Yapo v Torroni
2018 NY Slip Op 32789(U)
October 31, 2018
Supreme Court, New York County
Docket Number: 805293/2018
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Maurice Claudine Yapo,

Plaintiff,

-against-

Andrea Torroni, M.D., Denis Knobel, M.D., Roberto L. Flores, M.D., Pierre B. Saadeh, M.D., and New York City Health & Hospitals Corporation d/b/a Bellevue Hospital Center,

Defendants.

Index No. 805293/2018

DECISION and ORDER

Mot. Seq. 001

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HON. EILEEN A. RAKOWER, J.S.C.

Relief Sought

Plaintiff Maurice Claudine Yapo ("Plaintiff" or "Yapo") moves by Order to Show Cause for an order (a) deeming the Notice of Claim dated April 11, 2018 as timely served on defendant New York City Health and Hospitals Corporation ("Defendant" or "HHC") based on the continuous treatment doctrine. Alternatively, Plaintiff seeks leave to serve a Late Notice of Claim on HHC pursuant to General Municipal Law 50-e(5) and deeming the Notice of Claim served on HHC on April 12, 2018 as timely *nunc pro tunc*. HHC opposes.

Factual Allegations

Plaintiff alleges that Defendants deviated from good and acceptable standards of medical care and surgical care in their performance of a right hemimaxillectomy and palatal and maxillary reconstruction using a scapular tip free flap on June 22, 2017. Specifically, Plaintiff alleges that Defendants "failed to properly perform the scapula tip free flap harvest and failing to clearly identify the pedicle as it passed into the axilla to the axillary artery, and protecting the brachial plexus and root of

the long thoracic nerve, which proximately caused Plaintiff's brachial plexus injury and ensuing complications." Plaintiff alleges that following the June 22, 2017 surgical procedures, Plaintiff remained admitted at Bellevue Hospital until July 3, 2017 when she was discharged. Plaintiff alleges that following her discharge, she received continuous treatment by Bellevue Hospital through April 10, 2018. Plaintiff states that she presented for follow up visits, including on July 17, 2017, July 18, 2017, July 25, 2017, August 3, 2017, August 22, 2017, August 24, 2017, August 31, 2017, December 29, 2017, January 11, 2018, January 31, 2018, February 8, 2018, February 9, 2018, April 2, 2018, and April 10, 2018. Plaintiff served a Notice of Claim on April 12, 2018.

Plaintiff submits an expert affidavit from Dr. Mark El-Diery who states that he has reviewed the medical records from Bellevue Hospital for Plaintiff which document her care from June 1, 2017 to April 10, 2018. Dr. El-Diery states that based on his review:

> It is my opinion to a reasonable degree of medical certainty that there is a valid basis for the instant claim as Defendants deviated from accepted medical practice by failing to properly perform the scapula tip free flap harvest by clearly identifying the pedicle as it passed into the axilla to the axillary artery, and protecting the brachial plexus and root of the long thoracic nerve, and proximately causing Ms. Yapo's brachial plexus injury, including severe right scapula winging and complications outside the predicted expectation of this type of surgery, including but not limited to right shoulder and arm weakness, diminished range of motion, and impairment in ability to perform activities of daily living. (Expert Aff., ¶9).

Legal Standard

Pursuant to General Municipal Law § 50-e, a notice of claim in a medical malpractice action against a city must be served within 90 days after the claim arises. Section 50-e[5] authorizes a court, in its discretion, to extend the time to serve a notice of claim. The extension may not exceed the time limited for the commencement of an action by the claimant against the public corporation. "It is well-settled that both the 90-day period for serving a notice of claim and the statute

of limitations for commencement of an action are tolled by a continuous course of medical treatment relating to the original condition or complaint." *Oliveira v. New York City Health & Hosps. Corp.*, No. 22296/2010, 2011 WL 601401 [Supreme Court, Queens County 2011] (citing to *Allende v. New York City Health and Hospitals Corporation,* 90 N.Y.2d 333, 337-338 [1997]).

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 A.D. 3d 336, 337 [1st Dept 2006]. "In deciding whether a notice of claim should be deemed timely served under General Municipal Law § 50-e [5], the key factors considered are "[1] whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, [2] whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and [3] whether the delay would substantially prejudice the municipality in its defense. Moreover, the presence or absence of any one factor is not determinative." *Velazquez v. City of New York Health and Hosps. Corp. (Jacobi Med. Ctr.)*, 69 A.D. 3d 441, 442 [1st Dept 2010]. "The failure to set forth a reasonable excuse is not, by itself, fatal to the application." *Velazquez*, 69 A.D. 3d at 442.

Specific to medical malpractice claims, "[t]he relevant inquiry on a motion to serve late notice of claim is whether defendant's medical records provided it with actual knowledge of the facts, not the legal theory, underlying plaintiff's claim." *Hernandez v. New York City Health and Hospitals Corp.*, 2015 WL 4698763, at *3 [N.Y County Sup. Ct. 2015]. "[M]erely having or creating hospital records, without more, does not establish actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on plaintiff..." *Williams v. Nassau County Med. Ctr.*, 6 N.Y.3d 531, 537 [2006]. To demonstrate that a defendant's medical records provided defendant with actual knowledge of the facts underlying a plaintiff's claim, a plaintiff may submit affirmations from physicians establishing that the medical records, on their face, evinced that defendants failed to provide proper care. *See Talvera ex rel. Rios v. New York City Health and Hospitals Corp.*, 48 A.D. 3d 276, 277 [1st Dept. 2008]; *Lisandro v. New York City Health and Hospitals Corp.*, 50 A.D. 3d 304, 304 [1st Dept. 2008]; *Bayo v. Burnside Mews Associates*, 45 A.D. 3d 495, 495 [1st Dept. 2007].

Additionally, a plaintiff must demonstrate that the plaintiff's delay would not substantially prejudice the defendant so that "failure to serve a timely notice of claim" does not deprive "defendant of the opportunity to conduct a prompt investigation of the merits of the allegations against it that the notice provision of General Municipal Law § 50-e was designed to afford." *Velazquez*, 69 A.D. 3d at 442. "Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice." *Newcomb v. Middle Country Cent. Sch. Dist.*, 28 N.Y.3d 455, 466 [2016], *reargument denied*, 29 N.Y.3d 963 [2017].

Parties' Contentions

Plaintiff asserts that the continuous treatment doctrine is applicable. Plaintiff contends that under the continuous treatment doctrine, the statute of limitations to serve a notice of claim did not begin to run until April 10, 2018, the date of Plaintiff's last visit to Bellevue Hospital wherein she continued to complain that she could not lift her right arm. Plaintiff contends that the Notice of Claim served on April 12, 2018, two days after that visit, is therefore timely.

Plaintiff contends that even if the time to bring a claim began to run from the June 22, 2017 surgical procedures, the Court should permit Plaintiff to file a Late Notice of Claim *nunc pro tunc* pursuant to General Municipal Section 50[e][5]. Plaintiff contends that the application for an extension was made within one year and ninety days from the June 22, 2017 surgery. Plaintiff further contends that Defendants had actual knowledge of the essential facts since at least August 22, 2017 when Plaintiff reported difficulty fully raising her arm following the surgery. Plaintiff further contends that Plaintiff's physical incapacity justified any late filing of the notice of claim. Plaintiff further contends that any delay in serving a Notice of Claim did not prejudice HHC since Defendants had the medical records in their possession and actual knowledge of all the events that gave rise to Plaintiff's complaints regarding her right upper extremity following the June 22, 2017 surgical procedures.

In opposition, HHC contends that the mere possession of medical records does not put a defendant on notice of the facts constituting the claim and does not constitute actual knowledge of the claim. HHC contends that Plaintiff has failed to "identify any portion of the medical record that indicates there was negligence on the part of HHC, and wholly fails to demonstrate that the medical records 'evince that the medical staff, by its acts or omissions, inflicted an injury on plaintiff.'" HHC does not oppose or dispute other factors, including that Plaintiff has provided

a reasonable excuse for any delay, Defendants will not be prejudiced, and that Plaintiff has not established a meritorious claim.

Discussion

If the continuous doctrine applies to this case, Plaintiff's Notice of Claim served on April 2, 2018, two days after Plaintiff's last visit to Bellevue Hospital for injuries arising from the June 22, 2017 surgical procedures, is timely. Even if the continuous doctrine does not apply, then Plaintiff has met the "the basic criteria that would warrant the exercise of this Court's discretion to permit her to file a late notice of claim." *Rodriguez*, 97 A.D.3d at 467. Plaintiff establishes that HHC acquired "actual notice of the facts constituting the claim" based upon the hospital records in HHC's possession which contain repeated references to injury to Plaintiff's right arm. *Rodriguez*, 97 A.D.3d at 467; *Talavera*, 48 A.D.3d at 277. As stated above, HCC does not dispute that the other factors considered under General Municipal Law § 50-e [5] weigh in Plaintiff's favor.

Wherefore, it is hereby

ORDERED that the Notice of Claim, dated April 11, 2018, and served upon defendant New York City Health and Hospitals Corporation d/b/a Bellevue Hospital Center on April 12, 2018 is deemed timely served.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: October 31, 2018

EILEEN A. RAKOWER, J.S.C.