

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

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MABROUK M. MABROUK,	x	Index	
		Number	<u>8682</u> 2006
Plaintiff,		Motion	
-against-		Date	<u>September 27,</u> 2006
JAMAICA HOSPITAL MEDICAL CENTER, et al.,		Motion	
		Cal. Number	<u>26</u>
Defendants.			
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	x		

The following papers numbered 1 to 10 read on this motion by defendant Jamaica Hospital Nursing Home s/h/a Trump Pavilion for Nursing and Rehabilitation (Nursing Home) to dismiss the action for failure to serve the complaint within 20 days of the demand therefor, and a cross motion by plaintiff for an extension of time to plead and/or to compel the acceptance of a pleading untimely served.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-8
Reply Affidavits	9-10

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Defendant Nursing Home served a demand for the complaint on May 1, 2006, and defendant Jamaica Hospital Medical Center (Medical Center) served a similar demand on May 9, 2006. (CPLR 3012[b].) As demonstrated by plaintiff's affidavit of service, the complaint was served on June 2, 2006. Although the complaint was, thus, timely served on defendant Medical Center, service on defendant Nursing Home was seven days late, inclusive of the three-day Memorial Day weekend. (CPLR 3012[b]; 2103[b][2].) Defendant Nursing Home did not reject the complaint, but retained

it for 34 days before obtaining an order to show cause bringing on the instant motion and staying Nursing Home's time to answer.

Where, as here, plaintiff's delay in service of the complaint following demand was minimal and nonprejudicial, dismissal of the action is not warranted and an application to compel acceptance of the untimely served pleading will be granted without need of any further showing. (See, Hayes v Berman, 249 AD2d 881 [1998]; Mills v Niagara Mohawk Power Corp., 216 AD2d 828 [1995]; cf., Amodeo v Gellert & Quartararo, P.C., 26 AD3d 705 [2006].) Moreover, defendant Nursing Home's retention of the complaint without objection for 34 days before moving to dismiss, beyond the time for answering a timely served complaint (CPLR 3012[a], 2103[b][2]), was a waiver of the untimely service. (See, Haygood v Rochester Gen. Hosp., 249 AD2d 943 [1998]; Maunz v Laube, 60 AD2d 970 [1978].)

Accordingly, the motion to dismiss the action is denied. The cross motion is granted to the extent that defendant Nursing Home is directed to accept the complaint previously served. Defendant Nursing Home's time to answer shall commence upon service of a copy of this order.

Dated:

J.S.C.