filing fee in connection with the action commenced under 158026/2019. The NYC HHC's cross motion is denied.

The plaintiff commenced this action on October 9, 2019. The action was thereafter assigned to Justice Joan A. Madden. The plaintiff made the instant motion on October 28, 2019. The motion and cross motion were adjourned four times, until April 16, 2020, by which date the court had closed down due to the COVID-19 pandemic. The motion and cross motion had yet to be decided as of December 31, 2020, when Justice Madden retired from the court. The action was reassigned to this court on January 27, 2021.

The plaintiff testified at the hearing conducted pursuant to General Municipal Law § 50-h that, on May 23, 2018, he was an inmate at the New York City Department of Correction's (NYC DOC) Manhattan Detention Complex. He asserted that, on that date, he injured his left hand and wrist when he fell from a chair in his cell in the course of stringing a clothes line so that he could dry underwear that he had just hand washed. The plaintiff's submissions here show that he was diagnosed with a chip fracture, and presented to medical personnel at the jail. The plaintiff alleges that NYC HHC employees, who served as medical personnel at the jail, examined, and rendered treatment to, his hand on May 23, 2018, June 5, 2018, June 8, 2018, June 21, 2018, June 30, 2018, July 8, 2018, July 10, 2018, July 23, 2018, August 10, 2018, and August 27, 2018. At his August 10, 2018 appointment, he was referred to a hand surgeon. During his August 27, 2018 appointment, he discussed the possibility of surgery with a physician, but was unable to consult with any other physicians at the jail before he was transferred in September 2018 to the Ulster Correctional Facility, a prison operated by the New York State Department of Corrections and Community Supervision.

At the Ulster Correctional Facility, the plaintiff was informed that, if he insisted on undergoing surgery, the date for his release from that prison would be delayed. Consequently, the plaintiff did not undergo surgery while he was a state inmate, and was released from custody on September 28, 2018. When the plaintiff ultimately was able to obtain medical assistance in August 2019, he was allegedly diagnosed with a "bony irregularity" that was "noted in the region of the left trapezium and base of the first metacarpal that may represent prior injury."

On August 16, 2019, the plaintiff commenced the City action, alleging that the negligence of NYC DOC correctional personnel caused or contributed to his May 23, 2018 accident. As noted, he commenced the instant action against NYC HHC on October 9, 2019, and shortly thereafter made the instant motion, inter alia, for leave to serve a late notice of claim upon NYC HHC.

Unconsolidated Laws § 7401(2) provides that service of a notice of claim upon the NYC HHC in accordance with General Municipal Law § 50-e is a condition precedent to the commencement of a tort action against it.

> "The 1976 amendments to section 50-e of the General Municipal Law permit a court to grant an application to file a late notice of claim after the commencement of the action but preclude the court from granting an extension which would exceed 'the time limited for the commencement of an action by the claimant against the public corporation' (L 1976, ch 745, § 2 [now General Municipal Law, § 50-e, subd 5]). That means that the application for the extension may be made before or after the commencement of the action but not more than one year and 90 days after the cause of action accrued, unless the statute has been tolled"

(*Pierson v City of New York*, 56 NY2d 950, 954 [1982]). Thus, where a plaintiff moves for leave to serve a late notice of claim after the applicable limitations period has lapsed, the court is without authority to consider the motion (*see Preston v Janssen Pharmaceuticals., Inc.*, 171 AD3d 572, 572-573 [1st Dept 2019]; *Young v New York City Health & Hosps. Corp.,* 147 AD3d 509, 509 [1st Dept 2017]; *see also Townsend v City of New York*, 173 AD3d 809, 810 [2d Dept 2019]; *Chtchannikova v City of New York*, 138 AD3d 908, 909 [2d Dept 2016]).

The court rejects NYC HHC's contention that the court has no authority to entertain the instant motion because the limitations period applicable to the plaintiff's medical malpractice cause of action against it had expired. The plaintiff sustained the initial injury to his hand on May 23, 2018, and the limitations period applicable to the negligence cause of action asserted against the City in the City action expired one year and 90 days thereafter, or on August 21, 2019. Contrary to NYC HHC's argument, however, May 23, 2018 is not the date from which the limitations period against it should be measured, even though it was the first date on which the plaintiff sought medical treatment.

As the plaintiff correctly contends, the limitations period against NYC HHC was tolled until August 27, 2018 in accordance with the continuous treatment doctrine. Under that doctrine, the applicable one-year-and-90-day limitations period of Unconsolidated Laws § 7401(2) "does not begin to run until the end of the course of treatment 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" (*Nykorchuck v Henriques*, 78 NY2d 255, 258 [1991] [internal quotation marks omitted]; *see McDermott v Torre*, 56 NY2d 399, 405 [1982]; *Borgia v City of New York*, 12 NY2d 151, 155 [1962]; *see also* CPLR 214-a [codifying the doctrine in connection with medical malpractice claims against private medical providers]; *cf. Young v New York City Health & Hosps. Corp.,* 91 NY2d 291 [1998] [90-day period for service of a notice of claim upon NYC HHC was not tolled where plaintiff sought treatment beyond that period of time for conditions unrelated to the medical malpractice claim]).

Here, it is undisputed that all of the plaintiff's appointments with NYC HHC personnel between May 23, 2018 and August 27, 2018 involved his hand injury. Hence, the limitations period applicable to his medical malpractice claim against NYC HHC was tolled until August 27, 2018, and the limitations period for that claim did not lapse until November 25, 2019. The plaintiff made the instant motion on October 28, 2019 and, thus, within the applicable limitations period. Consequently, the defendant's cross motion to dismiss the complaint on the ground that

the court lacks authority to consider the plaintiff's application for leave to serve a late notice of claim and, hence, the plaintiff cannot satisfy a condition precedent to suit, must be denied.

As to the merits of the plaintiff's application for leave to serve a late notice of claim, General Municipal Law § 50-e(1)(a) requires that service of a notice of claim must be effected within 90 days after the claim arises. Since the 90-day period applicable here lapsed on November 25, 2018, a Sunday, the plaintiff generally would have been obligated to serve the notice of claim, at the latest, on November 26, 2018, the first business day thereafter (*see* General Construction Law § 25-a[1]). Inasmuch as he failed to do so, he is now seeking leave to extend that period of time.

In considering a request to extend the time for service of a notice of claim,

> "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; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted."

(General Municipal Law § 50-e[5]). The court must also consider whether there was a reasonable excuse for the delay in service the notice of claim (*see Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824 [1st Dept 2010]; *see also Matter of Grajko v City of New York*, 150 AD3d 595 [1st Dept 2017]). In addition, the court must assess whether the delay in service substantially prejudiced the public corporation's ability to defend on the merits (*see Rivera v City of New York*, 169 AD2d 387 [1st Dept 1991]).

No one factor articulated in the statute is determinative (*see Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448, 448 [1st Dept 2011]), "and since the notice statute is remedial in nature, it should be liberally construed" (*id.*; s*ee Pearson v New York City Health &*

Hosps. Corp. [Harlem Hosp. Ctr.], 43 AD3d 92, 94 [1st Dept 2007], *affd* 10 NY3d 852 [2008]; *see also Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]). In fact, even "[t]he lack of a reasonable excuse for failing to serve a timely notice of claim is not determinative" (*Matter of Meacham v New York City Health & Hosps. Corp.,* 77 AD3d 570, 570 [1st Dept 2010]) The most important factor is whether the public corporation, its attorney, or its insurer acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or a reasonable time thereafter (*see Matter of Gasperetti v Metropolitan Transp. Auth.,* 169 AD3d 564 [1st Dept 2019]; *Matter of Felice v Eastport/South Manor Cent. School Dist*., 50 AD3d 138 [2d Dept 2008]).

General knowledge that a wrong has been committed is not enough to satisfy the actual knowledge requirement (*see Matter of Devivo v Town of Carmel*, 68 AD3d 991 [2d Dept 2009]; *Matter of Wright v City of New York*, 66 AD3d 1037 [2d Dept. 2009]).

> "In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim; the public corporation need not have specific notice of the theory or theories themselves"

(*Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d at 148; *see Matter of Wally G. v New York City Health & Hosps. Corp. [Metro. Hosp.]*, 27 NY3d 672 [2016]; *Iglesias v Brentwood Union Free Sch. Dist.,* 118 AD3d 785 [2d Dept 2014]).

> "[K]nowledge of the accident itself and the seriousness of the injury does not satisfy this enumerated factor where those facts do not also provide the public corporation with knowledge of the essential facts constituting the claim"

(*Matter of Felice v Eastport/South Manor Cent. School Dist*., 50 AD3d at 155; *see Horn v Bellmore Union Free Sch. Dist*., 139 AD3d 1006 [2d Dept 2016]). Knowledge of facts that merely suggest the possibility of liability is insufficient, as a plaintiff must demonstrate the municipal corporation's actual knowledge of the negligent acts or omissions that allegedly resulted in injury to him or her (*see Matter of Townson v New York City Health & Hosps. Corp*.,

158 AD3d 401 [1st Dept 2018]; *see also Matter of Wally G. v. New York City Health & Hosps. Corp. [Metro. Hosp.],* 27 NY3d at 677).

A hospital defendant's possession of medical records does not, in and of itself, establish that it had knowledge of the essential facts underlying a potential medical malpractice claim (*see Williams v Nassau County Med. Ctr.*, 6 NY3d at 538). Stated differently, the medical records must do more than "suggest" that an injury occurred as a result of malpractice (*see Matter of Wally G. v. New York City Health & Hosps. Corp. [Metro. Hosp.],* 27 NY3d at 677). Nonetheless, as explained in the physician's affidavit submitted by the plaintiff here, the NYC HHC records at issue were sufficient to have placed it on notice, within 90 days after the cause of action accrued or a reasonable time thereafter, that its employees committed acts of malpractice by failing to stabilize or splint the plaintiff's fractured wrist and hand, and that such departure from good practice proximately caused the plaintiff to sustain permanent injury to his wrist and hand (*see Matter of Brown v New York City Health & Hosps. Corp.,* 190 AD3d 969 [2d Dept 2021]). Moreover, NYC HHC has not demonstrated that it would be prejudiced in defending the action because of the delay in the formal service of the notice of claim.

Consequently, the court grants that branch of the plaintiff's motion that seeks leave to serve a late notice of claim upon NYC HHC. The proposed notice of claim, dated August 15, 2019, and annexed to the plaintiff's moving papers at Docket Entry No. 8, is deemed to have been served in a timely fashion upon NYC HHC.

In connection with the plaintiff's request to consolidate this action with the City action, "[c]onsolidation is generally favored in the interest of judicial economy and ease of decision-making where cases present common questions of law and fact, 'unless the party opposing the motion demonstrates that a consolidation will prejudice a substantial right'" (*Raboy v McCrory Corp*., 210 AD2d 145, 147 [1st Dept 1994] quoting *Amtorg Trading Corp. v Broadway & 56th St. Assoc*., 191 AD2d 212, 213 [1st Dept 1993]). Where, as here, the two actions arise from the same accident, and the claims are made by the same plaintiff, they clearly present common

questions of law and fact (*see* CPLR 602; *DeSilva v Plot Realty, LLC*, 85 AD3d 422 [1st Dept 2011]; *Kern v Shandell, Blitz, Blitz & Bookson*, 58 AD3d 487 [1st Dept 2009]). Moreover, there is no indication that consolidation will prejudice any substantial right or delay the completion of discovery and the schedule for filing the note of issue (*see Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337 [1st Dept 2006]).

Nonetheless, 22 NYCRR 202.6(a) provides, in relevant part, that, with certain exceptions not relevant here, "in an action not yet assigned to a judge, the court shall not accept for filing a notice of motion . . . unless such notice or application is accompanied by a request for judicial intervention." CPLR 8020 requires that, before a civil action is assigned to a judge or justice, the party seeking the assignment must pay the clerk of the court a fee of $95 along with the filing of the RJI. Even though the instant motion was made in the instant action, in which an RJI fee has been paid and an RJI has been filed, relief is also requested that affects the City action that was commenced under Index No.158026/2019, for which no RJI has yet been filed and no RJI fee has yet been paid. Thus, the filing of a separate RJI and the payment of the appropriate fee is required before this court may dispose of a motion addressed to the latter action.

The court notes that the affidavit of the plaintiff's retained physician was executed and notarized in Florida, but does not include the certificate of conformity required by CPLR 2309, which is a written instrument pursuant to which a person qualified by the laws of the country or state in which an affidavit is executed and notarized, or by the laws of New York, certifies that the out-of-state affidavit has indeed been drafted, executed, and notarized in conformity with the laws of that country or state. This defect does not require the court to disregard the affidavit or reject the plaintiff's motion papers, as the defect may be cured by the submission of the proper certificate nunc pro tunc (*see Bank of New York v Singh*, 139 AD3d 486 [1st Dept 2016]; Seiden v Sonstein, 127 AD3d 1158 [2d Dept 2015]).

All other requests for relief, including the plaintiff's request to schedule a preliminary conference, are denied as premature.

Accordingly, it is

ORDERED that the branch of the plaintiff's motion that seeks leave to serve a late notice of claim upon the New York City Health and Hospitals Corporation is granted, and the proposed notice of claim dated August 15, 2019, and annexed to the plaintiff's moving papers at Docket Entry No. 8, is deemed to have been served in a timely fashion upon the New York City Health and Hospitals Corporation; and it is further,

ORDERED that the defendant's cross motion to dismiss the complaint is denied; and it is further,

ORDERED that the branch of the plaintiff's motion that seeks consolidation is granted to the extent that, within 20 days of the entry of this order, the plaintiff shall file a request for judicial intervention with the Clerk of the Supreme Court, New York County, and pay the appropriate fee, in connection with the action entitled *Matos v City of New York*, pending in the Supreme Court, New York County, under Index No. 158026/2019; and it is further,

ORDERED that the plaintiff, upon filing said request for judicial intervention and paying the appropriate fee, shall thereafter serve a copy of this order with notice of entry upon all other parties, the Clerk of the Supreme Court, New York County, and the Trial Support Office (60 Centre Street, Room 158, New York, NY 10007), and shall file the notice required by CPLR 8019(c) and a completed Form EF-22 with the New York County Clerk's office; and it is further,

ORDERED that, upon the plaintiff's compliance with the directives set forth above, the action entitled *Jorge Matos v New York City Health and Hospitals Corporation*, pending in the Supreme Court, New York County, under Index No. 805333/2019 shall be fully consolidated into the action entitled *Jorge Matos v City of New York,* pending in the Supreme Court, New York County, under Index No. 158026/2019, the consolidated action shall proceed under New York County Index No. 158026/2019, and, upon completion of discovery, the plaintiff shall only be required to file one note of issue in connection with the consolidated action; and it is further,

ORDERED that the caption of the consolidated action shall read as follows:

JORGE MATOS,

Plaintiff, Index No. 158026/2019

v

CITY OF NEW YORK and NEW YOR CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.;

and, upon the plaintiff's compliance with the directives set forth above, the Trial Support Office and the New York County Clerk's Office shall amend their records accordingly.

This constitutes the Decision and Order of the court.

3/12/2021
DATE

JOHN J. KELLEY, J.S.C.

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