

Ramos v City of New York

2022 NY Slip Op 30961(U)

March 24, 2022

Supreme Court, New York County

Docket Number: Index No. 451353/2020

Judge: Erika Edwards

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ERIKA EDWARDS

PART 10M

Justice

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INDEX NO. 451353/2020

JANET RAMOS, as the Proposed Administratrix of the Estate of PORFIRIO GARRASTAZU, Deceased, and JANET RAMOS, Individually,

**MOTION DATE 10/21/2021,
12/1/2021**

Plaintiff,

MOTION SEQ. NO. 001

- v -

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

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68 69, 70, 71

were read on this motion and cross-mtn. to/for DISMISS/LEAVE TO FILE.

Upon the foregoing documents, the court grants Defendant New York City Health and Hospitals Corporation’s (“HHC”) motion to dismiss Plaintiffs Janet Ramos, as Proposed Administratrix of the Estate of Porfirio Garrastazu, Deceased, and Janet Ramos, Individually’s (“Plaintiffs”) complaint for Plaintiffs’ failure to timely serve a notice of claim against Defendant HHC and the court denies Plaintiffs’ cross-motion for leave to serve a notice of claim and deem it timely served *nunc pro tunc*.

Plaintiffs brought this action against Defendants The City of New York (“City”) and HHC alleging medical malpractice, lack of informed consent and wrongful death arising from Defendants’ alleged improper care and treatment of the deceased Plaintiff Porfirio Garrastazu’s T-Cell Lymphoma while he was incarcerated at Riker’s Island Correctional Facility and treated at Bellevue Hospital from February 16, 2017 to February 9, 2018. The deceased Plaintiff passed away on February 9, 2018. Plaintiffs served a notice of claim on Defendant City and Plaintiff

Ramos subsequently appeared for a General Municipal Law § 50-h hearing with the City on July 17, 2018. Plaintiffs filed a complaint in Bronx County against the City and HHC on July 27, 2018, which was subsequently transferred to New York County. Plaintiffs failed to file a notice of claim against HHC and HHC was not present during Plaintiff Ramos' 50-h hearing.

HHC now moves under motion sequence 001 to dismiss Plaintiffs' complaint against it for failure to file a timely notice of claim against HHC prior to commencing this action, as required by General Municipal Law §§ 50-e(1)(a), 50-e(i), and 50-e(5); McKinney's Uncons Laws of NY § 7401 and CPLR 217-a. HHC argues in substance that such failure to do so requires dismissal because Plaintiffs failed to seek leave to file a late notice of claim prior to the expiration of the statute of limitations, Plaintiffs failed to demonstrate a reasonable excuse or any excuse for failing to serve a timely notice of claim and Plaintiffs failed to demonstrate that HHC would not be prejudiced from their failure to serve a notice of claim.

Plaintiffs oppose HHC's motion and cross-move for permission to serve a notice of claim against HHC *nunc pro tunc*. Plaintiffs argue in substance that HHC would not be prejudiced because they had knowledge of the decedent's injuries and potential claim since they were in possession of the deceased Plaintiff's medical records which indicated that he suffered from several pressure ulcers.

HHC opposes Plaintiffs' cross-motion and argues that mere possession of the medical records is insufficient to provide them with notice of Plaintiffs' claims and Plaintiff failed to submit an affidavit from an expert to support of their claims. HHC further argues in substance that it would be severely prejudiced if the court grants Plaintiffs' cross-motion because it has been four years since the decedent's death, it was unable to participate in the 50-h hearing and

HHC has been deprived of the opportunity to investigate this matter so it may not be able to locate and interview potential witnesses.

Any cause of action or special proceeding for personal injury, wrongful death or damage to real or personal property allegedly caused by the negligence or wrongful act of a municipality or public corporation, including HHC, requires the service of a notice of claim upon that entity in compliance with General Municipal Law § 50-e and that the action must be commenced within one year and ninety days after the happening of the event upon which the claim is based, except that wrongful death actions must be commenced within two years after the happening of the death (*see* General Municipal Law § 50-i; McKinney's Uncons Laws of NY § 7401[2]).

Defendant HHC is entitled to receive a notice of claim as a condition precedent to commencement of an action and such notice of claim must be served within ninety days after the claim arises (General Municipal Law § 50-e[1][a]).

Although the court has discretion whether to grant leave to serve a late notice of claim, the court cannot extend the statute of limitations (*see Bayne v City of New York*, 137 AD3d 428, 429 [1st Dept 2016]; *Baez v New York City Health & Hosps. Corp.*, 80 NY2d 571, 577 [1992]; *Ahnor v City of New York*, 101 AD3d 581, 582 [1st Dept 2012]; General Municipal Law § 50-e[5]). A plaintiff's service of a late notice of claim without leave of court is a nullity and his or her failure to seek a court order excusing such lateness prior to the expiration of the statute of limitations for which to commence the action, or within one year and ninety days after accrual of the claim, requires dismissal of the action (*Plaza v New York City Health & Hosps. Corp.*, 97 AD3d 466, 467 [1st Dept 2012]; *Croce v City of New York*, 69 AD3d 488, 488 [1st Dept 2010]).

The Court of Appeals has long recognized that Defendants City and HHC are separate entities for purposes of a notice of claim and a plaintiff's service of a notice of claim on

Defendant City, through its Comptroller's Office, does not constitute proper service upon HHC (see *Scantlebury v New York City Health & Hosps. Corp.*, 4 NY3d 606, 609 [2005]; *Williams v City of New York*, 74 AD3d 548, 549 [1st Dept 2010]; General Municipal Law § 50-e[1]; McKinney's Uncons Laws of NY § 7401[2]; and Public Authorities Law § 2980). Because the statute of limitations had expired the court lacks the "power to authorize late filing of the notice" (*Pierson v City of New York*, 56 NY2d 950, 956 [1982]).

Although a reasonable excuse for a plaintiff's failure to serve a notice of claim within the statutory 90 days is a factor for the court to determine whether to grant leave to serve a late notice of claim, the absence of an excuse should not require dismissal of the action where the municipality or public corporation "acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or a reasonable time thereafter, and was not prejudiced by the delay" (*Caminero v New York City Health & Hosps. Corp.*, 21 AD3d 330, 332 [1st Dept 2005] [internal citations omitted]).

HHC is deemed to possess actual knowledge of a claim when it has hospital records made contemporaneously with the events giving rise to the claim which contain the essential facts constituting the alleged malpractice and it is deemed not to be prejudiced by a plaintiff's delay in seeking the court's leave to file a late notice of claim under General Municipal Law § 40-e(5) (*Caminero v New York City Health & Hosps. Corp.*, 21 AD3d 330, 332-333 [1st Dept 2005]).

However, "merely having or creating medical 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*" (*Matter of Kelley v New York City Health*

& Hosps. Corp., 76 AD3d 824, 827 [1st Dept 2010]; *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]).

Here, the court must dismiss Plaintiffs' complaint as against HHC since Plaintiffs failed to timely serve a notice of claim on HHC and failed to seek leave to file a late notice of claim on HHC prior to the expiration of the statute of limitations. Therefore, the court has no authority to grant Plaintiff's cross-motion and permit the late service of the notice of claim. Although Plaintiffs' serviced a notice of claim on the City, such service is insufficient to give notice to HHC as HHC is a separate entity.

Additionally, even if Plaintiffs' cross-motion was timely, then the court would still deny the cross-motion because Plaintiffs offered no excuse for the delays in serving the notice of claim or seeking leave to serve a late notice of claim, let alone providing a reasonable excuse for such delays. Plaintiffs appear to imply that Plaintiff Ramos should be excused from these requirements simply because she filed the notice of claim on her own without the assistance of counsel. Such excuse is insufficient for the court to grant leave to file a late notice of claim. Furthermore, Plaintiffs failed to allege that the statutes were tolled.

Additionally, Plaintiffs failed to demonstrate that HHC had actual knowledge of the facts constituting the claim within ninety days of its accrual or shortly thereafter because, without more, the decedent's medical records in HHC's possession did not indicate that HHC caused the injuries alleged in Plaintiffs' notice of claim.

Therefore, the court dismisses Plaintiffs' complaint against HHC, only, and denies Plaintiffs' cross-motion for leave to serve a notice of claim on HHC and for the court to deem it timely served *nunc pro tunc*.

As such, it is hereby

ORDERED that the court grants Defendant New York City Health and Hospitals Corporation’s motion to dismiss Plaintiffs Janet Ramos, as Proposed Administratrix of the Estate of Porfirio Garrastazu, Deceased, and Janet Ramos, Individually’s complaint as against Defendant New York City Health and Hospitals Corporation; and it is further

ORDERED that the court denies Plaintiffs Janet Ramos, as Proposed Administratrix of the Estate of Porfirio Garrastazu, Deceased, and Janet Ramos, Individually’s cross-motion for leave to serve a notice of claim and deem it timely served *nunc pro tunc*; and it is further

ORDERED that Plaintiffs’ complaint is dismissed as against Defendant New York City Health and Hospitals Corporation, only, that the court severs and continues the remainder of the action against Defendant The City of New York, and the court directs the Clerk of the Court to enter judgment in favor of Defendant New York City Health and Hospitals Corporation as against Plaintiffs accordingly, without costs to any party; and it is further

ORDERED that the court amends the caption to the following:

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JANET RAMOS, as the Proposed Administratrix of the
Estate of PORFIRIO GARRASTAZU, Deceased, and
JANET RAMOS, Individually,

Plaintiffs,

-against-

THE CITY OF NEW YORK,

Defendant.

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and it is further;


ORDERED that counsel for Defendant New York City Health and Hospitals Corporation shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk’s Office

(60 Centre Street, Room 119) within ten (10) days of the date of this order, who is directed to mark the court's records to reflect the amended caption; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)].

ORDERED that the parties must appear for a status conference regarding the status of the decedent Porfiro Garrastazu's Estate's personal representative and discovery before this court via Microsoft Teams on September 13, 2022, at 9:30 a.m.

This constitutes the Decision and Order of the Court.

<u>3/24/2022</u>			
DATE			ERIKA EDWARDS, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> DENIED		