

**Martinez v New York City Health & Hosps. Corp.**

2023 NY Slip Op 34487(U)

December 20, 2023

Supreme Court, New York County

Docket Number: Index No. 805372/2023

Judge: Erika M. 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 M. EDWARDS**

**PART 10M**

*Justice*

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IBITOLA MARTINEZ, as the Administratrix of the Estate of  
KEVIN MARTINEZ, and IBITOLA MARTINEZ, Individually,

Plaintiff,

**INDEX NO.** 805372/2023

**MOTION DATE** 08/25/2023

**MOTION SEQ. NO.** 001

- v -

NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION, HARLEM HOSPITAL, KIHYUN KWON,  
M.D., ANJALI HULBANNI, M.D., and JOHN NWANKWO,  
M.D.,

Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 27

were read on this motion to/for LEAVE TO FILE.

Upon the foregoing documents, the court grants in part Plaintiff Ibitola Martinez, as Administratrix of the Estate of Kevin Martinez’s, and Ibitola Martinez, Individually’s (“Plaintiff”) motion for leave to file a late notice of claim and for other relief, to the extent that the court grants the portion of the motion seeking an order determining that Plaintiff’s notice of claim for the wrongful death claim was timely served on all defendants, the court grants Plaintiff leave to serve a late notice of claim as to Plaintiff’s remaining claims, and the court deems Plaintiff’s notice of claim filed on August 14, 2023, Plaintiff’s Summons and Complaint, Notice of Electronic Filing and Certificate of Merit to be deemed timely served on all defendants *nunc pro tunc*.

Plaintiff brought this medical malpractice, negligence and wrongful death action against Defendants New York City Health and Hospitals Corporation, Harlem Hospital, Kihyun Kwon, M.D., Anjali Hulbanni, M.D. and John Nwankwo, M.D. (collectively, “Defendants”) for their

care and treatment of the Deceased Plaintiff Kevin Martinez from on or about May 30, 2022, until his death on June 1, 2022.

Plaintiff served Defendants with a notice of claim on April 24, 2023, when Plaintiff Ibitola Martinez was the Proposed Administratrix of the Estate of Kevin Martinez, and another notice of claim on August 14, 2023, once Plaintiff Ibitola Martinez was appointed as the Administratrix of the Estate of Kevin Martinez.

Plaintiff now moves under motion sequence 001 for an order declaring that Plaintiff's notice of claim served on April 24, 2023, be deemed timely served upon all Defendants or timely served *nunc pro tunc*, that Plaintiff's notice of claim served on Defendants on August 14, 2023, be deemed timely served on Defendants or timely served *nunc pro tunc*, or in the alternative, that the court grants Plaintiff leave to file a late notice of claim on Defendants and that Plaintiff's Summons and Complaint, Notice of Electronic Filing and Certificate of Merit be deemed timely served on Defendants or timely served *nunc pro tunc*.

Plaintiff argues that Plaintiff Ibitola Martinez was appointed as the Administratrix on June 23, 2023, so the second Notice of Claim was timely served within the one-year and ninety day statute of limitation.

Defendants oppose the motion and request that the court dismisses Plaintiff's claim for pain and suffering. Defendants concede that Plaintiff's notice of claim for alleged wrongful death was timely, but argue in substance that Plaintiff failed to demonstrate her entitlement to service of a timely notice of claim for her remaining claims.

General Municipal Law ("GML") § 50-e(1) requires that to commence a tort action against a municipal defendant, such as Defendant NYCHHC or its employees, the claimant must serve a notice of claim on the defendant within ninety (90) days of the date on which the claim

arose and the notice must include the claimant's name and address, the nature of the claim, the time, place, and manner in which the claim arose, and the damages or injuries sustained (GML § 50-e[1] and [2] and 50-i). Timely service of a notice of claim is a condition precedent to the commencement of an action against Defendant NYCHHC (*see* CPLR 217-a). Failure to do so is grounds for dismissal. Although the court has discretion to extend the time in which to serve a notice of claim, it cannot do so if such time is beyond the applicable statute of limitations (*Hall v City of New York*, 1 AD3d 254, 256 [1<sup>st</sup> Dept 2003]).

GML § 50-e(5) provides that upon application, the court has discretion to extend the time to serve a notice of claim, as long as the extension does not exceed the time limited for the commencement of the action (GML § 50-e[5]).

The court grants Plaintiff's motion in part and finds that Plaintiff's notice of claim for the wrongful death claim was timely served on all Defendants, as it was served within ninety (90) days after Plaintiff Ibitola Martinez was appointed as the Administratrix of the Deceased Plaintiff's Estate. The court grants Plaintiff leave to serve a late notice of claim as to Plaintiff's remaining claims, including the claims for medical malpractice and negligence involving pain and suffering, and the court deems Plaintiff's notice of claim filed on August 14, 2023, Plaintiff's Summons and Complaint, Notice of Electronic Filing and Certificate of Merit to be deemed timely served on all Defendants *nunc pro tunc*.

The court finds that Plaintiff satisfied the statutory requirements for service of a late notice of claim as set forth in GML § 50-e(5). Plaintiff demonstrated that Defendants had actual knowledge of the essential facts of the claims by the filing of the initial notice of claim within a reasonable time after ninety (90) days from the accrual of the claim, at the latest. The court also considers the surrounding circumstances of such claims, including that the claimant died, that

Plaintiff's counsel had a reasonable excuse for the delay in that counsel filed the necessary papers not long after being retained on the matter and counsel took extraordinary efforts to investigate the claim and have an Estate representative appointed in an extremely brief period of time. Additionally, the court finds that Defendants were not substantially prejudiced by the delay.

Therefore, the court grants in part Plaintiff's motion as set forth herein.

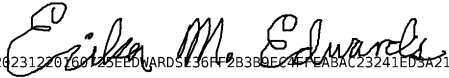
The court has considered any additional arguments raised by the parties which were not specifically discussed herein and the court denies any additional requests for relief which were not expressly granted herein.

As such, it is hereby

ORDERED that the court grants in part Plaintiff Ibitola Martinez, as Administratrix of the Estate of Kevin Martinez's, and Ibitola Martinez, Individually's motion filed under motion sequence 001, to the extent that the court determines that Plaintiff's notice of claim served on August 14, 2023, regarding Plaintiff's wrongful death claim, was timely served on all defendants, the court grants Plaintiff leave to serve a late notice of claim as to Plaintiff's remaining claims, and the court deems Plaintiff's notice of claim served on August 14, 2023, Plaintiff's Summons and Complaint, Notice of Electronic Filing and Certificate of Merit to be deemed timely served on all defendants *nunc pro tunc*; and it is further

ORDERED that the court denies the remainder of the motion.

This constitutes the decision and order of the court.

  
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12/20/2023  
DATE

ERIKA M. EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: