

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

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MARIA ANDRADE and MYRIAM KLEZUN,  
Petitioners,

**MICHELE M. WOODARD  
J.S.C.  
TRIAL/IAS Part 18  
Index No.: 17658/06  
DECISION AND ORDER**

-against-

NASSAU HEALTH CARE CORPORATION,  
and NASSAU UNIVERSITY MEDICAL CENTER,  
Respondents.

**Motion Seq. No.: 01**

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**Papers read on this motion:**

Petitioner's Order to Show Cause/Petition	01
Respondent Nassau Health Care Corp. and Nassau University Medical Center Affirmation in Opposition	xx
Petitioner's Reply Affirmation	xx

The petitioners Maria Andrade and Myriam Klezun, have moved for an Order *Nunc Pro Tunc*, pursuant to General Municipal Law §50-e(5), permitting the petitioners to serve a late Notice of Claim upon respondents and deeming the annexed Notice of Claim to be duly and timely served.

On August 3, 2005 Maria Andrade was taken by ambulance to Nassau University Medical Center as a result of a car accident in Nassau County. On the way to Nassau University Medical Center, the ambulance itself was involved in a motor vehicle accident. Following that accident, the ambulance continued to Nassau University Medical Center and Ms. Andrade was admitted treated through August 26, 2005 and lapsed into a coma from which she has never recovered. Maria Andrade's family contacted the law firm of Gold & Levy in Hartford,

Connecticut with regard to the injuries sustained by Maria Andrade. Petitioners allege that “that firm focused on the auto mobile accident and either did not consider investigating a medical malpractice action or was unaware that Nassau University Medical Center was a public benefits corporation which under New York State law, required a Notice of Claim to be served”.

On March 21, 2006 Gold & Levy, sent Ms. Andrade’s mother a letter stating its inability to pursue a negligence action arising out of the automobile accident.

Petitioners contend to “ have never been informed by any hospital personnel of any information that would lead them to believe that their daughter’s brain damage and coma were anything other than the natural result of the automobile trauma and thus, did not consider investigating a potential medical malpractice action”. It is undisputed that the petitioner remains in a coma from the date she was released from respondent hospital and is therefore mentally incapacitated.

In August of 2006, the law firm of Gair, Gair, Conason, Steigman & Mackauf agreed to obtain the Nassau University Medical Center records, but because of the approaching statute of limitations problem the firm declined to represent Ms. Andrade and provided the records to the firm of Quller, Fisher, Dienst, Serrins, Washor & Kool, LLP, who now represent petitioners in this proceeding. The petitioners request permission to file a late Notice of Claim.

When a petitioner seeks leave to serve a late Notice of Claim, the court is statutorily instructed to consider certain factors including: (1) Whether the petitioner demonstrates a reasonable excuse for failing to serve a timely Notice of Claim; (2) Whether the municipality had actual knowledge of the essential facts constituting a claim 90 days from accrual thereof; (3) Whether the municipality has been prejudiced in its defense as a result of the delay in notice; and

(4) Whether the claimant was an infant or mentally or physically incapacitated, *Dickerson v. New York City Housing Authority*, 245 AD2d 371 (2d Dept 1997).

The petitioners have submitted the affirmation of Elliot Newhouse M.D., in which he opines that the physicians and staff of Nassau University Medical Center were negligent in their medical care and treatment of Ms. Andrade, and that the hospital had actual knowledge of the claim from the medical records maintained by Nassau University Medical Center.

Respondent opposes the petitioners' application to permit petitioners to serve a late Notice of Claim, arguing that petitioners have not satisfied the legal requirements that would warrant this relief. The Second Department has consistently held that the mere existence of medical records does not suffice to prove actual knowledge of a prospective claim, *Bischert v. County of Westchester*, 212 AD2d 529 (2d Dept 2002). Respondents argue that the utilization of the outer most date of possible accrual (August 26, 2005), a timely Notice of Claim would have to have been served no later than November 24, 2005. Respondent also alleges that the municipality was not advised as to the existence of petitioner's case until the service of this application on November 8, 2006.

The Courts of this jurisdiction have consistently maintained that the failure to provide an adequate explanation with respect to a delay in service of a Notice of Claim will result in denial of the application for leave to do so, *Gillium v County of Nassau*, 284 AD2d 533 (2d Dept 2001). Generally, law office failure to file a Notice of Claim in a timely matter is not a valid excuse under the General Municipal Law §50-e(5). However, the mental incapacity of the plaintiff, as well as the out-of-state location of the Counsel chosen by her family, provide a sufficient excuse for the failure to timely file the Notice of Claim.


The respondents' summary allegation that the delay will cause them prejudice does not warrant the denial of petitioners' application. Death or incapacity is a statutory basis upon which leave to serve a late Notice of Claim may be granted, *see Matter of Ruiz v New York City Hosps, Corp.*, 165 AD2d 75, 81, 566 NYS2d 217; *Benegas-Nobles v New York City Health and Hospitals Corp.*, 184 AD2d 379, 585 NYS2d 376. Additionally, based upon the hospital records, the petitioners have established that the hospital will not be prejudiced by the delay in filing the Notice of Claim.

Based on the foregoing, the petitioners' motion for late Notice of Claim *Nunc pro tunc* is **GRANTED.**

This constitutes the **DECISION** and **ORDER** of the Court.

**DATE:** April 3, 2007  
Mineola, N.Y.

**ENTER:**

  
**MICHELE M. WOODARD**  
J.S.C.

**ENTERED**

APR 09 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**