

Bik-Lung Lee v Nassau Health Care Corp.
2013 NY Slip Op 34202(U)
February 15, 2013
Supreme Court, Nassau County
Docket Number: 12372/12
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

BIK-LUNG LEE, as Administratrix of the Estate of
KAR FOU LEE, decedent, and BIK-LUNG LEE,
individually,

Plaintiffs,

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 12372/12
Motion Seq. No.: 01
Motion Date: 10/31/12

- against -

NASSAU HEALTH CARE CORP. d/b/a
NASSAU UNIVERSITY MEDICAL CENTER,

Defendant.

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition</u>	<u>2</u>
<u>Reply Affirmation</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs move, pursuant to General Municipal Law §50-e (5), for an order granting them leave to serve a late Notice of Claim upon defendant. Defendant opposes the motion.

The instant action involves claims against defendant for medical malpractice in which plaintiffs claim that defendant negligently and carelessly treated decedent plaintiff's head injuries and improperly prescribed and administered the drug Morphine. Plaintiffs commenced the action

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with the filing of a Summons and Verified Complaint on or about September 28, 2012. *See* Plaintiffs' Affirmation in Support Exhibit A.

Decedent plaintiff Kar Fou Lee was admitted to defendant hospital, on July 17, 2011 with head injuries following a fall on the exterior steps of his residential building earlier that day. Plaintiffs' counsel submits that, "[a]ccording to defendants' hospital records attached hereto as Pltf. Exhibit B, decedent plaintiff, who was 84 years old, was responsive and able to answer questions upon admission to the trauma center. Neurological exams revealed that the patient was alert and agitated on July 17, 2011 and July 18, 2011. The medical staff noted that the decedent plaintiff's fall was caused by a possible incident of syncope, which is a loss of consciousness, and postural tone caused by cerebral blood flow. Radiological studies performed on July 17, 2011 showed that decedent plaintiff suffered a cervical comminuted fracture of the spinous process at C4 level, as well as multiple facial nasal and orbital fractures. Ct scan of the head/brain did not reveal the presence of an intracranial hemorrhage, or an acute intracranial injury. According to the hospital's medication administration record, the decedent plaintiff was administered IV 3 mg. of Morphine for pain control at approximately 11:00 P.M. on July 17, 2011, and 3 mg. of Morphine at approximately 9:00 P.M. on July 18, 2011. Neurological findings that decedent plaintiff was awake, and alert were noted in the chart on July 18, 2011. Decedent plaintiff was subsequently administered 4 mg. of Morphine at 5:30 A.M. on July 19, 2011, and a total of 5 mg. of the drug between 9:27 and 9:30 A.M. on that same date. Within one hour after the last Morphine administration on July 19, 2011, the hospital's medical staff reported that decedent plaintiff became completely unresponsive to stimuli, bradycardiac, and pulseless requiring CPR, intubation, and emergent mechanical intervention and tracheotomy. It was not until 7:10 A.M. on July 24, 2011 when the decedent plaintiff was initially

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diagnosed as comatose during a physical examination by a pulmonary/critical care physician, and on the following date with anoxic encephalopathy, a brain injury caused by lack of oxygen. It is noteworthy that the Airway Management Note dated, July 19, 2011 at 10:40 A.M. pointed out that the 'patient unresponsive and had previously received Morphine and Ativan recently administered.' On the same date at 3:00 P.M. the Pre-Anesthesia Evaluation record prepared by the anesthesiologist prior to performing a tracheotomy because of respiratory failure listed Morphine as a possible patient allergy. In addition, the Med Admin History Visit sheet lists under the Allergy heading the drug 'Morphine', and the medical condition 'Anaphylaxis.' Notwithstanding decedent plaintiff's medical condition including respiratory distress requiring a ventilator, and possible allergic reaction to Morphine, the hospital records show that decedent plaintiff was administered 4 mg. of Morphine at 12:30 P.M. on July 21, 2011. According to defendant's hospital records, the decedent plaintiff was discharged to a nursing home in a comatose condition on August 10, 2011." *See* Plaintiffs' Affirmation in Support Exhibit B.

Counsel for plaintiffs alleges that "[s]everal months prior to the decedent plaintiff's death, Bik-Lung Lee, decedent plaintiff's wife, presented to my law office advising about the circumstances surrounding her husband's severe medical condition. Based upon the fact that decedent plaintiff was physically unable to sign medical authorizations, or a power of attorney to fully obtain defendant's hospital records, and the records maintained at South Shore Healthcare, which required a court ordered appointment of a guardian ad litem for their release, I was unable to properly assess the legal merits of seeking a court order to serve a late notice of claim against this defendant hospital."

Counsel for plaintiffs submits that "[a]fter decedent plaintiff died on February 10, 2012,...[o]n August 15, 2012, Letter of Limited Administration was issued by Decree dated, August

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15, 2002 (*sic*) relating to a potential cause of action for conscious pain and suffering, and wrongful death due to the negligence at Nassau University Medical Center.” *See* Plaintiffs’ Affirmation in Support Exhibit F.

Counsel for plaintiffs argues that “[p]laintiffs’ motion seeking leave of court to serve a late Notice of Claim should be granted based upon the grounds that decedent plaintiff was in a comatose state, and suffered from severe mental and physical incapacity; that defendant acquired actual knowledge of the facts constituting plaintiff’s claim within 90 days of its accrual and /or reasonable period of time thereafter; that the delay did not substantially prejudice the defendant in defending on the merits; and that plaintiffs demonstrated a reasonable excuse for failing to serve a timely notice of claim,....”

Counsel for plaintiffs further argues that “by virtue of the hospital and medical records revealing decedent plaintiff’s injuries following the administration of the drug Morphine, defendant had sufficient knowledge of the facts underlying plaintiffs’ claim when decedent plaintiff was discharged;...Here, plaintiffs submitted sufficient medical evidence clearly demonstrating that decedent plaintiff was in a comatose condition at the time of discharge, and remained in a continuous vegetative state of severe physical and mental capacity until his death on February 12, 2012. Clearly, decedent plaintiff could not retain attorneys at law in order to timely file a notice of claim, given his severe medical condition requiring extraordinary care at the nursing homes. Accordingly, plaintiffs have satisfied the requisite burden of demonstrating a reasonable excuse for the brief approximate ten month delay.”

In opposition to the motion, counsel for defendant submits, “[t]his matter involves care and treatment rendered to Kar Fou Lee at NUMC [defendant] between July 17, 2011 and August 10, 2011. The care and treatment at issue occurred over one year and two months prior to the current

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motion, which was served on or after October 12, 2012....The cause of action for pain and suffering arose (according to the allegations in this matter) on or about July 19, 2011, but in no event later than August 10, 2011, when the patient was discharged from NUMC. Notwithstanding the obligations of the General Municipal Law to file a Notice of Claim within ninety (90) days of the accrual of the cause of action, plaintiff's (*sic*) counsel failed to take any action until October 12, 2012, over one year and two months after the patient's discharge. Plaintiff's (*sic*) counsel claims that the failure to comply with the General Municipal Law should be excused due to the fact that the patient was comatose as of July 19, 2011. This argument is faulty for the following reasons. According to the patient's own physician, Olaf Z. Butchma, D.O., the patient was in a 'chronic permanent vegetative state, a medical condition of severe physical and mental incapacity' as of no later than August 29, 2011. Notwithstanding this permanent condition, plaintiff's (*sic*) counsel did not take any action to arrange for a guardian ad litem to be appointed on behalf of the patient, so that the claims could be timely interposed....Plaintiff's (*sic*) counsel acknowledges in his Affirmation that Mrs. Lee had presented to his offices several months prior to the patient's death on February 10, 2012 to discuss pursuing a claim for medical malpractice. Notwithstanding the consultation several months before February 10, 2012, no action was taken to appoint a guardian ad litem."

Counsel for defendant also argues that "plaintiff's (*sic*) counsel has completely disregarded the requirement that a claimant provide 50-H hearing testimony prior to the initiation of a lawsuit. As such, the hospital has been deprived of timely notification of the lawsuit, has been deprived of an opportunity to conduct a 50-H hearing in accordance with the General Municipal Law and has been deprived of an opportunity to investigate the claims raised for over fourteen months."

General Municipal Law §50-e (1)(a) provides that a Notice of Claim must be filed with a municipality within ninety (90) days of the date on which the claim arose. If the Notice of Claim is

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not filed within that ninety (90) day time period, a claimant must make an application to the Court, within one year and ninety days from the time the cause of action accrued, for permission to file a late Notice of Claim. *See* General Municipal Law §50-I (1) (c); *Allende v. City of New York*, 69 A.D.3d 931, 894 N.Y.S.2d 472 (2d Dept. 2010).

It is noted that the Court's decision to grant or deny a late Notice of Claim is still purely a discretionary one and the Court remains free to deny an application for an extension in the interests of fairness to the potentially liable public corporation. *See Sverdlin v. City of New York*, 229 A.D.2d 544, 645 N.Y.S.2d 843 (2d Dept. 1996).

While all relevant factors should be considered, key factors in determining whether leave to serve a late Notice of Claim should be granted are whether claimant has demonstrated reasonable excuse for failing to timely serve a Notice of Claim, whether the municipality acquired actual knowledge of the essential facts constituting the claim within ninety days after its accrual, or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits. *See* General Municipal Law § 50-e; *Russo v. Monroe-Woodbury Cent. School Dist.*, 282 A.D.2d 465, 723 N.Y.S.2d 198 (2d Dept. 2001). Actual knowledge of the essential facts is an important factor in determining whether to grant an extension and "should be accorded great weight." *See Brownstein v. Incorporated Village of Hempstead*, 52 A.D.3d 507, 859 N.Y.S.2d 682 (2d Dept. 2008).

However, the presence or absence of any one of the factors used in determining whether to allow service of a late Notice of Claim against a municipality is not necessarily determinative, and the absence of a reasonable excuse is not necessarily fatal to plaintiffs' motion. *See Jordan v. City of New York*, 41 A.D.3d 658, 838 N.Y.S.2d 624 (2d Dept 2007); *Chambers v. Nassau County Health Care Corp.*, 50 A.D.3d 1134, 857 N.Y.S.2d 222 (2d Dept. 2008).

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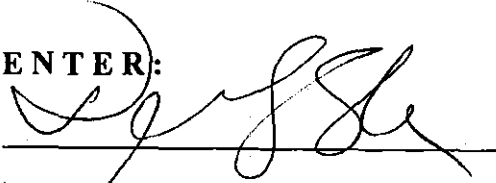
Here, on the issue of actual knowledge to be gleaned from the defendant hospital records, plaintiffs submit exhibits, attached to their papers, which objectively set forth the facts that constitute the claim of the alleged medical malpractice. There is clear indication that decedent plaintiff was administered Morphine despite the fact that there were notations in his records with respect to Morphine as a possible patient allergy. Accordingly, the entries in the defendant hospital records indicate knowledge of the facts underlying his claim. *See Robinson v. Westchester County Medical Center*, 270 A.D.2d 275, 703 N.Y.S.2d 528 (2d Dept. 2000); *Celeste v. Nassau Health Care Corp./Nassau County Medical Center*, 8 A.D.3d 271, 777 N.Y.S.2d 682 (2d Dept. 2004); *Olsen v. County of Nassau*, 14 A.D.3d 706, 789 N.Y.S.2d 264 (2d Dept. 2005); *Nardi v. County of Nassau*, 18 A.D.3d 520, 795 N.Y.S.2d 300 (2d Dept. 2005).

Finally, there has been no evidence presented that defendant would be substantially prejudiced in maintaining its defense on the merits as a result of the delay in seeking leave to serve a late Notice of Claim. *See Cifuentes v. New York City Health and Hospitals Corp.*, 43 A.D.3d 385, 840 N.Y.S.2d 433 (2d Dept. 2007); *Godoy v. Nassau Health Care Corp.*, 49 A.D.3d 541, 855 N.Y.S.2d 168 (2d Dept. 2008); *Castaneda v. Nassau Health Care Corp.*, 89 A.D.3d 782, 933 N.Y.S.2d 64 (2d 2011). Moreover, as previously indicated, defendant had actual knowledge of the claim or the facts giving rise to the claim because they possessed the decedent plaintiff's medical records. *See Ramirez v. County of Nassau*, 13 A.D.3d 456, 787 N.Y.S.2d 71 (2d Dept. 2004). In view of defendant's actual knowledge of the essential facts underlying the malpractice claim, it will not be substantially prejudiced by the delay as it is in possession of the pertinent medical records containing the details of the decedent plaintiff's treatment. Therefore, there is no substantial prejudice to defendant in maintaining a defense to the cause of action. *See Tapia v. New York City Health & Hosps. Corp.*, 27 A.D.3d 655, 811 N.Y.S.2d 768 (2d Dept. 2006).

Accordingly, plaintiffs' motion, pursuant to General Municipal Law §50-e (5), for an order granting them leave to serve a late Notice of Claim upon defendant is hereby **GRANTED**. Plaintiffs are directed to serve upon defendant a Notice of Claim, in the form annexed as an exhibit to their motion, by March 1, 2013.

It is further ordered that the parties shall appear for a Preliminary Conference on April 2, 2013, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
February 15, 2013

ENTERED
FEB 19 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE