

SEQUENCE NO. 1

PART - At IAS/Trial Part 10 of the Supreme Court of the State of New York held in and for the County of Queens located at 88-11 Sutphin Boulevard, Jamaica, New York, on the 3rd day of March 2010.

DATE FILED
CLERK 2010 OFFICE
FILED

2010 MAY 24 A. 10:30

HON. KEVIN J. KERRIGAN

Justice.

FS

PRESENT:
HONORABLE

(17) 3-16
4/13 (13)
(30)
4/27

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

Petitioner,

ORDER TO SHOW CAUSE TO FILE LATE NOTICE OF CLAIM

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.

Index No. 4407/10
**NO MOTION FEE,
FILED ON
COMMENCEMENT.**

UPON reading and filing the annexed affirmation of STEVEN B. SAMUEL, ESQ., a member of the firm of Steven B. Samuel, Esq., L.L.C., attorney for petitioner, duly affirmed the 19th day of February 2010 and the affidavit of petitioner DENIA MALANUM, sworn to the 28th day of January 2010, and the proposed Notice of Claim, annexed as an exhibit to the moving papers, and upon all the pleadings and proceedings heretofore had herein;

LET THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION show cause before this court at IAS/Trial Part 10 located at 88-11 Sutphin Boulevard, Jamaica, New York, 11435, on the 16th day of March 2010, at 9:30 a.m. in the forenoon of that day or as soon thereafter as counsel can be heard

WHY an Order should not be made and entered permitting claimant/petitioner to file a late Notice of Claim against The New York City Health and Hospitals Corporation, which is

PART ADDRESS }
DATE TIME }

1

being served simultaneously herewith, and granting such other and further relief as this Court deems just, fit, and proper.

SUFFICIENT reason appearing therefore,

LET service of a copy of this Order to Show Cause and the papers on which it is based on THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, by ~~certified~~ ^{PERSONAL} SERVICE ~~mail/return receipt requested and by regular mail~~, on or before the 5th day of March

2010 be deemed good and sufficient service.

ENTER:

[Handwritten signature]

JSC

Signature Rule § 430-1.1-a

[Handwritten signature of Steven B. Samuel]

Steven B. Samuel, Esq.

2010 MAY 24 A 10:30
FILED
QUEENS COUNTY
CLERKS OFFICE

[Handwritten initials]
DATE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS _____ X

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

Petitioner,

ATTORNEY'S AFFIRMATION

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

Index No.

_____ X

STEVEN B. SAMUEL, an attorney duly admitted to practice law in the courts of the State
of New York, affirms the following under penalties of perjury pursuant to CPLR 2106:

That I am a member of the firm of Steven B. Samuel, Esq., L.L.C., attorney for petitioner
in the above-entitled matter, and as such am fully familiar with the facts and circumstances
hereinafter set forth.

This affirmation is submitted in support of the within Order to Show Cause pursuant to
General Municipal Law § 50-e which seeks the permission of this Court to file a late Notice of
Claim upon THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION on behalf of
petitioner's decedent, Nathaniel Malanum.

This proposed claim is made on behalf of the Estate of Nathaniel Malanum, who died on
April 20, 2009, at Coler Goldwater Speciality Hospital, to be instituted by his wife and Proposed
Administratrix Denia Malanum. It is claimed that prior to his death Nathaniel Malanum was a
patient at Elmhurst Hospital Center whose agents, servants, and employees treated him for
various conditions, some of which required anti-coagulation.

It is alleged that the agents, servants, and employees of Elmhurst Hospital Center were negligent and careless in the medical management of decedent's care. Specifically, it is claimed that respondent, by its agents, servants, and/or employees, failed to promptly and properly monitor decedent's anti-coagulation status; failed to be aware of the significance of inordinately high blood values indicating that decedent was over anti-coagulated; in failing to make appropriate adjustments to decedent's medications and dosages; in failing to have adequate supervision over patient care; in having inadequate staff to properly care for decedent; in causing, allowing, and permitting residents to exceed permissible work hours; and in failing to follow orders to discontinue some of decedent's medication. The foregoing led to decedent experiencing pain and suffering, emotional distress, coma, and ultimately death, causing damage to decedent and his Estate.

As can be seen in the annexed affidavit of Denia Malanum, in part the delay in serving the Notice of Claim was based upon the hospital's refusal to provide Mrs. Malanum with a copy of her husband's medical records when she sought them as Nathaniel's next-of-kin at the time he was in a coma. The hospital personnel misled Mrs. Malanum into thinking that the only person entitled to obtain the records was her comatose husband. Upon her husband's death and until Mrs. Malanum consulted with me, she was under the mistaken impression based upon the hospital's misrepresentations that her right to obtain copies of her husband's records were forever extinguished.

It is respectfully requested that this Court grant leave for a Notice of Claim, a copy of which is annexed as Exhibit "A," be served on The New York City Health and Hospitals Corporation on behalf of the Estate of Nathaniel Malanum arising out of the alleged negligent

care and treatment rendered during decedent's treatment at Elmhurst Hospital Center on and about and between November 25, 2008, and January 28, 2009.

The law is clear that the Court in its discretion may grant petitioner leave to serve a late Notice of Claim as long as service is made within the applicable statute of limitations governing the claim. Given the fact that Nathaniel Malanum died at Coler Goldwater Speciality Hospital (New York City Health and Hospitals Corporation) on April 20, 2009, such is the case herein.

Section 50-e of the General Municipal Law provides as follows:

5. Application for leave to serve a late notice. Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

Your affirant contends that petitioner herein has met all of the applicable requirements of General Municipal Law § 50-e(5), and petitioner's motion to serve a late Notice of Claim should consequently be granted.

Clearly, in view of their patient's death, The New York City Health and Hospitals Corporation was well aware of the facts and circumstances surrounding the claim and cannot therefore claim prejudice. Undoubtedly as is required, a mortality and morbidity conference was held concerning this case in which decedent's condition and causes for his demise were discussed in detail. As is further indicated in petitioner's affidavit, the hospital administration failed to ever divulge decedent's cause of death to her and affirmatively concealed their own wrongdoing.

Therefore, the delay in serving a Notice of Claim at this juncture will not substantially prejudice respondent since Elmhurst Hospital, and consequently The New York City Health and Hospitals Corporation, has had actual knowledge of the underlying facts which comprise the instant claim. See, Rechenberger v. Nassau County Medical Center, 112 A.D.2d 150, 490 N.Y.S.2d 838 (2nd Dept, 1985) which held in pertinent part:

It is undisputed that the Nassau County Medical Center possesses records, kept in the ordinary course of business pertaining to Mr. Rechenberger's treatment while he was in the hospital. Since those records documented the hospital's treatment, which petitioners now claim to be negligent, the hospital clearly obtained actual notice of the underlying facts of the claim within the statutory ninety day period...In turn, "actual knowledge of the underlying facts of the claim....makes it unlikely that prejudice will flow from a delay in filing" (Matter of City of Rye, 44 N.Y.2d 398...) 490 N.Y.S.2d at 839

So too, here, respondent The New York City Health and Hospitals Corporation cannot now claim that it has not received or obtained actual notice of the underlying facts of this claim since, from the time when this cause of action accrued, The New York City Health and Hospitals Corporation, by and through its agents, servants, and/or employees of the Elmhurst Hospital, documented all aspects of decedent's treatment at that facility which is the subject of this claim.

As the Court stated in the compelling case of Dickey v. County of Nassau, 65 A.D.2d 780, 410 N.Y.S.2d 333 (2nd Dept, 1978):

The rationale for requiring one who sues a public corporation to file a notice of claim within 90 days is far less cogent and realistic in a medical malpractice case than in one for traditional negligence. In the latter case there is generally a definable trauma which would almost immediately alert the sufferer to a right to institute suit. In the former case the patient may not even know that he has been a victim of malpractice until an appreciable time elapses. Therefore, the ameliorative provisions of the amended text of 50-e (subd. 5) of the General Municipal Law are particularly appropriate to this case.

In the within case, even assuming petitioner would have been able to determine that malpractice existed within 90 days of the death of her husband and had heretofore served a Notice of Claim, the only thing that respondent could have done to investigate this matter would have been to obtain a copy of decedent's records from its own medical facility. The exact same record is still available now. See, Dunne v. Grello, 180 A.D.2d 662, 579 N.Y.S.2d 707 (2nd Dept, 1992) In holding that a municipal defendant was not prejudiced by the exercise of discretion by a court which allowed petitioner to serve a late Notice of Claim, the Appellate Division stated "that, by virtue of the hospital records maintained at the city-owned and operated hospital where it claimed the malpractice took place, the defendants have throughout been on notice of the essential facts constituting the infant plaintiff's causes of action." Mendez v. City of New York, 176 A.D.2d 311, 311-12, 574 N.Y.S.2d 579 (2nd Dept, 1991)

By virtue of the Elmhurst Hospital record, which has been maintained at the hospital at which it is alleged the malpractice occurred, respondent has had notice of the essential facts constituting the basis for an action on behalf of decedent's Estate.

No prior application for the relief requested has been made.

WHEREFORE, it is respectfully requested that the within motion be granted in all respects and for such other and further relief as the Court may deem just, and equitable.

Duly affirmed: Lake Success, New York
February 19, 2010



STEVEN B. SAMUEL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS _____ X

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

Petitioner,

AFFIDAVIT

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

Index No.

_____ X

STATE OF NORTH CAROLINA)
COUNTY OF WAKE) ss:

DENIA MALANUM, being duly sworn, deposes and says:

1. I am the petitioner, wife, and Proposed Administratrix of the Estate of Nathaniel Malanum, decedent herein. I submit this affidavit in support of the within Order to Show Cause allowing the filing of a late Notice of Claim against THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION alleging negligence and malpractice in the medical care and treatment rendered to decedent while he was a patient at Elmhurst Hospital Center.

2. My husband Nathaniel Malanum and I are immigrants from the Philippines. I became a citizen of the United States in February 2007, and my husband came to the United States on July 4, 2008. He was not a citizen of this country but had a green card.

3. My husband first went to Elmhurst Hospital Center with various medical problems on November 25, 2008, and was discharged on November 26, 2008. On December 3, 2008, my husband was diagnosed with a stroke at Elmhurst Hospital Center and subsequently received rehabilitative services at the same institution. I learned that my husband was prescribed and given three anti-coagulants simultaneously consisting of Coumadin, aspirin and Heparin. Thereafter my husband suffered excruciatingly painful headaches leading to the performance of

an MRI which revealed that my husband suffered a bleed in his brain. Surgery was performed on December 24 after which my husband became comatose and died on April 20, 2009.

4. Having heard about the massive bleeding and what appeared to be lax monitoring of my husband's anti-coagulated status, I sought to obtain my husband's medical records which I believed would show that my husband was over-medicated and over anti-coagulated. When I attempted to obtain the records from the hospital, I was told in no uncertain terms that the only one who is entitled to the medical records is my husband, who at the time was in a coma and completely unable to make any request for them. My husband never came out of the coma, and therefore I was not able to make any further efforts to obtain the records. After my husband's death, based upon what the hospital personnel told me, I believed that I would not be able to ever obtain the records which would prove the mismanagement of my husband's condition.

5. Upon information and belief Nathaniel's injuries have been solely caused or significantly exacerbated by improper treatment received by him during his hospitalizations at Elmhurst Hospital Center. On January 22, 2010, I consulted with Mr. Samuel for the first time. He advised me that I am entitled to obtain my husband's medical records and of the Notice of Claim requirements. My husband's condition was well known to many of the Elmhurst Hospital Center personnel who were maintaining records of his treatment throughout his stay, and upon information and belief, his dangerously high blood values were known to the hospital personnel caring for him.

6. That prior to my consulting with my lawyer which has culminated in the within Petition, I did not believe that I could ever get the records necessary to prove what I believe occurred; and therefore I had pretty much given up hope of seeking justice.

7. I had never been aware until my recent consultation with my lawyer, that in order to institute an action against Elmhurst Hospital, it is necessary that a Notice of Claim be filed. Once I consulted with my lawyers and being advised that in circumstances such as these the Court can exercise its discretion to permit the filing of a late notice, I directed my lawyer to act

expeditiously to seek the Court's permission to do so. Simultaneously, I will be submitting an application to the Surrogate's Court, Queens County, for Letters of Administration, and I as next-of-kin will be seeking production of my husband's medical records .

WHEREFORE, it is respectfully requested that the within Order to Show Cause be granted in all respects and that the Court grant any and all such other and further relief as it may deem just, fit, and proper.

Denia Malanum

DENIA MALANUM

Sworn to before me this
28th day of ~~February~~ 2010
January (MB)

Melanie K. Burke
Melanie K. Burke Notary Public



-----X
In the Matter of the Claim of DENIA MALANUM
as proposed Administratrix of the Estate of
NATHANIEL MALANUM

NOTICE OF CLAIM

- against -

THE NEW YORK CITY HEALTH AND
HOSPITALS CORPORATION/ELMHURST
HOSPITAL CENTER
-----X

TO: NEW YORK CITY HEALTH AND HOSPITALS CORPORATION

PLEASE TAKE NOTICE that the undersigned claimant hereby makes claim and demand
against The New York City Health and Hospitals Corporation as follows:

1. The name and address of claimant and claimant's attorney are as follows:

DENIA MALANUM, claimant
603 NC Highway 751
Apex, NC 27523

STEVEN B. SAMUEL, ESQ., L.L.C.
Attorney for Claimant
1979 Marcus Avenue
Suite 210
Lake Success, NY 11042

2. Upon information and believe the nature of the claim is: Medical malpractice by the agents, servants, and employees of Elmhurst Hospital Center in failing to monitor the anticoagulation status of Nathaniel Malanum, deceased; in over anti-coagulating Nathaniel Malanum; in failing to properly regulate doses and numbers of medications prescribed to the decedent; in negligently failing to discontinue Heparin when blood studies revealed that the continuation of this medication created a grave risk of danger to the patient; in having inadequate supervision over patient care; in having inadequate staffing; in overworking residents thereby causing, allowing, and permitting the decedent to suffer a bleed in his brain causing severe pain and suffering, emotional distress, coma, and death.

3. The time when, the place where and the manner in which the claim arose is on or about and between November 25, 2008, and April 20, 2009, at Elmhurst Hospital in its various departments where decedent was housed and treated, at all times that decedent was a patient thereat.

4. The items of damage or injuries claimed are: pain, suffering, emotional distress, coma, death, pecuniary loss to the estate, loss of services, and medical expenses of the prolonged hospitalization.

Claimant therefore presents this claim and demand for adjustment and payment. You are hereby notified that unless it is adjusted and paid within the time period provided by law from the date of presentation to you, it is the intention of the undersigned to commence an action thereon.

Dated: Lake Success, New York
January 26, 2010

Denia Malanum

DENIA MALANUM

STEVEN B. SAMUEL, ESQ., L.L.C.

By: *Steven B. Samuel*

Steven B. Samuel, Esq.

Attorney for Claimant
1979 Marcus Avenue
Suite 210
Lake Success, NY 11042
(516) 326-2100

STATE OF NORTH CAROLINA)
COUNTY OF *Wake*) ss:

DENIA MALANUM, being duly sworn, deposes and says:

That deponent is the claimant in the within action; that she has read the foregoing Notice of Claim and knows the contents thereof; that the same is true to deponent's own knowledge except as to matters therein stated to be alleged on information and belief; and that as to those matters, deponent believes it to be true.

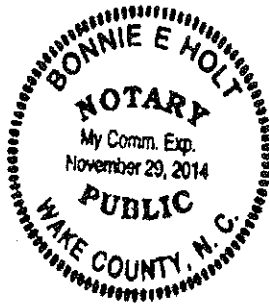
Denia Malanum

DENIA MALANUM

Sworn to before me this
29 day of *Jan*, 2010

Bonnie E Holt

Notary Public



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

Petitioner,

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

ORDER TO SHOW CAUSE TO
FILE LATE NOTICE OF CLAIM

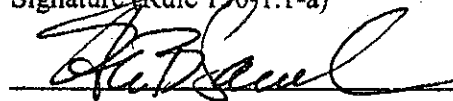
STEVEN B. SAMUEL, ESQ., L.L.C.
Attorney for the Plaintiffs
Office and Post Office Address, Telephone
1979 Marcus Avenue
Suite 210
Lake Success, New York 11042
(516) 326-2100
Fax (516) 326-2365

QUEENS COUNTY
CLERK'S OFFICE

2010 MAY 24 A 10:30

To

Signature (Rule 130.1.1-a)



Attorneys for

Service of a copy of the within

Is hereby admitted.

Dated:

Check 0210.00
Total: 0210.00
4407/2010 MALANUM, DENIA M/O vs.
Tr. 1805620
Other 0210.00
Queens County Clerk's Office
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

MD

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

AFFIRMATION IN
OPPOSITION

Petitioner,

Index No. 4407/10

-against-

For an Order Permitting Claimant/Petitioner to Serve and
File a Late Notice of Claim against THE NEW YORK
CITY HEALTH AND HOSPITAL CORPORATION,

Respondent.

2010 MAY 24 A-10 31
QUEENS COUNTY
CLERKS OFFICE
FILED

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Andrea Crawford, an attorney admitted to practice before the courts of the State of New York affirms, pursuant to Rule 2106 of the CPLR and subject to the penalties for perjury, that the following facts are true:

1. I am an Associate Counsel in the Office of SALVATORE J. RUSSO, Acting General Counsel of New York City Health and Hospitals Corporation and attorney for THE NEW YORK CITY HEALTH AND HOSPITAL CORPORATION (hereinafter "HHC"), respondent herein. I am familiar with the facts and circumstances surrounding this matter, based on the records maintained by the Office of the General Counsel.

2. I make and submit this affirmation in opposition to Petitioner's application seeking leave to file a late notice of claim pursuant to General Municipal Law §50-e(5). As set forth fully below, Petitioner has failed to comply with the threshold requirements which allow the court to exercise its discretion and, therefore, their application should be denied.

(S)

3. GML §50-e mandates that a notice of claim be filed within ninety (90) days after the cause of action arose. This requirement is a condition precedent to bringing a suit against HHC, and its employees. See Matter of Daniel J. v NYCHHC, 77 N.Y.2d 630, 633 (1991); Potts v NYCHHC, 270 A.D.2d 129, 130 (1st Dep't 2000). Unconsolidated Law §7401 renders the notice of claim requirement applicable to actions against HHC.

4. Petitioner seeks to file a late notice of claim and assert a claim against HHC for the injury that petitioner's husband allegedly sustained as a result of his treatment at Elmhurst Hospital Center from November 25, 2008 through January 28, 2009.¹ As such, GML §50-e required claimant to serve a proper notice of claim for petitioners' alleged injury on or before April 28, 2009. Petitioner's Petition was served on HHC on March 8, 2010, which is nearly fourteen months after the alleged incident. HHC had no knowledge of this claim until receipt of the instant Petition.

5. GML §50-e(5) permits a court, in its discretion, upon certain circumstances, to extend the time to serve a notice of claim if the application is made within one year and ninety days. The statute also directs the court to consider various factors in doing so. The burden is clearly on the petitioners to establish what circumstances justify allowing them a late filing and thus relieving them of failing to satisfy the statute. See Harris v City of New York, 297, A.D. 2d 473 (1st Dep't 2002).

6. The petitioner alleges in her papers that her husband was first treated at Elmhurst Hospital Center November 25, 2008 and November 26, 2008 for "various medical problems." On December 3, 2008 she claims he was diagnosed with having had a stroke and

¹ These are dates claimant alleges the malpractice occurred. HHC takes no position related to their accuracy at this point in time.

underwent rehabilitation at Elmhurst Hospital Center for the condition resulting from this stroke.

She further alleges that at the time of his admission on December 3 2008, she learned that her husband received three anti-coagulation medications simultaneously. According to her affidavit, her husband began to suffer from headaches. He allegedly underwent an MRI of his head which demonstrated a brain bleed. According to the petitioner he underwent brain surgery on December 24, 2008 at Elmhurst Hospital Center and died on April 20, 2009 at Coler Goldwater Hospital.

I PETITIONERS HAVE FAILED TO SHOW THAT RESPONDENT HAD ACTUAL NOTICE OF THEIR CLAIM AGAINST NYCHHC.

7. A critical factor to be considered in determining whether a petitioner should be granted leave to file a late notice of claim is whether or not the public corporation acquired actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter. Petitioner incorrectly relies on caselaw that held that simply maintaining the hospital record constituted sufficient notice. In Williams v Nassau County Medical Center, 6 N.Y.3d 531, 537 (2006) the Court of Appeals explained that, in the medical malpractice context, the "actual knowledge" factor means that petitioner must show that the public entity knew of the facts suggesting injury attributable to malpractice.

8. Accordingly, in Williams, the Court of Appeals held that "merely 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 missions, inflicted any injury on the plaintiff. See also Ocasio v NYCHHC, 14 A.D.3d 361, 362 (1st Dep't 2005) ("[A]ctual notice to defendant is not established by its medical records, which provide no

indication of a causal connection between plaintiff's injuries and acts of negligence on defendant's part.").

9. Petitioner states in her affidavit that her husband had numerous medical conditions that brought him under the care of Elmhurst Hospital Center. She further notes that he had suffered from a stroke and was hospitalized at Elmhurst Hospital Center while receiving medical services for these conditions. That a person with such significant underlying medical conditions undergoes changes in his status during admission is not an event that would put a hospital on notice. From claimant's affidavit it is noted that Mr. Malanum was in a stable condition in order to be able to participate in a rehabilitation program due to his stroke of December 3, 2008. It appears that the decedent was a stable patient with "various medical problems," had a stroke, and then suffered an additional brain insult or additional medical issues. This does not point to anything which would give respondents notice of an impending claim.

II PETITIONER FAILED TO SHOW THAT NYCHHC WOULD NOT BE PREJUDICED BY DELAY IN FILING

10. Petitioner further states that even had the Notice of Claim been served timely that the only investigation that the respondents would have engaged in would have been to obtain the medical record. This is a ludicrous statement. Petitioner cannot presume what actions HHC would have taken had proper notice been made of this matter. Petitioner is not in a position to comment on the investigative process that HHC engages in when they are served with a Notice of Claim. To state with authority as to what respondents would have done does not make it a fact.

11. It is well settled in the State of New York that claimant bears the burden of proving absence of prejudice prior to granting leave to file a late notice of claim. See

11. It is well settled in the State of New York that claimant bears the burden of proving absence of prejudice prior to granting leave to file a late notice of claim. See Williams, 6 N.Y.3d 531, 535. Moreover, "proof that the defendant had actual knowledge is an important factor in determining whether the defendant is substantially prejudiced by such a delay." Id. at 539.

12. In the instant case, petitioner fails to satisfy this standard. Indeed, the only argument made is since NYCHHC rendered the care and were in possession of the medical records, then respondents had sufficient notice, and thereby are not prejudiced. Petitioner's own affidavit discusses the complicated medical presentation of her husband. Further, now almost one year after petitioner's decedent's transfer to a different facility, memories have faded with regards to the multiple medical personnel who may have been involved in the care and treatment of Mr. Malanum, thus leaving HHC greatly prejudiced in having to investigate a stale claim. A change in medical status would not place the medical institution on notice exactly because decedent was already in a compromised medical condition. As there was no notice, then clearly NYCHHC would be prejudiced if forced to defend this baseless claim.

II PETITIONER FAILED TO PROVIDE A REASONABLE EXCUSE FOR HER DELAY IN SERVICE A NOTICE OF CLAIM FOR CARE RECEIVED AT NYCHHC.

13. Before a court exercises its discretion under GML §50-e(5), it should consider whether the claimant had provided a reasonable excuse for the delay. Arias v New York City House. Auth., 40 A.D.3d 298 (1st Dep't 2007) (holding that petitioner's mistaken belief as to responsible party is not a reasonable excuse); Alexander v City of New York, 2 A.D.3d 332 (1st Dep't 2003)(holding that waiting for accident report is not a reasonable excuse.)

Here, petitioner's attorney offers no valid excuse to comper this Court to exercise its discretion in allowing petitioner to file her stale claim. Ignorance of the law is not a reasonable excuse. Webb v New York City Hous. Auth., 35 A.D.3d 313, 314 (1st Dep't 2006)("The only excuse plaintiffs offers is ignorance of the law, which this Court has held to be insufficient."). In this case, claimant's assumption that she could not obtain medical records and was precluded from a suit is, in other words, simply ignorance of the law. It is unknown at this time whether petitioner is in possession of the medical records since they are neither attached to the petition or referred to in the affirmation.

15. Her affirmation suggests that she knew the medications her husband was taking and had questions concerning their administration and monitoring. It is the claimant's questions that form the basis of the proposed Notice of Claim annexed to the petition. As such, there is a clear demonstration that petitioner was in possession of enough material that would have allowed an attorney to have served a timely Notice of Claim. Since she apparently still did not have records on January 22, 2010 when she saw an attorney, her excuse that she was unaware of her rights to the records or that her rights were extinguished by her husband's death makes little sense, since nothing had changed in the interim.

16. Petitioner makes an outrageous allegation that the records were not released to the her because the facility was covering up alleged malfeasance. This is an outlandish and inflammatory statement made in order to draw the attention of the court away from the issue that petitioner lacks a valid excuse for delaying the Notice of Claim. The above excuse falls exactly into the category described by Webb. As such, petitioner's excuse should be deemed unsatisfactory.

However, in the event this grants petitioner's application, respondent respectfully requests that this court order petitioner to file the notice of claim that is attached to her petition with respondents within 30 days of the order. General Municipal law §50-h(2) gives respondent only 90 days to serve a demand for a 50-h hearing upon receipt of a notice of claim. Service of the Order will ensure petitioner is timely notified of her obligation to submit to the 50-h hearing requirement. Respondent fully reserves and does not waive any rights at law.

WHEREFORE, it is respectfully submitted that the application be decided in accordance with the above.

Dated: New York, New York
April 8, 2010



ANDREA CRAWFORD

STATE OF NEW YORK, COUNTY OF NEW YORK, SS.:

The undersigned, an attorney admitted to practice in the Courts of New York State shows: That she is employed in the office of the General Counsel of New York City Health and Hospitals Corporation and affirms this statement to be true under the penalties of perjury, pursuant to Rule 2106 CPLR:

That on the 8th of April, 2010}, she served the annexed Affirmation in Opposition

upon Steven B. Samuels, Esq.

the attorney(s) for Petitioner

at 1979 Marcus Avenue, Suite 210, Lake Success NY 11042

being the address within the State therefore designated by him for that purpose, by causing to be deposited a copy of the same, enclosed in a prepaid wrapper in a post office box situated at 346 Broadway in the Borough of Manhattan, City of New York, regularly maintained by the Government of the United States in said City.

Dated: New York, New York
April 8, 2010



ANDREA CRAWFORD



QUEENS COUNTY
CLERK'S OFFICE
FILED
2010 MAY 24 A 10:30

Index No. 4407/10
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS
In the Matter of the Application of DENIA MALANUM as Proposed Administratrix of the Estate of Nathaniel Malanum, Petitioner, -against- For an Order Permitting Claimant/Petitioner to Serve and File a Late Notice of Claim against THE NEW YORK CITY HEALTH AND HOSPITAL CORPORATION, Respondent(s).
AFFIRMATION IN OPPOSITION
<i>SALVATORE J. RUSSO</i> <i>Acting General Counsel of New York City</i> <i>Health and Hospitals Corporation</i> <i>Attorney for NYCHHC</i> <i>346 Broadway Room 600,</i> <i>New York, NY 10013</i> <i>Of Counsel: Andrea Crawford</i> <i>Tel: (212) 323-2261</i> <i>NYCLIS No. 2010-000121</i>

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REMITTAN 4-21

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS _____ X

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

Petitioner,

**ATTORNEY'S
AFFIRMATION IN REPLY**

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 _____ X

Index No. 10-4407

2010 MAY 24 AM 10:31
QUEENS COUNTY
CLERKS OFFICE
FILED

STEVEN B. SAMUEL, an attorney duly admitted to practice law in the courts of the
State of New York, affirms the following under penalties of perjury pursuant to CPLR 2106:

1. I am the attorney for the petitioner herein and submit this affirmation in reply to
the affidavit in opposition to petitioner's application seeking leave to file a late Notice of Claim
pursuant to General Municipal Law §50-e(5). The law on this subject is well settled in New
York. Courts have broad discretion to grant leave to serve a late Notice of Claim pursuant to
GML §50-e (5). See, Matter of Victors v. City of New York 2010 NY Slip Op 30583 (U)
decided on March 18, 2010.

2. In the Second Department case of In Re Whittaker v. N.Y. City Bd. Of Educ.,
2010 Slip Op 01969, decided on March 9, 2010, the Court recognizes that in exercising its
broad discretion with respect to permitting the filing of a late Notice of Claim, the court must
consider whether the petitioner had a reasonable excuse for the delay, whether the delay
prejudiced the municipality's defense and whether the municipality acquired "actual
knowledge of the essential facts constituting the claim." In *Whittaker* the court made clear,
citing Matter of Felice v/ Eastport/South Manor Cent. School Dist., 50 A.D.3d 138, 147 and
Matter of Devivo v. Town of Carmel, 68 A.D.3d 991, that of all the factors to be considered

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the most important is whether the public corporation acquired actual notice of the essential facts constituting the claim within 90 days of the accrual of the claim or within a reasonable time thereafter. "Although no one factor is dispositive, the court must give particular consideration to whether the respondent acquired actual knowledge of the claim within the 90-day statutory period or shortly thereafter." See, Justiniano v. New York City Housing Authority Police, 191 A.D. 2d 252; see also Gelish v. Dix Hills Water District, 58 A.D. 3d 841 (2nd Dept, 2009). Given the importance that the Courts have placed on the acquisition by the respondent of actual knowledge of the facts constituting the claim, it is not surprising that in the case at bar, respondents place great reliance on their claimed "lack of knowledge." The problem with making such a claim in this case is that it is simply not true. In denying that the respondent had actual knowledge of the facts and circumstances which demonstrated medical malpractice as a cause of Mr. Malanum's death, either the respondent has a shocking lack of knowledge of that which cannot be denied, or in the alternative, the respondent is being disingenuous with this Court.

3. The respondent's glib use of phrases like "outlandish" and "inflammatory" to characterize petitioner's statements in support of her application seeking the Court to exercise its discretion to permit the filing of a late Notice of Claim under the circumstances herein is wholly inappropriate. The attempt to compare the facts of the case at bar to the matter of Webb v. NYC Housing Authority 35 AD 3d 313, could not be more inapposite. In the *Webb* case, an infant was burned by hot water in Housing Authority premises **16 years before the notice of claim was filed**. There is absolutely no conceivable similarity between the case at bar and the *Webb* case. The respondent makes the claim that ignorance of the law is not an excuse. In fact, it is not ignorance of the law which petitioner is claiming as the reason for the

failure to file a timely notice of claim. It is the ignorance of the facts, the cause of which is directly attributable to the conduct of the respondent in misrepresenting the facts and in withholding the records from her. For the reasons which will be set forth at length herein, the statement made by respondent that "**(a)s there was no notice, then clearly NYCHHC would be prejudiced if forced to defend this baseless claim**" is false. The falsity of this claim clearly demonstrates why this Court should exercise its broad discretion in favor of petitioner. In fact, the converse of this statement is true, and therefore the logic of the respondent's opposition to the application must fall. Since contrary to the above claim, as will be demonstrated herein, there was complete notice of all the facts which comprise this claim, following the respondent's logic NYCHHC is **not** prejudiced in defending a claim which **they have known to have merit** from the outset. The respondent's reliance on the cases of Alexander v City of N.Y. et al, 769 N.Y.S.2d 267 is equally misplaced. In the **Alexander** case the court determined that the petitioner's excuse for the delay was that he was waiting for an accident report was unreasonable. They found this excuse to be unreasonable because the petitioner had in his possession "all the information necessary to file a timely notice." In this case it was only after a resident had the courage to come forward with the facts which had been concealed from the petitioner, that petitioner gained the knowledge of facts which comprise the claim. In this case, *the respondents* always had this knowledge; petitioner did not.

4. From the facts as hereinafter set forth, it is clear that the respondent has engaged in a pattern of deliberate misconduct to cover up its own wrongdoing and specifically to conceal it from the petitioner and her attorneys. In an effort to conduct a proper investigation of her case, petitioner sought her husband's medical records from the respondent. Rather

than provide her with the records to which she was entitled, the respondent simply stonewalled Ms. Malanum's requests and led her to believe that she was not entitled thereto. Notwithstanding the fact that on February 19, 2010, the undersigned forwarded a request for Mr. Malanum's records, together with a duly executed HIPAA compliant authorization and death certificate, the respondent has continued to engage in this course of obstruction by failing to comply. A copy of this correspondence is annexed hereto as Exhibit "A." Notably, not only have the respondents failed to respond in any fashion to this request, but they have also failed to give any reason for their non-compliance.

5. As can be seen from the annexed affidavit from a physician with actual knowledge of the facts, (Exhibit "B"), Mr. Malanum's death was the result of a bleed caused by over anticoagulation and a negligent failure to comply with orders to modify the anticoagulation regimen. The discontinuation of the heparin was required when lab results unequivocally showed Mr. Malanum's blood levels to be dangerously high. The affidavit from a physician personally involved in Mr. Malanum's care demonstrates the merits of the claim.

6: There was considerable discussion among the medical providers responsible for Mr. Malanum's care at the time of his initial massive brain hemorrhage and subsequent death in April 2009. During meetings conducted at the hospital, Mr. Malanum's care and the cause of the condition which resulted in his death were discussed in substantial detail. The physicians supervising his care determined that his condition was the result of a medical error which resulted in over anticoagulation. At the time of these discussions a conscious decision was made by the Rehabilitation Medicine Department to withhold the fact that Mr. Malanum died as a result of a medical error from any members of Mr. Malanum's family under the belief

that Mr. Malanum's underlying condition would divert the family from any thought of culpability on the part of the medical providers..

7. These shocking facts are stated in the annexed affidavit of one of the many residents who were involved in Mr. Malanum's care. The discussions in which this resident and others participated prove beyond all doubt that the hospital had *actual knowledge* of the facts which constitute petitioner's claim and *actual knowledge* of the wrongdoing which caused Mr. Malanum's death. The name of the resident is redacted to protect the resident from retaliation; however, should this Court wish to view the original affidavit in camera, an unredacted version shall be provided.

8. In Paragraph 4 of respondent's affirmation in opposition, a wholly disingenuous claim is made that "**HHC had no knowledge of this claim until receipt of the instant *Petition.***" In other words under penalty of perjury, this Court is being misled into believing that HHC had absolutely *no knowledge* of the facts upon which this claim is based until the within Petition by Order to Show Cause was served on HHC on March 5, 2010. In fact, aside from the considerable attention this matter received within the hospital at the time of Mr. Malanum's care and death, the New York State Department of Health conducted an independent investigation which included professional staff visits to the facility, onsite observations, review of medical records, review of applicable facility policies and procedures and interviews of staff. It would be absurd to accept that an investigation of this depth could have been conducted without HHC having actual knowledge thereof. In addition to the intensive investigation which was conducted, the New York State Department of Health submitted a statement of deficiencies to the facility wherein it was found to be in violation of the State Hospital Code, and a plan of correction was required. A copy of a redacted letter

confirming these facts is annexed hereto as Exhibit "C." This letter conclusively establishes that the claim of "lack of knowledge" of the facts upon which this claim is based **before the filing of this application** is patently, intentionally and demonstrably false.

9. It should be noted that the decedent died at an HHC facility on April 20, 2009, and therefore was under "continuous treatment" by an HHC facility from his admission until his death. Therefore, the respondent's claim that the Notice of Claim would have had to have been served on or before April 28, a mere one week after his death is also incorrect.

10. Respondent's claim that petitioner failed to show that respondent had actual notice of the claim is belied by the exhibits attached hereto. Interestingly, the respondent in its opposition refers to the *Williams* case and acknowledges that the petitioner must "show that the public entity knew of the facts suggesting injury attributable to malpractice." Here the petitioner has not only shown that the entity knew of the facts attributing decedent's death to malpractice but also has shown that the respondent, fully aware of the medical error, consciously determined to withhold information about the error from the petitioner's family and believed that it could succeed in its deception by reason of the fact that it was possible that this could have happened in the absence of negligence. Based upon the affidavit of the resident annexed hereto, the respondents knew well within the 90-day notice requirement that the cause of Mr. Malanum's massive bleed was medical error related to his over-anticoagulation. It is believed that the records which have been withheld will show that the decedent had a dangerously elevated PTT blood level, that therapeutic INR levels had been reached days before the decedent's bleed, that the medical personnel were aware of this fact, and that appropriate orders were entered and disregarded resulting in the avoidable death of Mr. Malanum.

11. As a further example of the gross disingenuous nature of the affirmation in opposition, respondent has the temerity to state that "(i)t appears that the decedent was a stable patient with 'various medical problems,' had a stroke, and then suffered an additional brain insult or additional medical issues. This does not point to anything which would give respondents notice of an impending claim." Obvious by its omission is any reference to the hospital record, which at this point only the respondent controls, and any affidavit from a medical professional who could properly render such an opinion. Intentionally withheld from this Court is the fact that Mr. Malanum had a bleed which was directly related to his over-anticoagulated state and the failure of hospital personnel to take the necessary action to abate the danger of a devastating bleed in his brain once his blood levels reached a certain level. The true significance of this statement by the respondent is that it demonstrates the validity of the excuse for the claimant not filing a Notice of Claim within the 90 days after Mr. Malanum's death. The statement referred to above is consistent with the position that the respondent took during discussions concerning whether to inform Mr. Malanum's family of the medical errors which caused the bleed. If the respondent takes the position that the brain insult "does not point to anything which would give respondents notice of an impending claim" (while in fact the entire time they were well aware of the facts), clearly the intentional withholding of records and information would not give a lay person notice of the wrong doing. The problem here is that the respondent did in fact know the truth and intentionally deceived the claimant and her family. Given their actual knowledge and intentional deception, it is respectfully submitted that the Court should not exercise its broad discretion to punish the claimant for the misdeeds of the respondent.

12. Respondent's affirmation in opposition, in conclusory fashion, claims prejudice because "memories have faded." Notably absent is a single affidavit from anyone who "may" have been involved in decedent's care, suggesting any loss of memory of these dramatic events which were discussed in great detail. The affirmation in opposition is internally inconsistent in that the respondent claims prejudice because a change in medical status would not place the institution on notice because the "decedent was already in a compromised medical condition," yet at the same time respondent takes the position that decedent was so stable as to "be able to participate in a rehabilitation program." All of this glosses over the fact that even at the time of this application, the respondent is withholding the fact from the Court that it was well aware of the negligence which forms the basis of this claim.

13. From a reading of the affirmation in opposition, one cannot help but get the impression that there can be no case in which a court can providently exercise its discretion to permit a filing of a late notice. In the case at bar, the petitioner has demonstrated the underlying merits of the case, the reason why the claimant was not able to file the Notice of Claim in a timely fashion, and an intentional frustration of petitioner's right to obtain the information to more specifically prove its claim. The petitioner has further demonstrated actual knowledge on the part of numerous members of the hospital staff, including those at high levels of administration, that Mr. Malanum died as a result of medical negligence. Additionally, there were meetings at which the facts of this case were discussed in detail and written notes taken. Moreover, respondent clearly had knowledge of the Department of Health investigation and findings, all of which belie any claim of prejudice from the relatively short delay. The conclusory characterization of this as being a "baseless claim" is yet another

intentional and troubling obfuscation in a case where the respondent's affirmant knew or should have known of the Department of Health's Statement of Deficiencies in Mr. Malanum's care and the enumerated violations of the State Hospital Code. Counsel's mischaracterization of the claim of coverup of the malfeasance as "outrageous, outlandish and inflammatory" is simply an effort to deny the undeniable through use of hyperbole which is patently false. The institution has and continues to withhold the medical records from those entitled to them by law, and no explanation is offered for so doing. As clearly demonstrated by the attached affidavit from the resident, the institution made a conscious determination to withhold the cause of death from the decedent's family despite conclusive discussions about the medical errors committed resulting in decedent's massive intra-cranial bleed.

14. In summary, the merits of the case are clear; the actual knowledge of the medical negligence which caused the death of Mr. Malanum is indisputable; and there have been ongoing investigations both within the hospital and the Department of Health which would eliminate any claim of prejudice by the relatively brief delay in the filing of the Notice of Claim. There is extensive documentation within the possession of the hospital personnel of testimony given by those with knowledge of the events both within the hospital's own internal review process and their response to the Department of Health investigation. The claim of prejudice and "faded memory" of these events are patently false, and it is most respectfully requested that it should not be countenanced by this Court. In its totality the respondent's opposition is a blatant and intentional misrepresentation of the facts in a continued effort to obstruct, obfuscate and deny justice to those who were impacted by the respondent's wrongful conduct. The facts presented and the misconduct revealed is precisely why Courts are given the broad discretion to permit the filing of a late Notice of Claim, particularly when the

deceptive misconduct described herein is the reason why the petitioner did not file a timely Notice of Claim.

WHEREFORE, it is respectfully requested that this Court exercise its discretion to do so in this instance and grant petitioner's motion in all respects.

Duly affirmed: Lake Success, New York
April 22, 2010



STEVEN B. SAMUEL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS _____ X

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

Petitioner,

SUPPLEMENTAL
AFFIDAVIT

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

Index No. 10-4407

STATE OF NORTH CAROLINA)
COUNTY OF WAKE) ss:

DENIA MALANUM, being duly sworn, deposes and says:

1. I am the petitioner in the above-captioned matter. I wish to submit the within supplemental affidavit after having read the affirmation in opposition submitted by the New York City Health and Hospitals Corporation to my application to file a late Notice of Claim.

2. Needless to say, I was distraught at the time of my husband's massive intra cranial bleed which led to his death. During the period of time that my husband was comatose up through the time of his death, I attempted to obtain answers to my questions of why this bleed occurred while my husband was under the care of providers who I believed to be competent medical personnel. I was simply told in words or substance that these things happen to people who have had strokes. I was aware that initially my husband had a blood clot which traveled to his brain causing the stroke, but I did not understand, nor were my questions answered, why he had a massive bleed some time thereafter.

3. In the absence of acceptable answers to my questions by the hospital personnel, I began my efforts to obtain the hospital records with the hope that I would find the answers I was seeking. My efforts to obtain the hospital records continue to the present time; and despite my attorney's requesting them and forwarding all necessary forms and authorizations which I signed and had notarized, the hospital continues to be unresponsive to my requests.

4. Until January of this year the only explanation that I was given for my husband's condition was that "these things happen." In January I first learned the truth of what happened from a courageous resident who could no longer live with the deception which had been perpetrated upon me. I did not want to reveal that this resident had come forward until the resident indicated a willingness to submit an affidavit confirming what I was told.

5. Based upon the information that had been given to me by the hospital personnel, I had no basis other than suspicion and conjecture to file a Notice of Claim. I now know the truth and feel betrayed by the medical providers to whom I entrusted my husband's life. I request that the Court exercise the broad discretion which the law bestows upon it to allow me to file a late Notice of Claim and to seek justice within our system of law which provides a remedy for people in my position.

WHEREFORE, it is respectfully requested that the within Order to Show Cause be granted in all respects and that the Court grant any and all such other and further relief as it may deem just, fit, and proper.

Denia Malanum

DENIA MALANUM

Sworn to before me this
16th day of April 2010

Melanie K. Burke

Notary Public



STEVEN B. SAMUEL

Attorney At Law
1979 Marcus Avenue
Suite 210
Lake Success, New York 11042
(516) 326-2100
Facsimile (516) 326-2365

February 19, 2010

Elmhurst Hospital Center
79-01 Broadway
Elmhurst, NY 11373

Attention of Medical Records

In re Nathaniel Malanum
Date of birth August 19, 1943
Our File No. 7052-10

Dear Sir or Madam:

This law firm is representing Mrs. Denia Malanum, wife of Mr. Nathaniel Malanum. In connection with our representation we would like to obtain a copy of the hospital record for the care and treatment rendered to Mr. Malanum, including all pre-hospital care reports, test and procedure results, laboratory reports, consultation reports, operative reports, and transfer reports. Mr. Malanum was treated in your facility on November 25 and December 3, 2008, and was an in-patient from December 24, 2008, to January 28, 2009.

An authorization permitting the release of these materials is enclosed along with a copy of the death certificate and the pertinent section of the Public Health Law. The law permits the release of a decedent's medical records to the surviving spouse upon submission of a duly executed HIPAA compliant authorization and copy of the decedent's death certificate.

If you should require a fee for the records, kindly advise; a check will be remitted. Pursuant to Public Health Law § 17 the reasonable charge for the records is not to exceed \$.75 per page, and retrieval fees also are not permitted.

Your courtesy and assistance shall be appreciated.

Very truly yours,

Jane M. Ebersberger
Paralegal

Enclosures

Patient Name NATHANIEL MALANUM	Date of Birth August 19, 1943	Social Security Number 062-98-8201
Patient Address 39-40 65th Street, Woodside, New York, 11377		

I, or my authorized representative, request that health information regarding my care and treatment be released as set forth on this form. In accordance with New York State Law and the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), I understand that:

- This authorization may include disclosure of information relating to **ALCOHOL and DRUG ABUSE, MENTAL HEALTH TREATMENT**, except psychotherapy notes, and **CONFIDENTIAL HIV+ RELATED INFORMATION** only if I place my initials on the appropriate line in Item 9(a). In the event the health information described below includes any of these types of information, and I initial the line on the box in Item 9(a), I specifically authorize release of such information to the person(s) indicated in Item 8.
- If I am authorizing the release of HIV-related, alcohol or drug treatment, or mental health treatment information, the recipient is prohibited from redisclosing such information without my authorization unless permitted to do so under federal or state law. I understand that I have the right to request a list of people who may receive or use my HIV-related information without authorization. If I experience discrimination because of the release or disclosure of HIV-related information, I may contact the New York State Division of Human Rights at (212) 480-2493 or the New York City Commission of Human Rights at (212) 306-7450. These agencies are responsible for protecting my rights.
- I have the right to revoke this authorization at any time by writing to the health care provider listed below. I understand that I may revoke this authorization except to the extent that action has already been taken based on this authorization.
- I understand that signing this authorization is voluntary. My treatment, payment, enrollment in a health plan, or eligibility for benefits will not be conditioned upon my authorization of this disclosure.
- Information disclosed under this authorization might be redisclosed by the recipient (except as noted above in Item 2), and this redisclosure may no longer be protected by federal or state law.
- THIS AUTHORIZATION DOES NOT AUTHORIZE YOU TO DISCUSS MY HEALTH INFORMATION OR MEDICAL CARE WITH ANYONE OTHER THAN THE ATTORNEY OR GOVERNMENTAL AGENCY SPECIFIED IN ITEM 9 (b).**

7. Name and address of health provider or entity to release this information:
ELMHURST HOSPITAL CENTER, 79-01 Broadway, Elmhurst, New York, 11373

8. Name and address of person(s) or category of person to whom this information will be sent:
STEVEN B. SAMUEL, ESQ., J.L.C., 1979 Marcus Avenue, Suite 210, Lake Success, New York, 11042

9(a). Specific information to be released:

Medical Record from (insert date) _____ to (insert date) _____

Entire Medical Record, including patient histories, office notes (except psychotherapy notes), test results, radiology studies, films, referrals, consults, billing records, insurance records, and records sent to you by other health care providers (see below for

Other: November 25, 2008, December 3, 2008 Include: (Indicate by initialing dates)
December 24, 2008, to January 28, 2009

Am Alcohol/Drug Treatment
Am Mental Health Information
Am HIV-Related Information

Authorization to Discuss Health Information

(b) By initialing here _____ I authorize _____
Initials Name of individual health care provider
to discuss my health information with my attorney, or a governmental agency, listed here

(Attorney/Firm Name or Governmental Agency Name)

10. Reason for release of information: <input type="checkbox"/> At request of individual <input checked="" type="checkbox"/> Other: investigation	11. Date or event on which this authorization will expire at the conclusion of the case
12. If not the patient, name of person signing form: DENIA MALANUM	13. Authority to sign on behalf of patient surviving spouse

All items on this form have been completed and my questions about this form have been answered. In addition, I have been provided a copy of the form.

Amalanum
Signature of patient or representative authorized by law.

Date: January 28, 2010
[Signature]

* Human Immunodeficiency Virus that causes AIDS. The New York State Public Health Law protects information that could identify someone as having HIV symptoms or infection and information regarding a person's contacts. Notary Public, State of New York
No. 20-21347

DEATH TRANSCRIPT

DATE FILED THE CITY OF NEW YORK - DEPARTMENT OF HEALTH AND MENTAL HYGIENE

CERTIFICATE OF DEATH Certificate No. 156-09-016495

NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE APR-22-2009 08:14 PM

1. DECEDENT'S LEGAL NAME NATHANIEL MALANUM (First, Middle, Last)

Medical Certificate of Death form containing sections for Place of Death, Date and Time of Death, Medical Certificate, Usual Residence, Date of Birth, Education, Marital Status, Informant, and Disposition.

PERSONAL PRINTING AT RISK: This form is subject to the provisions of the Copyright Act of 1976...



This is to certify that the foregoing is a true copy of a record on file in the Department of Health and Mental Hygiene...

Signature of Steven P. Schwartz, Ph.D., City Registrar



Do not accept this transcript unless it bears the security features listed on the back. Reproduction or alteration of this transcript is prohibited by §3.19(b) of the New York City Health Code...

DATE ISSUED

thirty days of receiving notification of such decision, the qualified person may commence, upon notice, a special proceeding in supreme court for a judgment requiring the provider to make available the information for inspection or copying. The court upon such application and after an in camera review of the materials provided including the determination and record of the committee, and after providing all parties an opportunity to be heard, shall determine whether there exists a reasonable basis for the denial of access. The relief available pursuant to this section shall be limited to a judgement requiring the provider to make available to the qualified person the requested information for inspection or copying.

(g) Where the written request for patient information under this section is signed by a distributee of a deceased subject for whom a personal representative has not been appointed, or from the holder of a power of attorney from such a distributee, a copy of a certified copy of the certificate of death of the subject shall be attached to the written request.

(h) Where the written request for patient information under this section is signed by the holder of a power of attorney, a copy of the power of attorney shall be attached to the written request. A written request under this subdivision shall be subject to the duration and terms of the power of attorney.

(i) The release of patient information shall be subject to: (i) article twenty-seven-F of this chapter in the case of confidential HIV-related information; (ii) section seventeen of this article and sections twenty-three hundred one, twenty-three hundred six and twenty-three hundred eight of this chapter in the case of termination of a pregnancy and treatment for a sexually transmitted disease; (iii) article thirty-three of the mental hygiene law; and (iv) any other provisions of law creating special requirements relating to the release of patient information, including the federal health insurance portability and accountability act of 1996 and its implementing regulations.

4. Medical record access review committees. The commissioner shall appoint **medical record access review committees** to hear appeals of the denial of access to patient information as provided in paragraph (e) of subdivision three of this section. Members of such committees shall be appointed by the commissioner from a list of nominees submitted by statewide associations of providers in the particular licensed profession involved; provided, however, that, with respect to patient information maintained by a psychiatrist, the list of nominees shall be composed of psychiatrists. In the case of the licensed physicians, such association shall be the medical society of the state of New York. Such medical record access review committees shall consist of no less than three nor more than five licensed professionals. The commissioner shall promulgate rules and regulations necessary to effectuate the provisions of this subdivision.

5. Annual report. The commissioner shall submit an annual report on or before December thirty-first to the governor and the legislature. Such report shall include, but not be limited to, the number of requests for committee review of providers' denial of access and the committees' determinations thereon.

6. Disclosure to third persons. Whenever a health care provider, as otherwise authorized by law, discloses patient information to a person or entity other than the subject of such information or to other qualified persons, either a copy of the subject's written authorization shall be added to the patient information or the name and address of such third party and a notation of the purpose for the disclosure shall be indicated in the file or record of such subject's patient information maintained by the provider provided, however, that for disclosures made to government agencies making payments on behalf of patients or to insurance companies licensed pursuant to the insurance law such a notation shall only be entered at the time the disclosure is first made. This subdivision shall not apply to disclosure to practitioners or other personnel employed by or under contract with the facility, or to

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS _____ X

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_____ X

Index No. 4407/10

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

, being duly sworn, deposes and says:

1. I am a physician duly licensed to practice medicine in the State of New York. I submit this affidavit in support of the petitioner's application seeking to file a late notice of claim in the within matter.

2. During the period of Mr. Malanum's admission to Elmhurst Hospital in 2008-2009, I was one of several residents involved in his care. As such, the information I provide herein is based upon my personal knowledge.

3. In December 2008, Mr. Malanum was admitted to Elmhurst Hospital after sustaining a stroke secondary to underlying atrial fibrillation. He was prescribed two blood thinners, coumadin for the atrial fibrillation and subcutaneous heparin for deep venous thrombosis prophylaxis. The standard of care was to monitor coumadin's anticoagulation effects by measuring INR levels. Additionally, Mr. Malanum was placed on aspirin, a third blood thinner, as per the recommendation of a neurologist who evaluated him. In accordance with the standard of care, the subcutaneous heparin was to be discontinued after the coumadin which effects INR values, achieves INR values greater than 2. A

therapeutic level of 2 achieved by the coumadin would help prevent the formation of DVT, and therefore the standard of care would require the discontinuation of heparin at this level. Despite Mr. Malanum's INR being greater than 2 for several days, and despite orders in the chart and sign out instructions to discontinue the heparin, the hospital staff failed to discontinue Mr. Malanum's subcutaneous heparin up to and including December 24, 2008, the day he had a massive intracranial bleed which ultimately caused his death. This failure was a substantial departure from accepted standards of medical practice which existed at the time. I only learned of the failures which led to Mr. Malanum's condition and ultimate death after the failures had occurred and therefore unfortunately was not in a position to prevent them.

4. On January 22, 2009, a meeting was held at the Hospital at which numerous rehabilitation residents and Dr. Jeffrey Fine, the director of Rehabilitation Medicine participated. There was extensive discussion about the medical errors which led to Mr. Malanum's catastrophic result. Specific failures which were discussed in detail related to the failure to discontinue Mr. Malanum's heparin in the face of ominous blood levels. There was a detailed discussion and a recording of the dosages and dates that Mr. Malanum was continued on the coumadin, aspirin and subcutaneous heparin. We were advised that this information would be forwarded on for a further internal review. Based upon what was discussed, it was agreed that Mr. Malanum's massive bleed was directly related to errors in patient management including the failure to properly monitor him, and failing to follow physician's orders to discontinue the heparin when discontinuation was indicated by INR values over a period of several days.

5. I specifically recall conversations regarding the issue of informing the Malanum family of the reason for his deteriorated condition. The residents were directed *not* to tell the family that Mr. Malanum was overanticoagulated causing his massive bleed. We were told not to tell the family of the overanticoagulation because "a bleed after a stroke can happen anyway..." and that the family need not know. However, Mr. Malanum was several

weeks out from his stroke, and a hemorrhagic conversion of his stroke as an explanation of the massive bleed at this point was highly unlikely.

6. At the time that Mr. Malanum suffered his massive intracranial bleed, a PTT was drawn and found to be excessively high, suggesting the misuse and overdose of subcutaneous heparin in the presence of two other blood thinners. It is my opinion that this ultimately caused his bleed. Despite the fact that Mr. Malanum was transferred to another Hospital prior to his death, I continued to follow his course. It is my opinion to a reasonable degree of medical certainty based upon my knowledge of the facts and circumstances surrounding Mr. Malanum's massive intracranial bleed, that the bleed and his subsequent death was caused by the medical errors as set forth above.

DATED: 4/14/10

NEW YORK, NY

*Sworn to before me this 14th day
of April, 2010*

CHARMAINE RAPHAEL
NOTARY PUBLIC, STATE OF NEW YORK
No. 01RA6217652
RESIDED IN NEW YORK COUNTY
COMMISSION EXPIRES FEBRUARY 16, 2014

Charmaine Raphael

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

Metropolitan Area Regional Office ♦ 90 Church Street ♦ New York, NY 10007

Richard F. Daines, M.D.
*Commissioner*James W. Clyne, Jr.
Executive Deputy Commissioner

March 24, 2010

**Re: Elmhurst Hospital Center
Complaint # NY00081198**

Dear _____,

The New York State Department of Health (the Department) has evaluated the concerns you identified with care provided to **Nathaniel Malanum** at Elmhurst Hospital Center.

As part of the review activities, professional staff visits the facility to make onsite observations, review medical record(s), review applicable facility policies and procedures, and interview staff at the facility.

As a result of this review, the facility was found to be in violation of the State Hospital Code in the following areas:

- 405.4 (a) (1) (i) Medical Staff – Medical Staff Accountability
- 405.5 (b)(4) Nursing Services – Delivery of services
- 405.5 (c) Nursing Services

A Statement of Deficiencies has been issued to the facility. In response, the facility will be required to provide a written Plan of Correction and implement corrective measures, acceptable to the Department to address these violations. The Department will continue to monitor implementation of the corrective measures in an attempt to prevent these situations from reoccurring.

Thank you for sharing your concerns with the Department and providing the opportunity for facility review. If you have any questions, you may contact this office at 212-417-5990.

Sincerely,

Jeffrey Spitz, LCSW
Regional Program Director
Bureau of Hospital and Primary Care Services

mf/kg/rh

STATE OF NEW YORK)
COUNTY OF NASSAU) ss:

JANE M. EBERSBERGER, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age, and resides at Westbury, New York.

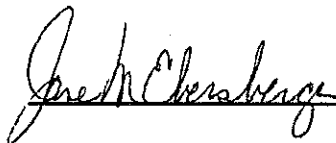
That on the 22 day of April 2010 deponent served the within ATTORNEY'S AFFIRMATION IN REPLY and SUPPLEMENTAL AFFIDAVIT

upon the attorneys below set forth representing the parties, as indicated, at the address and facsimile number shown, and said address being designated by said attorneys for that purpose,

ATTORNEY:

SALVATORE J. RUSSO, ESQ.
Acting General Counsel of New York
City Health & Hospitals Corporation
Attorney for New York City Health &
Hospitals Corporation
346 Broadway
Room 600
New York, NY 10013
FAX: (212) 323-2254

by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.



JANE M. EBERSBERGER

Sworn to before me this
22 day of April 2010.



STEVEN B. SAMIJEL
Notary Public, State of New York
No. 30-4713257
Qualified in Nassau County
Commission Expires September 30, 2010



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

Petitioner,

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

ATTORNEY'S AFFIRMATION
IN REPLY
and
SUPPLEMENTAL AFFIDAVIT

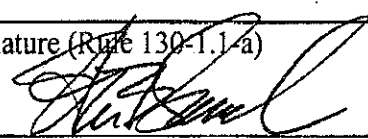
CUFFERS COUNTY
CLERK

200 MAY 24 10 31

STEVEN B. SAMUEL, ESQ., L.L.C.
Attorney for the Petitioner
Office and Post Office Address, Telephone
1979 Marcus Avenue
Suite 210
Lake Success, New York 11042
(516) 326-2100
Fax (516) 326-2365

To

Signature (Rule 130-1.1-a)



Attorneys for

Service of a copy of the within

Is hereby admitted.

Dated:

AMERICAN

APR 26 2010