

Gorelik v Good Care Agency Inc.

2023 NY Slip Op 32729(U)

August 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 535090/2022

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS:

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OLEG GORELIK as Administrator of the Estate of
NAUM GORELIK and OLEG GORELIK, individually,

Plaintiff,

-against-

GOOD CARE AGENCY INC, TATYANA RESANSKA
and THE NEW YORK CITY HEALTH & HOSPITAL
CORPORATION,

Defendants.

-----X
HON. CONSUELO MALLAFRE MELENDEZ, J.S.C

Recitation, as required by CPLR §2219 [a], of the papers considered in the review: NYSCEF #s: 8-17; 19-21.

DECISION AND ORDER

Index No. 535090/2022

Motion Sequences: 001

Plaintiff filed an Order to Show Cause requesting leave to file a late notice of claim. The proposed notice of claim asserts claims for conscious pain and suffering and wrongful death against Defendant THE NEW YORK CITY HEALTH & HOSPITALS CORPORATION (“NYCHHC”) to recover for the death of a patient. Defendant opposes the motion on the grounds that they did not acquire actual notice of the essential facts giving rise to the claim within 90 days of the decedent’s treatment, Plaintiff has failed to provide a reasonable excuse for the delay in serving the notice of claim, and Plaintiff fails to establish a lack of prejudice to NYCHHC.

When considering a request for leave to file a late notice of claim the court must consider the underlying theory of the claim(s) being brought. Specifically, a cause of action for wrongful death is “designed to compensate the distributees themselves for their pecuniary losses as a result of the wrongful act.” See EPTL 5-4.3; *Heslin v. County of Greene*, 14 NY3d 67, 76-77 [2010]. Comparatively, a cause of action for personal injury “on behalf of the deceased under EPTL 11—3.2(b) seeks recovery for the conscious pain and suffering of the deceased and any damages awarded accrue to the estate (internal citation omitted).” *Heslin*, 14 NY3d at 76-77. Pursuant to General Municipal Law §50-e, “(a) timely and sufficient notice of claim is a condition precedent to asserting a tort claim against a municipality or public benefit corporation.” *Se Dae Yang v. New York City Health and Hosps. Corp.*, 140 AD3d 1051, 1052 [2d Dept 2016], citing General Municipal Law §50–e[1][a]; *Brown v. City of New York*, 95 NY2d 389, 393 [2000]. “With respect to most torts, service of the notice of claim must be made within 90 days after the claim

arises, but ‘in wrongful death actions, the [90] days shall run from the appointment of a representative of the decedent's estate.’” *Se Dae Yang*, 140 AD3d at 1052; General Municipal Law §50–e[1][a]).

Service of a notice of claim regarding conscious pain and suffering, must be made within 90 days after the claim arises. See General Municipal Law §50–e[1][a]. When determining whether to grant a petition for leave to serve a late notice of claim, the court must consider “(1) whether the public corporation has acquired actual knowledge of the essential facts constituting the claim within 90 days from its accrual or a reasonable time thereafter; (2) whether the delay substantially prejudiced the public corporation in defending on the merits; and (3) whether the claimant has demonstrated a reasonable excuse for failing to serve a timely notice of claim.” *Matter of Brown v. New York City Health & Hosps. Corp.*, 190 AD3d 696, 970 [2d Dept. 2021] quoting *Matter of Khan v New York City Health & Hosps. Corp.*, 135 AD3d 940, 941 [2d Dept. 2016] [internal citation omitted]. The determination of an application for leave to serve a late notice of claim is left to the sound discretion of the trial court. *Matter of Ruiz v. City of New York*, 154 AD3d 945, 946 [2d Dept 2017]. “Although the Supreme Court has ‘broad discretion’ to evaluate the factors set forth in General Municipal Law §50–e(5), its determination must be supported by record evidence.” *Parker v. City of New York*, 206 AD3d 936, 937-938 [2d Dept 2022], citing *E.R. v. Windham*, 181 AD3d 736, 738 [2d Dept 2020], quoting *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 465 [2016].

Here, the statute of limitations has not run on the wrongful death claims and, as Defendant acknowledges, the notice of claim is filed timely as to the wrongful death claim. Accordingly, the notice of claim is timely as to the wrongful death claim.

Although the notice of claim as to pain and suffering was filed beyond 90 days of the accrual of the claim, the statute of limitations has not run as to the claim of conscious pain and suffering thus the court has discretion to determine the request. Here, the last date of treatment for Plaintiff’s decedent, Naum Gorelik, was December 10, 2021. The notice of claim, annexed to Defendant’s opposition as exhibit A, bears a stamp from NYCHHC that reads “Jul 11 ‘22” which is 213 days after the claim arose. As set forth below, Plaintiff has not established that the defendant acquired actual notice of the essential facts giving rise to the claim within 90 days after the claim arose. Nor has the plaintiff offered a reasonable excuse for the late filing of the notice of claim or established that the defendant has not been substantially prejudiced.

“While 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.” *Wieman-Gibson v. County of Suffolk*, 206 AD3d 666, 667 [2d Dept 2022], citing *Matter of Snyder v. County of Suffolk*, 116 AD3d 1052, 1053 [2d Dept 2014], quoting *Matter of Placido v. County of Orange*, 112 AD3d 722, 723 [2d Dept 2013]. The plaintiff has not offered any evidence or argument as to any notice received by the defendant regarding the death of Naum Gorelik. To serve as actual notice, the medical records must evince that the defendants inflicted injury on the plaintiff, through the acts or omission of its medical staff. *W.Z. v. New York City Health and Hospitals Corporation*, 185 AD3d 759, 761 [2d Dept. 2020] [the Second Department held that plaintiff failed to establish that the medical records supplied defendant with actual notice of the essential facts constituting the claim where “[t]he medical records failed to evince that the defendant's medical staff, by its acts or omissions, inflicted injury on the plaintiff ...” (internal citations omitted)]. Here, there are no medical records submitted in support of the order to show cause for the court to consider. Indeed, no showing is made that the defendant received actual notice of the claim within 90 days or a reasonable time thereafter. Thus the court finds that the plaintiff has failed to establish that the defendant acquired actual knowledge of the essential facts constituting the claim for conscious pain and suffering.

Annexed to the plaintiff’s affirmation in support of the order to show cause is Plaintiff’s affidavit. In the affidavit, the plaintiff states he filed the notice of claim late because he had no proof that the hospital was negligent, and he was not yet appointed by the Court as administrator of his father’s estate. Evidently, Plaintiff was planning to file such a claim in February when Plaintiff signed the notice of claim, but this was not done. Further, Plaintiff could have filed a notice of claim for conscious pain and suffering without an administrator being appointed to the estate. *Heslin*, at 76-77.

Plaintiff also fails to provide an explanation as to how this establishes lack of prejudice to Defendant. “[A] showing [of prejudice] need not be extensive, but the plaintiff must present some evidence or plausible argument that supports a finding of no substantial prejudice.” *Matter of Ruiz*, 154 AD3d at 947, quoting *Matter of Newcomb*, 28 NY3d at 466. Plaintiff in this case argues that because Defendant was in possession of the hospital records, held its 50-h hearing, and, as Plaintiff asserts, was aware of the death of Naum Gorelik, the defendant was not

“substantially prejudiced” by the delay, in preparing its defense. Participation in pretrial discovery did not preclude a defendant from raising the untimeliness of the notice of claim (see *Laroc v City of New York*, 46 AD3d 760 [2d Dept 2007]; *Wade v New York City Health & Hosps. Corp.*, 16 AD3d 677 [2d Dept 2005]; *Barnaman v New York City Health and Hosps. Corp.*, 90 AD3d 588 [2d Dept 2011]). The court finds that this is insufficient to establish that defendant will not be substantially prejudiced by the delay in filing the notice of claim nor does it establish notice.

In conclusion, the order to show cause for leave to file a late notice of claim is GRANTED as to the wrongful death claim and DENIED as to conscious pain and suffering claim.

This constitutes the decision and order of the court.

Dated: August 7, 2023

ENTER.



Hon. Consuelo Mallafre Melendez,
J.S.C.