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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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T.V., infant by his mother and natural guardian
RAISA VALERIO,

Plaintiff,

Index No. 805064-15

-against-

DECISION/ORDER

Motion Sequence 001

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, BELLEVUE HOSPITAL CENTER, and
METROPOLITAN HOSPITAL CENTER,

Defendants.

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HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

Papers	Numbered
Order to Show Cause, Affirmations & Collective Exhibits Annexed	1, 2, 3
Notice of Cross Motion, Answering Affirmation & Exhibits Annexed	4, 5
Plaintiff's Reply Affirmation	6
Defendants' Reply Affirmation	7

This is an action for medical malpractice and negligence stemming from infant plaintiff, T.V. ("Infant Plaintiff") falling out of a hospital bed at Metropolitan Hospital Center ("Metropolitan") after his mother Raisa Valerio ("Plaintiff") inadvertently fell asleep while breast feeding Infant Plaintiff. Plaintiff filed suit against Metropolitan, Bellevue Hospital Center ("Bellevue"), and New York City Health and Hospitals Corporation ("HHC," collectively "Defendants").

On April 19, 2009, Plaintiff gave birth to Infant Plaintiff at Metropolitan. Plaintiff, age 18 at the time of Infant Plaintiff's birth, alleges, on the same day she gave birth and after 9 hours of labor, she asked a health care worker at Metropolitan to take Infant Plaintiff to the nursery so Plaintiff could rest (Plaintiff's Aff. Supp. at ¶ 6). Plaintiff further alleges that Metropolitan's "employee told [her] that the nursery was only for babies born by cesarean section and just walked away" (*Id.*). Shortly thereafter, Plaintiff fell asleep with Infant Plaintiff in the same bed,

without the bed's side rails up (*Id.*). At some point while Plaintiff was asleep, Infant Plaintiff fell out of the bed.

Plaintiff further alleges that no one at Metropolitan instructed her on how Infant Plaintiff should sleep, and that as a result of the fall, Infant Plaintiff suffered a subdural hematoma, parietal skull fracture, and cavernous malformation resulting in an ongoing seizure disorder (*Id.* at ¶ 8).

Following Infant Plaintiff's fall, Metropolitan performed a CT scan of Infant Plaintiff's head that documented an acute subdural hematoma and identified "mega cisterna magna versus retrocerebellar arachnoid cyst..." (*Id.* at ¶ 9). Metropolitan transferred Infant Plaintiff to Bellevue for twenty-four hours of neurosurgical observation (*Id.*). At Bellevue, another CT scan documented the subdural hematoma and a non-displaced left parietal bone fracture in the skull (*Id.*). The bone fracture went unidentified in the previous CT scan conducted by Metropolitan (*Id.*). Doctors at Bellevue later informed doctors at Metropolitan that no further treatment was necessary (*Id.* at ¶ 10).

Then, in 2013, at Morgan Stanley Children's Hospital of New York-Presbyterian, Infant Plaintiff was examined by medical staff, and "presented with new-onset focal seizure and ultimately found to have a right frontal intracranial hemorrhage that was thought to be due to a cavernous malformation" (*Id.* at ¶ 11). Plaintiff alleges that the cavernous malformation was previously diagnosed, but was never addressed by Defendants (*Id.*). Defendants deny diagnosing the cavernous malformation (Defendant's Aff. Opp. at ¶ 13).

On February 13, 2015, Plaintiff filed a Summons and Complaint alleging negligence and medical malpractice (Plaintiff's Aff. Supp. Ex. C). Further, on March 17, 2015, Plaintiff moved, by Order to Show Cause, for an order, pursuant to General Municipal Law § 50-e, granting leave to file a notice of claim *nunc pro tunc* and for an order requiring Defendants to disclose medical records and all investigation records relating to the subject incident. Defendants cross-moved for an order, pursuant to CPLR 3211 (a)(7), dismissing Plaintiff's Complaint for failure to comply with General Municipal Law § 50-e.

Pursuant to General Municipal Law § 50-e, a notice of claim in a medical malpractice action against a city must be served within 90 days of the alleged malpractice (General Municipal Law § 50). Section 50-e(5) authorizes a court, in its discretion to extend the time to serve a notice of claim (*Id.* at § 50-e[5]). The extension, however, may not exceed the time limited for the commencement of an action by the claimant against the public corporation (*Id.*). Thus, a court generally has discretion to grant a motion to serve a late notice of claim provided that it is made within the one-year-and-90 day statute of limitations (*Id.* at § 50-i).

This limitation period is, however, subject to a toll for infancy (*Sarjoo v New York City Health and Hosp. Corp.*, 309 AD2d 34, 38 [1st Dept 2003], *lv denied* 1 NY3d 506 [2004]). Presently, Infant Plaintiff is entitled to the benefit of the infancy toll. Thus, the petition to serve a

late notice of claim, made during her infancy and less than ten years after accrual of her claim, is timely. Further, because Infant Plaintiff's action is not per se barred by the statute of limitations, the court has broad discretion to grant an extension of time to serve the notice of claim (*Davis v City of New York*, 250 AD2d 368, 369 [1st Dept 1998]).

In deciding whether to grant an extension of time to serve the notice of claim under General Municipal Law § 50-e(5), the key factors courts must consider are: (1) whether the claimant is an infant; (2) whether the movant has shown a reasonable excuse for their failure to serve the Notice of Claim; (3) whether the public corporation acquired actual notice of the essential facts underlying the claim within 90 days after the claim arose or a reasonable time thereafter; (4) and whether the delay would substantially prejudice the public corporation in its defense. Crucially, the presence or absence of any one factor is not determinative, but are merely part of the consideration for the court (*Plaza ex rel. Rodriguez v New York Health & Hospitals Corp. [Jacobi Med. Ctr.]*, 97 AD3d 466, 467 [1st Dept 2012] *aff'd sub nom Plaza ex rel. Rodriguez v New York Health & Hospitals Corp.*, 21 NY3d 983, [2013] citing *Velazquez v City of N.Y. Health and Hosps. Corp. [Jacobi Med. Ctr.]*, 69 AD3d 441, 442 [1st Dept 2010], *lv. denied*, 15 NY3d 711, 2010 WL 4065634 [2010] quoting *Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [1st Dept 2003]). The burden is on the Plaintiff to demonstrate the existence of these factors to the court (*Washington v City of New York*, 72 NY2d 881, 883 [1988]).

Further, courts construe the statute liberally because it is remedial in nature (*Camacho v City of New York*, 187 AD2d 262, 263 [1st Dept 1992]). However, this liberal construction has its limits, and "should not be taken as carte blanche to file a late notice of claim years after the incident which gave rise to the claim occurred. Such an interpretation would frustrate the purpose of the statute which is to protect the municipality from unfounded claims and ensure that it has an adequate opportunity to explore the claim's merits while information is still readily available" (*Plaza ex rel. Rodriguez*, 97 AD3d at 467-468 citing *Matter of Porcaro v City of New York*, 20 AD3d 357 [1st Dept 2005]).

According to Plaintiff's proposed Notice of Claim, Plaintiff asserts two claims against Defendants (Plaintiff's Aff. Supp. Ex. B). First, that Defendants' negligence in caring for Infant Plaintiff and failure to prevent Infant Plaintiff's fall, resulted in Infant Plaintiff's injuries (*Id.*). Specifically, a subdural hematoma, parietal bone fracture, and cavernous malformation resulting in an ongoing seizure disorder (*Id.*). Plaintiff makes a second claim based on medical malpractice, and specifically a failure to diagnose (*Id.*). Plaintiff claims the injuries were the result of Defendants' "misdiagnosis of cavernous malformation and failure to communicate cavernous malformation" (*Id.*). The Court will examine the claim for negligence and the claim for medical malpractice separately.

First, it is undisputed that Infant Plaintiff is, and was at the time of the alleged malpractice, an infant. Second, Plaintiff argues that this infancy is a reasonable excuse for the delay in filing. Defendants argue that Plaintiff has not met her burden in demonstrating that the delay was causally related to infancy. However, while "[a] delay of service caused by infancy

[makes] a more compelling argument to justify an extension ...the lack of a causative nexus may make the delay less excusable, but not fatally deficient" (*Williams ex rel. Fowler v Nassau Cnty. Med. Ctr.*, 6 NY3d 531, 538 [2006]). Here, Plaintiff has failed to establish a nexus between the excuse of infancy and the reason for the delay, as there is nothing in the record to indicate that infancy made it more difficult to diagnose the possible permanence of the injury. Indeed, Plaintiff only asserts "[t]he delay in filing the notice of claim was not [Infant Plaintiff's] fault and he should not be penalized" (Plaintiff's Rep. Aff. at ¶ 39). However, the failure to demonstrate a nexus, or otherwise provide a reasonable excuse, is not fatal where a movant can demonstrate Defendant had knowledge of the incident (*Flores-Vasquez v New York City Health & Hosps. Corp.*, 112 AD3d 540, 541 [1st Dept 2013] citing *Matter of Ansong v City of New York*, 308 AD2d 333, 334 [1st Dept 2003]).

Thus, the court now considers whether the public corporation acquired actual notice of the essential facts underlying each claim within 90 days after the claim arose or a reasonable time thereafter. Courts have found defendants acquired actual knowledge of the facts underlying the claim where plaintiffs have submitted expert affidavits demonstrating that defendants had knowledge of the facts underlying the "theory of a departure from the accepted standard of ... care with regard to the diagnosis and treatment of the child" (*Flores-Vasquez*, 112 AD3d at 541; *Perez ex rel. Torres v New York City Health & Hosps. Corp.*, 81 AD3d 448 [1st Dept 2011]; *Kellel B. v New York City Health & Hosps. Corp.*, 122 AD3d 495, 496 [1st Dept 2014]), usually contained in defendants' medical records (*Castaneda v Nassau Health Care Corp.*, 89 AD3d 782, 783 [2d Dept 2011]), or through an investigation conducted by defendants *(Lopez v City of New York*, 103 AD3d 567, 568 [2013]; *Santana v City of New York*, 183 AD2d 665, 666 [1st Dept 1992]).

Here, Plaintiff contends that Defendants had actual knowledge of the essential facts constituting the claims because Defendants "(1) caused plaintiff's injuries by their negligent acts and omissions, (2) were informed of the fall by T.V's mother following the fall, (3) treated plaintiff's injuries which they caused, (4) documented their acts, omissions and subsequent treatment of the injuries in their own records, and (5) 'incident report was written'" (Plaintiff's Aff. Supp. ¶ 16). Plaintiff further contends that because the Occurrence Reporting Form documents the fact that "...baby fell down the floor ... [with] bed at low position" (Defendant's Ex. A), Defendants have actual knowledge of essential facts.

With regard to the claim in negligence, the medical records denote the injury to Infant Plaintiff, and the Occurrence Reporting Form documents Defendants' actions that could be attributed to negligence. Namely, that the "bed was in low position." Thus, Defendants' had actual knowledge of facts underlying the claim for negligence within 90 days.

The last factor courts look to in deciding whether to grant leave to file a late notice of claim is whether the delay would substantially prejudice the public corporation in its defense. Here again, Plaintiff has the burden to show there would not be substantial prejudice to public corporation (*Lauray v City of New York*, 62 AD3d 467 [1st Dept 2009]). Plaintiff argues that

Defendants would not be prejudiced because they conducted an investigation of the matter promptly as documented in an "Occurrence Reporting Form" (Defendant's Ex. A). Further, Plaintiff contends that Defendants also conducted a second investigation, including a recorded interview of Plaintiff, which alerted them to the underlying facts of the claims (Plaintiff's Reply Aff. at 4).

Defendants' contention that "there is a substantial risk that the memories of HHC witnesses will have faded" (Defendant's Aff. Opp. ¶ 32) is not persuasive where Defendants have actual knowledge of the facts from a contemporaneous investigation conducted by Defendants within 90 days (*see Caminero v New York City Health & Hospitals Corp. [Bronx Mun. Hosp. Ctr.]*, 21 AD3d 330, 333 [1st Dept 2005]). Because Defendants had actual knowledge of the facts underlying the claim in negligence, as documented in the Occurrence Reporting Form, there is no prejudice.

Therefore, Plaintiff's motion for leave to file a late notice of claim is granted with respect to the claim in negligence. Conversely, Defendant's motion to dismiss for failure to comply with § 50-e is denied with respect to the claim in negligence.

The Court now turns to Plaintiff's claim in malpractice, where Plaintiff similarly must demonstrate her right to relief through the factors listed above.

First, as discussed above, Plaintiff has failed to establish a nexus between the excuse of infancy and the reason for the delay. However, the record demonstrates that Plaintiff has a reasonable excuse as it pertains to the claim in medical malpractice. Specifically, Plaintiff has asserted that Infant Plaintiff did not begin to experience seizures until 2013, and thus Plaintiff did not discover the true nature of the problem, until that time (Plaintiff's Aff. Supp. at ¶ 11). As such, Plaintiff has demonstrated a reasonable excuse with regard to the claim in malpractice (*Cifuentes v New York City Health & Hosps. Corp.*, 43 AD3d 385, 386 [2d Dept 2007]; citing *Casias v City of New York*, 39 AD3d 681 [2d Dept 2007]).

With regard to whether Defendants had actual knowledge, Plaintiff, in her reply affirmation, asserts that Defendants diagnosed Infant Plaintiff with cavernous malformation, where Defendants' medical staff reported a "Mega cisterna magna versus retrocerebellar" (Plaintiff's Rep. Aff. at ¶ 28), but then failed to properly communicate or treat the diagnosis. Conversely, Plaintiff asserts that Defendants failed to diagnose the cavernous malformation (Plaintiff's). However, under either of the competing claims, "[s]ince the medical issues presented here are not within the ordinary knowledge and experience of a layperson, an expert affidavit is necessary" (*see e.g. Mosberg v Elahi*, 80 NY2d 941, 942 [1992]; *Fiore v Galang*, 64 NY2d 999, 1001 [1985]).

Thus, where Plaintiff claims that Defendants diagnosed Infant Plaintiff with a cavernous malformation but failed to communicate or treat the condition, in order to meet the burden to demonstrate actual knowledge, Plaintiff needed to submit an expert affidavit to demonstrate that

a diagnosis of "Mega cisterna magna versus retrocerebellar" put Defendants on notice of the cavernous malformation (*Mosberg*, 80 NY2d at 942). Conversely, where Plaintiff claims that Defendants failed to diagnose a cavernous malformation, Plaintiff needed to submit an expert affidavit to demonstrate that Defendants had actual knowledge of facts underlying the failure to diagnose (see, eg *Flores-Vasquez*, 112 AD3d at 541 ["Plaintiffs submitted expert affidavits showing that defendant had actual knowledge of the facts underlying their theory of a departure from the accepted standard of pediatric care with regard to the diagnosis ... and the existence of a causally related injury."]). Indeed, the First Department has "repeatedly stressed the presence of such an affidavit in upholding grants of motions for leave to serve a late notice of claim (*Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824, 828 [1st Dept 2010] citing *Lisandro v New York City Health & Hosps. Corp. [Metropolitan Hosp. Ctr.]*, 50 AD3d 304, 304 [2008], *lv denied* 10 NY3d 715 [2008] ["plaintiff submitted affirmations from physicians establishing that the available medical records, on their face, evinced that defendants failed to provide the infant plaintiff with proper care"]; *Talavera v New York City Health & Hosps. Corp.*, 48 AD3d 276, 277 [2008] ["Plaintiffs submitted affirmations from a physician establishing that the medical records, on their face, evince that defendant failed to provide proper care to plaintiffs"]).

Therefore, with respect to the cavernous malformation, the records do not, on their face and without an expert affidavit, give an indication that Defendants had actual knowledge of Infant Plaintiff's cavernous malformation, or of Defendants' failure to diagnose one, or that Defendants' failure to communicate a diagnosis was attributable to Defendants' deviation from good and accepted medical standards (*Clase ex rel. Lopez v New York City Health & Hospitals Corp.*, 92 AD3d 454, 455 [1st Dept 2012] citing *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537 [2006]; *Perez ex rel. Torres v New York City Health & Hosps. Corp.*, 81 AD3d 448 [1st Dept 2011]). As such, Plaintiff failed to meet the burden in establishing that Defendants had actual knowledge of the facts underlying the claim for medical malpractice.

Further, where plaintiffs fail to demonstrate actual knowledge, longer delays are generally more prejudicial because "the medical personnel who could testify to the facts at the time of the alleged malpractice may no longer be available, or, if they are, their memories are no longer fresh" and the public corporation would be prejudiced in its defense (*Cartagena ex rel. Gilliam v New York City Health & Hospitals Corp.*, 93 AD3d 187 [1st Dept 2012]). Here, Defendants would be substantially prejudiced because they did not have actual knowledge of facts supporting a claim in medical malpractice.

As such, Plaintiff's motion for leave to file a late notice of claim is denied with respect to the claim for medical malpractice, and Defendants' cross-motion for an order dismissing the claim pursuant to CPLR § 3211(a)(7) is granted with respect to the claim for medical malpractice.

Lastly, Plaintiff seeks an order compelling Defendants to produce certain items in discovery. Motions relating to discovery, "must have served and filed with the motion papers an affirmation that the attorney for the moving party has conferred in good faith with the counsel for

the opposing party in order to attempt to resolve the issues that are contained in the motion (*Nikpour v City of New York*, 179 Misc 2d 928, 1999 NY Slip Op 99117 [Sup Ct, NY County 1999]; 22 NYCRR 202.7[a] and [d]). "Counsel who wish to make such types of motions are required to do that so as to avoid the unnecessary expenditure of limited judicial resources where the attorneys for the parties could resolve through constructive dialogue the issues that would be raised in a motion" (*Nikpour v City of New York*, 179 Misc. 2d 928, 930, 686 N.Y.S.2d 920, 921 (Sup Ct, NY County 1999] citing *Sixty Six Crosby Assocs. v Berger & Kramer, LLP*, 256 AD2d 26 [1st Dept 1998]; see also *Dunlop Dev. Corp. v Spitzer*, 26 AD3d 180, 182 [1st Dept 2006]). No such affirmation was attached to the present motion papers. Thus, Plaintiff's motion to compel discovery must be summarily denied. The court has considered the parties' remaining arguments and finds them unpersuasive. It is therefore

ADJUDGED that the petition for leave to serve a late notice of claim is granted in part and denied in part, consistent with this decision; and it is further

ORDERED that Defendant's motion to dismiss is denied in part and granted in part, consistent with this decision; and it is further

ORDERED that Plaintiff's motion to compel discovery is denied; and it is further

ORDERED that the parties are to appear for a status conference on March 22, 2016 at 9:30am at Part 10, 60 Centre St., Room 422, New York, NY 10007; and it is further

ORDERED that Plaintiff is to serve a copy of this order, with notice of entry, upon Defendants within 20 days of entry.

George J. Silver

George J. Silver, J.S.C.

Dated: 1/15/16
New York County

GEORGE J. SILVER