SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 28

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IVERSON DANIEL MATOS, an infant by his mother and natural guardian CARINEL MATOS, and CARINEL MATOS, individually,

Plaintiff,

Index No. 155353/2012

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

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Hon. Martin Schoenfeld:

In this medical malpractice action, in which plaintiff Carinel Matos (Matos) sues defendant, New York City Health and Hospitals Corporation (HHC), both derivatively and on behalf of her infant son, Iverson Daniel Matos (Iverson), Matos moves for an order granting her leave to file a late notice of claim.

Background

In July 2009, Matos went to what was apparently Harlem Hospital's urgent care facility, complaining that she had been vomiting for two days. Harlem Hospital is a HHC entity. After testing, the hospital discovered that she was pregnant, and advised Matos that she was pregnant. Matos indicated that she had been aware of that fact since early March 2009, but had not sought any prenatal care. She was given prenatal vitamins and was referred to the hospital's obstetric clinic for prenatal care. She started her prenatal care at the clinic in August 2009, when she was about 22 weeks pregnant, was given a December 17, 2009 estimated due date, and continued to be seen at the clinic for her prenatal visits and for one postnatal visit for only herself, on

December 30, 2009.

At a December 15, 2009 clinic visit, Matos complained of vaginal leakage of fluid, and was sent to the emergency room for a possible rupture of her membranes. No leakage or rupture was found, nor was there any cervical dilation or effacement.[1] Matos was sent home with instructions to follow up at the clinic. At about 11:30 p.m., on December 17, 2009, Matos went to the hospital's obstetrical triage area, complaining of abdominal pain. A sonogram revealed oligohydramnios, an amniotic fluid level that was below normal. She was immediately admitted for induction of labor. Upon admission, there was still no cervical dilation or effacement, and the membranes were intact. The next morning, December 18, at about 11:00 a.m., Matos was given medication to ripen her cervix. At that point, her cervix was only .5 cm dilated and effacement was at 20%. At about 7:00 that evening, a bedside sonogram indicated that there was sufficient fluid around the fetus. At 7:30 p.m., a cervical balloon was inserted to help her cervix ripen.

By about 2:00 p.m. the next day, December 19, the cervix was only 4 cm dilated and 50% effaced. At 4:00 p.m. that day, Pitocin was administered to augment labor. At about midnight on December 20, 2009, Matos's membranes were artificially ruptured by the hospital. By 8:30 that morning, Matos's cervix was dilated only 4 cm and cervical effacement was at 70%. Matos's progress remained the same through 12:09 p.m. that day. Because, that morning, the fetus began experiencing a few episodes of tachycardia,[2] labor was not progressing, and because Matos, by 11:30, experienced a fever of 100.7°, which caused the attending physician, Mark

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[1] "The thinning out of the cervix either just before or during labor." Stedman's Medical Dictionary (27th ed. 1999).

[2] Rapid beating of the heart. Stedman's Medical Dictionary.

[redacted]

Michnik (Michnik), to suspect chorioamnionitis,[3] Michnik, somewhere between 11:30 and 11:53 that morning, decided to send Matos to the operating room so that he could perform a caesarean section (C-section), and Iverson was delivered at about 1:00 p.m. that afternoon. *See* Nurse's assessment/progress notes of 12/20/08, 11:30 a.m.; 2:15 p.m.; Michnik's medical director's note of 12/20/09, 11:53 a.m.; Michnik's medication orders of 12/20/09, 11:53. Because, it was presumed that Matos had chorioamnionitis, Iverson was transferred from the operating room to the neonatal intensive care unit (NICU). Iverson and his mother were discharged from the hospital on December 23, 2009, with instructions for Matos to bring Iverson to the pediatric clinic for a followup visit, later that month, but Matos failed to ever bring him there. She did bring him once, on January 11, 2010, to the emergency room, complaining that his eye had been crusty and that he had had a fever for two days. However, upon examination, he had no fever, and he and his eyes were normal. That was the last time Iverson was seen at the hospital.

The Instant Action and Motion

On January 9, 2012, about 25 months after Iverson's birth, Matos served a notice of claim on HHC, approximately 22 months late. A 50-h hearing (*see* General Municipal Law § 50-h) was held on April 20, 2012. Matos commenced this action on August 10, 2012, close to two years and eight months after Iverson's birth. The complaint sets forth three causes of action. The first two are medical malpractice causes of action, the first, based on departures from accepted standards of practice, and the second, based on a lack of informed consent, on Iverson's behalf, and the third cause of action alleges Matos's derivative claims for lack of Iverson's services and for the extraordinary costs of raising him.

A preliminary conference was held, and Matos, who had two years of college, was

[3] An infection that involves the chorion, the amniotic fluid, the amnion, and usually the placental villi and decidua. Stedman's Medical Dictionary.

deposed in November 2013. At neither her 50-h hearing, nor at her deposition, did she seem to know the exact nature of Iverson's condition, claiming that she was told by various therapists that he might have autism or a form of autism, that other people told her it was not autism, that he went to school for students with autism, that she was told that Iverson might have PDD, but that she was never told that he had pervasive development delay, and that no doctor ever diagnosed him with brain damage. *See* Matos ebt at 19, 53, 59, 60, 66, 82; 50-h hearing at 80. She further testified that Iverson never had an MRI or a CAT scan of his brain. *Id.* at 81.

Now, by notice of motion, efiled on January 15, 2014, more than four years after Iverson's birth, Matos moves for an order granting her leave to serve a late notice of claim. Her claim is supported by the affirmation of her expert obstetrician, Joel Cooper (Cooper), who asserts that the fetal monitoring tapes showed minimal variability and decelerations, and, thus, fetal distress and poor oxygenation, on December 18, and 19, and, on December 20, decreased and minimal variability and tachycardia. Cooper claims that the mother should have been placed on her side, administered oxygen, and intravenous fluids, and that the infant should have been delivered "long before the four days of labor plaintiff endured," because fetal distress "can" result in brain damage and hypoxic ischemic encephalopathy. Cooper affirmation, ¶¶ 9, 10.

Cooper also notes that, around midnight on December 20, 2009, an artificial rupture of the membranes was performed, and contends that, with prolonged rupture of those membranes, chorioamnionitis can potentially result in complications to the fetus. Cooper then asserts, without indicating when chorioamnionitis was first diagnosed, that when it is diagnosed, an immediate C-section must be performed. In addition, Cooper asserts that a C-section was not performed until more than 14 hours "later," but does not state that chorioamnionitis was diagnosed 14 hours before the C-section was performed, and the period of 14 hours seemingly

refers to the period between when the membranes were ruptured and when the C-section was performed. Cooper further maintains that antibiotics should have been administered to Matos when chorioamnionitis was diagnosed, but that they were not. Cooper also asserts that Iverson was diagnosed with septicemia.

HHC opposes Matos's motion, asserting that she did not provide a reasonable excuse for failing to timely file a notice of claim or her own affidavit on this issue. HHC also claims that Matos has failed to demonstrate a lack of prejudice to HHC. Specifically, HHC contends that it was prejudiced because the delivering doctor, Michnik, and the neonatologist who treated Iverson at the hospital, are no longer employed by HHC. HHC urges that it is also prejudiced, because it cannot interview witnesses when memories are fresh, as it could have, had Matos served it with a notice of claim within 90 days of the alleged malpractice. In addition, HHC's counsel maintains that Cooper's affirmation is replete with misstatements, and fails to explain why the infant's course, immediately after his birth and during his admission, was completely normal, except for a mildly elevated bilirubin, and was devoid of evidence of hypoxic encephalopathy. Furthermore, HHC maintains that merely because it possesses the records of the mother's prenatal, perinatal, and postnatal care, does not mean that it had knowledge of the facts constituting Matos's claims in this action within 90 days of their accrual, particularly since the hospital's records showed that Iverson was a normal and healthy newborn.

In opposing Matos's motion, HHC also relies on the affirmation of its expert obstetrician, Boris Petrikovsky (Petrikovsky). Petrikovsky maintains that there was nothing in the hospital records which would have alerted HHC to the possibility of suit. In particular, Petrikovsky opines that the labor and delivery were appropriately managed and that the means the hospital used to induce labor, including the use of Cytotec and the cervical balloon, were proper, and that

a medication was given to slow down the contractions and stem hyper-uterine stimulation. While Petrikovsky does not deny that there were fetal monitoring strips that periodically showed decreased variability or decelerations, he notes that there were fetal readings that demonstrated moderate variability and no decelerations. In addition, Petrikovsky observes that, because Matos was presumed to have chorioamnionitis, the hospital properly placed the infant prophylactically on antibiotics, even though it was ultimately determined that the mother did not have that condition nor did Iverson have sepsis, as evidenced by the pathology report of the placenta, the fact that the mother's records did not reflect that a foul smell or pus emanated from her vagina, and by the negative results of Iverson's cultures.

Moreover, Petrikovsky opines that the C-section was timely performed and that there is a lack of any support in the medical records for the occurrence of an hypoxic event. In this regard, Petrikovsky observes that, as contrasted with an infant that has experienced an hypoxic event, the records show that Iverson was healthy at birth, throughout his stay, and at his discharge. His Apgar scores were both nine, he required no resuscitation, his breathing and bowel sounds were normal, he passed stool and urinated, he was admitted to the NICU in good condition, he was orally fed, and he was sent home "in well baby condition." Petrikovsky affirmation, ¶ 11.

In reply, Matos does not address Petrikovsky's opinions which are based on the fact that the infant, with the exception of his mildly elevated bilirubin level, appeared at all times after his birth to be normal and healthy, but, instead, Matos's counsel contends that the fetal monitoring tapes are the most significant factor in determining the fetus's well-being. Her counsel further contends that a healthy infant would not be sent to the NICU. Additionally, counsel asserts that Matos was in labor for four days before Iverson was finally delivered.

Discussion

A notice of claim must be served in a personal injury suit against HHC, as a condition precedent to suit. McKinney's Uncons Laws of NY § 7401 (2); *Matter of Daniel J. v New York City Health & Hosps. Corp.*, 77 NY2d 630, 633 (1991). Notice of claim requirements are intended to protect the municipality and governmental entities from "unfounded claims and to ensure that [they have] an adequate opportunity to timely explore the merits of a claim while the facts are still 'fresh.'" *Matter of Nieves v New York Health & Hosps. Corp.*, 34 AD3d 336, 337 (1st Dept 2006). The notice of claim provisions of General Municipal Law § 50-e govern the notices required to be served on HHC. McKinney's Uncons Laws of NY § 7401 (2); *Matter of Daniel J. v New York City Health & Hosps. Corp.*, 77 NY2d at 633. Therefore, such notices must be served within 90 days of a claim's accrual. General Municipal Law § 50-e (1) (a). However, a court has the discretion to extend the filing time, provided that the one year and 90-day statute of limitations, as extended by any applicable toll, has not expired. *Matter of Daniel J.*, at 633-634; General Municipal Law § 50-e (5).

To the extent that Matos seeks leave to file a late notice of claim as to the complaint's third cause of action, i.e., her individual claims for loss of Iverson's services and for any extraordinary costs of raising him, Matos's motion is denied. The bill of particulars alleges (¶ 3) that the claimed malpractice occurred starting in about April 1, 2009 through "about December 23, 2009, and thereafter." However, the first time that Matos was seen at the hospital was on July 10, 2009, when she went to the hospital's adult urgent care facility, complaining of a two-day period of vomiting and was referred to the hospital's obstetric clinic. Further, it is undisputed that Matos and Iverson were both discharged from the hospital on December 23, 2009, with instructions for Matos to bring Iverson to the hospital's pediatric clinic on December

29, 2009, but failed to ever go there. The only other time Iverson was seen at the hospital was on January 11, 2010, when Matos brought him to the hospital's emergency room, complaining that he had had a fever and crusting around one eye, but was found to be normal. Plaintiffs' counsel concedes on this motion that any malpractice ceased on Iverson's birth (*see* Podolsky affirmation in support at 1 [action was brought as a consequence of malpractice during "prenatal care, labor, and delivery"]) . Even assuming for argument's sake, that the last act of malpractice accrued on January 11, 2010, Matos's motion, which was efiled on January 15, 2014, more than four years after any possible claim accrued, was clearly untimely, because Matos's individual claims are subject to the one year and 90-day statute of limitations applicable to claims of adults.

Turning to the branch of the motion which seeks leave to serve a late notice of claim as to the complaint's first and second causes of action, which allege on Iverson's behalf claims sounding in medical malpractice, such causes of action are subject to the 10-year toll afforded infants (CPLR 208), which toll runs from a particular claim's accrual, not from the end of any course of continuous treatment. *Matter of Daniel J. v New York City Health & Hosps. Corp.*, 77 NY2d at 634-635. Assuming, for argument's sake, that Matos is still asserting postnatal claims, because any prenatal, perinatal, and postnatal act of malpractice, which accrued between July 10, 2009 and January 11, 2010, is subject to the 10-year infancy toll, and because this January 15, 2014 motion was made before the statute of limitations expired as to any such act, this motion is timely.

In deciding whether to extend a party's time to serve a notice of claim, a court must consider whether HHC, within 90 days of the claim's accrual or a "reasonable time thereafter," "acquired actual knowledge of the essential facts constituting the claim ..." General Municipal Law § 50-e (5). In addition, the court must consider all other relevant circumstances and facts,

including whether the claimant was an infant, whether HHC would be prejudiced in its defense of the action by the delay in service of the notice of claim, and whether the claimant has offered a reasonable excuse for failing to timely serve the notice of claim. *Id.*

Here, Matos has not offered a reasonable excuse for failing to timely serve a notice of claim. Instead, her counsel, who has no personal knowledge of the facts, effectively asserts that, because Matos was 25 years of age, spoke little English, had not yet retained an attorney, and did not know that the hospital committed malpractice, she had reasonable excuses for failing to timely serve a notice of claim. Nevertheless, the lack of knowledge of the law (*Matter of Todd v New York City Health & Hosps. Corp.*, 129 AD3d 433 [1st Dept 2015]; *Plaza v New York Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 97 AD3d 466, 468 [1st Dept 2012], *affd* 21 NY3d 983 [2013]) and a poor command of English do not constitute reasonable excuses. *Matter of Vasquez v City of Newburgh*, 35 AD3d 621, 623 (2d Dept 2006). Even if the lack of counsel and ignorance of the law were reasonable excuses, no explanation has been offered for the two-year delay between counsel's January 2012 service of a late notice of claim, without leave of the court, which rendered that notice a nullity, and service of this motion. *Abad v New York Health & Hosps. Corp.*, 114 AD3d 564, 566 (1st Dept 2014); *cf. Basualdo v Guzman*, 110 AD3d 610, 610 (1st Dept 2013). Also, Matos has not established that the delay of close to four years in moving for leave to serve a notice of claim was due to Iverson's infancy. *Rowe v Nassau Health Care Corp.*, 57 AD3d 961, 962 (2d Dept 2008); *Matter of Nieves v New York City Health & Hosps. Corp.*, 34 AD3d at 337. Furthermore, that infancy is set forth as a factor to be considered in deciding whether to grant leave to serve a late notice of claim, signifies, when taking into account the maxim expressio unius est exclusio alterius to construe General Municipal Law § 50-e (5), that one's status as an adult, i.e., that Matos is 25 of age, is not such a

factor. *Moret Partnership v Spickerman*, 125 AD3d 729, 731 (2d Dept 2015).

As for Matos's counsel's claim that Matos could not have made an earlier application because the law firm only received the fetal monitoring strips and the medical records in November 2013, such claim does not constitute a reasonable excuse, since counsel was able to serve a notice of claim in 2012, albeit one that is rather broad. Moreover, Matos has not submitted her affidavit indicating when she started to believe that something was wrong with Iverson, so as to raise the possibility of malpractice. The court notes, however, that her deposition transcript indicates that a year and one month after his birth, i.e., more than a year before her counsel served the first notice of claim, Iverson was enrolled in an early intervention therapy program. Matos ebt at 54.

Although Matos has failed to establish a reasonable excuse for failing to timely serve a notice of claim, or that the delay in serving that notice was due to Iverson's infancy, it is well settled that the lack of any of the pertinent factors, standing alone, does not mandate the denial of a motion for leave to serve a late notice of claim. *Webb v New York City Health & Hosps. Corp.*, 50 AD3d 265 (1st Dept 2008); *Arias v New York City Health & Hosps. Corp. (Kings County Hosp. Ctr.)*, 50 AD3d 830, 832 (2d Dept 2008); *Matter of Matarrese v New York City Health & Hosps. Corp.*, 215 AD2d 7, 10 (2d Dept 1995); *Matter of Kurz v New York City Health & Hosps. Corp.*, 174 AD2d 671, 672 (2d Dept 1991). However, when combined with other factors, such as a lack of timely notice of the facts constituting the claim and prejudice, such leave must be denied. *Arias*, at 832. Whether the public corporation obtained "actual knowledge of the essential facts constituting the claim within 90 days after the accrual of the claim or within a reasonable time thereafter," is the most important factor. *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 128 AD3d 701, 702 (2d Dept 2015).

On the issue of whether HHC suffered substantial prejudice as a result of Matos's failure to timely serve a notice of claim, defense counsel's assertion that HHC will suffer prejudice because two of the four HHC physicians whom Matos wished to depose, Michnik and the treating neonatologist, are no longer working at the hospital, is unavailing, because counsel has failed to demonstrate that they are actually unavailable. *Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448, 449 (1st Dept 2011); *Caminero v New York City Health & Hosps. Corp. (Bronx Mun. Hosp. Ctr.),* 21 AD3d 330, 333 (1st Dept 2005) (fact that HHC physician moved out of state does not establish his unavailability and, thus, prejudice). Nevertheless, it is Matos who has the burden of establishing that HHC would not be substantially prejudiced in defending this action, as a consequence of her delay in serving the late notice of claim and in seeking leave to serve a notice of claim. *Basualdo v Guzman*, 110 AD3d at 611; *Matter of Dumancela v New York City Health & Hosps. Corp.*, 32 AD3d 515, 516 (2d Dept 2006); *see also Williams v Nassau County Med. Ctr.*, 13 AD3d 363, 364-365 (2d Dept 2004), *affd* 6 NY3d 531 (2006). Here, where the original notice of claim was served almost two years late, Matos has failed to establish that HHC had actual notice of the essential facts constituting the claim within 90 days of a claim's accrual or within a reasonable time thereafter, so that Matos's claims could be investigated when the events were fresh in the witnesses' minds. *See Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824, 829 (1st Dept 2010) (supreme court improperly granted petition for leave to serve a late notice of claim where petitioner failed to meet his burden of establishing that his 11-month delay in filing the notice of claim did not diminish the recollection of the hospital's staff); *Cartagena v New York City Health & Hosps. Corp.*, 93 AD3d 187, 192 (1st Dept 2012).

Simply creating or having the medical records does not necessarily equate with the

defendant having knowledge of the facts constituting the claim. *Williams v Nassau County Med. Ctr.*, 6 NY3d at 537. "Where ... there is little to suggest injury attributable to malpractice during delivery, comprehending or recording the facts surrounding the delivery cannot equate to knowledge of the facts underlying a claim." *Id.* (difficult delivery where there were signs of fetal distress did not warrant the granting of a late notice of claim where, after the delivery, the infant's Apgar scores were eight and nine, and there was no reason to predict lasting harm); *Plaza v New York City Health & Hosps. Corp.(Jacobi Med. Ctr.)*, 97 AD3d at 468-469 (although there were record entries of fetal distress, respiratory distress, and fetal heart rate fluctuations, denial of leave to serve a late notice of claim was proper, where infant had Apgar scores of eight and nine, heart rate fluctuations were not that dramatic, respiration fully improved, and infant was described as alert, and responsive, with normal muscle tone, and a strong suck and cry); *Cartagena v New York City Health & Hosps. Corp.*, 93 AD3d at 189, 191 (although plaintiff claimed that labor was improperly allowed to continue for 48 hours and that there was fetal distress, that did not warrant the granting of the late notice of claim, where Apgar score was nine and the nursery records demonstrated that the infant, during the hospital stay, was alert, active, and lacked any neurological abnormalities); *Bucknor v New York City Health & Hosps. Corp. (Queens Hosp. Ctr.),* 44 AD3d 811, 812, 813 (2d Dept 2007) (motion granting leave to serve notice of claim, reversed where child was delivered by emergency C-section after several days of unsuccessfully attempting to induce labor, and child at birth was limp, had to have meconium[4] suctioned, but had an Apgar score of seven, and was discharged several days later, without any medical problems, because, although delivery was difficult, there was little reason to predict a

[4] The first intestinal discharge [bowel movement] after an infant's birth that is usually a greenish color (Stedman's Medical Dictionary), which may be evidence of fetal distress, when present in the womb, causing the amniotic fluid to be stained with it and/or the infant to aspirate it around the time of delivery, sometimes requiring suctioning.

developmental disorder or lasting harm); *see also Abad v New York City Health & Hosps. Corp.*, 114 AD3d at 566; *Matter of Nieves v New York City Health & Hosps. Corp.*, 34 AD3d at 338; *Matter of Dumancela v New York City Health & Hosps. Corp.*, 32 AD3d at 516.

In the instant case, although there was difficulty in inducing labor, and there were episodes of minimal variability and decelerations, which, according to Cooper indicates fetal distress, and, absent timely intervention, "can" lead to hypoxic-ischemic encephalopathy or brain damage, the hospital records also indicate that the infant had frequent periods, throughout Matos's labor, of moderate variability and a lack of decelerations. Further, the hospital chart's progress notes shows that the staff frequently placed Matos on her left side and gave her oxygen and intravenous fluids, steps Cooper asserted were required. Additionally, although Cooper claims that, in light of the fetal monitoring strips, four days of labor was too long for Matos to endure and that Iverson should have been delivered at some unspecified earlier time, Cooper states that labor was induced in Matos (who had arrived at the hospital with cervical dilation and effacement, both of zero), starting at 11:45 a.m. on December 18, 2009, and that Iverson was born at 1:00 p.m. on December 20, a period of labor which amounted to only two days. The records also reflect that it was not until December 20, 2009, when Matos and the infant experienced several intermittent episodes of tachycardia, and Matos's temperature rose, at about 11:30 a.m., to a slight fever of 100.7, which, along with the lack of the labor's progression, led Michnik, at about that time, to suspect that Matos was suffering from chorioamnionitis, and decide to perform a C-section.

Upon delivery, Iverson had Apgar scores of nine, both at one and five minutes after birth. The neonatal intensive care unit's (NICU) attending physician's progress note of December 23 indicates that, at birth, there was no meconium staining in the amniotic fluid, that no

resuscitation was required, that the infant arrived in the NICU in good condition, and that he did not require CPAP.[5] The hospital's records reveal that, upon physical examination, both soon after birth and throughout his hospitalization, Iverson was found to be normal, active, and alert, without any respiratory distress, that his neurological examination and his reflexes were normal, and that he could move all of his extremities. The pediatric admission note characterizes Iverson as a "well appearing infant." The only problem noted was a mildly elevated bilirubin level, which was briefly treated on December 23, the day Iverson was discharged from the hospital, with phototherapy, which treatment was discontinued after several hours. On discharge, Iverson's status was reported in the hospital's discharge summary relating to him as "good.".

The records further indicate that the only reason Iverson was transferred to the NICU was because the doctors suspected that, with her fever, Matos had chorioamnionitis. In view of that, Iverson was sent to the NICU to rule out sepsis. *See* Iverson's discharge summary. However, the hospital's laboratory results of all cultures taken from Iverson at birth, were reported as normal, the NICU admission note reveals that Iverson was asymptomatic for sepsis, and the hospital's discharge summary for Iverson recites that sepsis was ruled out. Cooper's insinuation that Iverson had septicemia was clearly incorrect, as a review of his hospital records would have revealed. Furthermore, the placental tissue removed from Matos at Iverson's birth was sent for a biopsy, and on January 22, 2010, the final pathology report was issued and recites that "no evidence of acute chorioamnionitis [wa]s identified." Also, all of the antibiotics that Matos had been taking while in the hospital, were terminated by December 23, 2009, and although she was prescribed medications upon her discharge, they were only iron supplements, ibuprofen, and prenatal vitamins. *See* Matos's discharge summary; Patient plan for post hospital care. Thus,

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[5] An abbreviation for "continuous positive airway pressure" (Stedman's Medical Dictionary), an artificial means of aiding respiration.

Cooper's claims, essentially that upon suspecting chorioamnionitis, at an unspecified time, a C-section should have been performed and that Matos should have immediately been given antibiotics, does not avail Matos. In addition, a review of the records seemingly indicates that an infection of the amniotic cavity was first suspected by Michnik shortly before 11:53 a.m., on December 20, 2009, when Matos became feverish, and it was then determined that a C-section was required. *See* Medical Director intrapartum note of 12/20/09, 11:53 a.m.; Michnick's medication order of 12/20/09, 11:53 a.m. Thus, Cooper's opinion that a C-section should have been performed once chorioamnionitis was diagnosed, and his effective assertion that there was a long delay in this regard, lack merit.

The hospital's medication order sheets indicate that antibiotics were ordered for Matos at 1:47 p.m. on December 20, 2009, shortly after the infant's birth. In addition, Cooper did not indicate how the failure to give Matos antibiotics just before the C-section would have negatively impacted the fetus, especially since the hospital records reflect that the infant was prophylactically administered antibiotics immediately after his birth, which medications were discontinued by the hospital before the infant's discharge when it was found that he had no infection. In any event, the court notes that Michnik, at 11:53 a.m. on December 20, 2009, ordered for Matos Cefazolin Sodium, an antibiotic. *See* Michnik's medication order of 12/20/09, 11:53. In light of all of the foregoing, it is readily apparent that HHC had no reason to suspect that Iverson was anything other than a well, normal baby, throughout his hospitalization and upon his discharge, and, thus, did not have notice, within 90 days or a reasonable time thereafter, of the alleged facts comprising this action. Because of Matos's delay of about four years in moving for leave to serve a late notice of claim, the fact that she first apprised HHC of her claims, albeit, via a null notice of claim, about two years after her claims accrued, and her failure

to meet the "overall requirements" in seeking leave to serve a late notice of claim, in the exercise of this court's discretion, the branch of her motion which seeks leave to serve a late notice of claim as to the causes of action she has asserted on Iverson's behalf, is denied. *See Plaza v New York City Health & Hosps. Corp. (Jacobi Med, Ctr.)*, 97 AD3d at 471 (plaintiff failed to show overall requirements for leave to serve late notice of claim where, although defendant did not demonstrate substantial prejudice, plaintiff failed to show that defendant gained knowledge, within 90 days or within a reasonable time thereof, of the facts constituting the claim, where plaintiff filed a null notice of claim two years and eight months late, and failed to demonstrate a reasonable excuse, or that infancy was responsible, for the notice of claim's late service).

Although Matos has not met the condition precedent to suit, because HHC has not cross-moved to dismiss the complaint and this is not a summary judgment motion which permits the court to search the record and dismiss the complaint (CPLR 3212 [b]), the court cannot dismiss the complaint at this juncture. *Bernard v Chase Natl. Bank*, 233 App Div 384, 385-386 (1st Dept 1931); *see also Nichols v Curtis*, 104 AD3d 526, 527 (1st Dept 2013); *Grant v Rattoballi*, 57 AD3d 272, 273 (1st Dept 2008) (power of trial level court to dismiss a complaint "sua sponte should be used sparingly and only in extraordinary circumstances") .

In conclusion it is

ORDERED that Matos's motion for leave to serve a late notice of claim, is denied.

Dated December 22, 2015

ENTER:

J.S.C.