

Lowe v New York City Health & Hosps. Corp.

2025 NY Slip Op 31083(U)

March 31, 2025

Supreme Court, Kings County

Docket Number: Index No. 526747/2024

Judge: Consuelo Mallafre Melendez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part MMESP-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 31st day of March 2025.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
SANDRA LOWE,

Plaintiff,

-against-

DECISION & ORDER

Index No. 526747/2024
Mo. Seq. 2

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, BONNIE WONG, M.D., HANNAH LOCASCIO, M.D., LWIN CHO, M.D., NYC HEALTH & HOSPITALS/KINGS COUNTY and NYC HEALTH & HOSPITALS/MCKINNEY,

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: 33 – 35, 36 – 47, 54 – 56, 57

Plaintiff moves (Seq. No. 2) for an Order, pursuant to Gen. Mun. Law § 50-e (5), deeming their notice of claim timely served *nunc pro tunc*. Defendants oppose the motion.

Plaintiff’s underlying medical malpractice claims arise from treatment and care rendered at two New York City Health and Hospitals Corporation (“NYCHHC”) facilities: Kings County Hospital Center (sued herein as “NYC Health & Hospitals/Kings County”) and McKinney Nursing and Rehab Center (sued herein as “NYC Health & Hospitals/McKinney”). In brief, Plaintiff presented to the emergency department at Kings County on November 5, 2023 with a toe injury and numbness throughout her legs. She was discharged to McKinney for subacute rehabilitation. She returned to Kings County for additional tests including a lumbar spine MRI on November 30 and an EMG on December 21. She was transferred from McKinney to non-

party Lenox Hill Hospital on January 9, 2024, where she was ultimately diagnosed with a spinal dural arteriovenous fistula. Plaintiff alleges this condition was not properly and timely diagnosed and treated.

Plaintiff's last date of treatment at Kings County was December 21, 2023 when she underwent an EMG, and her last date of treatment at McKinney was January 9, 2024. Pursuant to Gen. Mun. Law § 50-e, Plaintiff's 90-day period to serve a notice of claim on NYCHHC ended, at latest, on April 8, 2024.

Plaintiff served an untimely notice of claim on NYCHHC on May 16, 2024. A 50-h hearing was held. Plaintiff subsequently commenced this action on October 1, 2024, and filed the instant motion to deem the notice of claim timely on February 5, 2025. It is within the court's discretion to "grant an application to file a late notice of claim after the commencement of the action," so long as the statute of limitations of one year and ninety days has not expired (*Pierson v City of New York*, 56 NY2d 950, 954 [1982]). Defendants do not contest that Plaintiff's medical malpractice claims were within the statute of limitations when this application was made.

"In determining whether to grant or deny leave to serve a late notice of claim, the court must consider in particular whether the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days of the claim's accrual or within a reasonable time thereafter" (*Jaime v City of New York*, 41 NY3d 531, 540 [2024]). The court also considers other relevant facts and circumstances, particularly whether "the delay would substantially prejudice the municipality or public corporation in its defense" and whether the plaintiff "demonstrated a reasonable excuse for the failure to serve a timely notice of claim" (*Ibrahim v New York City Tr. Auth.*, 202 AD3d 786, 787 [2d Dept 2022]). "The presence or absence of any one of these factors

is not dispositive” (*Balbuenas v New York City Health & Hosps. Corp.*, 209 AD3d 642, 644 [2d Dept 2022], quoting *Rodriguez v Westchester Med. Ctr. [WMC]*, 196 AD3d 659, 660 [2d Dept 2021]).

Plaintiff argues that she had a reasonable excuse for the delay in serving notice of claim. In a personal affidavit, Plaintiff details her inability to timely file the claim due to the treatment and long-term recovery from her spinal fistula, including undergoing multiple spinal surgeries, post-operative rehabilitation, and transferring between multiple inpatient facilities during the 90-day notice period. Plaintiff avers that she was initially unaware of the nature of her spinal condition and the cause of her progressive weakness, numbness, and loss of control of her bladder and bowels, and she was focused on seeking diagnosis and treatment. After her diagnosis of spinal fistula, the 81-year-old Plaintiff underwent three spinal surgeries. She remained hospitalized at Lenox Hill Hospital until January 27, 2024, when she was transferred to non-party Glen Cove Hospital. She was then discharged from Glen Cove Hospital to Glen Cove Rehab on February 13, 2024.

Plaintiff states that she continued to reside at Glen Cove Rehab, a subacute treatment facility, until June 13, 2024. She had difficulty relearning to walk, dealing with urinary and bowel incontinence, and finding new housing because her walk-up apartment was no longer compatible with her disability and wheelchair use. She was therefore unable to retrain legal counsel and pursue her claims until May 2024, missing the notice of claim deadline by approximately five weeks.

The Court finds Plaintiff has demonstrated a reasonable excuse for the delay in these circumstances. Defendants argue in opposition that Plaintiff was not physically or mentally “incapacitated” such that she could not timely serve a notice of claim. However, a medical

condition need not rise to the level of total physical or mental incapacitation to constitute a reasonable excuse. “While the statute does not explicitly provide for the consideration of [reasonable excuse], the statute is non-exhaustive and this factor has firmly taken root in the case law” (*Jaime*, at 541). The Second Department has held that “even absent incapacitation, a reasonable excuse may be established by an allegation that a petitioner was *more concerned and preoccupied with his or her alleged injuries* or those of a spouse or child than with retaining counsel to pursue a legal claim,” provided that “such an allegation is supported by medical evidence” (*Balbuenas*, at 646). In the *Balbuenas* case, the appellate court found the petitioner’s mental health treatment for depression after her stillbirth was sufficient to show the delay was caused by her “emotional and psychological injuries and the accompanying preoccupation with her well-being,” and the claim was pursued once she retained counsel. Of note, there were several months between that petitioner’s documented mental health counselling and the notice of claim, but the court found this did not represent “a significant gap in time between the cessation of . . . treatment and her retention of counsel.” (*Id.*, at 646-647.)

Here, Plaintiff’s excuse is supported not only by her personal affidavit, but also substantiated by her treatment records at Lenox Hill Hospital and Glen Cove Hospital. It is undisputed that she underwent two spinal angiograms and a laminectomy/resection in January 2024, followed by a prolonged period of hospitalization and subacute rehabilitation. Her Glen Cove chart notes her condition as “leg weakness, bowel incontinence, partial urinary incontinence,” and she was recommended “therapy for functional deficits, gait/ADL [activities of daily living] impairments and acute rehabilitation.” She was cleared for discharge to “SAR” (subacute rehab) on February 13, 2024. Based on the submissions, Plaintiff received extensive care and physical therapy for ongoing injuries, allegedly caused by Defendants’ malpractice,

which hindered her ability to pursue legal action. As in *Balbuenas*, this Court finds “the medical records do not reveal a significant gap in time” when she should have been able to retain counsel after being discharged from the hospital. Contrary to Defendants’ argument in opposition, the fact she eventually contacted a lawyer and served a notice of claim in May 2024 – while still residing at Glen Cove Rehab – does not negate the excuse that her physical injuries and recovery took precedence over the legal claim before that point.

Additionally, Plaintiff argues that Defendants would not be substantially prejudiced by the late notice of claim. On this factor, Plaintiff has the prima facie burden of presenting at least “some evidence or plausible argument that supports a finding of no substantial prejudice” (*Newcomb v Middle County Cent. School Dist.*, 28 NY3d 455, 466 [2016]). Once this burden is met, the opposing party must make a particularized showing that they would be substantially prejudiced by the late notice of claim.

It is not disputed that the untimely notice of claim was served on May 16, 2024, approximately five weeks after the 90-day deadline of April 8, 2024. Plaintiff argues the evidence necessary to try this action is “entirely preserved” in Defendants’ medical records, and there has been “no change in evidence from the time of the deadline until the time defendants received notice of the claim.” Therefore, they argue the passage of time alone would not prejudice Defendants in opposing the action on its merits.

Defendants argue this fails to satisfy Plaintiff’s initial burden, contending that because “plaintiff has failed to show that the defendant had actual knowledge of the malpractice . . . plaintiff cannot show the defendant is not prejudiced by the delay.” However, this Court finds the cases cited by Defendants are not applicable here. On the issue of prejudice, Plaintiff has not merely relied on an argument that Defendants had prior knowledge of the facts. Plaintiff makes

the argument that the relatively short five-week delay (or nine weeks based on her treatment at Kings County) had no impact on the medical records at issue or Defendants' access to them, and therefore, once the untimely notice was served and this action was commenced, Defendants were not prejudiced in reviewing those records, conducting interviews and depositions, and consulting with experts to maintain a defense (*see Balbuenas*, at 646-647). This meets Plaintiff's burden of providing a plausible argument to support a finding that Defendants would not be substantially prejudiced. In opposition, Defendants have not made any particularized showing that they suffered prejudice from the delay between April 8, 2024 and the untimely May 16, 2024 notice.

Finally, Plaintiff argues that Defendants acquired actual knowledge of the facts underlying her claim within the 90-day period "or within a reasonable time thereafter" (Gen. Mun. Law § 50-e [5]). Plaintiff submits her Kings County and McKinney medical records, along with an expert affirmation from Aric Hausknecht, M.D. Plaintiff's expert opines that the medical records evince departures from the standard of care, including a delay in performing a lumbar spine MRI and thoracic spine MRI. The expert therefore opines that the essential facts constituting a potential malpractice claim were apparent from the records.

"While the contents of records in the municipality's possession may sometimes be sufficient to demonstrate that a municipality acquired actual knowledge of the essential facts constituting the claim within a reasonable time, 'mere possession or creation of records does not ipso facto establish actual knowledge'" (*Jaime*, at 545, quoting *Wally G. ex rel. Yoselin T. v New York City Health and Hosps. Corp.*, 27 NY3d 672, 677 [2016]). In the case of a medical malpractice claim, the records themselves must "evince that the medical staff, by its acts or omissions, inflicted [an] injury on plaintiff" (*Wally G.*, at 677; *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]).

Here, Plaintiff's expert affirmation does not necessarily demonstrate Defendants' actual knowledge of the facts underlying a potential malpractice claim. "[A]ssertions that a different course of treatment could have been followed do not address whether [Defendant] had actual knowledge" of the injury inflicted on plaintiff (*Wally G.*, at 677). However, this Court notes that the essential facts underlying the claim were also set forth in the notice served on NYCHHC on May 16, 2024, including the dates of treatment, specific allegations of malpractice, and alleged injuries. While there is no strict precedent on what constitutes a "reasonable time" under the statute, the Second Department has held that where a notice of claim is served one month late, the respondents did acquire actual knowledge in a reasonable time (*see Regan v City of New York*, 131 AD3d 1064, 1066 [2d Dept 2015]; *Gershanow v Town of Clarkstown*, 88 AD3d 879, 880 [2d Dept 2011]). Conversely, a notice served three months late – the equivalent of another 90-day period – is not a reasonable time to provide actual knowledge (*Maggio v City of New York*, 137 AD3d 1282, 1283 [2d Dept 2016]). In these circumstances, the Court finds NYCHHC's receipt of the notice of claim just over one month after the 90-day period constituted actual knowledge within a reasonable time.

Further, "while the actual knowledge factor generally should be given 'great weight' in the analysis . . . failure to satisfy that factor is not fatal to [a] petition to serve a late notice of claim" (*Balbuenas*, at 645 [internal citations omitted]; *Davis v Inc. Vil. of Laurel Hollow*, 195 AD3d 1019 [2d Dept 2021]). The court must evaluate all relevant facts and circumstances, including Plaintiff's inability to retain counsel while undergoing diagnosis, treatment, and

rehabilitation for her spinal condition, and the lack of substantial prejudice caused by the short delay.

As Plaintiff has demonstrated actual knowledge, a reasonable excuse for the delay, and a lack of substantial prejudice, this Court finds an extension of time to file the notice of claim is warranted. Accordingly, Plaintiff's motion (Seq. No. 2) is **granted** and the notice of claim dated May 16, 2024 is deemed timely filed and served.


It is hereby:

ORDERED that the motion (Seq. No. 2) for an Order, pursuant to Gen. Mun Law § 50-e, granting leave to file a late notice of claim *nunc pro tunc*, is **granted**; and it is further

ORDERED that the notice of claim dated May 16, 2024 is deemed timely filed and served *nunc pro tunc*.

This constitutes the decision and order of this Court.

ENTER.



Hon. Consuelo Mallafre Melendez

J.S.C.