

**Matter of Bernacet v New York City Health & Hosps.
Corp.**

2023 NY Slip Op 34611(U)

December 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 529422/2023

Judge: Carolyn E. Wade

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS HON. CAROLYN E. WADE, JSC

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 In the Matter of the Application of DENISE BERNACET,

Petitioner,

DECISION & ORDER

-against-

Index No.: 529422/2023

NEW YORK CITY HEALTH AND HOSPITALS
 CORPORATION, WOODHULL HOSPITAL, and
 BELLEVUE HOSPITAL,

Motion Seq. 001

Respondents.
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After oral argument, Petitioner's application for an Order granting leave to serve a late Notice of Claim and deem same timely served *nunc pro tunc*, NYSCEF Doc. Nos.: 1-15; 29-33; 35-36, is **GRANTED** as follows:

General Municipal Law ("GML") § 50-e (1)(a) provides that a Notice of Claim must be served within 90 days following the date of the incident giving rise to the claim. GML § 50-e (5) prescribes that upon an application, the Court may, in its discretion, permit service of a late Notice of Claim.

In deciding an application, pursuant to GML § 50-e(5), the Court considers the following: whether the respondent acquired actual notice of the essential facts constituting the claim within 90 days of its accrual or a reasonable time thereafter; whether there is substantial prejudice to the respondent in permitting the late Notice of Claim; and whether there is a reasonable excuse for the failure to serve a timely Notice of Claim (*Matter of Balbuenas v. New York City Health & Hosps. Corp.*, 209 AD3d 642, 644 [2d Dept 2022]). The presence or absence of a factor is not dispositive as to granting leave to serve a late Notice of Claim (*Rodriguez v. Westchester Med. Ctr. (wmc)*,

196 AD3d 659, 660 [2d Dept 2021]).

Petitioner maintains that the Respondents committed medical malpractice by, *inter alia*, failing to identify a severe infection from the contaminated peripheral intravenous line site in her right arm. Petitioner alleges that her cause of action arose on October 1, 2022, which would require an application for leave to file a Notice of Claim be filed by December 30, 2023. Nevertheless, the within application to file a late Notice of Claim was timely filed on October 11, 2023, well within the one year and 90-day statute of limitations for commencing an action against the Respondents (GML § 50-i (1); *Johnson v. City of New York*, 302 A.D.2d 463, 462 [2d Dept 2003]).

The Court finds Petitioner has met her burden for leave to serve a late Notice of Claim and deeming service timely *nunc pro tunc*. In support of her application, Petitioner submits her medical records and Dr. Ellen Bondar's affirmation, who opines that the Respondents departed from the accepted standard of care when they medically treated the Petitioner, resulting in her injuries. "Where the alleged malpractice is apparent from an independent review of the medical records, those records constitute actual knowledge of the facts constituting the claim" (*Matter of Breslin v. Nassau Health Care Corp.*, 153 A.D.3d 1256, 1258 [2d Dept 2017] [citation omitted]; see also *Matter of Leon v. New York City Health & Hosps. Corp.*, 163 AD3d 670, 672 [2d Dept 2018]).

In opposition, Respondents argue that upon a review of the medical records, their expert, Dr. Pollack, opined that Petitioner's medical records evinced no malpractice by hospital staff. Thus, Respondents contend that they did not acquire actual knowledge of the facts underlying Petitioner's claim within ninety days of its accrual. However, neither statute nor case law requires a claimant to "establish the merits of [her] cause of action at so preliminary a stage as upon service of a notice of claim" (*Matter of Benavides v. NY City Health & Hosps. Corp.*, 197 NYS3d 493,

494-495 [1st Dept 2023]. Upon an examination of Petitioner's submissions, *i.e.*, her medical records and expert affirmation, the Court finds that Respondents acquired actual knowledge of the facts underlying Petitioner's claim within ninety days of its accrual.

The Court further finds that Petitioner has set forth a reasonable excuse for the delay in serving the Notice of Claim, which is premised on her health issues and months of recovery following her discharge from the Respondents' hospital (*Matter of Levin v. County of Westchester*, 91 A.D.3d 646, 647 [2d Dept 2012]; *Matter of Olsen v. County of Nassau*, 14 A.D.3d 706, 707 [2d Dept 2005]). However, the Court notes that where there is a showing of actual notice and lack of substantial prejudice, lack of a reasonable excuse does not prohibit granting leave to serve a late Notice of Claim (*Matter of Rivera-Guallpa v. County of Nassau*, 40 A.D.3d 1001, 1002 [2d Dept 2007]; *Hendershot v. Westchester Med. Ctr.*, 8 A.D.3d 381, 382 [2d Dept 2004]).

[INTENTIONALLY LEFT BLANK]

Based upon the foregoing, the Court finds that Respondents had actual knowledge of the facts underlying the Petitioner's claim within 90 days of its accrual; there is no substantial prejudice to Respondents in permitting service of the late Notice of Claim; and that the Petitioner established a reasonable excuse for the delay in filing.

Accordingly, the instant application to serve a late Notice of Claim and deem same timely served *nunc pro tunc* is **GRANTED**.

ORDERED that Petitioner serves a copy of this Order with Notice of Entry via NYSCEF within ten (10) days of the entry of this Order by the Clerk of the Court, it is further

ORDERED that Petitioner files a Summons and Complaint with thirty (30) business days of the date of this Order to commence an action against the Respondents.

This constitutes the Decision and Order of the Court.

Dated: 12/20/2023



Hon. Carolyn E. Wade, J.S.C.

KINGS COUNTY CLERK
FILED
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