

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

D28189
C/prt

_____AD3d_____

Submitted - May 25, 2010

STEVEN W. FISHER, J.P.
FRED T. SANTUCCI
HOWARD MILLER
PLUMMER E. LOTT, JJ.

2009-08888

DECISION & ORDER

Dorinda Braxton, et al., respondents, v
George McMillan, et al., defendants,
Mario DiBlasio, appellant.

(Index No. 16053/08)

Schuchman Schwarz & Zoldan-Leite, LLP, New York, N.Y. (Joseph K. Schwarz of counsel), for appellant.

Paul B. Weitz & Associates, P.C. (Pollack, Pollack, Isaac & DeCicco, New York, N.Y. [Brian J. Isaac and Jillian Rosen], of counsel), for respondents.

In an action to recover damages for medical malpractice, etc., the defendant Mario DiBlasio appeals from an order of the Supreme Court, Kings County (Dabiri, J.), dated August 14, 2009, which denied his motion pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against him and granted the plaintiffs' cross motion pursuant to CPLR 306-b to extend their time to serve the summons and complaint upon him.

ORDERED that the order is reversed, on the facts and in the exercise of discretion, with costs, the motion of the defendant Mario DiBlasio pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against him is granted, and the plaintiffs' cross motion pursuant to CPLR 306-b to extend the time for service of the summons and complaint upon the defendant Mario DiBlasio is denied.

Under the circumstances of this case, the Supreme Court improvidently exercised its discretion in denying the appellant's motion pursuant to CPLR 3211(a)(8) to dismiss the complaint

August 17, 2010

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insofar as asserted against him and in granting the plaintiffs' cross motion pursuant to CPLR 306-b to extend their time to serve the appellant (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106). The plaintiffs failed to exercise due diligence in attempting to serve the summons and complaint upon the appellant within 120 days, and they did not seek an extension of time to serve the appellant until more than a year after the summons and complaint were filed, after a motion to dismiss had been brought by the appellant (*see Varon v Maimonides Med. Ctr.*, 67 AD3d 779, 779-780; *Shea v Bloomberg, L.P.*, 65 AD3d 579, 580; *Garcia v Simonovsky*, 62 AD3d 655, 656).

FISHER, J.P., SANTUCCI, MILLER and LOTT, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court