

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

Handwritten initials and scribbles.

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In the Matter of the Application of Denia Malanum, as Proposed Administratrix of the Estate of Nathaniel Malanum,

Index
Number: 4407/10

Petitioner,
- against -

Motion
Date: 4/27/10

For an Order Permitting Claimant/
Petitioner to Serve and File a Late
Notice of Claim against The New York
City Health and Hospitals Corporation/
Elmhurst Hospital Center,

Motion
Cal. Number: 32

Respondent.

Motion Seq. No.: 1

2010 MAY 24 A 10:22
QUEENS COUNTY CLERKS OFFICE FILED

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

| | <u>Papers Numbered</u> |
|--|----------------------------|
| Order to Show Cause-Affirmation-Exhibit..... | 1-4 |
| Affirmation in Opposition..... | 5-6 |
| Reply-Exhibits..... | 7-9 |

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

Application by petitioner for leave to file a late notice of claim, pursuant to General Municipal Law §50(e)(5), is granted.

A condition precedent to commencement of a tort action against a public corporation is the service of a notice of claim upon the public entity within 90 days after the claim arises (see General Municipal Law §50-e[1][a]; Williams v. Nassau County Med. Ctr., 6 NY 3d 531 [2006]).

Petitioner's deceased, Nathaniel Malanum, allegedly died of a brain hemorrhage as a result of being over-administered anticoagulants by medical personnel at Elmhurst Hospital in Queens County in December 2008 in connection with being treated for a

stroke. Malanum allegedly suffered a massive intra-cranial bleed on December 24, 2008, the day that surgery was performed upon him at Elmhurst Hospital and became comatose as a result. Thereafter, he was moved to Coler Goldwater Specialty Hospital where he died on April 20, 2009. Therefore, petitioner's claim of medical malpractice accrued, at the latest, on December 24, 2008. The instant order to show cause for leave to serve a late notice of claim was served on March 10, 2010, 11 months and two weeks past the 90-day deadline.

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]).

The Court finds that petitioner has proffered an adequate excuse for her delay in filing a notice of claim. Petitioner alleges that she inquired into the circumstances of her husband's intra-cranial bleed and subsequent death, but the hospital actively concealed its malpractice from her and refused her requests for decedent's hospital records. She alleges that she did not find out about respondent's alleged malpractice until January 2010, when a resident physician at Elmhurst Hospital who was involved in the care of the decedent apprised her that her husband's death resulted from malpractice.

In support of these allegations, petitioner annexes to her petition an affidavit of a physician who avers that he was one of several residents involved in decedent's care at Elmhurst Hospital in 2008-2009 and details the departures from good and accepted medical practice that, in his opinion, were the proximate cause of decedent's intra-cranial bleed and ensuing coma and death. He also avers that a meeting was held at Elmhurst Hospital on January 22, 2009 at which numerous residents as well as the director of Rehabilitative Medicine participated. He averred that at the

meeting there was an extensive discussion about the medical errors that led to decedent's catastrophic result and that it was agreed that the specific failures identified relative to the failure to discontinue several anticoagulants notwithstanding decedent's dangerous blood levels in contravention of his physician's orders and what the standard of care dictated, and the failure to properly monitor decedent, were directly related to his massive bleed. The affiant also avers that the issue of whether to inform the Malanum family of the reason for decedent's deteriorated condition was also discussed and that the residents were directed not to tell the family that decedent was overanticoagulated and that such was the cause of his massive bleed.

The affidavit has the name of the resident physician redacted, but counsel for petitioner states in his affirmation that the unredacted affidavit would be available for an in-camera inspection should the Court so require. However, the Court does not feel that examination of the unredacted affidavit merely to see the name of the affiant would be necessary, since a reasonable excuse proffered by petitioner for the delay in serving a notice of claim need not be supported by evidence in admissible form as would be required of a proponent of a motion for summary judgment. Knowledge of the name of the resident by the Court would not be a factor its decision to allow the service of a late notice of claim. Indeed, knowledge of the resident's name by respondent would not have materially altered its ability to oppose the instant petition.

Therefore, petitioner has, through this affidavit, presented a reasonable excuse for her failure to serve a timely notice of claim.

In addition, the affidavit of the aforementioned resident physician also establishes that respondent acquired actual knowledge of the facts underlying the claim within 90 days after the claim accrued.

In addition, petitioner also avers that she was distraught over the death of her husband: Death is a statutory ground for granting leave to file a late notice of claim, provided there is no prejudice (see Morton v. New York City Health and Hospitals Corporation, 24 AD 3d 229 [1st Dept 2005]). There has been no showing that respondent would be prejudiced by the filing of a notice of claim at this, albeit late, juncture. Indeed, since respondent conducted an investigation of the incident and possessed timely actual knowledge of the facts underlying the claim, there can be no prejudice to it by the filing of a late notice of claim.

Accordingly, petitioner is given leave to serve a notice of claim, in the form annexed to the petition as Exhibit "A", within

thirty (30) days from the date of entry of this order.

Serve a copy of this order with notice of entry upon the attorney for respondent without undue delay.

Dated: May 10, 2010



KEVIN J. KERRIGAN, J.S.C.

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