

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - November 29, 2007

PETER B. SKELOS, J.P.
FRED T. SANTUCCI
ROBERT A. LIFSON
EDWARD D. CARNI, JJ.

2006-09099

DECISION & ORDER

Bernadelle Charles, etc., plaintiff,
v Long Island College Hospital, et al.,
defendants, Atlantic Hemodialysis Center,
defendant third-party plaintiff/second third-party
plaintiff-appellant; New York Dialysis Services,
Inc., third-party defendant-respondent; Bio-
Medical Applications of New York, Inc., et al.,
second third-party defendants-respondents.

(Index No. 27730/04)

McAloon & Friedman, P.C., New York, N.Y. (Timothy J. O'Shaughnessy and Gillian Fisher of counsel), for defendant third-party plaintiff/second third-party plaintiff-appellant.

Whiteman Osterman & Hanna LLP, Albany, N.Y. (Joel L. Hodes and John P. Calareso, Jr., of counsel), for third-party defendant-respondent.

Garbarini & Scher, P.C., New York, N.Y. (William D. Buckley and William Scher of counsel), for second third-party defendants-respondents.

In an action to recover damages for medical malpractice and wrongful death, the defendant third-party plaintiff/second third-party plaintiff appeals from an order of the Supreme Court, Kings County (Rivera, J.), dated August 15, 2006, which granted that branch of the motion of the third-party defendant which was to dismiss the third-party complaint pursuant to CPLR 3211(a)(8), and granted that branch of the separate motion of the second third-party defendants which was to dismiss the second third-party complaint pursuant to CPLR 3211(a)(8).

January 15, 2008

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ORDERED that the order is affirmed, with one bill of costs payable by the defendant third-party plaintiff/second third-party plaintiff to the third-party defendant and the second third-party defendants appearing separately and filing separate briefs.

As conceded by the defendant third-party plaintiff/second third-party plaintiff, AFMSM, Inc., sued herein as Atlantic Hemodialysis Center (hereinafter AFMSM), the plaintiff failed to properly serve it with the summons and complaint (*see e.g. De Candia v Hudson Waterways*, 89 AD2d 506, 507; *see also Gajdos v Haughton El.*, 109 AD2d 729; *Jacobs v Zurich Ins. Co.*, 53 AD2d 524). Therefore, contrary to AFMSM's contention, the Supreme Court properly granted those branches of the separate motions of the third-party defendant, New York Dialysis Services, Inc., and the second third-party defendants, Bio-Medical Applications of New York, Inc., and FMS New York, Inc., which were to dismiss the third-party complaint and the second third-party complaint, respectively (*see Prigent v Friedman*, 264 AD2d 568, 569; *see also Cogan v Madeira Assoc.*, 1 AD3d 1066; *Nickerson v City of New York*, 309 AD2d 588, 588; *Braithwaite v 409 Edgecombe Ave. HDFC*, 294 AD2d 233, 234; *Martinez v One Plus Rental Sys.*, 247 AD2d 594, 594; *Lewis v Borg-Warner Corp.*, 35 AD2d 722).

The remaining contention of AFMSM is without merit.

SKELOS, J.P., SANTUCCI, LIFSON and CARNI, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court