

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

2012 NY Slip Op 33949(U)

September 27, 2012

Supreme Court, Kings County

Docket Number: 501134/12

Judge: Lawrence S. Knipel

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NYSCEF DOC. NO. 13

INDEX NO. 501134/2012

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At an IAS Term, Part ^{MMSH} of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of September, 2012

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X

IN THE MATTER OF THE CLAIM OF ROMITA SOSA,

Petitioner,

- against -

Index No. 501134/12

NEW YORK CITY HEALTH & HOSPITALS
CORPORATION,

Respondent.

-----X

The following papers numbered 1 to 5 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1, 2, 3 _____
Opposing Affidavits (Affirmations) _____	4 _____
Reply Affidavits (Affirmations) _____	5 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Petitioner Romita Sosa moves for leave to serve a late notice of claim or to deem her notice of claim served timely *nunc pro tunc*.

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Petitioner's attorney asserts that petitioner is non-English speaking and came to his office for the first time May 10, 2012. The attorney asserts petitioner "was sent home with appendicitis three times on consecutive days by the emergency room" at Woodhull Hospital with "catastrophic" results. By the time she was admitted to a different hospital, her appendix had burst, and she lost portions of her intestine and colon, and she needed a colostomy. She was confined to home with a home attendant, and when that ran out, she flew to Texas so her daughter could care for her until her return to New York in February 2012. In short, it is asserted, petitioner was "sick continuously since March 2011." The application was brought before the expiration of the statute of limitations on June 10, 2012.

The application is supported by an affidavit of petitioner and an affirmation of a physician who opines that "appendicitis or other surgical abdominal crisis" should be suspected when a patient persists in returning to the emergency room every day, and that sending her home was a departure from appropriate practice.

HHC opposes the petition, arguing that petitioner has failed to show sufficient facts to warrant an extension of time to serve a notice of claim. According to the hospital records respondent obtained, petitioner was treated under different names from March 10 to March 12, 2011, and HHC had no knowledge of this potential claim until receipt of the order to show cause in May. Blood work and a CT scan were performed, and she was discharged in stable condition with stomach pain

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resolved. The records from New York Community Hospital had a primary diagnosis of diverticulosis of colon, and petitioner was not diagnosed with appendicitis or a ruptured appendix.

Respondent argues that it did not have actual notice of the facts constituting petitioner's claim, and the mere fact that there are medical records does not demonstrate that respondent was put on notice of any potential medical malpractice claim. The Woodhull record, it is urged, "is devoid of any complications of facts sufficient to notify the hospital of a potential claim for negligence." Petitioner never returned to Woodhull after March 12, 2012, and it is unclear how the treatment rendered caused or contributed to any alleged injury. Nor can petitioner demonstrate that lack of prejudice by the 11-month delay after the expiration of the 90-day period. Lastly, it is argued, petitioner has failed to provide a reasonable excuse for the delay. Even if she were under continuing medical care, she does not explain "how this alleged incapacity prevented her from contacting an attorney or availing herself of other resources to effectuate a timely notice of claim." No medical affidavit is submitted to substantiate the excuse proffered.

In reply, petitioner's attorney noted that petitioner is not English speaking, and, since the statute of limitations was approaching, he had to act quickly. He contends that it is inconsequential whether his client suffered from diverticulosis or appendicitis. Here, it is argued, the medical records demonstrate actual knowledge of the essential facts constituting the claim.

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Among the factors to be considered by a court in determining whether to grant leave to serve a late notice of claim are whether the municipality acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or within a reasonable time thereafter; whether the delay would substantially prejudice the municipality in maintaining its defense; and whether the claimant had a reasonable excuse for the failure to serve a timely notice of claim (*see Matter of Levin v County of Westchester*, 91 AD3d 646 [2d Dept. 2012])[The delay in serving a notice of claim was “directly attributable to Levin’s medical condition and that they were more concerned with her health than with commencing legal action;” and although the County was not afforded a prompt notice of the essential facts underlying the claims, the delay will not substantially prejudice the County]; *Matter of Joy v County of Suffolk*, 89 AD3d 1025 [2d Dept. 2011][While the excuse was not reasonable, petitioner demonstrated that respondents had knowledge of the essential facts underlying her claim and lack of prejudice; conclusory assertions of prejudice were insufficient]; *Matter of Chambers v Nassau County Health Care Corp.*, 50 AD3d 1134 [2d Dept. 2008][Court providently exercised its discretion in granting leave to serve a late notice of claim where, even though petitioner did not offer a reasonable excuse for the delay, she demonstrated that appellant acquired timely knowledge of the facts constituting the claim and would not be substantially prejudiced by the delay; appellant failed to demonstrate prejudice or that the claim was patently without merit]). “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" (*Matter of Joy v County of Suffolk, supra*).

Here, it cannot be said that respondent had "actual knowledge of the essential facts constituting the claim." To begin with, the record shows that petitioner presented herself for treatment under different names. Even if it were clear that it was only one person, the condition she was treated for in New York Community Hospital, diverticulosis, was not related to the condition she initially claims to have had, appendicitis. Her expert's affirmation, is wholly insufficient as it only discusses appendicitis, not diverticulosis. While petitioner's attorney took timely action with the information he had, it simply cannot be said that respondent had, or should have had, knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter.

Nor has petitioner offered a valid excuse for the delay in filing a notice of claim. If her medical condition did not prevent her from flying to Texas, she could have timely consulted an attorney.

Accordingly, the application is denied, the petition is denied, and the proceeding is dismissed.

The foregoing constitutes the decision, order and judgment of this court.

E N T E R

J. S. C.