

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

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In the Matter of the Application of
EDENILSON CLAROS,

Plaintiff,

Index No. 12122/08
Sequence #001
Part 40

- against -

for permission to serve a late Notice of Claim
upon the COUNTY OF NASSAU, NASSAU HEALTH
CARE CORPORATION and A. HOLLY
PATTERSON EXTENDED CARE FACILITY,
Defendant.

8/12/2008

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Upon the foregoing papers, petitioner's application granting leave to file a late notice of claim pursuant to General Municipal Law §50(e)(5)(a) is denied.

Petitioner alleges that on March 9, 2007, while a resident at A. Holly Patterson Extended Care Facility he was "injured as I was being aided by an individual named Felix employed by A. Holly Patterson. . ."

Petitioner refers to the occurrence as "the incident" throughout his affidavit and states following the incident his left knee continued to swell until March 14, 2007, when he was transferred to the Nassau University Medical Center where it was learned he sustained a left supracondylar femur fracture.

Petitioner does not describe the incident. His attorney claims petitioner was dropped or fell to the floor when he was being transferred from his wheelchair to his bed. His attorney's affirmation, however, is not evidence of how the injury occurred (see *Carpluk v. Friedman*, 269 AD2d 349).

The medical records indicate that prior to the alleged date of the incident plaintiff, who is non-ambulatory due to multiple health problems including a seizure disorder, was allowed passes from the facility on March 3, 2007 in the care of his family and from which he returned the same day and again on March 5, 2007, in the care of an "escort" for which he returned the next day on March 6.

An x-ray was ordered on March 9, 2007 apparently because of petitioner's swollen knee. No

mention of a fall is made in the medical records submitted.

On March 14, 2007 petitioner was transferred by ambulance to Nassau University Medical Center. The ambulance records indicate that petitioner stated he "may have been injured being transferred to bed."

At NUMC petitioner was examined by Dr. Matthew Sichel, who diagnosed a minimally displaced fracture of the left femur. Petitioner was given a "Jones" dressing and a knee immobilizer and was to receive a follow-up examination at the Nassau Health Care Corporation Orthopedic Clinic.

On April 30, 2007 petitioner was seen at the clinic where he reported no complaints. He was brought to the clinic a second time on May 21, 2007. He reported no pain. Petitioner's left knee range of motion was checked and he was given stretching exercises to all joints.

Petitioner continues as a resident at A. Holly Patterson to this day.

On August 31, 2007, petitioner retained the services of his current counsel. This application was filed July 2 and served on July 9, 2008.

The proposed notice of claim sounds in medical malpractice alleging petitioner was dropped to the floor and that the facility should have used a hoist or other medically assistive device.

In order to avoid the statute of limitations for late filing, one year and 90 days (see *Porcaro v. Town of Beckman*, 15 AD3d 377; *Little v. Nassau Health Care Corp.*, 15 AD3d 377), petitioner alleges the continuous treatment doctrine, maintaining that the facility is still treating him for his injury.

The Court determines that the continuous treatment doctrine does not apply in this case. Petitioner's claim sounds in ordinary negligence. His treatment at A. Holly Patterson is for multiple health problems for which extended care is required. Any treatment the facility might continue to render, such as stretching the leg, is incidental to the extensive overall health care petitioner is receiving.

There is no allegation of negligence subsequent to the fall; therefore, this application is denied on statute of limitations grounds (*Id.*).

Even if the undersigned was inclined to consider this application on the merits, petitioner has failed to demonstrate a reasonable excuse for the delay, that defendants acquired actual notice of the essential facts of the claim and that defendant's opportunity to investigate and defend against the claim was not prejudiced (*Nieves v. Girimonte*, 309 AD2d 753).

First, counsel had been retained for over ten months before bringing the instant application. No excuse is given.

Second, petitioner avers he told his treating physician about the "incident" the same day it occurred.

Yet the Court cannot discern what happened during the "incident" from petitioner's affidavit and there is no evidence concerning the actual conversation with the doctor and the information petitioner conveyed.

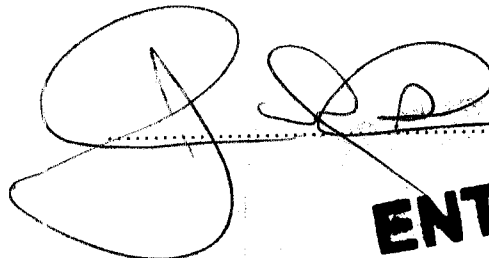
Petitioner's purported statement at the hospital that the injury may have occurred while being transferred to a bed is too vague. The bed in question is not identified and given his recent overnight pass he may have been sleeping elsewhere when he was injured. The x-ray ordered on March 9, 2007 may have been due to the knee's swelling and not to any accident occurring on the premises that would provide the actual notice.

Finally, defendants should be prejudiced at this juncture were late notice to be allowed. Petitioner is a long-term resident at the facility and not a patient who is expected to recover from his considerable health problems.

Since he receives palliative care on a daily basis from numerous health care practitioners and their assistants, it may be difficult to determine exactly what happened over a year and five months ago

The application is denied and the petition is dismissed.

Dated: August 13, 2008

  
.....J.S.C.  
**ENTERED**  
AUG 19 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE