

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 09-01836

PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND GREEN, JJ.

PAMELA MITCHELL, AS EXECUTRIX OF THE ESTATE OF
SARAH FINCHER, DECEASED, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION,
DEFENDANT-RESPONDENT.

BROWN CHIARI LLP, LANCASTER (DAVID W. OLSON OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

CHERYL A. GREEN, COUNTY ATTORNEY, BUFFALO (RUTHANNE WANNOP OF
COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph D. Mintz, J.), entered November 19, 2008 in a wrongful death action. The order granted the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed in the exercise of discretion without costs, the motion is denied and the complaint is reinstated.

Memorandum: Plaintiff appeals from an order in which Supreme Court granted the motion of defendant seeking to dismiss the complaint pursuant to CPLR 3012 (b) based on plaintiff's failure to serve the complaint in a timely manner in response to its notice of appearance and demand for complaint. In order to defeat the motion, plaintiff was required to "demonstrate both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action . . . It is generally within the sound discretion of the court to determine what constitutes a reasonable excuse for the delay in serving the complaint . . . , and the court has the discretion to excuse delay based on law office failure" (*Kordasiewicz v BCC Prods., Inc.*, 26 AD3d 853, 854 [internal quotation marks omitted]). We conclude that the court improvidently exercised its discretion in granting the motion and dismissing the complaint where, as here, the 12-day delay in serving the complaint was the result of law office failure (*see Nolan v Lechner*, 60 AD3d 473), and plaintiff's notice of claim established that plaintiff has a meritorious cause of action (*cf. Kordasiewicz*, 26 AD3d at 855; *see generally Guzzetti v City of New York*, 32 AD3d 234).

Entered: February 11, 2010

Patricia L. Morgan
Clerk of the Court