SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

WANDRA BROWN,

Petitioner,

Index No. 805622/2015

-against-

DECISION/ORDER

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmations in Opposition	2
Replying Affidavits.....	3
Exhibits.....	4

Petitioner Wandra Brown brings the instant petition for leave to serve a late Notice of Claim against respondent New York City Health and Hospitals Corporation ("NYCHHC"). For the reasons set forth below, the petition is denied.

The relevant facts are as follows. On or about August 26, 2014, petitioner underwent bariatric surgery at Harlem Hospital. At the time of the surgery, an IV was placed on petitioner's left hand. Medical records submitted by NYCHHC from the time of the surgery report that the surgery was successful, with no complications. However, in her affidavit, petitioner testifies that after the surgery, two fingers on her left hand did not function properly. Petitioner repeatedly spoke to a physician, Dr. McCoy ("McCoy") at Harlem Hospital, who told her that the problem with her fingers was a "normal side effect and that it would wear off."

Medical records submitted by petitioner show that petitioner complained to McCoy, described in the records as a "PA," or physician assistant, of "some numbness and tingling of [her] left arm and left leg" on September 2, 2014 and of "numbness of her hand" on January 22, 2015. In April 2015, petitioner saw her primary care physician, who was not affiliated with Harlem Hospital, who told her that the condition of her fingers "was not normal." On or about May 29, 2015, neurologist Dr. Mia Minen of NYU Langone Hospital performed a test or tests on petitioner's hand. In late June 2015, petitioner allegedly learned that the nerves in her hand had been damaged. Thereafter, petitioner sought counsel and, on or about August 18, 2015, served a late Notice of Claim for medical malpractice on respondent NYCHHC. Petitioner's late Notice of Claim states that petitioner's claim for medical and hospital malpractice and negligence arose on August 26, 2014, when petitioner sustained damage to the sensory nerves in two of the fingers on her left hand caused by the placement of an IV on petitioner's left hand or arm. She now seeks leave to serve a late Notice of Claim or an Order deeming her late Notice of Claim served *nunc pro tunc*.

Prospective plaintiffs must serve a Notice of Claim against a municipal entity within ninety days after the claim arises. *See* General Municipal Law ("GML") §50-e(1)(a). However, courts have broad discretion to grant leave to serve a late Notice of Claim pursuant to GML §50-e(5). In determining whether to grant leave, the court must consider whether the petitioner had a reasonable excuse for his delay, whether the delay prejudiced the municipality's defense and whether the municipality acquired "actual knowledge of the essential facts constituting the claim" within 90 days after the claim arose or within a reasonable time thereafter. *See* GML §50-e(5); *Strauss v. New York City Transit Authority*, 195 A.D.2d 322 (1st Dept 1993). It is plaintiff's burden to prove each of these elements, including lack of prejudice

to the defendant. *See Delgado v. City of New York*, 39 A.D.3d 361 (1st Dept 2005). Although no one factor is dispositive, the court must give particular consideration to whether the defendant acquired actual knowledge of the claim within the ninety day statutory period or shortly thereafter. *See Justiniano v. New York City Housing Authority Police*, 191 A.D.2d 252 (1st Dept 1993).

In the present case, considering all the factors together, the petition for leave to serve a late Notice of Claim is denied. As an initial matter, the court finds that petitioner had a reasonable excuse for failing to timely serve a Notice of Claim as she claims that she relied on the statements of McCoy that the problem with her fingers was a side effect and would wear off on its own.

However, petitioner has failed to establish that NYCHHC acquired actual knowledge of the essential facts underlying her claim for medical malpractice within 90 days after the claim arose or within a reasonable time thereafter through its possession of petitioner's medical records. A respondent has actual notice of a claim for medical malpractice "when it creates a contemporaneous medical record containing the essential facts constituting the alleged malpractice." *Cartagena v. New York City Health & Hosps. Corp.*, 93 A.D.3d 187, 190 (1st Dept 2012). The medical records must show on their face "that [the] respondent, by its acts or omissions, inflicted injuries" on the petitioner. *Webb v. New York City Health & Hosps. Corp.*, 50 A.D.3d 265 (1st Dept 2008). The First Department has repeatedly emphasized the importance of the petitioner's submission of an expert affidavit to establish that a claim of malpractice "can be evidenced from the face of medical records." *See Kelley v. New York City Health & Hosps. Corp.*, 76 A.D.3d 824, 827-28 (1st Dept 2010); *Greene ex rel. Middleton v. New York City Health & Hosps. Corp.*, 35 A.D.3d 206, 207 (1st Dept 2006).

In the present case, petitioner has failed to establish that contemporaneous medical records possessed by NYCHHC document the essential facts constituting the alleged medical malpractice. Petitioner has submitted three medical records for "PostOp Bariatric" visits at Harlem Hospital. On September 2, 2014, petitioner complained to McCoy of "some numbness and tingling of [her] left arm and left leg." Petitioner complained to McCoy of "numbness of her hand" on January 22, 2015. On June 25, 2015, petitioner complained to Steven Ng, PA, of numbness of two fingers on her left hand and of two toes on her left foot "since surgery." Petitioner has failed to establish that it is evident from the face of these medical records that acts or omissions of hospital staff, particularly in the insertion of the IV or the performance of bariatric surgery, inflicted the alleged injuries to petitioner's fingers. Although the medical records show that petitioner complained of numbness and tingling in her left extremities, it is not clear from the face of the medical records that the numbness and tingling were caused by malpractice on the part of hospital staff through the insertion of the IV or on the part of the surgeons who performed the bariatric surgery. Moreover, petitioner has not submitted an affidavit of a medical expert testifying that the medical records show that the numbness and tingling were caused by malpractice. In addition, McCoy's alleged statements to petitioner that the problem with petitioner's fingers was a side effect that would wear off on its own are not documented in the medical records.

Further, petitioner has failed to establish that respondent has not been prejudiced by petitioner's delay in serving the Notice of Claim. Where a respondent does not have actual notice of the facts underlying a claim for medical malpractice, a long delay is substantially prejudicial. *Cartagena*, 93 A.D.3d at 192. Courts have found that a delay of one year may be prejudicial to a respondent's "ability to investigate and defend the claim." *See Matter of Nieves*

v. New York Health & Hosps. Corp., 34 A.D.3d 336 (1st Dept 2006); *Kelley*, 76 A.D.3d at 826-29 (holding that a 14-month delay may diminish "the likelihood of the staff having any recollection of petitioner").

In the present case, petitioner has failed to establish that respondent has not been prejudiced by the delay of nearly a year in serving the Notice of Claim, particularly as petitioner has failed to establish that respondent had actual notice of the facts underlying the claim for medical malpractice. Petitioner's argument that respondent has not been prejudiced because a hearing, during which respondent would have the opportunity to question petitioner about her care and treatment, has not yet been held pursuant to GML §50-h is without merit. The fact that respondent would now have the opportunity to investigate the claim if the court allowed petitioner to serve a late Notice of Claim does not show that respondent was not prejudiced by petitioner's delay of nearly a year, which may have diminished the likelihood that hospital staff will recall petitioner and her treatment.

To the extent that petitioner argues for the first time in reply that respondent is equitably estopped from claiming a defense based on petitioner's failure to timely serve a Notice of Claim due to McCoy's allegedly misleading statements, this court will not consider the argument as "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." *Dannasch v. Bifulco*, 184 A.D.2d 415 (1st Dept 1992).

Accordingly, the petition is denied. This constitutes the decision and order of the court.

Dated: 2/11/16

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.