Axisa v New York City Health & Hosps. Corp.
2023 NY Slip Op 30225(U)
January 19, 2023
Supreme Court, New York County
Docket Number: Index No. 805179/2022
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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GARY AXISA, as the Administrator of the Estate of CHARMAINE PEREZ,

Plaintiff,

- v -

THE NEW YORK CITY HEALTH & HOSPITALS CORPORATION and BELLEVUE HOSPITAL

Defendants.

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INDEX NO. 805179/2022

MOTION DATE 12/19/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 16, 17, 18, 19, 20, 21, 22, 23, 24

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, 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, and the complaint is dismissed.

The plaintiff alleged in his complaint that, on November 22, 2020, his decedent, Charmaine Perez, was treated at the defendant Bellevue Hospital (Bellevue). The plaintiff alleged that the defendants failed properly to diagnose her, negligently failed to administer antibiotics to her, carelessly and negligently performed a procedure on her, and left her unattended, thus causing her death. All three causes of action alleged by the plaintiff in the complaint sought to recover for his decedent's conscious pain and suffering pursuant to EPTL 11-3.2(b), but none of them sought to recover for the pecuniary loss to the decedent's estate

pursuant to EPTL 5-4.3(a). Hence, the plaintiff did not assert a wrongful death cause of action (*see Leger v Chasky*, 55 AD3d 564, 565 [2d Dept 2008]).

Although NYC HHC is a self-insured entity (*see Dennehy v Harlem Hosp. Cent.*, 2018 NY Slip Op 32496[U], *7, 2018 NY Misc LEXIS 4370, *10 [Sup Ct, N.Y. County, Oct. 2, 2018]), on December 15, 2020, the attorney who was then representing the plaintiff's adult daughter wrote directly to the Bellevue Hospital Risk Management Department as follows:

> "Please be advised that our office has been retained to pursue a claim on behalf of Charmaine Perez, by her daughter, Charleen Rivera, in connection Ms. Perez's death sustained due to your negligence on November 22, 2020.
>
> "You are required to inform your liability insurance carrier of this claim immediately. Please acknowledge receipt of this claim by advising our office of your insurance company's name and your policy number.
>
> "Furthermore, it is our understanding that this accident was recorded by surveillance cameras on the premises. We hereby demand that you preserve any and all video recordings made on the entire day and night of November 22, 2020 without making changes thereto, pursuant to New York State rules against the spoliation of evidence. Please make these video recordings available to us for inspection."

By letter dated January 6, 2021, the same attorney again wrote to the Bellevue Hospital Risk Management Department, advising it that his

> "office has been retained to pursue a claim on behalf of Charmaine Perez, by her daughter, Charleen Rivera, in connection Ms. Perez's death due to your negligence and medical malpractice.
>
> "You are required to inform your liability insurance carrier of this claim acknowledge receipt of this claim by advising our office of your insurance company's name and your policy number."

After the plaintiff was appointed as the administrator of his decedent's estate, he commenced the instant action on May 27, 2022. He now seeks leave to serve a late notice of claim upon the defendants.

As the defendants correctly contended, the 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 (*see Del Pozo v Bellevue Hosp.*, 2011

WL 797464, *8 [SD NY, Mar. 3, 2011] [agreeing with City's contention that "Bellevue is merely a facility within the HHC" and thus "lacks the capacity to be sued"]; *Ayala v Bellevue Hosp.*, 1999 WL 637235, *3 [SD NY, Aug. 20, 1999] ["Bellevue is a facility belonging to the NYCHH . . . [S]ince Bellevue is merely a facility within the HHC, it . . . lacks the capacity to be sued."]; *Davis v City of New York*, 1998 WL 29247 [SD NY, Jan. 26, 1998]; *see also Blasoff v New York City Health & Hosps. Corp.*, 147 AD3d 481, 481-482 [1st Dept 2017] [noting that NYC HHC was sued therein "as HHC and Bellevue Hospital Center"]; *Barnaman v New York City Health & Hosps. Corp*., 90 AD3d 588, 589 [2d Dept 2011] [NYC HHC's Queens Hospital Center facility is not a proper entity upon which a notice of claim may be served]). Consequently, the branch of the plaintiff's motion seeking leave to serve a late notice of claim upon Bellevue must be denied on that ground alone.

With respect to the plaintiff's claims against the NYC HHC, General Municipal Law § 50-e(1)(a) provides that a party seeking to sue a public corporation, which includes the NYC HHC (*see Watts v City of New York*, 186 AD3d 1574, 1575 [2d Dept 2020]), must serve a notice of claim on the prospective defendant "within ninety days after the claim arises." Specifically, Unconsolidated Laws § 7401(2) provides that timely service of a legally sufficient 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 to recover damages for its tortious conduct (*see Umeh v New York City Health & Hosps. Corp.,* 205 AD3d 599, 601 [1st Dept 2022]). The failure to satisfy this condition precedent may implicate the subject matter jurisdiction of the court (*see Copeland v Salomon*, 56 NY2d 222, 227 [1982] [the term "lack of subject matter jurisdiction" is "inexactly used to refer to the situation in which the absence of a condition precedent requires dismissal of a particular case notwithstanding that the court has jurisdiction of the subject matter"]; *Lumbermens Mut. Cas. Co. v Port Authority of N.Y. & N.J.*, 137 AD2d 796 [2d Dept 1988] [failure to serve notice of claim upon Port Authority deprives court of subject matter jurisdiction]; *cf. McKenzie v Port Auth. of N.Y. & N.J.,* 201 AD3d 572, 572 [1st Dept 2022]

[requirement that action be commenced against Port Authority within one year of accrual of cause of action is a condition precedent, and the failure to commence action within that time period deprives the court of subject matter jurisdiction]).

General Municipal Law § 50-e(5) nonetheless permits a court, in its discretion, to extend the time for a petitioner or plaintiff to serve a notice of claim.

Crucially, however,

> "[t]he 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 id.*; *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 limitations period applicable to negligence actions against public corporations such as the NYC HHC is one year and 90 days "after the happening of the event upon which the claim is based" (General Municipal Law § 50-i[1][c]), except that "wrongful death actions shall be commenced within two years after the happening of the death" (*id.*). As explained above, the plaintiff did not assert a wrongful death action against the defendants in his complaint. The alleged malpractice occurred on November 22, 2020 and, thus, the one-year-and-90-day period described in the General Municipal Law lapsed on Sunday, February 20, 2022 (*see* General Construction Law § 20). Monday, February 21, 2022 was a public holiday. Hence, the commencement deadline applicable to the three causes of action set forth in the complaint

lapsed on February 22, 2022, the first business date thereafter (*see* General Construction Law § 25-a), and the plaintiff thus was obligated to petition or move for leave to serve a late notice of claim on or before February 22, 2022. He did not do so, instead waiting until October 19, 2022 to seek such relief.

Inasmuch as the limitations period applicable to the plaintiff's claims had lapsed by the time he made the instant motion, the court is without authority to consider his motion, and it must be denied as to the NYC HHC on that ground, and as to Bellevue on that ground in addition to Bellevue's lack of capacity to be sued.

Even if the plaintiff had properly asserted a wrongful death cause of action pursuant to EPTL 5-4.1(1) and 5-4.3(a), and the limitations period thus lapsed two years after the accrual of the claim, or on November 22, 2022, court would be constrained to deny the plaintiff's otherwise timely October 19, 2022 motion on the merits in any event.

In assessing a request for leave to serve a late notice of claim, 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, his decedent'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 submits no expert affirmation from a physician explaining why those 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 the court rejects the defendants' contention that any actual knowledge of relevant facts that Bellevue personnel had acquired can never 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 claim letters in which an attorney stated only that his client may 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, or how those acts or omissions caused or contributed to the decedent's injuries or death. Hence, those claim letters 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.

Consequently, even if the plaintiff had asserted a wrongful death cause of action, his motion for leave to serve a late notice of claim upon the NYC HHC would have to be denied on the merits in any event.

In light of the foregoing, it is

ORDERED that the plaintiff's motion for leave to serve a late notice of claim upon the defendants 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.

1/19/2023
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**