Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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Katherine Collaguazo and Eduardo Saldana,

Plaintiffs,

- against -

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

Defendants.

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Index Number: 704239/18

Motion Date: 10/22/18

Motion Seq. No.: 2

The following papers numbered 1 to 13 read on this motion by plaintiffs for leave to serve a late notice of claim; and cross-motion by defendant New York City Health and Hospitals Corporation (HHC), sued herein as New York City Health and Hospitals Corporation (HHC) and Elmhurst Hospital Center, to dismiss.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Notice of Cross-Motion-Affirmation-Exhibits	5-7
Affirmation in Opposition-Exhibits	8-9
Affirmation in Opposition to Cross-Motion-Exhibits	10-12
Reply	13

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

That branch of the motion by plaintiffs for leave to serve a late notice of claim by them, pursuant to General Municipal Law §50-e(5), nunc pro tunc, is granted solely to the extent that the notice of claim heretofore filed is deemed served, nunc pro tunc to March 20, 2018 with respect to the claim of plaintiff Katherine Collaguazo only and is denied in all other respects. That branch of the motion "deeming" any 50-h hearing to be completed within 15

days of service of a copy of this order with notice of entry is denied. The remaining branches of the motion for an order deeming the filing of the summons and complaint proper and timely and deeming the nunc pro tunc filing of the notice of claim to have satisfied the statutory 30 day period set forth in General Municipal Law §50-i (1)(b) are academic.

Cross-motion by HHC to dismiss the complaint, pursuant to CPLR 3211(a)(5) and (7), is granted solely to the extent that so much of plaintiff's first cause of action alleging negligent hiring of physicians by HHC, plaintiff's second cause of action alleging lack of informed consent and the third cause of action of co-defendant Eduardo Saldana for loss of services and society are dismissed pursuant to CPLR 3211(a)(7). In all other respects, the cross-motion is denied.

Plaintiff alleges that physicians at Elmhurst Hospital Center's department of obstetrics and gynecology and emergency room departed from good and accepted medical practice by failing, inter alia, to diagnose her as suffering from cancer and to detect an impending stroke when she presented to them commencing October 19, 2015 through December 25, 2016, and that such failure to diagnose was a substantial factor in causing her injuries. Plaintiff did not file a notice of claim with HHC within 90-days of the accrual of her cause of action, as required pursuant to General Municipal Law §50-e, which, at the latest, was March 27, 2017 (since the 90th day, March 25, 2017, fell on Saturday, the deadline to file a notice of claim was extended to the next business day, Monday, March 27th, pursuant to General Construction Law §25-a). Plaintiffs served a notice of claim on March 20, 2018, almost one year past the deadline for serving a notice of claim. Plaintiffs also commenced the present medical malpractice action simultaneously on March 20, 2018, within the statute of limitations for commencement of an action against HHC. Under General Municipal Law §50-e(5), a party may commence an action prior to moving for leave to file a late notice of claim, as is commonly the practice where the statute of limitations is a concern.

Plaintiffs subsequently moved by order to show cause, which was filed on April 13, 2018, for leave to serve a late notice of claim. That motion, and a cross-motion by HHC to dismiss the complaint, were fully submitted to this Court on July 30, 2018. This Court notes that since the motion was made after the action had been commenced, it was properly brought as a motion in this action rather than as a special proceeding under a separate index number. That motion, however, and consequently the cross-motion, were denied without prejudice pursuant to the order of this Court issued on August 28, 2018 and entered on September 10, 2018 upon

the ground that the moving papers were not in compliance with this Court's Part rules. The instant notice of motion for leave to serve a late notice of claim was thereafter served on September 15, 2018.

Thus, plaintiffs' time to make an application for leave to serve a late notice of claim, which is coextensive with the one year and 90-day period of limitation for commencement of an action against HHC, was tolled from the time the order to show cause was submitted to the Court for signature on April 13, 2018 until the order denying that motion without prejudice was entered on September 10, 2018 (see CPLR 204[a]; Giblin v. Nassau County Medical Center, 61 NY 2d 67 [1984]). The time then commenced running and was tolled again when plaintiff made the instant motion on September 15, 2018, which is when it was served. Since the instant motion was made by notice of motion, it was made not when it was filed but when it was served (see Russo v Eveco Dev. Corp., 256 AD 2d 566 [2nd Dept 1998]). Thus, one year and 20 days passed from the date of accrual of plaintiffs' causes of action (the claim of Eduardo Saldana, plaintiff Collaguazo's spouse, being a derivative claim of loss of consortium) until the order to show cause on plaintiff's first application for leave to serve a late notice of claim was submitted, and another 5 days passed from the date of entry of the order denying that motion until the date that the instant motion was made. Therefore, the instant motion, factoring in the tolls, was made one year and 25 days after plaintiffs' claims accrued and is therefore timely (see Riera v. City of New York Dept. of Parks & Recreation (156 AD 2d 206 [1st Dept 1989]). Moreover, the statute of limitations is tolled until the instant order is entered (see Giblin v. Nassau County Medical Center, supra; Riera v. City of New York Dept. of Parks & Recreation, supra).

The determination to grant leave to serve a late notice of claim lies within the sound discretion of the court (see General Municipal Law § 50-e[5]; Lodati v. City of New York, 303 A.D.2d 406 [2d Dept. 2003]; Matter of Valestil v. City of New York, 295 A.D.2d 619 [2d Dept. 2002], lv denied 98 NY 2d 615 [2002]). In determining whether to grant leave to serve a late notice of claim, the court must consider certain factors, including, inter alia, whether the claimant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality acquired actual knowledge of the facts constituting the claim within ninety (90) days from its accrual or a reasonable time thereafter, and whether the municipality is 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]).

Saldana, in his affidavit in support of the motion, avers that he and his wife have had a difficult time dealing with her medical issues and that his wife has been trying to recover from a stroke and has been undergoing chemotherapy since April 2017 all while trying to help him raise their newborn child. He avers that his wife has been physically and mentally incapacitated and that he and his wife obtained an attorney as soon as reasonably practicable. He also avers that they first consulted with their present counsel in March 2018 after another law firm declined to represent them in February 2018.

Also annexed to the moving papers is an affirmation of a physician, Kenneth Ackerman, dated March 21, 2018, in which he opines, inter alia, "Based upon my review of the medical records [which he also avers consisted of the medical records of Elmhurst Hospital and Northwell] and the affidavit of the husband Eduardo Saldana, it is my opinion within a reasonable degree of medical certainty that Catherine Collaguazo has been substantially mentally and physically incapacitated as a result of the large intraparenchymal hemorrhage that she sustained on January 1, 2017. Based upon my review given the severity and invasive nature of the treatment that she underwent while in inpatient for three months in January, February and March in North University Hospital Manhasset [sic] she was medically unable to participate in the process of serving a notice of claim within the 90 days following her presentation to the emergency room at Elmhurst Hospital Center on December 25, 2016. This substantial mental and physical incapacitation has unfortunately continued for Katherine Collaguazo up until the present and she has undergone several rounds of debilitating chemotherapy and continues to suffer from the permanent neurological deficit secondary to hemorrhagic stroke which includes hemiparesis and aphasia."

Plaintiff has thus proffered a reasonable excuse for her delay in filing a notice of claim by submitting an affirmation of a physician supporting Saldana's averment that plaintiff was physically and mentally too incapacitated to have filed a timely notice of claim either by the 90-day deadline or up to the date that one was filed on March 20, 2018 (see Matthews v. New York City Housing Authority, 210 AD 2d 205 [2nd Dept 1994]). HHC's counsel's contention that Dr. Ackerman's affirmation is unsupported by any admissible hospital records and thus is without probative value and inadmissible is without merit. No authority is cited for the proposition that a proper physician's affirmation in support of an application for leave to serve a late notice of claim must be supported by medical records annexed to the application in

admissible form. The cases cited by counsel regarding the admissibility of affirmations of physicians and their probative value based upon whether they are supported by admissible medical records concern the sufficiency of evidence proffered on motions for summary judgment and are, therefore, entirely inapposite to the present issue.

Plaintiff has also demonstrated that HHC, by virtue of being in possession of the hospital records, would not suffer any substantial prejudice in its ability to investigate the claim if the notice of claim against her that was filed on March 20, 2018 were allowed. In opposition, HHC has failed to allege or show that the passage of time has in any way hampered its ability to conduct a proper investigation. Indeed, HHC cross-moves for dismissal based upon the hospital records which it contends are dispositive of the merits of the claim.

That branch of the motion, however, by Saldana for leave to serve a late notice of claim nunc pro tunc concerning his loss of consortium claim must be denied. Although he averred that his wife was mentally and physically incapacitated and for that reason could not file a timely notice of claim, he proffers no excuse for his failure to serve a timely notice of his own loss of consortium claim. Although he avers that he and his wife have had a difficult time dealing with her medical condition, that his wife was trying to help him raise their newborn child and that amidst his wife's physical and mental incapacitation they obtained an attorney as soon as reasonably practicable, he does not state that he was unable to file a timely notice of claim or that his wife's condition prevented him from filing a timely notice of claim. Moreover, there is nothing in the medical records submitted to show that HHC had any timely knowledge, within 90 days of the alleged malpractice or a reasonable time thereafter, of any facts constituting Saldana's claim for loss of consortium.

The branch of the motion for an order directing that any 50-h hearing be completed within 15 days of service of this order with notice of entry is denied. There is no basis for such relief. Finally, those branches of the motion deeming the summons and complaint timely and properly filed nunc pro tunc and deeming that the 30 day period set forth in GML §50-i has been satisfied are academic. The summons and complaint was unquestionably timely filed within the statute of limitations period. Moreover, in light of the nunc pro tunc granting of leave to file the March 20, 2018 late notice of claim, the condition precedent for commencing the action was satisfied and consequently the complaint is not a nullity and states a cause of action. Moreover, the notice of claim which has been allowed contains 30-day demand language that satisfies the

requirement of GML 50-i.

In light of the foregoing, this Court need not reach, and will not determine, plaintiff's remaining argument that plaintiff's notice of claim was timely under the continuous treatment rule.

That branch of HHC's cross-motion to dismiss the complaint pursuant to CPLR 3211(a)(5) is denied. In the first instance, counsel does not set forth the basis for that branch of the motion seeking dismissal under CPLR 3211(a)(5). Counsel never references this subdivision of CPLR 3211(a) in the body of the supporting affirmation. Counsel appears to be arguing that the action is time-barred because the notice of claim that was filed without leave of court was a nullity and, therefore, the action that was commenced pursuant to it was also a nullity and may not be deemed filed nunc pro tunc. Such argument is without merit, for the reasons heretofore stated.

As to the branch of the cross-motion seeking dismissal of the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7) addresses merely the sufficiency of the pleadings. Unless a 3211(a)(7) motion is converted into a motion for summary judgment, pursuant to CPLR 3211[c], affidavits submitted in support of the motion are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (see Rovello v. Orofino Realty Co., 40 NY 2d 633 [1976]; Hornstein v. Wolf, 109 AD 2d 129 [2nd Dept 1985]), but may be received only for the limited purpose of remedying defects in the complaint, unless the affidavits conclusively establish that plaintiff has no cause of action (see Rovello v. Orofino Realty Co., supra). The affidavits and affirmations on this record do not conclusively establish that plaintiff has no cause of action against the HHC, except with respect to so much of her first cause of action alleging negligent hiring, her second cause of action alleging lack of informed consent and the third cause of action by Saldana alleging loss of consortium.

As it is neither alleged nor argued that physicians employed by Elmhurst Hospital had a history of committing malpractice as is alleged here and that HHC had knowledge of their propensity for doing so and that HHC nevertheless hired them (see Hang v St. John's Evangelical Lutheran Church, 129 AD 3d 1053 [2nd Dept 2015]), the complaint fails to state a cause of action for negligent hiring.

With respect to plaintiff's second cause of action alleging lack of informed consent, she fails to set forth what procedure or

surgery of a non-emergency nature or invasive diagnostic procedure was performed without her informed consent that resulted in injuries (see Public Health Law §2805-d; Ellis v Eng, 70 AD 3d 887 [2nd Dept 2010]).

As to the third cause of action by Saldana alleging loss of consortium, since his predicate notice of claim was untimely and his motion for leave to serve a late notice of claim is denied, the action commenced by him for loss of consortium is a nullity and, therefore, must be dismissed.

Accordingly, the caption of this action is amended to read as follows:

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Katherine Collaguazo,

Plaintiff,

- against -

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

Defendants.

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Index Number: 704239/18

Dated: October 29, 2018

KEVIN J. KERRIGAN, J.S.C.

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COUNTY CLERK
QUEENS COUNTY