

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

D20881
Y/hu

_____AD3d_____

Argued - September 19, 2008

REINALDO E. RIVERA, J.P.
MARK C. DILLON
JOSEPH COVELLO
DANIEL D. ANGIOLILLO, JJ.

2007-06434

DECISION & ORDER

Isaac Gonzalez, etc., et al., respondents, v
County of Westchester, et al., appellants.

(Index No. 16161/04)

Schiavetti, Corgan, DiEdwards & Nicholson, LLP, White Plains, N.Y. (Dena Berke of counsel), for appellants.

Fitzgerald & Fitzgerald, P.C., Yonkers, N.Y. (John E. Fitzgerald, John M. Daly, Eugene S.R. Pagano, and Mitchell L. Gittin of counsel), for respondents.

In an action, inter alia, to recover damages for medical malpractice, the defendants appeal from an order of the Supreme Court, Westchester County (Colabella, J.), entered January 2, 2007, which denied their motion to dismiss the complaint on the ground that the plaintiffs failed to serve a timely notice of claim pursuant to General Municipal Law § 50-e, granted the plaintiffs' cross motion for leave to renew their prior motion, in effect, for leave to serve a late notice of claim, which had been denied in an order entered January 3, 2006, and, upon renewal, vacated the original determination and granted the plaintiffs' motion, in effect, for leave to serve a late notice of claim.

ORDERED that the order is affirmed, with costs.

“A motion for leave to renew must (1) be based upon new facts not offered on a prior motion that would change the prior determination, and (2) set forth a reasonable justification for the failure to present such facts on the prior motion” (*Ellner v Schwed*, 48 AD3d 739, 740; *see* CPLR 2221[e]). On her motion for leave to renew, the plaintiffs submitted certain evidence that was not before the court on their prior, unsuccessful motion, in effect, for leave to serve a late notice of claim,

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which sufficiently established their entitlement to leave to serve a late notice of claim (*see* General Municipal Law § 50-e[5]; *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537; *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 149; *Matter of Godoy v Nassau Health Care Corp.*, 49 AD3d 541, 542-543; *Montero v New York City Health & Hosps. Corp.*, 17 AD3d 550, 550-51). The plaintiffs also set forth a reasonable justification for their failure to submit that evidence on their prior motion. Under these circumstances, the Supreme Court properly granted the plaintiffs leave to renew and, upon renewal, properly granted them leave to serve a late notice of claim.

The defendants' remaining contentions are without merit.

RIVERA, J.P., DILLON, COVELLO and ANGIOLILLO, JJ., concur.

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DECISION & ORDER ON MOTION

Isaac Gonzalez, etc., et al., respondents, v
County of Westchester, et al., appellants.

(Index No. 16161/04)

Motion by the appellants on an appeal from an order of the Supreme Court, Westchester County, dated January 2, 2007, to strike stated portions of the respondents' brief. By decision and order on motion of this Court dated May 14, 2008, the motion was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the motion is denied.

RIVERA, J.P., DILLON, COVELLO and ANGIOLILLO, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court

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