Schrager v Henry J. Carter Specialty Hosp. & Nursing Facility
2018 NY Slip Op 31202(U)
June 15, 2018
Supreme Court, New York County
Docket Number: 150051/2018
Judge: George J. Silver
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10
--X
ALAN SCHRAGER, as Administrator of the Estate of
GLENN VICTOR

Petitioner,

-against-

Index № 150051/2018
Motion Seq. № 001

HENRY J. CARTER SPECIALTY HOSPITAL &
NURSING FACILITY,

Respondent.
--X
GEORGE J. SILVER, J.S.C.:

In this action, petitioner ALAN SCHRAGER ("petitioner"), as administrator of the Estate of GLENN VICTOR ("decedent") moves, by Order to Show Cause, for an order granting petitioner leave to serve a late notice of claim upon respondent HENRY J. CARTER SPECIALTY HOSPITAL AND NURSING FACILITY ("respondent"), a New York City Health and Hospitals Corporation facility. Respondent solely opposes petitioner's application to the extent that respondent argues that decedent's medical records did not provide it with sufficient notice. In response, petitioner argues that notice can be imputed to respondent based on the facts of this case.

Decedent became a resident at respondent's facility in December of 2015, after having surgery on his back that required rehabilitation. Decedent remained a resident of the facility until January 13, 2017, when he was transferred to Mt. Sinai St. Luke's Hospital ("Mt. Sinai"). Upon admission to Mt. Sinai, decedent was found to have a severe sacral pressure sore measuring ten (10) centimeters in diameter, septic shock secondary to a severe urinary infection, severe abdominal distension, bowel obstruction, fecal impaction in the rectum, and a markedly dilated colon, among other ailments. Three days after his admission to Mt. Sinai, decedent passed away from his injuries.

Decedent's death occurred on January 15, 2017. Decedent left behind an elderly mother (88 years old), entirely unfamiliar with the legal process, and a cousin. Decedent's cousin, petitioner, noted the potential neglect suffered by decedent when decedent was first admitted to Mt. Sinai. However, decedent was unable to fully assess the severity of the neglect at respondent's facility until he was able to obtain decedent's medical records from the hospital. Once those records were obtained, petitioner contacted an attorney to discuss further steps. Unfortunately for petitioner, this was after the 90-day period for timely filing a notice of claim had elapsed. As soon as counsel was retained, petitioner contends that efforts were made to appoint him as administrator of decedent's estate. While the surrogate's court action seeking to appoint petitioner was pending, petitioner's retained counsel attempted to further this matter by requesting documents from respondent pertaining to decedent's stay at respondent's facility. Petitioner contends that respondent refused to provide the requested documents, even after petitioner sent a second request. Based on these events, petitioner states that petitioner had a reasonable excuse for failing to serve a timely notice of claim.

Even if the court were to find petitioner's excuse unreasonable, petitioner contends that the existence or absence of a reasonable excuse for any delay is but one of factor to consider. Indeed petitioner submits that if there is timely notice and the absence of prejudice, even the absence of a reasonable excuse for failing to timely serve a notice of claim will not bar the granting of leave to serve a late notice of claim. Moreover, petitioner contends that while decedent was a resident of the facility, its employees, agents and servants were responsible for regularly turning and positioning him while in bed, have him weight shift when out of bed to a chair, attend to the correct care of his bladder including regular examination of his genitalia, and observe him on a regular basis passing stool. Petitioner contends that all of these responsibilities required regular direct contact with

decedent, and frequent observation of his condition. Petitioner further contends that at the time of petitioner's admission to Mt. Sinai, his dire condition was readily apparent to even a casual observer, having required an extended period of time to progress to that level of severity. Given the nature of decedent's injuries, petitioner contends that it is axiomatic that respondent, its employees, agents and servants had notice of the essential facts underlying the claims herein, through any, even minimal, interaction with decedent while he remained at the facility.

Petitioner further contends that respondent had additional notice of the essential facts and circumstances underlying this claim based on a complaint filed with the Department of Health on May 23, 2017 outlining the injuries sustained by decedent due to respondent's neglect. Following the filing of this complaint, petitioner received a confirmation from the Department of Health, assigning a Case ID number and outlining the investigation process. In pertinent part, this letter explains that the Department of Health conducts interviews, reviews medical records and other facility documentation, conducts unannounced site visits among other investigative steps. As such, petitioner contends that this investigation would have put respondent on notice of the essential facts of this claim.

Finally, petitioner argues that in the case at bar, there is no prejudice, let alone substantial prejudice, that respondent would suffer on account of a late filing of a notice of claim because there has been no impact on any ability to defend against the claim. In particular, petitioner highlights that the hospital records set forth the nature and extent of the injuries that were caused at the time of the wrongdoing, and respondent's own records will set forth the nature and extent of the care provided or not provided to decedent. As would be the case if the notice of claim were timely filed, petitioner contends that defense counsel and will review the medical records and the facility records and defend

accordingly. Petitioner therefore submits that since mere months have elapsed since the 90-day notice date and the filing of the instant motion, the negligible delay here has not compromised respondent's ability to defend this matter.

As highlighted above, respondent's only challenge to petitioner's request is based on respondent's contention that it did not receive sufficient, and legally sound, notice of petitioner's claims on account of its own records.

DISCUSSION

Actions against a municipal entity such as defendant are governed by McKinney's Unconsolidated Laws of N.Y. § 7401(2) which, in relevant part, provides that such action may not be commenced "unless a notice of intention to commence such action and of the time when and the place where the tort occurred and the injuries or damage, were sustained [...] shall have been filed with a director or officer of the corporation within ninety days after such cause of action shall have accrued." Pursuant to General Municipal Law (GML) § 50–e, the timely filing of a notice of claim is a statutory precondition to the initiation of personal injury suits against a municipality. Thus, a party has 90 days from the date the claim arises to file a notice of claim and when a notice of claim is served beyond the required ninety-day period, without leave of court, it is deemed a nullity (*see McShane v. Town of Hempstead*, 66 AD3d 652 [2009]; *Fuschsia Sun et al. v. New York City Health and Hosps. Corp. et al.*, 13 AD3d 151, 152 [1st Dept 2004]); *Potts v. City of New York Health and Hosps. Corp.*, 270 AD2d 129, 130 [1st Dept 2000]). The failure to comply with this condition precedent is grounds for dismissal of the action (*see generally Silberstein v. County of Westchester*, 92 AD2d 867 [2d Dept 1983], *aff'd* 62 NY2d 675 [1984]).

GML §50(e)(2) requires that a written notice sworn to, by, or on behalf of the claimant set

forth: (1) the name and post-office address of each claimant, and of his attorney, if any; (2) the nature of the claim; (3) the time when, the place where and the manner in which the claim arose; (4) and the items of damage or injuries claimed to have been sustained so far as then practicable.

The purpose of the statutory notice of claim requirement is to provide a municipality or public corporation with an adequate opportunity to investigate and to explore the merits of the claim while the information is fresh and readily available (*Cruz v. New York City Housing Authority*, 269 A.D.2d 108 [1st Dept. 2000]; *Rosenbaum v. City of New York*, 8 NY3d 1, 11 [2006]). Indeed, "[t]he test of the sufficiency of a notice of claim is merely whether it includes information sufficient to enable the city to investigate" (*Rosenbaum*, 8 NY3d at 7, *citing to Brown v City of New York*, 95 NY2d 389 [2000] [internal quotation marks and citations omitted]). Therefore, the notice of claim must contain a sufficient description of "the place," "the time," and "the nature" of the claim (*see id.*).

Courts have broad discretion to grant permission to file a late notice of claim (*Ali v. Bunny Realty Corp.*, 253 AD2d 356, 357 [1st Dept. 1998]). In deciding whether to grant a motion to file a late notice of claim, the court must look to the factors enumerated in General Municipal Law § 50-e(5) for guidance. More specifically, the court must consider all the facts and circumstances, with special attention to (1) whether an infant plaintiff is involved, (2) whether there is a reasonable excuse for the delay, (3) whether the municipal defendant acquired actual knowledge of the pertinent facts constituting the claim, and (4) whether the delay has prejudiced the defendant's ability to defend the claim (Gen. Mun. L. § 50-e[5]; *see Frith v. New York City Housing Authority*, 4 AD3d 390, 391 [2d Dept. 2004]; *Ali v. Bunny Realty Corp.*, 253 AD2d, at 357, *surpa*). No single factor is determinative (*see Matter of Dubowy v. City of New York*, 305 AD2d 320 [1st Dept. 2003]["presence

or absence of any one factor is not determinative"]).

The instant matter does not involve an infant, and therefore is outside the ambit of comparisons to the Court of Appeals' decision in *Wally G. ex rel. Yoselin T. v. New York City Health and Hospitals Corp.*, 27 NY3d 672 (2016), wherein the Court denied an infant leave to serve late notice of claim against a medical center, based on center's alleged negligence which led to injuries sustained after infant was born prematurely. Even if it did fall within the parameters of *Wally G.*, that case is inapposite to the facts contained herein.

In *Wally G.*, the Court's concern was not rooted in the length of the delay, but rather in whether the medical records that were at issue provided respondent with sufficient notice of the petitioner's potential claims. In resolving that issue, the Court noted that the medical records at issue in the case were bereft of any indication that respondent or its staff were fully aware that any of their actions were potentially attributable to malpractice. As such, the Court reasoned that the medical records were insufficient to provide notice insofar as they required more than a mere suggestion that the alleged injury was the result of malpractice (*Wally G. ex rel. Yoselin T.*, 27 NY3d 672, *supra*).

This case involves the death of decedent due to respondent's alleged failure to care for him. Respondent's alleged failure resulted in several conspicuous marks on decedent's body. Most notably, decedent had a severe sacral pressure sore measuring ten (10) centimeters in diameter on his body that petitioner states is attributable to respondent's neglect. As such, respondent's agents, employees, and personnel that cared for decedent necessarily would have seen his injuries with their own eyes. Further, petitioner filed a complaint with the Department of Health that led to a full investigation that respondent was well aware of. As such, respondent had more than cursory notice of petitioner's claims herein. Indeed, respondent does note take umbrage with petitioner's assertion

that its staff had receipt of decedent's medical records and could conspicuously see the sacral sore on his body. The First Department, like the Second Department, has repeatedly held that such factors are sufficient to provide actual notice to a respondent (*see McMillan v. City of New York*, 279 AD2d 280, 281 [1st Dept. 2001]; *Rodriguez v. New York City Health and Hosp. Corp.*, 270 AD2d 110, 110 [1st Dept. 2000]; *Spaulding v. New York City Health and Hosp. Corp.*, 210 AD2d 128, 128 [1st Dept. 1994]); *Williams v. Bronx Municipal Hosp. Center*, 205 AD2d 420, 421 [2d Dept.1994]). Balancing the facts of this case against the concerns enumerated by the Court of Appeals in *Wally G.* weighs decidedly in petitioner's favor. Therefore, this case falls outside of *Wally G.*, and petitioner cannot be denied leave to file a late notice of claim on account of respondent receiving insufficient notice of his claims.

Respondent does not challenge petitioner's remaining assertions that petitioner had a reasonable excuse for his delay and that respondent will not be prejudiced by petitioner's late filing of a notice of claim. On the latter point, it is worth mentioning here that courts have routinely dismissed allegations of prejudice based on the mere passage of time (*see e.g. McMillan v. City of New York*, 279 AD2d at 280-81, *supra* [seven-year delay and doctors no longer being employed by defendant insufficient to establish prejudice]). Here, respondent's statements regarding an inability to conduct an investigation are rooted in the passage of time. Here, the mere passage of a few months does not make it impossible to reconstruct the events and conversations that gave rise to petitioner's claims. Also, respondent also cannot persuasively contest late notice given its own role in failing to promptly provide petitioner with decedent's medical records. Moreover, any argument rooted in respondent's personnel's inability to remember conversations is insufficient as the passage of time has not been substantial enough to advance an argument concerning faded memories.

As such, on this record, the court will allow petitioner to serve a late notice of claim, *nunc pro tunc*. The analysis weighs heavily in favor of permitting the notice and allowing petitioner's claims to proceed. The scale tips decidedly in favor of going forward in light of the strong policy against punishing petitioner for a delay as short as the one occasioned here, especially given the lack of prejudice and the actual knowledge of the facts with which respondent can fairly be charged (*see Rodriguez*, 270 AD2d at 110, *supra*; *Williams v. Bronx Municipal Hosp. Center*, 205 AD2d at 421, *supra* [nine year delay excusable because of knowledge of facts and lack of prejudice]; *contrast*, *Harris v . City of New York*, 297 AD2d 473, 474 [1st Dept. 2002][holding lack of notice and the passage of time will prejudice city because it won't be able to find witnesses or conduct a proper investigation], *lv. denied* 99 NY2d 503 [2002]).

Accordingly, based on the foregoing, it is hereby

ORDERED and ADJUDGED that petitioner's motion, by Order to Show Cause, for leave to file a late notice of claim, is GRANTED; and it is further

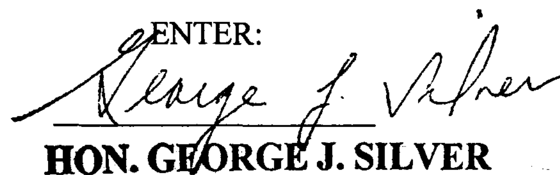
ORDERED that petitioner is directed to serve respondent with a notice of claim no later than July 23, 2018; and it is further

ORDERED that the parties are directed to appear for a conference before the court on Tuesday August 7, 2018 at 111 Centre Street, Room 1227 to ensure compliance with this court's order.

This constitutes the decision and order of the court.

Dated: June 15, 2018

ENTER:



HON. GEORGE J. SILVER