

**Rodriguez v Wyckoff Hgts. Med. Ctr.**

2023 NY Slip Op 32793(U)

August 10, 2023

Supreme Court, Kings County

Docket Number: Index No. 511585/2023

Judge: Consuelo Mallafre Melendez

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At an IAS Term, Part 7 of the Supreme Court of the State of NY, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 10th day of August 2023.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
JUAN RODRIGUEZ,

Petitioner,

-against-

WYCKOFF HEIGHTS MEDICAL CENTER, KAREN AMBERT, M.D., HAKEEM AFUWAPE, D.O., NEW YORK CITY HEALTH AND HOSPITALS CORP., JAMES O'CONNOR, M.D., SANTIAGO LOPEZ, M.D., AND CHRISTOPHER TOULOUKIAN, M.D.,

Respondents.  
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**HON. CONSUELO MALLAFRE MELENDEZ, J.S.C.**

Recitation, as required by CPLR §2219 [a], of the papers considered in the review:  
NYSCEF #s: 15 – 16, 17, 19 – 23, 25, 26

Petitioner JUAN RODRIGUEZ moves for an Order pursuant to New York General Municipal Law § 50-e(5), granting Petitioner leave to serve the proposed Notice of Claim upon Respondent NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (“NYCHHC”), or, alternatively, to deem this proposed Notice of Claim timely served *nunc pro tunc*.

This matter involves a claim against NYCHHC for alleged negligent treatment and medical malpractice by the Queens Hospital Center division of the Respondent public health organization. MR. RODRIGUEZ presented to Queens Hospital Center on January 23, 2022 with symptoms of severe abdominal pain, nausea, and constipation. After a CT scan demonstrated that MR. RODRIGUEZ had a bowel obstruction, he was admitted to the in-patient surgery care unit at Queens Hospital Center on January 24, 2022 to be monitored by surgery specialists. Due to non-improvement in MR. RODRIGUEZ’s condition, a laparotomy procedure was ordered on January 27, 2022 to treat the bowel obstruction. Petitioner claims that complications both during

the laparotomy and in the subsequent treatment provided until his discharge on April 1, 2022 constitute negligent treatment and medical malpractice. Petitioner asserts that the alleged negligent treatment and medical malpractice from NYCHHC were the proximate cause of numerous injuries, including an operative iatrogenic tear resulting in bowel resection and complications in the healing of the superficial abdominal wound due to dehiscence and inverted edges.

Pursuant to General Municipal Law § 50–e, a party seeking to sue a public corporation must serve a notice of claim on the prospective defendant within 90 days after the claim arises. See *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 460 (2016). “In determining whether to grant a petition for leave to serve a late notice of claim or to deem a late notice of claim timely served, *nunc pro tunc*, the court must consider all relevant circumstances, including whether (1) the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim, and (3) the delay would substantially prejudice the public corporation in its defense on the merits. *Matter of Brown v. City of New York*, 202 A.D.3d 783 (2nd Dept. 2022); see General Municipal Law § 50–e[5]; *Matter of Reddick v. New York City Housing Auth.*, 188 A.D.3d 890, 890 (2nd Dept. 2020). The presence or absence of any factor is not determinative (see *Matter of Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d at 460; *Etienne v. City of New York*, 189 A.D.3d 1400, 1402 (2nd Dept. 2020).” *Vincent v. City of New York*, 208 A.D.3d 589, 590 (2nd Dept. 2022).

This Court finds that NYCHHC acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter. “Where malpractice is apparent from an independent review of the medical records, those

records constitute actual knowledge of the pertinent facts.” *Cifuentes v. New York City Health and Hospitals Corp.*, 43 A.D.3d 385, 386 (2nd Dept. 2007). The Court finds that the descriptions in the medical records detailing the iatrogenic injury suffered by MR. RODRIGUEZ and his difficult post operative course constitutes notice of malpractice. Respondent contends that the medical records do not suggest that the injuries complained of are attributable to medical malpractice, and notes that the Petitioner failed to avail themselves of the opportunity to submit an affidavit from a medical expert to support their opinion. However, an affidavit from a medical expert is not required “at so preliminary a stage as upon service of a notice of claim”. *Matter of Sloan v. County of Westchester*, 175 A.D.2d 838, 839 (2nd Dept. 1991).

This Court also finds that MR. RODRIGUEZ demonstrated a reasonable excuse for the failure to serve a timely notice of claim, as he was recovering from his medical issues and experienced delays in obtaining medical records from Queens Hospital Center. While MR. RODRIGUEZ was discharged from Queens Hospital Center on April 1, 2022, he continued to require daily wound care by wound VAC treatment for the following months, both at home and in facility. Further, while Petitioner executed a HIPAA-compliant authorization on November 3, 2022 for the release of his medical records from Queens Hospital Center, the hospital never acknowledged the release. Thus, Petitioner had to submit a second HIPAA compliant authorization for release on January 12, 2023 for delivery to Petitioner. These medical records upon which Petitioner’s claims rely were only transmitted to him as of March 14, 2023. As Petitioner filed this Order to Show Cause for leave to file a late notice of claim on April 19, 2023, only 36 days after receiving his medical records, his delay in serving notice of claim is deemed reasonable.

Finally, “the burden initially rests on the petitioner to show that the late notice will not substantially prejudice the public corporation. Such a showing need not be extensive, but the

petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice.” *Newcomb v. Middle County Cent. School Dist.*, 28 N.Y.3d 455, 466 (2016). Once satisfied, the burden shifts to the respondent to rebut the showing. *Id.* 28 N.Y.3d at 467. In the instant case, Petitioner asserts that there are no records or other evidentiary materials upon which he relies to assert the allegations of negligent treatment and malpractice aside from the records created and maintained by Queens Hospital, and thus Petitioner’s initial burden is satisfied as NYCHHC retains access to these records. Respondent contends that Petitioner’s delay in timely filing the notice of claim injures the hospital as any hospital witness will have little to no memory of the events leading to and following MR. RODRIGUEZ’s injuries. However, this argument is speculative at best, and “a finding that a corporation is substantially prejudiced by a late notice of claim cannot be based solely on speculation and inference.” *Id.* 28 N.Y.3d at 465. Thus, this Court finds that petitioner has established that NYCHHC is not substantially prejudiced by Petitioner’s late notice of claim.

Accordingly, Petitioner’s application to deem this proposed Notice of Claim timely served *nunc pro tunc* is GRANTED.

Respondent’s rights are preserved with regards to filing a motion in the future to seek a change of venue.

This constitutes the decision and order of the court.

**ENTER.**



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