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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Hon. SHEILA ABDUS-SALAAM PART 13
Justice

Daniel Yardeni

-v-

Manhattan Eye, Ear and Throat Hospital
and David A. Hidalgo, M.D.

INDEX NO. 120387/01
MOTION DATE 11/8/02
MOTION SEQ. NO. 001
MOTION CAL. NO. 22

The following papers, numbered 1 to _____ were read on this motion to/for_____

Papers Numbered

Notice of Motion/Order to Show Cause - Affidavits - Exhibits... _____

Answering Affidavits - Exhibits _____

Replying Affidavits _____

SCANNED JAN 24 2003

2 **Cross-Motions** ☒ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion by defendant Manhattan Eye, Ear and Throat Hospital ("MEETH") and the cross-motion by defendant David Hidalgo, M.D. for an order dismissing the complaint for failure to comply with CPLR 306-b, is granted. Plaintiff's cross-motion for an order granting him an extension of time to serve the summons with notice is denied. The related action bearing index number IO3963102 is dismissed as time-barred (see order issued under that index number).

This is a medical malpractice action arising out of nasal surgery performed by Dr. Hidalgo at the hospital on May 13, 1999. The procedural history of this action is as follows:

Plaintiff, acting pro se, filed a summons with notice on October 20, 2001. In either December 2001 (according to the affirmation of Brian J. Isaac, Esq.) or February 2002 (according to the affirmation of Alan J. Ripka, Esq.) the Ripka Rotter

& King firm was retained by plaintiff. The summons with notice was not served upon defendants and has never been served upon them. Instead, plaintiff's counsel purchased a second index number and filed a summons and complaint on February 26, 2002, apparently in reliance upon the former CPLR 306-b (repealed in 1997 and replaced with the current version applicable to actions commenced on or after January 1, 1998) which provided plaintiffs who had not effectuated service of the summons and complaint within 120 days of filing and whose action had therefore been "deemed dismissed", with the opportunity to commence a new action and to serve process within a second 120-day period from the date of the automatic dismissal, even where the Statute of Limitations had since expired (see discussion of former CPLR 306-b in Leader v. Maronev, Ponzini & Spencer, 97 NY2d 95,991.

Plaintiff served defendant MEETH with the summons and complaint bearing the 2002 index number on February 28, 2002 and served defendant Dr. Hidalgo on March 7, 2002. Both defendants served answers asserting the affirmative defense of the Statute of Limitations. According to counsel for defendant Dr. Hidalgo, when his office contacted plaintiff's counsel in July 2002 to inform them that they were preparing to move for dismissal of the action based upon the Statute of Limitations ground, plaintiff's counsel informed defense counsel that plaintiff had filed a prior summons with notice. Plaintiff has never served either defendant with this summons with notice, and only made an application for an extension of time to do so in response to these motions by defendants for dismissal of both the 2001 and the 2002 actions.

CPLR 306-b provides that "[i]f service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." In Leader, supra, the Court of Appeals made it clear that "good cause" and "the interest of justice" are two separate standards by which to measure an application for an extension of time to serve (97 NY2d 95,1031, and that while reasonably diligent efforts at service are a threshold for a showing of good cause, such efforts are not a threshold for a showing of the interest of justice, but only one of several relevant factors for courts to consider in determining whether an extension should be granted in the interest of

justice (97 NY2d 95, 103-106).

Plaintiff's counsel concede that they have not demonstrated good cause. Their application is based upon the interest of justice. As was noted by the Court of Appeals in Leader, id., in determining whether to grant an application in the interest of justice, " . . . the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant."(id., p. 105).

Here, there has been no diligence in attempting to serve, because there has never been any attempt to serve the October 2001 summons with notice. The delay in service of any process notifying defendants that they were the subject of a lawsuit, measured from the time that the summons with notice was filed on October 20, 2001 to the February 28, 2002 service of a summons and complaint upon MEETH and the March 7, 2002 service upon Dr. Hidalgo, is approximately four months, and thus defendants did not receive notice of plaintiff's claim until almost three years after the claim had accrued . Plaintiff's request for an extension cannot be described as "prompt", in that even after being served with answers asserting the affirmative defense of the Statute of Limitations (one served on March 19, 2002 and the other served on April 1, 2002), plaintiff did not seek an extension until he cross-moved in October 2002 (eight months after the 120-day period to serve the summons with notice had expired) in response to defendants' motions to dismiss.

Significantly, plaintiff has also failed to demonstrate that he has a meritorious claim. The conclusory affirmation of plaintiff's expert, Jeffrey R. Fischman, M.D., which states that the surgery performed by defendant proximately caused plaintiff's "perceived bilateral airway obstruction" is insufficient to make a prima facie showing that plaintiff has sustained an injury as the result of a departure by defendants.

The Second Department's recent decision in ~~Leadbeater v. Beaubrun~~, __ AD2d __, 749 NYS2d 894, which cites Leader v. Maronev, supra, is instructive here. In Leadbeater, plaintiff did not offer a reasonable excuse for her failure to

serve the hospital within the 120-day period, and did not seek to validate the late service until after the defendant had moved for summary judgment dismissal, nothwithstanding that the hospital had raised the failure to timely serve as an affirmative defense in its answer. Additionally, the record was insufficient to demonstrate that the plaintiff had a meritorious claim. Under those circumstances, the court found that the trial court had providently exercised its discretion to deny plaintiff's application to extend her time to serve the defendant and to validate the late service. As noted, in this case, plaintiff never served or even attempted to serve defendants with the summons with notice and like the Leadbeater plaintiff, has failed to demonstrate that he has a meritorious claim. Similarly, in DeSilva v. Town of Brookhaven (__ AD2d __, 749 NYS2d 730), another recent decision issued by the Second Department, the court affirmed the trial court's denial of an application to extend time to serve in the interest of justice, "despite the expiration of the statute of limitations" where "[t]he record demonstrates a lack of diligence in effecting service and the failure to demonstrate the existence of a meritorious claim (citations omitted)."(749 NYS2d 730; see also Winter v. Irizarry, __ AD2d __,2002 WL 31831692).

In Jervis v. Teachers Insurance and Annuitv Association (279 AD2d 367), a decision issued by the First Department prior to the Court of Appeals' decision in Leader, supra, the summons and complaint was not served within the 120-day period and plaintiff's counsel claimed that he was unaware of the amendment to CPLR 306-b which eliminated the right to recommence within an additional 120 days. As in this case, plaintiff's counsel commenced a second action and in response to defendants' motions to dismiss, sought relief from the court.' The court affirmed the trial court's dismissal of both actions, finding that "[t]he 120-day period under the original statute should not be extended in the interest of justice, as also permitted by current CPLR 306-b, where there has been an unacceptably protracted delay measured from the expiration of the 120-day period (citation omitted)."(279 AD2d 367). The "protracted delay" in Jervis, id., was six months

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'In Jervis, unlike here, plaintiffs counsel served the summons and complaint in the first action upon defendants and then moved to have the service validated nunc pro tunc.

after expiration of the 120-day period. Here, plaintiff did not serve the summons with notice, and did not apply for an extension of time to serve it until eight months after the 120-day period had expired.

Based upon the Court of Appeals' decision in Leader, supra, and the appellate court's decisions in Leadbeater, supra, DeSilva, supra, Winter, supra, and Jervis, supra, I conclude that plaintiff has failed to show that his time to serve the summons with notice should be extended in the interest of justice.

Accordingly, the motion and cross-motion by defendants are granted and plaintiff's cross-motion is denied.

ORDERED that the Clerk enter judgment dismissing the complaint.

Dated 1/7/03 **ENTER:** J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☐ NON-FINAL DISPOSITION