

Matter of Burrows v County of Wyoming

2014 NY Slip Op 31153(U)

April 30, 2014

Supreme Court, Wyoming County

Docket Number: 46606

Judge: Michael M. Mohun

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This opinion is uncorrected and not selected for official publication.

At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on the 30th day of April, 2014.

PRESENT: **HONORABLE MICHAEL M. MOHUN**
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT : COUNTY OF WYOMING

**In the Matter of the Application
For Leave to File a Late Notice of Claim
on Behalf of**

**PAUL BURROWS, Individually and as Executor
of The Estate of BETTY L. PALMER, Deceased,**

Claimant,

v.

DECISION AND ORDER
Index No. 46606

**COUNTY OF WYOMING,
WYOMING COUNTY COMMUNITY HEALTH SYSTEM
WYOMING COUNTY COMMUNITY HOSPITAL
WYOMING COUNTY COMMUNITY HOSPITAL
SKILLED NURSING FACILITY, and
RODNEY LOGAN, M.D.,**

Respondents.

The above-named claimant having moved by order to show cause signed April 7, 2014, for an order pursuant to General Municipal Law §50-e(5) permitting the service of a late notice of claim upon the above-named respondents, and said motion having duly come on to be heard.

NOW, on reading the application for the order to show cause, supported by the affirmation of Katherine V. Markel, Esq., attorney for the claimant, dated April 7, 2014, together with the attached exhibits, the responding affidavit of Sharyn G. Rogers, Esq., attorney for the respondents, dated April 17, 2014, and the reply affirmation of Katherine V. Markel, Esq., dated April 21, 2014, and after hearing Katherine V. Markel, Esq., in support of the motion and Sharyn G. Rogers, Esq., in opposition thereto, due deliberation having been had, the following decision is rendered.

The decedent, Betty Palmer, died on February 1, 2013, at Highland Hospital in Rochester, New York. According to the death certificate, she died of septic shock as a consequence of pneumonia. Her chronic obstructive pulmonary disease [COPD] was also listed as significantly contributing to her death. She had been transferred to Highland from the Wyoming County Community Hospital [WCCH] on January 19, 2013, after being admitted to WCCH on December 31, 2012, for an acute exacerbation of her COPD. (On December 20, 2012, Ms. Palmer had also visited the WCCH Emergency Room for an allergic reaction to medication, but she had been discharged the same day without being admitted.) Between December 31 and January 15, Ms. Palmer was treated at WCCH. On January 15, she was moved to the WCCH Skilled Nursing Facility to recuperate. Unfortunately, her condition deteriorated there, and on January 19, after

she was discovered to have developed pneumonia, sepsis, hypotension and acute renal failure, she was brought back to the WCCH Emergency Room. From there, she was transferred by Mercy Flight to Highland in "guarded condition" with the expectation that she would need to receive dialysis for her kidney failure after her arrival. Although Ms. Palmer died on February 1, 2013, Mr. Burrows was not appointed as Executor of her estate until March 25, 2014. He now seeks to commence an action individually and on behalf of the Estate against the respondents for malpractice and wrongful death.

With the exception of a claim for wrongful death, the service of a Notice of Claim "within ninety days after the claim arises" is a condition precedent to the commencement of a tort action against a public corporation or the employee of a public corporation (General Municipal Law §50-e[1][a]). With wrongful death claims, the ninety day period still applies, but it is measured from the date of the appointment of a representative for the estate, not from the date that the claim arose. Thus, in this case, given that ninety days have not yet elapsed since the claimant was appointed Executor of Ms. Palmer's estate, the claimant may still serve a timely Notice of Claim for Ms. Palmer's wrongful death in accordance with General Municipal Law §50-e(1)(a). He does not require leave of the Court to do so.

With respect, however, to the remaining causes of action for personal injury due to malpractice and negligence, it is evident that service

of a Notice of Claim at this time would be untimely. Those claims clearly arose no later than January 19, 2013 – the last date when any of the respondents provided treatment to Ms. Palmer. Therefore, the claimant will be unable to bring suit based upon those claims unless the Court grants the claimant leave pursuant to General Municipal Law §50-e(5) to serve a late Notice of Claim.

The Court is inclined to grant the claimant's application. Although the delay in the appointment of a representative for the estate is unexplained, in the Court's estimation the fact that the claimant did not become the Executor until March 25, 2014, constitutes a reasonable excuse for his failure to file a timely Notice of Claim. Furthermore, it is clear that the respondents had actual knowledge of the facts of the claimant's claim within the ninety day period in the form of the decedent's medical records. Those records amply document that she developed debilitating and life threatening medical conditions while in the care of the respondents prior to her being moved to Highland Hospital (see, Caminero v. New York City Health & Hospitals Corp., 21 A.D.3d 330 [1st Dept., 2005]). Contrary to the contention of respondents' counsel, it is not necessary that the respondents had actual knowledge of Ms. Palmer's subsequent death. It suffices that they had actual knowledge of the essential facts of the claimant's negligence and malpractice claims. Finally, it does not appear that the delay in the

service of the Notice of Claim has prejudiced the respondents.

Respondents' counsel contends that the Court is precluded from granting the claimant's application on the grounds that the statute of limitation for the commencement of the action has already expired. General Municipal Law §50-e(5) states that an extension of the time to serve a Notice of Claim "shall not exceed the time limited for the commencement of an action by the claimant against the public corporation." The applicable limitations period is 1 year and 90 days (General Municipal Law §50-i[1][c]). Thus, respondent's counsel argues, since more than 1 year and 90 days have elapsed since the respondents treated the decedent, no further extension of the time to serve a Notice of Claim is possible at this time.

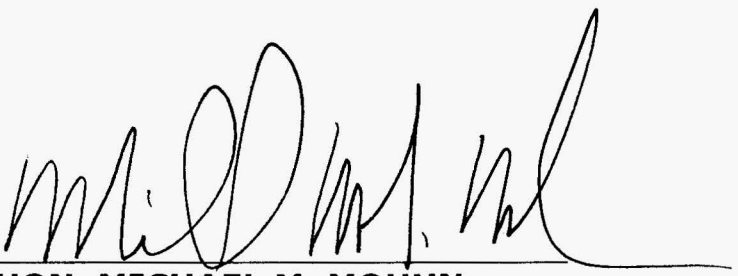
With respect to any claim arising from the Ms. Palmer's December 20, 2012, visit to the Emergency Room, the Court agrees. The limitations period expired for any such claim before the claimant applied for an extension of the time to file a Notice of Claim. Consequently, the Court is now prohibited by General Municipal Law §50-i(1)(c) from authorizing the claimant to file a Late Notice of Claim with respect to claims arising from the December 20, 2012, treatment. The Court reaches a different conclusion with respect to claims arising from the treatment Ms. Palmer received from the respondents between December 31, 2012, and January 19, 2013. Ms. Palmer was clearly continuously under the respondents' care for the same

conditions during the period, and therefore under the continuous care doctrine the accrual of the cause of action was tolled until January 19, 2013, the last date on which Ms. Palmer received treatment from the respondents. Additionally, the claimant's application for leave to serve a Late Notice of Claim, filed on April 7, 2014, tolled the running of the time allowed for serving a late Notice of Claim with leave of the Court (Giblin v. Nassau County Medical Center, 61 N.Y.2d 67 [1984]). Therefore, since the claimant applied for leave to serve a Late Notice of Claim before the expiration of the statute of limitations, the Court is not precluded from granting the claimant leave to file a late Notice of Claim with respect to claims arising from the respondents' treatment of Ms. Palmer during the period from December 31, 2012, to January 19, 2013.

NOW, THEREFORE, it is hereby

ORDERED that the claimant's motion is granted to the extent that the claimant is hereby granted leave to serve a Late Notice of Claim upon the respondents in accordance with this Decision and Order within 10 days.

DATED: April 30, 2014
Warsaw, New York



HON. MICHAEL M. MOHUN
Acting Supreme Court Justice