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

PRESENT: HON. EILEEN BRANSTEN PART 6

Index Number : 100102/2006
GILLESPIE, MADALINE
VS
ST.CLARE'S HOSPITAL &
Sequence Number : 001
DISMISS ACTION

INDEX NO. 100102/06
MOTION DATE 7/24/07
MOTION SEQ. NO. 01
MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to/for dismiss and cross-motion

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3,4,5

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 18 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10-15-07

Eileen Branst J.S.C.
HON. EILEEN BRANSTEN

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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MADALINE GILLESPIE and JOHN GILLESPIE,

Plaintiffs,

-against-

ST. CLARE'S HOSPITAL AND HEALTH CENTER, ST. VINCENT'S MIDTOWN HOSPITAL, SAINT VINCENT'S CATHOLIC MEDICAL CENTERS OF NEW YORK, MYUNG SOOK KIM, M.D., DAVID M. BURKE, M.D., SETH RAPHAEL KLATZKO DIVAK, M.D. and MICHAEL GRECO, CRNA,

Defendants.

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Index No.100102/06
Motion Date: 7/24/07
Motion Seq. No.: 01

PRESENT: EILEEN BRANSTEN, J.

Defendants St. Clare's Hospital and Health Center, n/k/a St. Vincent's Midtown Hospital, Myung Sook Kim, M.D., David M. Burke, M.D. and Seth Raphael Klatzko Divak, M.D. (collectively "Defendants")* move to dismiss the complaint pursuant to CPLR 3211(a)(8) and 306-b, arguing that service was not timely effected. Alternatively, Defendants seek an Order requiring Madaline Gillespie and John Gillespie ("Plaintiffs") to post security for costs in accordance with CPLR 8501 and 8503.

Plaintiffs oppose dismissal and cross-move for an extension of time to serve Defendants pursuant to CPLR 306-b. They are willing to post security for costs.

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* Defendant Michael Greco, CRNA was never served. *See*, Affidavit of E. Brown Parkinson, Jr. ("Opp."), at ¶ 21.

Background

On July 3, 2003, while vacationing with family in New York, Madaline Gillespie, who suffers from Alzheimer's disease, was hospitalized at St. Clare's Hospital. Affidavit of John D. Gillespie ("Gillespie Aff."), Ex. A, at 1. While at St. Clare's, she fell, broke her left hip and consequently underwent surgery. She remained in the hospital until July 10, 2003, and then returned to her home in South Carolina. Affirmation in Support ("Supp."), at ¶ 5.

On January 4, 2006, six days before expiration of the statute of limitations, Plaintiffs--Mrs. Gillespie and her husband--commenced this medical malpractice action. Supp., Ex. A. They allege that Defendants departed from accepted medical practice by, among other things, administering general anesthesia in the course of Mrs. Gillespie's hip-fracture surgery because of "the known negative impact on cognitive function that general anesthesia can cause in certain patients, particularly those with dementia of the Alzheimer's type." Gillespie Aff., at ¶ 4.

Plaintiffs did not attempt to serve Defendants until March 2007, which was over a year and two months after they commenced the action and after expiration of the statute of limitations. *See*, Supp., at ¶ 8; Affidavit of E. Brown Parkinson, Jr. ("Opp."), at ¶ 21.

Defendants now move to dismiss the action, arguing that there is no personal jurisdiction over them because they were not timely served.

Plaintiffs concede that they failed to timely serve the summons and complaint. They cross move for an extension of time to serve, urging that counsel is from South Carolina and "overlooked" the service requirement. Opp., at ¶ 21.

Plaintiffs' counsel points out that before this action was commenced, Defendants' risk management department and insurance carriers had notice of a potential lawsuit. For example, in February 2005, Plaintiffs' counsel notified St. Clare's Hospital's Risk Management Department of an interest "in establishing a dialogue with your hospital and/or its insurance carrier to discuss the possibility of an amicable resolution." Opp., Ex. A. Plaintiffs' counsel further stated: "If we do not hear from you or if reasonable steps are not taken soon to begin this dialogue, then we will retain local counsel and file suit." *Id.* The hospital's insurance carrier received the letter, opened a file on the case and requested authorizations for the release of Mrs. Gillespie's medical records. *Id.*, at Exs. B, C, D (April 21, 2005 letter to carrier setting forth that as a result of general anesthesia Mrs. Gillespie's Alzheimer's disease "has been made significantly worse"), E, F, G, H.

In fact, in January 2006, Plaintiffs sent the hospital's insurance carrier "a courtesy copy of the Summons and Complaint," which was being filed and served. Opp., Ex. I. Plaintiffs also sent the insurance carrier "a typed summary of events" prepared by Mr. Gillespie. *Id.*, Ex. K. Thus, in opposition to the motion, Plaintiffs urge that Defendants' insurance carrier:

> "Had knowledge of the nature of our claim regarding liability and damages. That carrier had medical records we had submitted and authorizations to obtain medical records that we had provided at the carrier's request. * * * The insurance carrier had a copy of the Summons and Complaint within several days of the date of filing * * * . * * * There is nothing that [the] carrier did not know about how to begin preparation of a defense in this case. There is no reasonable probability that the carrier or the Defendants could have been prejudiced by the delay in the service of process, since they clearly had notice."

Opp., at ¶ 23.

In an attempt to establish that the action has merit, Plaintiffs submit an affidavit from Mr. Gillespie who attests that:

> "Darwin Boor, M.D. [a neurologist] * * * has been following my wife for various conditions, including Alzheimer's dementia, for a number of years both before and after the events in New York. Dr. Boor has stated to me that my wife's Alzheimer's dementia advanced an equivalent of eight years beyond where she should have been at her stage of the disease following her hospitalization in New York in July 2003. Dr. Boor has also stated to me that any medical professional should have known not to give her general anesthesia for her hip fracture surgery, but instead should have used local or spinal or regional anesthesia."

Gillespie Aff., at ¶ 4.

Furthermore, in a CPLR 3012-a Certificate of Merit, Plaintiffs' counsel attested that he "consulted with at least one physician" and based on that review and consultation "there is a reasonable basis for the commencement of this action."

Analysis

CPLR 306-b requires that service of the summons and complaint "shall be made within one hundred twenty days after the filing of the summons and complaint." It is uncontested that the 120-deadline was not met here.

The statute, however, authorizes a court to grant an extension of time to serve "in the interest of justice." The "interest of justice standard" contemplates accommodation of late service due to a mistake, confusion or oversight, so long as there is no prejudice to the defendant. *Leader v. Maroney*, 97 N.Y.2d 95, 104-105 (2001).

> "[It] requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, 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 causes of action, the length of the delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant."

Id., at 105-106.

Here, for a year and two months, service was altogether forgotten. There was absolutely no attempt to comply with CPLR 308's service requirements, much less a reasonably diligent effort at effecting service. Plaintiffs' failure to attempt service for over a year after instituting the action and after expiration of the statute of limitations constitutes an "extreme lack of diligence." *See, Slate v. Schiavone Constr. Co.*, 4 N.Y.3d 816, 817

(2005). Indeed, Plaintiffs only sought an extension of time to serve in response to Defendants' motion to dismiss, which weighs in favor of denying additional time now. *Posada v. Pelaez*, 37 A.D.3d 168, 168 (1st Dept. 2007) (extension of time to serve not warranted when plaintiff "did not move * * * until faced with a motion to dismiss, approximately seven months after the 120-day period had expired, and more than three years after the [medical malpractice] cause of action had accrued"); *Yardeni v. Manhattan Eye, Ear and Throat Hosp.*, 9 A.D.3d 296, 298 (1st Dept. 2004), *lv. denied* 4 N.Y.3d 825 (2005).

Additionally, Plaintiffs have not established that their claims have merit. The affidavit by Mr. Gillespie-- himself a plaintiff--indicating that he spoke with a physician who informed him that the case has merit, is not sufficient. There is no medical evidence whatsoever establishing that this action is meritorious. *See*, *Yardeni v. Manhattan Eye, Ear and Throat Hosp.*, 9 A.D.3d, at 298 (plaintiff's expert's affirmation was conclusory and did not establish merit); *see also*, *Pecker Iron Works, Inc. v. Namasco Corp.*, 37 A.D.3d 367, 368 (1st Dept. 2007) (conclusory affidavit of merit insufficient).

Although, Defendants' insurance carrier had notice of Plaintiffs' claim and of commencement of the action, there is no indication that Defendants themselves were notified of the pendency of the action. It would be unjust to impute the insurer's knowledge to Defendants themselves absent any indication that within the statute of limitations Defendants were aware of their own exposure to liability. This lack of notice creates an inference of

substantial prejudice and permitting late service under these circumstances would not be in the "interest of justice." *See*, *Rodriguez v. Saal*, 43 A.D.3d 272 (1st Dept. 2007) (permitting late service effected within one-month of the 120-day deadline but not allowing an extension of time to serve other defendants because "there was no evidence that they had been put on notice of plaintiff's claims against them"); *Pecker Iron Works, Inc. v. Namasco Corp.*, 37 A.D.3d, at 368 (pre-suit correspondence with defendant and claims expert did not justify an extension of time to serve "given no explanation for the failure to attempt timely service and the subsequent long delay");*New York State Div. of Human Rights v. Giffuni*, 40 A.D.3d 361, 362 (1st Dept. 2007) (service on defendants' attorneys did not justify extension of time).

In the end, despite this Court's strong commitment to having all cases heard on their merits, Plaintiffs have not sufficiently demonstrated that their failure to serve or even attempt service of the summons and complaint for over a year after this action's commencement and expiration of the statute of limitations (without any notice whatsoever to the individual defendants) warrants an extension of time to serve in the interests of justice.

Accordingly, it is ORDERED that Defendants' motion to dismiss is granted and the Clerk of the Court is respectfully directed to enter judgment in their favor; it is further

ORDERED that Plaintiffs' cross-motion for an extension of time to serve is denied.

This constitutes the Decision and Order of the court.

Dated: New York, New York
October 15, 2007

ENTER

Hon. Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
CIVIL BRANCH

Index No. 100102/06

Madaline Gillespie and
John Gillespie

Plaintiffs,

vs.

St. Clare's Hospital and Health Center; St. Vincent's Midtown Hospital; Saint Vincents Catholic Medical Centers of New York; Myung Sook Kim, M.D.; David M. Burke, M.D.; Seth Raphael Klatzko Divack, M.D.; and Michael Greco, CRNA;

Defendants.

ORDER FOR ADMISSION PRO HAEC VICE

Upon motion for admission pro haec vice of the Defendants Madaline Gillespie and John Gillespie., it is, hereby,

ORDERED that Attorney E. Brown Parkinson, Jr., of Devlin & Parkinson, P.A., is hereby admitted to practice in New York State as counsel for the Defendants Madaline Gillespie and John Gillespie under the case name of Madaline Gillespie and John Gillespie vs. St. Clare's Hospital and Health Center; St. Vincent's Midtown Hospital; Saint Vincents Catholic Medical Centers of New York; Myung Sook Kim, M.D.; David M. Burke, M.D.; Seth Raphael Klatzko Divack, M.D.; and Michael Greco, CRNA, Index Number: 100102/06.

HON. EILEEN BRANSTEN