SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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KWADWO DWOMOH APPONG MANU, by Proposed Guardian, FELICIA MANU,

Plaintiff,

- v -

THE NEW YORK CITY HEALTH & HOSPITALS CORPORATION and BELLEVUE HOSPITAL CENTER,

Defendants.

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INDEX NO. 805165/2022

MOTION DATE 11/22/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 20, 27

were read on this motion to/for LEAVE TO SERVE LATE NOTICE OF CLAIM.

In this action to recover damages for medical malpractice based on departures from good and accepted practice, common-law negligence, and negligent hiring, retention, and supervision of employees, 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 defendants. The defendants oppose the motion. The motion is denied.

The defendant Bellevue Hospital (Bellevue) is merely a facility owned and operated by the defendant New York City Health and Hospitals Corporation (NYC HHC) and, thus, is not an entity that has capacity to sue or be sued, nor one upon which a notice of claim may be served (*see Del Pozo v Bellevue Hosp.*, 2011 WL 797464, *8 [SD NY, Mar. 3, 2011]; *Barnaman v New York City Health & Hosps. Corp.*, 90 AD3d 588, 589 [2d Dept 2011]). Moreover, the plaintiff failed to establish that she met the statutory criteria for service of a late notice of claim upon the NYC HHC.

In connection with the aforementioned statutory criteria, General Municipal Law § 50-e(5) requires the court to consider whether the public corporation "acquired actual knowledge of the essential facts constituting the claim within [90 days after the accrual of the claim] or within a reasonable time thereafter" and "all other relevant facts and circumstances" (General Municipal Law § 50-e[5]; *see Matter of Newcomb v Middle Country Cent. Sch. Dist.,* 28 NY3d 455, 460-461 [2016]). The statute provides a "nonexhaustive list of factors that the court should weigh" (*Williams v Nassau County Med. Ctr*., 6 NY3d 531, 538-539 [2006]). The requirement that the public corporation have actual knowledge of the essential facts underlying the claim is the most important factor, "based on its placement in the statute and its relation to other relevant factors" (*Matter of Felice v Eastport/South Manor Cent. School Dist*., 50 AD3d 138, 147 [2d Dept 2008]).

> "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"

(*id.* at 147-148).

In medical malpractice actions where the medical records themselves contain facts that detail both the procedures used and the claimant's injuries, and also suggest that the relevant public corporation may be responsible for those injuries, the public corporation will be held to have had actual knowledge of the essential facts constituting the claim (*see Greene v New York City Health & Hosps. Corp*., 35 AD3d 206, 207 [1st Dept 2006]; *Matter of Staley v Piper,* 285 AD2d 601, 603 [2d Dept 2001]; *Matter of Robinson v Westchester County Med. Ctr.*, 270 AD2d 275, 275-276 [2d Dept 2000]; *Matter of Matarrese v New York City Health & Hosps. Corp*., 215 AD2d 7, 16 [2d Dept 1995]). Nonetheless, as the Court of Appeals explained in *Williams v Nassau County Med. Ctr.* (6 NY3d at 537),

> "[w]e disagree with plaintiff's suggestion that because defendants have medical records, they necessarily have actual knowledge of the facts constituting the claim. *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 plaintiff during*"

the course of the plaintiff's treatment (emphasis added). "The relevant inquiry is whether the hospital had actual knowledge of the facts--as opposed to the legal theory--underlying the claim. Where, as here, there is little to suggest injury attributable to malpractice during" the treatment or procedure, merely "comprehending or recording the facts surrounding" the treatment or procedure "cannot equate to knowledge of facts underlying a claim" (*id.*).

In the instant matter, the plaintiff has pointed to no medical record that would suggest which, if any, facts therein demonstrated a nexus between the care that was provided or should have been provided by the defendants, the patient's injuries, and whether the defendants committed malpractice that caused or contributed to those injuries (*see id.; Brown v New York City Health & Hosps. Corp. [N. Cent. Bronx Hosp.]*, 116 AD3d 514, 514 [1st Dept 2014]; *Plaza v New York Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 97 AD3d 466, 469-470 [1st Dept 2012]; *Basualdo v Guzman*, 110 AD3d 610, 610 [1st Dept 2013] ["the records do not, on their face, evince that the hospital deviated from good and accepted medical practice, and thus do not provide HHC with timely actual knowledge of the underlying claim"]; *Matter of King v New York City Health & Hosps. Corp*., 42 AD3d 499, 500-501 [2d Dept 2007]), particularly since he does not submit the records or any expert affirmation from a physician explaining why the defendants' records established such a nexus (*cf. Bayo v Burnside Mews Assoc*., 45 AD3d 495, 495 [1st Dept 2007] ["Plaintiffs submitted affirmations from a physician establishing that the medical records, on their face, evinced that appellants failed to provide infant plaintiff with preventive care against lead poisoning"]).

Moreover, although, under certain circumstances, actual knowledge of relevant facts that Bellevue personnel may have acquired might be imputed to the NYC HHC itself, as those personnel are NYC HHC employees (*see Matter of Orozco v City of New York,* 200 AD3d 559, 560-561 [1st Dept 2021]; *Williams v New York City Housing Auth*., 179 AD2d 523, 524 [1st Dept 1992]), the "facts" actually provided to those employees here were limited to a claim letter to

Bellevue sent on April 5, 2022, approximately three months after the 90-day notice of claim deadline had lapsed, in which the plaintiff's attorney stated only that his client might have a claim against Bellevue or the NYC HHC. The attorney provided no particulars as to what acts or omissions constituted malpractice or other negligence, did not supply the correct date or dates on the malpractice allegedly was committed, and failed to state how that malpractice caused or contributed to the decedent's injuries or death. Hence, that claim letter did not provide the defendants with knowledge of the essential facts underlying the claim and did not permit them to acquire such knowledge with 90 days of the accrual of the claim or a reasonable time thereafter.

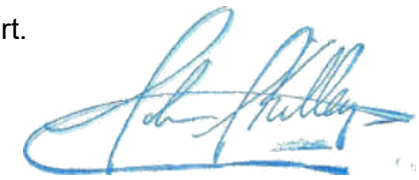
Since, upon denial of this motion, the plaintiff will not be able to establish that she complied with a condition precedent to the commencement of the action, the complaint must be dismissed.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to serve a late notice of claim is denied; and it is further,

ORDERED that, upon the court's own motion, the complaint is dismissed, and the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.



1/20/2023
DATE

JOHN J. KELLEY, J.S.C.

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