| **Ahmed v New York City Health & Hosp. Corp.** |
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| 2019 NY Slip Op 33875(U) |
| December 9, 2019 |
| Supreme Court, Queens County |
| Docket Number: 710296/19 |
| Judge: Kevin J. Kerrigan |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Fayza Ahmed,

Plaintiff,

- against -

New York City Health & Hospital Corporation and Elmhurst Hospital Center,

Defendants.

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Index Number: 710296/19

Motion Date: 11/18/19

Motion Seq. No.: 2

The following papers numbered 1 to 9 read on this motion for leave to serve a late notice of claim.

| | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation-Exhibits | 1-3 |
| Affirmation in Opposition-Exhibit | 4-6 |
| Reply-Exhibits | 7-9 |

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by plaintiff for leave to serve a late notice of claim, pursuant to General Municipal Law §50-e(5), is denied.

Plaintiff alleges that physicians at Elmhurst Hospital Center departed from good and accepted medical practice by failing to administer Tissue Plasminogen Activator, or TPA, within the effective window period to prevent stroke damage, after she presented and was admitted to the hospital with signs of stroke on February 10 2018. Plaintiff alleges that the period of malpractice continued during the period of her admission, from February 10th to March 28th, 2018.

A condition precedent to commencement of a tort action against the HHC is the service of a notice of claim upon it within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Unconsolidated Laws §7401; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]). In addition, an action against the HHC must be commenced within one year and 90 days after the plaintiff's cause of action accrues (see General Municipal Law §50-i; Unconsolidated Laws §7401).

Since plaintiff's cause of action accrued on March 28, 2018, at the latest, she was required to serve a notice of claim no later than June 26, 2018 and commence an action no later than June 26, 2019. The moving papers indicate that plaintiff filed a summons and complaint on June 12, 2018. The order to show cause on the instant motion was filed on June 28, 2019.

An extension of time to serve a late notice of claim "shall not exceed the time limited for the commencement of an action by the claimant against the public corporation" (General Municipal Law §50-e[5]). The Court has no authority to entertain an application for leave to serve a late notice of claim made beyond the one year and 90-day period of limitations for commencement of an action (see Hochberg v. City of New York, 63 NY 2d 665 [1984]). Since the order to show cause on this motion was filed two days after the expiration of the statute of limitations, the motion must be denied outright.

This Court notes, parenthetically, that plaintiff had filed an ex-parte application for an order to show cause for the same relief on June 17, 2019, but this Court declined to sign the proposed order to show cause. The statute of limitations for commencement of an action is tolled from the date a signed order to show cause for leave to serve a late notice of claim is filed until the date of entry of the order granting the motion (see Giblin v. Nassau County Medical Center, 61 NY 2d 67 [1984]). But since an application for an order to show cause is merely an ex-parte application for permission to make a motion, accompanied by a proposed order to that effect, the declination by the court to sign the proposed order is as if no application was ever brought (see Fry v Village of Tarrytown, 89 NY 2d 714 [1997]). Therefore, the only order to show cause brought by plaintiff was the untimely one filed on June 28, 2019. Plaintiff's counsel argues that because this Court declined to sign the first proposed order "without prejudice", it directed that the order to show cause be "resubmitted". Counsel's argument is without merit. All this Court meant in declining to sign the order to show cause without prejudice was that it was not prohibiting plaintiff from making another application upon proper supporting papers. Therefore, the filing of the second order to show cause, which this Court signed, did not relate back to the first application.

In addition, although an application for leave to serve a late notice of claim may be made after plaintiff has commenced a timely action (see General Municipal Law §50-e[5]), an extension of time to serve a late notice of claim "shall not exceed the time limited for the commencement of an action by the claimant against the public corporation" (General Municipal Law §50-e[5]). Thus, even if plaintiff commenced the action within the one year and 90-day statute of limitations period, if, as here, a motion for leave to

serve a late notice of claim is not made until after the passage of said period, the Court is precluded from exercising judicial discretion to allow the filing of a late notice of claim (see Cintron v City of New York, 82 AD 2d 796 [2nd Dept 1981]; Kellogg v Office of Chief Med. Examiner of City of New York, 24 AD 3d 376 [1st Dept 2005]).

Even were the instant application timely, plaintiff has failed to set forth a reasonable excuse for failing to timely serve a notice of claim or to demonstrate that HHC acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and that it would not be substantially prejudiced by the delay (see Nairne v. N.Y. City Health & Hosps. Corp., 303 A.D.2d 409 [2d Dept. 2003]; Brown v. County of Westchester, 293 A.D.2d 748 [2d Dept. 2002]; Perre v. Town of Poughkeepsie, 300 A.D.2d 379 [2d Dept. 2002]; Matter of Valestil v. City of New York, supra; see General Municipal Law § 50-e[5]).

No excuse for the delay, indeed, is offered, and no affidavit of plaintiff is annexed to the motion setting forth an excuse. Counsel's only contention is that HHC acquired actual knowledge of the facts underlying plaintiff's claim by virtue of the Elmhurst Hospital records.

A hospital may be deemed, under appropriate circumstances, to have acquired actual knowledge of the facts underlying a claim of malpractice by reason of having been in possession of the plaintiff's medical records since the time of the alleged malpractice (see Kurz v. New York City Health & Hospitals Corp., 174 AD 2d 671 [2nd Dept 1991]). However, "[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 NY 3d 531, 537 [2006]). Actual knowledge based upon hospital records may not be found absent a clear showing of a nexus between the alleged malpractice and the injuries (see In Re Fallon v. County of Westchester, 184 AD 2d 510 [2nd Dept 1992]). Such nexus may only be shown "[w]here malpractice is apparent from an independent review of the medical records" (Cifuentes v New York City Health and Hosp Corp, 43 AD 3d 385, 386 [2nd Dept 2007]). Since the Court is not qualified to evaluate medical records to determine whether they indicate on their face that physicians committed malpractice causing injury, the plaintiff, in order to establish that the hospital had timely actual knowledge of the essential facts of the claim through its own medical records, not only must annex those records to the petition to demonstrate that they exist, but must also submit an affirmation of a medical expert to interpret those records and opine within a reasonable degree of medical certainty,

supported by a presentation of objective medical facts, that the records demonstrate on their face that there were departures from good and accepted medical practice on the part of hospital staff, that there were injuries and that the departures proximately caused those injuries. No affirmation of a physician interpreting the medical records is annexed to the moving papers. Plaintiff's counsel's own reference to certain entries in plaintiff's medical records in an attempt to support his own incompetent lay conclusion that defendants departed from the standard of care does not satisfy plaintiff's burden.

Finally, plaintiff has failed to meet her affirmative burden of demonstrating lack of prejudice (see Felice v. Eastport/South Manor Central School Dist., 50 AD 3d 138 [2nd Dept 2008]). In fact, her counsel does not even address the issue of prejudice at all. But even if there were no prejudice, it would be an abuse of discretion to grant leave to serve a late notice of claim where plaintiff has failed to demonstrate either that there was a reasonable excuse for her failure to timely file a notice of claim or that HHC acquired actual knowledge of the facts constituting the claim within the 90-day period or a reasonable time thereafter (see Carpenter v. City of New York, 30 AD 3d 594 [2nd Dept 2006]; State Farm Mut. Auto. Ins. Co. v. New York City Transit Authority, 35 AD 3d 718 [2nd Dept 2006]).

Accordingly, the motion is denied.

Dated: December 9, 2019

KEVIN J. KERRIGAN, J.S.C.

FILED
DEC 16 2019
COUNTY CLERK
QUEENS COUNTY