

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

D30242
C/prt

_____AD3d_____

Submitted - January 25, 2011

MARK C. DILLON, J.P.
JOSEPH COVELLO
ANITA R. FLORIO
L. PRISCILLA HALL, JJ.

2010-01020

DECISION & ORDER

Esther Horowitz, respondent, v Dorrit Coch, etc.,
defendant, Laura McKenna, etc., appellant.

(Index No. 6435/08)

Edward Garfinkel (Fiedelman & McGaw, Jericho, N.Y. [Ross P. Masler], of counsel),
for appellant.

In an action to recover damages for medical malpractice, the defendant Laura McKenna appeals from an order of the Supreme Court, Kings County (Steinhardt, J.), dated December 9, 2009, which denied her motion pursuant to CPLR 306-b and 3211(a)(5) to dismiss the complaint insofar as asserted against her, and to vacate a prior order of the same court dated May 21, 2009, granting the plaintiff's unopposed motion pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon her and, in effect, to deny the plaintiff's motion.

ORDERED that the order dated December 9, 2009, is reversed, on the facts and in the exercise of discretion, with costs, the appellant's motion pursuant to CPLR 306-b and 3211(a)(5) to dismiss the complaint insofar as asserted against her, and to vacate the order dated May 21, 2009, granting the plaintiff's unopposed motion pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon her and, in effect, to deny the plaintiff's motion is granted, the order dated May 21, 2009, is vacated, and the plaintiff's motion pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the appellant is denied.

The plaintiff commenced this action in February 2008 against Dr. Dorrit Coch, and Laura McKenna, a certified nurse-midwife who was once employed by Coch. Although Coch was timely served with the summons and complaint, the process server learned, upon attempting service upon McKenna at Coch's office, that McKenna no longer worked there, and no further attempt was

March 1, 2011

Page 1.

HOROWITZ v COCH

made to serve McKenna with the summons and complaint. In May 2009 the plaintiff moved, pursuant to CPLR 306-b, to extend the time to serve the summons and complaint upon McKenna. The motion was made on notice to Coch, but not on notice to McKenna. In an order dated May 21, 2009, the Supreme Court granted the plaintiff's unopposed motion. After McKenna was served with the summons and complaint, she moved to dismiss the complaint insofar as asserted against her pursuant to CPLR 306-b and 3211(a)(5), to vacate the May 21, 2009, order, and, in effect, to deny the plaintiff's motion. The Supreme Court denied the motion. We reverse.

In light of, among other things, the plaintiff's lack of due diligence in attempting to serve McKenna within 120 days, the more than one-year delay between the commencement of the action and the plaintiff's motion to extend the time to serve McKenna, and the failure of the plaintiff to make a showing of merit, the Supreme Court improvidently exercised its discretion in granting the plaintiff's motion to extend the time within which to serve McKenna and in denying McKenna's motion to dismiss the complaint insofar as asserted against her and vacate the order dated May 21, 2009 (see *Redman v South Is. Orthopaedic Group, P.C.*, 78 AD3d 1147, 1148; *Braxton v McMillan*, 76 AD3d 607, 608; *Meusa v BMW Fin. Servs.*, 32 AD3d 830, 831).

DILLON, J.P., COVELLO, FLORIO and HALL, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court