Zeqiraj v Manhattan Eye, Ear & Throat Hosp.
2006 NY Slip Op 30811(U)
June 14, 2006
Supreme Court, New York County
Docket Number: 115903/05
Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

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MUSA ZEQIRAJ and VERA ZEQIRAJ,

Plaintiffs,

-against-

Index No. 115903/05
Motion Date: 4/4/06
Motion Seq. No.: 001

MANHATTAN EYE, EAR & THROAT HOSPITAL, DR. JEFFREY C. PACCIONE, M.D., DR. KENNETH J. WALD, M.D., and RETINA ASSOCIATES OF NEW YORK,

Defendants.

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PRESENT: EILEEN BRANSTEN, J.

Defendant Manhattan Eye, Ear & Throat Hospital ("the Hospital") moves pursuant to CPLR 3012(b) to dismiss plaintiffs' claims for failure to timely serve a complaint. Defendants Jeffrey C. Paccione, M.D. ("Dr. Paccione"), Kenneth J. Wald, M.D. ("Dr. Wald") and Retina Associates of New York ("Associates") cross-move pursuant to CPLR 3211(a)(4) for an order dismissing the action on the grounds that a prior action is pending involving essentially the same parties and causes of action.

Plaintiffs Musa Zeqiraj ("Mr. Zeqiraj") and Vera Zeqiraj ("Mrs. Zeqiraj") oppose defendants' motions and cross-move to: consolidate the actions; amend the caption; amend the complaint; and substitute attorneys.

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Background

On November 9, 2005, Mr. Zeqiraj, by his attorneys, Levine & Grossman, commenced a medical malpractice action by filing a Summons and Complaint in New York County. Associates's Affirmation in Support of Cross-motion ("Defendants' Cross"), at ¶ 6. The case was assigned index number 115582/2005 (hereinafter "First Action").

In the complaint, Mr. Zeqiraj alleged that defendants Dr. Paccione, Dr. Wald and Associates negligently treated him and failed to obtain his informed consent. Defendants' Cross, at ¶ 6. He also submitted a Certification of Merit by his attorneys, who stated that they reviewed the facts of the case with a New York physician who believed there was merit to commencement of a medical malpractice action. Dr. Paccione, Dr. Wald and Associates answered the complaint and issue was joined in the First Action on December 29, 2005. Defendants' Cross, at ¶ 7. Neither Mrs. Zeqiraj nor the Hospital are parties to the First Action. Cross, at ¶ 6.

In Autumn of 2005, although he was already represented by Levine & Grossman in the First Action, Mr. Zeqiraj approached attorney Stuart R. Shaw, Esq. ("Mr. Shaw") to discuss a proposed medical malpractice action against defendants. Plaintiffs' Affirmation in Support of Cross-motion ("Plaintiff's Cross"), at ¶ 6. Because Mr. Shaw was unaware of the First Action or the other attorneys, Mr. Shaw prepared a Summons with Notice, which

included a claim for medical malpractice on behalf of Mr. Zeqiraj and a claim for loss of consortium on behalf of Mrs. Zeqiraj. Plaintiffs' Cross, at ¶ 17.

Mr. and Mrs. Zeqiraj then used the prepared Summons with Notice to commence a separate action *pro se* on November 15, 2005, just six days after Levine & Grossman commenced the First Action on Mr. Zeqiraj's behalf. Affirmation in Support of Motion ("Aff."), at 3. This action was assigned index number 115903/2005 (hereinafter "Second Action").

Attached to the second Summons, Mr. and Mrs. Zeqiraj annexed a Certificate of Merit in which they both averred before a notary public that they had consulted with a New York physician who believed commencement of a medical malpractice suit was warranted based on the facts. Furthermore, the Summons set forth that Dr. Paccione, Dr. Wald and Associates (each of whom had been served in the First Action) and a new defendant, the Hospital, committed medical malpractice in treating Mr. Zeqiraj. Defendants' Cross, at ¶ 5. The Summons also indicated commencement of a derivative cause of action on behalf of Mrs. Zeqiraj. *Id.*

Dr. Paccione, Dr. Wald and Associates did not respond to the second Summons, having received a Summons and Complaint in the First Action. The Hospital, however, served plaintiffs with a Demand for a Complaint on November 23, 2005. Defendants'

Cross, at ¶ 5. In response to the Hospital's demand, plaintiffs did nothing. Hospital's Affirmation in Reply ("Hospital's Reply"), at 2.

The Second Action was then assigned to Justice Faviolo Soto ("Justice Soto"), who transferred it to this Court on March 21, 2006 because the First Action is pending here.

Now, the Hospital moves for dismissal of the Second Action pursuant to CPLR 3012(b) based on plaintiffs' failure to serve a complaint within 20 days of the Hospital's Demand. Aff., at 2. Dr. Paccione, Dr. Wald and Associates cross-move for dismissal of the Second Action, claiming that it is barred pursuant to CPLR 3211(a)(4) because another identical case is already pending.* Defendants' Cross, at ¶ 2.

Plaintiffs oppose the motions and annex a Verified Complaint to their cross-motion. *See*, Plaintiffs' Cross, Ex. 2. Plaintiffs also argue that dismissal is inappropriate in this case because Mr. Shaw – who did not represent plaintiffs at the time they commenced this action – had surgery on January 5, 2006 and was unable to assist them in drafting a complaint. Plaintiffs' Cross, at ¶ 12. Moreover, Mr. and Mrs. Zeqiraj claim that they were out of the country trying to find a medical expert from November 23, 2005 through January of 2006, and therefore, did not receive the Hospital's Demand for a Complaint. Plaintiffs' Cross, at ¶ 7.

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* In their papers, Dr. Paccione, Dr. Wald and Associates do not address that the causes of action in both cases are actually not identical, the Hospital and Mrs. Zeqiraj not being parties to the First Action.

In support of these claims, they submit the affidavit of Mr. Zeqiraj, who swears that he went out of the country to visit doctors in Canada, Kosovo and Germany on several occasions between November 2005 and January 2006. Affidavit of Mr. Zeqiraj ("Zeqiraj Aff."), at ¶ 2.

They also submit the report of Minir Asani ("Dr. Asani"), a physician practicing in Germany. Plaintiffs' Cross, at ¶ 9. This report, however, is in German, does not contain the original signature of Dr. Asani and is not certified. Plaintiffs' Cross, Ex. 1. Furthermore, the "certified translation from Germany" of Dr. Asani's report is actually not certified, nor is it a signed original. Plaintiffs additionally rely on photocopies of Dr. Asani's website, which is in German, and the affidavit of Dr. Asani, which is in English. Both were submitted for the first time on reply.

Finally, plaintiffs submit the report of Kabil Tairi ("Dr. Tairi"), a physician who treated Mr. Zeqiraj in Germany. Plaintiffs' Cross, Ex. 1. Dr. Tairi's report is neither exclusively in English nor German, but is drafted in a mixture of the languages. *Id.* Moreover, the report submitted is unsworn and is not an original. *Id.*

In addition to opposing defendants' motions, plaintiffs also cross-move pursuant to CPLR 602 to consolidate the First and Second Actions, arguing that consolidation would avoid unnecessary expenses and prevent divergent decision based on the same facts. Plaintiffs' Cross, at ¶ 32.

Moreover, plaintiffs cross-move to amend the complaint in the Second Action to include as defendants Retina Research Foundation of New York ("Foundation") and the Hospital. Plaintiffs' Cross, at ¶ 24. In particular, plaintiffs allege that the Foundation is an alter ego of Associates and that Dr. Paccione and Dr. Wald are "intricately involved as owners, directors, shareholders, incorporators, employees and/or assigns" of the Foundation. Plaintiffs' Cross, at ¶ 24. They cross-move to amend the caption to reflect the consolidation and the additional parties. Plaintiffs' Cross, at ¶ 34.

Finally, plaintiffs cross-move to substitute Mr. Shaw as the attorney of record for both actions. Plaintiffs' Cross, at ¶ 23. Mr. and Mrs. Zeqiraj submit an executed Consent to Change Attorney in support of this cross-motion. Plaintiffs' Cross, Ex. 3, at 1.

Defendants' oppose plaintiffs' cross-motions.

In particular, defendants point out that plaintiffs' Verified Complaint is not acceptable for filing because it is not accompanied by a Certificate of Merit. Associates's Reply, at ¶ 9. They further set forth that Dr. Asani's reports and records are insufficient to support plaintiffs' claims because they are in German and submitted by a European doctor not familiar with the standard of care in New York. *Id.* Defendants additionally argue that plaintiffs cannot amend their complaint to assert claims against new defendants because the statute of limitations has expired. Associates's Affirmation in Reply ("Associates's Reply"), at ¶ 4. Finally, they contend that plaintiffs should not be permitted to add a claim against

the Foundation because plaintiffs have no basis for asserting that the Foundation is an "alter ego" of Associates. Associates's Reply, at ¶ 7.

Analysis

Failure to Serve Complaint

CPLR 3012(b) provides that when a complaint is not served with the summons, defendants may make a written demand for a complaint, after which plaintiff must serve a complaint within 20 days. If plaintiff fails to serve a complaint in accordance with the statute, "the court upon motion may dismiss the action." CPLR 3012(b).

In the alternative, the court may extend plaintiff's time to plead or compel defendant to accepted an untimely pleading "upon a showing of reasonable excuse for delay * * *." CPLR 3012(d); *see, e.g., Rodriguez v. MC Builders, Inc.*, 18 A.D.3d 262 (1st Dept. 2005) (extending time to serve complaint because plaintiff showed reasonable excuse for delay and merit to claim); *Skrabalak v. Finn*, 258 A.D.2d 719 (3d Dept. 1999). "The determination of what constitutes reasonable excuse for a default lies within the sound discretion of the trial court." *Bravo v. New York City Hous. Auth.*, 253 A.D.2d 510 (2d Dept. 1998). Nonetheless, "law office failure, without supporting facts to explain and justify the default, is insufficient to establish an excusable default." *Id.*; *see also, Quinn v. Wenco Food Sys.*, 269 A.D.2d 437 (2d Dept. 2000) (law office failure insufficient to excuse 14-month delay),

lv denied, 95 N.Y.2d 758; *Manhattan King David Rest., Inc. v. Nathanson*, 269 A.D.2d 297 (1st Dept. 2000) (two-and-a-half-month delay in serving complaint); *Bardales v. Blades*, 191 A.D.2d 667 (2d Dept. 1993) (dismissing action after four-month delay).

If plaintiff's delay in serving the complaint is by more than a few days, it will be treated as a default. Siegel, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C3012:12.

To vacate the default and oppose the CPLR 3012 motion to dismiss, plaintiff must "submit an affidavit of merit containing evidentiary facts sufficient to establish a prima facie case." *Kel Mgt. Corp. v. Rogers & Wells*, 64 N.Y.2d 904, 905 (1985); *see also*, *Dick v. Doral Greens Ltd. Partnership*, 289 A.D.2d 74, 76 (1st Dept. 2001), *lv denied*, 98 N.Y.2d 607 (2002); *Chmielnik v. Ferguson*, 269 A.D.2d 555 (2d Dept. 2000); *Quinn v. Wenco Food Sys.*, 269 A.D.2d, at 438.

When the actions sounds in medical malpractice, the defaulting plaintiff must submit the affidavit of a licensed physician demonstrating a *prima facie* case of medical malpractice. *Curcio v. Sax*, 16 A.D.3d 1093 (4th Dept. 2005); *Ault v. Richman*, 299 A.D.2d 613 (3d Dept. 2002); *Sabatino v. Albany Med. Ctr.*, 187 A.D.2d 777 (3d Dept. 1992) (dismissed for failure to submit affidavit of physician). "The averments of a lay plaintiff cannot serve as the essential showing of the merit of a medical malpractice action where

* * * the averments include matters not within the ordinary experience and knowledge of laypersons." *Curcio v. Sax*, 16 A.D.3d, at 1093-94.

Here, the Hospital's motion to dismiss pursuant to CPLR 3101(b) must be granted.

Mr. and Mrs. Zeqiraj waited two-and-a-half months after the Hospital served its Demand for a Complaint – from November 23, 2005 to February 10, 2006 – and until after this motion was made to serve their first Verified Complaint. This delay is inordinate and constitutes a default on their part. *See,* Siegel, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C3012:12. Thus, to vacate their default against the Hospital, plaintiffs were required to demonstrate both a reasonable excuse for their delay and a meritorious cause of action. They have done neither.

Plaintiffs excuses – namely, that they were out of the country when the Hospital sent its Demand for a Complaint and that Mr. Shaw, who was not their attorney at the time their complaint should have been filed, had surgery in January – are insufficient. Plaintiffs chose to commence the lawsuit *pro se* by summons in November. They should have been aware that they could expect a demand for a complaint in December and would then be required to serve a complaint within 20 days. *See,* CPLR 3012(b). Their decision to leave the country repeatedly during that period without checking and responding to their mail was improvident. Furthermore, the Court is not persuaded by plaintiffs' contention that they

were *required* to seek medical help outside the country during that period because *no doctor* in the United States would treat Mr. Zeqiraj after he filed this action.

Plaintiffs also wholly fail to demonstrate a meritorious cause of action against the Hospital.

The affidavit of plaintiffs' attorney is insufficient to establish a *prima facie* case of medical malpractice because he is without personal knowledge of facts. *Dick v. Doral Greens Ltd. Partnership*, 289 A.D.2d, at 76; *Marion v. Notre Dame Academy High School*, 133 A.D.2d 614, 614-15 (2d Dept. 1987).

Furthermore, because plaintiffs' claims against the Hospital sound in medical malpractice, they were required to submit the *affidavit* of a physician establishing that the Hospital departed from accepted standards of medical care in treating Mr. Zeqiraj and proximately caused his injuries. *Curcio v. Sax*, 16 A.D.3d, at 1093-94 (emphasis added); *see also*, *Ault v. Richman*, 299 A.D.2d, at 614-15 (dismissed for failure to submit affidavit of physician).

Instead, they submitted the report of Dr. Asani, which is unsworn, not an original and in a foreign language not understandable by the Court. Moreover, the translation plaintiffs submitted of this report on March 27, 2006 is not certified, not signed and is not an original. In addition, Dr. Tairi's report, submitted with the proposed complaint, is written in a mixture of German and English, is unsworn and is not an original. Finally, Dr. Asani's "affidavit"

– submitted inappropriately for the first time on reply – is riddled with defects: it is not made under oath, not notarized and contains no indication that Dr. Asani is familiar with the standard of care in the United States. Affidavit of Dr. Asani ("Asani Aff."), at ¶ 1.

None of plaintiffs' submissions are sufficient to demonstrate a *prima facie* case of medical malpractice against the Hospital because they are unsworn, unsigned and not originals. *See, Sabatino v. Albany Med. Ctr.*, 187 A.D.2d, at 778 (dismissed pursuant to CPLR 3012 because plaintiff only provided unsworn and unsigned statements of physician from medical file); *cf., Simms v. North Shore Univ. Hosp.*, 192 A.D.2d 700 (2d Dept. 1993) (court cannot consider unsigned, unsworn letter of physician); *Chase v. Cayuga Med. Ctr.*, 2 A.D.3d 990 (3d Dept. 2003) (unsworn letter of out-of-state doctor inadmissible on motion).

Moreover, the Court cannot consider the statements made in German because they are not accompanied by a certified translation from an English translator stating his or her qualifications and that the translation is accurate. CPLR 2101(b). Nor can the Court consider the unsworn submission of Dr. Asani submitted for the first time of reply. *See, Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 562 (1st Dept. 1992) (establishing prohibition against accepting material raised for the first time of reply when opposing party has no opportunity to respond).

In the end, plaintiffs have not demonstrated a reasonable excuse for their failure to timely serve a complaint or that they have a meritorious action; therefore, their claims against the Hospital must be dismissed. *See, Kel Mgt. Corp. v. Rogers & Wells*, 64 N.Y.2d, at 905 (trial court erred in not dismissing action because plaintiff failed to serve the complaint for more than three-and-one-half months and submitted no affidavit of merit in opposition to defendant's CPLR 3102 motion).

Neither will plaintiffs be permitted to amend the first complaint to add a cause of action against the Hospital because the statute of limitations has expired and they do not get the benefit of a toll pursuant to CPLR 205(a). Siegel, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C3012:13 (if the action is dismissed pursuant to CPLR 3012[b] after the statute of limitations has run, plaintiff will not be permitted an additional six months to recommence the action); *see, Schwartz v. Luks*, 46 A.d.2d 634 (1st Dept. 1974).

Pendency of Another Action

The cross-motion by Dr. Paccione, Dr. Wald and Associates for dismissal pursuant to CPLR 3211(a)(4) is denied.

CPLR 3211(a)(4) provides that a court may dismiss a cause of action, upon motion, on the ground that "there is another action pending between the same parties for the same

cause of action in a court of any state or the United States." To warrant dismissal, the statute does not require that the parties be identical, only that there is "substantial" identity of the parties. *White Light Productions, Inc. v. On The Scene Productions, Inc.*, 231 A.D.2d 90, 93-94 (1st Dept. 1997); *Barringer v. Zgoda*, 91 A.D.2d 811 (3d Dept. 1982). Additionally, the presence of additional parties does not necessarily require denial of the motion if "both suits arise out of the same subject matter or series of alleged wrongs." *White Light Productions, Inc. v. On The Scene Productions, Inc.*, 231 A.D.2d, at 94.

The existence of a substantially similar suit, however, does not *require* dismissal pursuant to CPLR 3211(a)(4). Indeed, the statute provides that the court "may make such order as justice requires" and that the court is vested with "broad discretion" in deciding a CPLR 3211(a)(4) motion. *Whitney v. Whitney*, 57 N.Y.2d 731 (1982); *Walsh v. Goldman Sachs & Co.*, 185 A.D.2d 748, 748-49 (1st Dept. 1992); *Barringer v. Zgoda*, 91 A.D.2d, at 911. For instance, "If the parties are not the same, even though the lawsuits have pretty much the same purpose, the court may be disinclined to apply paragraph 4 and dismiss * * *." Seigel, *New York Practice*, § 262, at 443 (4th ed. 2005).

The court, instead, may decide to consolidate the actions. *See, e.g., Campagna v. Dune Alpin Farm Assocs.*, 81 A.D.2d 633, 634 (2d Dept. 1981) (consolidating the actions *sua sponte*); *Cooperman v. C.O.R. Land Corp.*, 41 Misc. 2d 330, 331 (Sup. Ct., Kings County, 1963). Moreover, "if both actions are pending in New York courts * * *

consolidation or joint trial is permissible and in many instances preferable to dismissal." Seigel, *New York Practice*, at 443.

Here, plaintiffs' Second Action includes additional parties not party to the First Action, namely the Hospital and Mrs. Zeqiraj. Plaintiffs' claims against the Hospital have been dismissed for failure to timely serve a complaint and thus are not relevant to this analysis. Mrs. Zeqiraj's claims for loss of consortium against Dr. Paccione, Dr. Wald and Associates, by contrast, are extremely pertinent to defendants' motion to dismiss because they were not asserted in the First Action. The movants – Dr. Paccione, Dr. Wald and Associates – have altogether failed to mention Mrs. Zeqiraj's derivative claim.

Because Dr. Paccione, Dr. Wald and Associates have not demonstrated entitlement to dismissal of all plaintiffs' claims against them based on the pendency of the First Action, their motion to dismiss is denied. Instead, the Court will grant plaintiffs' cross-motion to consolidate the two actions pursuant to CPLR 602 to conserve court resources, prevent the parties from receiving inconsistent verdicts and ensure that Mrs. Zeqiraj obtains fair adjudication of her separate claims.

Amendment of Complaint

Plaintiffs' cross-motion to amend the complaint to add the Foundation as a party is also granted.

Leave to amend the pleadings is ordinarily freely given unless it would unduly prejudice the non-moving party. CPLR 3025(b); *Kassis v. Teachers Ins. and Annuity Assn.*, 258 A.D.2d 271, 272 (1st Dept. 1999). Moreover, pursuant to CPLR 1003, "Parties may be added at any stage of the action by leave of court * * *."

Plaintiffs argue that the Foundation is a necessary party to this action because it is the "alter ego" of Associates, occupies the same building as defendants do, and Dr. Paccione and Dr. Wald control the Foundation. Plaintiffs' Cross, at ¶ 24. Based on these allegations, there is a question of fact as to whether plaintiffs' claims against the Foundation relate back to their claims against the doctors and Associates; the Court cannot be certain that the statute of limitations bars the claims.

Additionally, defendants are incorrect in asserting that plaintiffs are required to submit an affidavit of merit to support the new claims against the Foundation because plaintiffs did not *inordinately* delay in seeking the amendment. *Kassis v. Teachers Ins. and Annuity Assoc.*, 258 A.D.2d, at 272; *see also*, *Spada v. Sepulveda*, 306 A.D.2d 270, 271 (2d Dept. 2003). Indeed, plaintiffs moved to amend only three months after serving the complaint.

Thus, plaintiffs are granted leave to amend the complaint to the limited extent of adding the Foundation as a party. Of course, the Foundation may make a proper motion to dismiss the complaint if it believes there are grounds to do so. Plaintiffs are directed to serve the Foundation with a complaint within 30 days of this Decision and Order. Additionally, the caption will be amended to reflect the addition of the Foundation as a party to the action.

Change of Attorney

Finally, plaintiffs' cross-motion to change the attorney of record is granted and Stuart R. Shaw is substituted as attorney for plaintiffs in the consolidated action.

Accordingly, it is

ORDERED that the Hospital's motion to dismiss is granted and the complaint is hereby severed and dismissed against defendant Manhattan Eye, Ear & Throat Hospital. The Clerk is respectfully directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the cross-motion to dismiss by Dr. Paccione, Dr. Wald and Associates is denied; and it is further

ORDERED that plaintiffs' cross-motion to consolidate is granted and the above-captioned action is consolidated in this Court with *Musa Zeqiraj v. Kenneth J. Wald, M.D.,*

Jeffrey C. Paccione, M.D., and Retina Associates of New York, P.C., Index No. 115582/2005 under Index No. 115903/2005; and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark the records to reflect the consolidation; and it is further

ORDERED that plaintiffs' cross-motion to amend the complaint to add the Hospital as a defendant to the consolidated action is denied; and it is further

ORDERED that plaintiffs' cross-motion to amend the complaint to add the Foundation as a defendant in the consolidated action is granted. Plaintiffs are directed to serve the Foundation with a complaint within 30 days of this Decision and Order; and it is further

ORDERED that the caption is amended to reflect the consolidation and the addition of the new defendant as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX
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MUSA ZEQIRAJ and VERA ZEQIRAJ,

Plaintiffs,

-against-

JEFFREY C. PACCIONE, M.D., KENNETH J. WALD, M.D., RETINA ASSOCIATES OF NEW YORK, RESEARCH FOUNDATION OF NEW YORK,

Defendants.
----------X; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect the consolidation and the change in the caption herein; and it is further

ORDERED that plaintiffs' cross-motion to change the attorney of record is granted and Stuart R. Shaw is substituted as attorney for plaintiffs in the consolidated action; and it is further;

ORDERED that the parties are to appear on July 11, 2006 for a preliminary conference.

This constitutes the Decision and Order of the Court.

FILED
JUN 21 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York

June 14, 2006

ENTER

Hon. Eileen Bransten