ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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Kristen Copeland, an Infant, by her Mother and Natural Guardian, Sharon Copeland, and Sharon Copeland, Individually,

Plaintiffs,

INDEX NO.: 38599/03

- against -

BY: HON. JULES L. SPODEK

James Christopher Wittig, M.D., Chyandwani Sulachini, M.D., Matthew Leibman, M.D., Roberto Garcia, M.D., Herman Yee, M.D., and Guoping Cai, M.D.

DATE: NOVEMBER 8, 2004

Defendants.

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Upon the Notice of Motion, dated February 25, 2004, the affirmation of Tim O'Shaughnessy, Esq., dated February 25, 2004, the affidavit of Susan Richards, dated February, 2004, the affirmation of Rhona Silverman, Esq., dated April 28, 2004, the affirmation of Tim O'Shaughnessy, Esq., dated May 4, 2004, the affirmation of Rhona Silverman, Esq., dated March 31, 2004, the Notice of Cross-Motion, dated March 25, 2004, the affirmation of Rhona Silverman, E$sq., dated March 25, 2004, the affirmation of Tim O'Shaughnessy, Esq., dated May 24, 2004, the Order To Show Cause, dated May 12, 2004, the affirmation of Rhona Silverman, Esq., dated May 5, 2004 memorandum of law, dated June 23, 2004, correspondence dated June 21 and 22, 2004, and upon all exhibits annexed thereto and upon oral argument:

Plaintiff commenced this medical malpractice action on or about October 13, 2003, naming six physicians as defendants who allegedly rendered medical services to the infant plaintiff. Those services and treatments took place over a period of approximately

six months.

The facts which form the basis of plaintiffs' legal claims are generally undisputed. In June of 2002 the infant began experiencing pain in her hip. Following visits to two hospital emergency rooms in Brooklyn, plaintiffs were referred to the Hospital for Joint Diseases for further diagnosis and treatment. Once there, plaintiffs met with defendant Dr. Christopher Wittig who then referred the infant to Bellevue Hospital Center (BELLEVUE), a public hospital, for further evaluation and testing. It appears that the physicians tending to the infant at Bellevue were New York University School of Medicine (NYU) colleagues of Dr. Wittig[1]. While at Bellevue, the infant underwent a biopsy and lab work.

Initially, the infant plaintiff was diagnosed with osteosarcoma, or bone cancer, and accordingly, was transferred to NYU in order to receive a course of chemotherapy. Subsequent to the administration of chemotherapy, the infant's mother was informed - probably by Dr. Wittig - that the actual cause of the infant's hip pain was an aneurysmal bone cyst and not cancer. As a consequence, the infant underwent surgery at BELLEVUE to remove a portion of her hip in order to excise the cyst. She is currently unable to walk without assistance.

The NYU physicians who treated the infant plaintiff during her admission to BELLEVUE were providing medical services in accordance with the provisions of an Affiliation Agreement (the Agreement) between the New York City Health and Hospitals

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[1]This Court has not been provided with information detailing the professional role each defendant had with respect to treatment of the infant plaintiff. Nor is this Court aware of the specifics of the infant's treatment at the various hospitals.

Corporation and NYU. The terms of the Agreement provide, as is relevant here, that should any "Physician Provider" be answerable for any charge of medical malpractice, NYCHHC is to defend and indemnify that employee. This contractual obligation to indemnify extends to "acts of malpractice... arising from the obligatory or voluntary provision of patient care services or the diagnosis of patients while performing Contract Services".

The instant motion raises the novel issue of whether the defendant physicians employed by NYU, a non-party private hospital, but indemnified by NYCHHC for services rendered to the infant plaintiff at BELLEVUE, are entitled to the protections of the one year and ninety day Statute of Limitations and the notice of claim requirements contained in General Municipal Law §50-k and §50-e.

This Court finds that they are not so entitled.

Where a physician is an employee of the public benefit corporation (NYCHHC), it cannot be disputed that in the event of a lawsuit, the one year and ninety day limitations period is applicable to such party as well as the requirements delineated in the General Municipal Law regarding filing of Notices of Claim. (A notice of claim must be filed within ninety days of the accrual of the cause of action). NYCHHC must also defend and indemnify an employee against charges of negligence or malpractice. General Municipal Law §50-e and §50-k; see also, General Municipal Law §50-d.

I

In evaluating defendants' request that plaintiff's action be dismissed for failing to file a notice of claim, this Court reviewed the following relevant statutory provisions in

order to determine the necessity of filing a notice of claim under the circumstances presented:

General Municipal Law §50-d states, in pertinent part as follows:

> 1. [E]very municipal corporation shall be liable for, and shall assume the liability, to the extent that it shall save him harmless, of any resident physician, physician, [or] interne rendering medical, ... services of any kind to a person without receiving compensation from such person in a public institution maintained in whole or in part by the municipal corporation, ...for damages for personal injuries alleged to have been sustained by such person by reason of the malpractice of such resident physician, physician, [or]interne, ... while engaged in the rendition of such services. Every such resident physician, physician, [or] interne,... for the purpose of this section, shall be deemed an employee of the municipal corporation notwithstanding that the municipal corporation derived no special benefit in its corporate capacity.
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> 2. No action shall be maintained under this section against such municipality, resident physician, physician, [or] interne, ... unless a notice of claim shall have been made and served in compliance with section fifty-e of this chapter...

General municipal Law §50-e states, in pertinent part as follows:

> a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation,...or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises....

General Municipal Law §50-k states, in pertinent part as follows:

1e. "Employee" shall mean any person holding a position by election, appointment or employment in the service of any agency, whether or not compensated, or a volunteer expressly authorized to participate in a city sponsored volunteer program, but shall not include an independent contractor....

2. At the request of the employee and upon compliance by the employee with the provisions of subdivision four of this section, the city shall provide for the defense of an employee of any agency in any civil action or proceeding in any state or federal court... arising out of any alleged act or omission which the corporation counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency....

3. The city shall indemnify and save harmless its employees in the amount of any judgement obtained against such employees in any state or federal court, or in the amount of any settlement of a claim approved by the corporation counsel and the comptroller, provided that the act or omission from which such judgment or settlement arose occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency.....

4. The duty to defend or indemnify and save harmless prescribed by this section shall be conditioned upon (a) delivery to the corporation counsel at the office of the law department of the city by the employee of the original or a copy of any summons, complaint, process, notice, demand or pleading within ten days after he is served with such document.... Such delivery shall be deemed a request by the employee that the city provide for his defense pursuant to this section....

6. Every action or proceeding instituted hereunder,... shall be commenced pursuant to the provisions of section fifty-i of this chapter and within one year and ninety days. No action or proceeding instituted hereunder... shall be prosecuted or

> maintained against the city or any agency or an employee unless notice of claim shall have been made and served upon the city in compliance with section fifty-e of this chapter and within ninety days after the claim arises.

One of the relevant cases interpreting the above referenced statutory provisions is Hassan v. Woodhull Hospital and Medical Center, 282 A.D.2d 709. In this Second Department case, the defendant physician, an employee of a private hospital was providing various medical and supervisory services at an NYCHHC facility under the auspices of a city Community Physician Program. The defendant moved for summary judgment dismissing the complaint because he asserted that as a "statutory employee" of NYCHHC pursuant to G.M.L §50-d, a notice of claim should have been filed but wasn't. The Second Department concluded that §50-d refers only to municipal corporations assuming the liability for malpractice of any physician providing medical services without receiving compensation at any facility maintained by that municipal corporation; NYCHHC is a public benefit corporation and as such does not fall within the meaning of the statute. Consequently, a notice of claim was not required.

The Hassan decision then addressed the NYCHHC's duty to indemnify in accordance with G.M.L. §50-k. The Court commented on this obligation coupled with the need to file a Notice of Claim as follows:

> However, the duty of the City and the HHC to defend and indemnify pursuant to General Municipal Law §50-k is conditioned upon an employee's compliance with the requirements of subdivision four of this statute.... Since the defendants offered no evidence that Dr. Terry complied with the requirements of [G.M.L. §50-k(4)], they failed to

> establish, as a matter of law, that the City and the HHC have a duty to defend and indemnify them which would require the service of a notice of claim (see, General Municipal Law §50-k(6); General Municipal Law §50-e[1][b].

Id. at 710.

The above holding seems to suggest that if the duty to indemnify under §50-k exists under circumstances similar to those now before this Court, (by NYCHHC on behalf of private physicians assigned to work in an NYCHHC hospital pursuant to an agreement or program) - then there is also a duty on the part of the plaintiff to file a notice of claim as long as that plaintiff complies with the other provisions of §50-k, including service of the Summons and Complaint within ten days after service. However, this Court cannot apply the latter finding of Hassan to the infant plaintiff since another requirement, aside from the need to comply with §50-k(4), seems to be that the defendant physician be deemed an employee of NYCHHC; movants have failed to sustain their burden of proof on this issue as mandated by the caselaw discussed hereinbelow as well as the statute itself. See, G.M.L. §50-k(1)(e).

II

Another consideration by appellate courts as to whether a notice of claim must be filed in an action against a doctor providing services pursuant to an affiliation agreement is employment status. In DeGradi v. Coney Island Medical Group, P.C., 172 A.D.2d 582, leave denied, 78 N.Y.2d 860, a case cited by the defendants, the Second Department found that the subject affiliation agreement clearly characterized the private medical group doctors providing medical services to NYCHHC's Coney Island Hospital as employees of NYCHHC and therefore entitled to the benefits of an abbreviated statute of limitations period. See also, Pedrero v. Moreau, 179 A.D.2d 365 (the presentation of documentary proofs such as pay stubs, tax returns and employment records were required

in order to establish employment status and hence determine the necessity for filing a notice of claim); Ramos v. Ravan, 289A.D.2d 81, 82 (the affiliation agreements between private and city hospitals did not support defendant doctors' contentions that they were transient employees of NYCHHC but instead revealed that these defendant employees of Montefiore Hospital, a voluntary facility were subject to that hospital's supervision and control; defendants were not entitled to the condition precedent of a notice of claim).

In the case at bar, the Court has been provided with portions of the Affiliation Agreement between NYCHHC and Bellevue. These selective provisions strongly indicate that as in Ramos, supra, the private hospital, and not NYCHHC and BELLEVUE, has retained supervision and control over its employees - the defendant physicians. In reciting the basic obligations of NYU, the Agreement states as follows:

> Under the general supervision of [NYCHHC], the Affiliate [NYU] shall provide to the Corporation all necessary teaching, administration... and supervisory services.... In meeting this obligation, the Affiliate will assign and supervise Physician Providers and Non-Physician Providers who are employees of the Corporation.

In addition, there are multiple references to "Affiliate employees" throughout the Agreement further suggesting supervision and control by NYU.

For these reasons and in deference to appellate caselaw, this Court finds that the defendant physicians have failed to meet their burden of proof demonstrating that there was a statutory or contractual duty on the part of the plaintiff to file a notice of claim.

Accordingly, defendants' motion to dismiss the Complaint for failure to do so is denied. Were it necessary for this Court to consider an application to file a late notice of claim it would not hesitate to do so based on the factual scenario presented.

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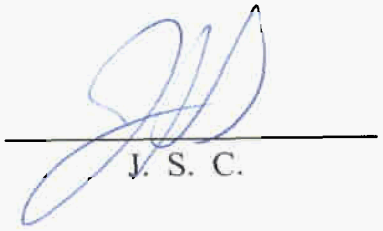

J. S. C.