

Duhart-Neal v Monroe County

2023 NY Slip Op 34758(U)

March 20, 2023

Supreme Court, Monroe County

Docket Number: Index No. E2022009742

Judge: Victoria M. Argento

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE**

**STEPHANIE DUHART-NEAL, as Administrator of the
Estate of SAMUEL NEAL, JR.,**

Plaintiff,

-vs-

**DECISION AND ORDER
Index No. E2022009742**

**MONROE COUNTY, MONROE COUNTY HOSPITAL,
and JOHN/JANE DOES #1-5,**

Defendants.

**APPEARANCES: NEIL FLYNN, ESQ.
The Russell Friedman Law Group, LLP
Attorney for Plaintiff**

**JOHN P. BRINGEWATT, ESQ.
Monroe County Attorney
ALISSA M. BRENNAN, ESQ., Of Counsel
Attorney for Defendants**

VICTORIA M. ARGENTO, J.

Plaintiff has moved for an order deeming her service of a late notice of claim upon defendant’s valid, nunc pro tunc, or granting her leave to serve it late. The motion is denied for the reasons that follow.

Donald Neal, as Attorney in Fact for Samuel Neal, Jr., the decedent herein, filed a notice of claim with Monroe County on or about August 25, 2021, to recover “money damages for personal injuries, pain and suffering, medical expenses and related damages incurred by...Samuel Neal, Jr., all by reason of the negligence, recklessness, gross negligence and carelessness of The County of Monroe and Monroe Community

Hospital...regarding the stage IV bedsore suffered by Claimant.” The notice of claim alleged that “[d]ue to MCH’s negligence in failing to properly care for Claimant, including failure to reposition Claimant around in his bed, Claimant began developing a bedsore around his buttocks in or around December 2020... [and] [d]ue to MCH’s continuous neglect and failure to care for Claimant’s wound, the bedsore...has now reached stage IV, causing constant excruciating pain to Claimant...[and] Claimant’s doctors [have] opined that the bedsore will be permanent.” Mr. Neal died on February 19, 2022. His death certificate states the cause of death as “severe oropharyngeal dysphagia following cerebral infarction.”

Plaintiff filed an Administration Petition with Surrogates Court on October 27, 2022, seeking authority to prosecute this action, and commenced a lawsuit against defendants on November 28, 2022. The following day plaintiff filed the motion that is the subject of this decision.

The Amended and Supplemental Notice of Claim plaintiff wishes to file would add claims for negligence, gross negligence, recklessness, medical malpractice, and statutory violations in connection with decedent’s bedsore, which plaintiff claims “became infected causing sepsis and ultimately [Mr. Neal’s] death.”

The statute of limitations for filing a personal injury claim made against a county is “one year and ninety days after the happening of the event upon which the claim is based.” Here, the bedsore developed in December of 2020, and became permanent on or about August 25, 2021. Thus, the statute of limitations expired prior to the time plaintiff filed this motion, leaving the Court without the power to authorize a late filing of the

notice of claim (*Pierson v. City of New York*, 56 NY2d 950, 956 [1982]; *Bennett v. City of Buffalo Parks & Recreation*, 192 AD3d 1684 [4th Dept. 2021]; see also Municipal Law §50-e[5]). Therefore, that portion of plaintiff's motion seeking to file new claims for medical malpractice and statutory violations related to the decedent's bedsore is denied.

Turning to the portion of plaintiff's motion seeking to file a notice with new claims in connection with the alleged injuries of sepsis and death. A notice of claim must be filed within 90 days after the claim accrues, but courts may grant leave extending the time to serve the notice of claim (General Municipal Law §50-e[5]). In deciding whether to grant such relief the court must consider all relevant facts and circumstances, including the list of factors provided in section 50-e(5) of the General Municipal Law. "It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant has demonstrated a reasonable excuse for the delay, whether the respondent acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice the respondent in maintaining a defense on the merits. Although no single factor is determinative, one factor that should be accorded great weight is whether the respondent received actual knowledge of the facts constituting the claim in a timely manner" (*Mariani v. Wilson Cent. Sch. Dist.*, 192 AD3d 1579, 1579-1580 [4th Dept. 2021]; internal quotations and citations omitted).

Plaintiff has failed to provide a reasonable excuse for the delay, however, her failure to do so "is not fatal where...actual notice was had and there is no compelling

showing of prejudice to [respondent]” (*Matter of Mary Beth B. v. Wet Genesee Cent. Sch. Dist.*, 186 AD3d 979, 980 [4th Dept. 2020]). “It is well established that knowledge of the injuries claimed, rather than mere notice of the underlying occurrence, is necessary to establish actual knowledge of the essential facts of the claim” (*Matter of Diaz v. Rochester-Genesee Regional Transp. Auth.*, 175 AD3d 1821, 1822 [4th Dept. 2019]), “and the claimant has the burden of demonstrating that the respondent had actual timely knowledge” (*Matter of Turlington v. Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept. 2016]). Plaintiff argues that defendants had knowledge of the pertinent facts in this case because “all those events occurred while Plaintiff’s Decedent was a patient at Defendant’s long term care facility/hospital, [which means] they are legally obligated to have created and maintained detailed records relating to those claims” (Plaintiff’s Attorney’s Affirmation, para. 12).

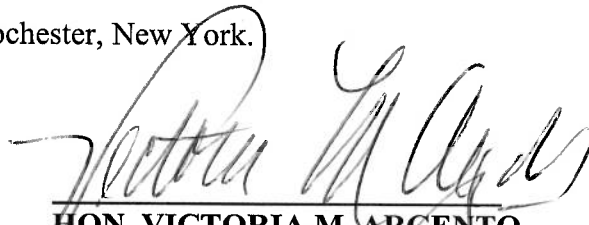
Contrary to that contention, the defendants did not acquire actual knowledge of the facts constituting the claims related to the decedent’s alleged injuries of sepsis and death by virtue of its possession of medical records relating to the decedent’s death. “A medical provider’s mere possession or creation of medical records does not establish that it had actual knowledge of a potential injury where the records do not evidence that the medical staff, by its acts or omissions, inflicted any injury on the claimant” (*Rosenblatt v. New York City Health and Hospitals Corp.*, 149 AD3d 961, 962 [2nd Dept. 2017]). Here, plaintiff did not provide medical records or other evidence suggesting defendants inflicted the injuries in question, but instead offered only conclusory allegations to that effect, which are insufficient (*see Matter of Fethallah v. New York City Police Dept.*, 150 AD3d

998, 1000 [2nd Dept. 2017]).

Accordingly, plaintiff's motion is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated this 20th day of March, 2023, at Rochester, New York.



HON. VICTORIA M. ARGENTO
SUPREME COURT JUSTICE