

**Rosell v International Cosmetic Surgery, P.C.**

2007 NY Slip Op 33603(U)

November 1, 2007

Supreme Court, New York County

Docket Number: 0103487/2006

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER

PART ~~103487/06~~ 16

Index Number : 103487/2006

ROSELL, MARIA

INDEX NO. 103487/06

vs

INTERNATIONAL COSMETICS

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. 001

DISMISS

MOTION CAL. NO. \_\_\_\_\_

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 \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION.**

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

**FILED**  
NOV 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

NOV 01 2007

Dated: \_\_\_\_\_

*Alice Schlesinger*

**ALICE SCHLESINGER** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

[\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 16

-----X  
MARIA ROSELL,

Plaintiff,

-against-

INTERNATIONAL COSMETIC SURGERY, P.C. and  
CAP B. LESESNE, M.D.,

Defendants.  
-----X

SCHLESINGER, J.:

Index No. 103487/06  
Motion Seq. No. 001

**FILED**  
NOV 08 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendants International Cosmetic Surgery, P.C., and Cap B. Lesesne, M.D. have moved to dismiss this medical malpractice action, alleging that plaintiff failed to file a proper Certificate of Merit pursuant to CPLR §3012-a and failed to timely file a Notice of Medical Malpractice pursuant to the Uniform Rules for Trial Courts §202.56. They argue that the Certificate of Merit is deficient because it indicates that the plaintiff's attorney consulted with a dentist to confirm the merits of the case, when the claims involve medical, rather than dental, malpractice. As for the Notice of Medical Malpractice, defendants assert that plaintiff filed the Notice nearly a year after joinder of issue, rather than within sixty days as required by law, and failed to seek permission for the late filing.

Plaintiff opposes the motion and cross-moves for leave to have her corrected Certificate of Merit accepted and to have her Notice of Medical Malpractice deemed timely filed *nunc pro tunc*. She asserts that the use of the word "dentist" instead of "physician" in the Certificate of Merit was a minor typographical error which did not prejudice the defendants, and that the late filing of the Notice of Medical Malpractice is excusable.

[\* 3 ]

The Rules Governing a Certificate of Merit

CPLR §3012-a requires that a medical malpractice complaint be accompanied by a Certificate of Merit which confirms that a "reasonable basis" exists for the commencement of the action. *Perez v. Lenox Hill Hospital*, 159 A.D.2d 251 (1<sup>st</sup> Dep't 1990). Subdivision (a)(1) of the statute provides in relevant part that:

In any action for medical ... malpractice, the complaint shall be accompanied by a certificate, executed by the attorney for the plaintiff, declaring that: the attorney has reviewed the facts of the case and has consulted with at least one physician ... who is licensed to practice in this state or any other state and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for commencement of such action.

Noting that plaintiff's Certificate of Merit indicates that counsel consulted with a dentist instead of a physician, defendants urge this Court to treat the matter as a default. Citing to *George v. St. John's Riverside Hospital*, 162 A.D.2d 140 (1<sup>st</sup> Dep't 1990) and *Defelice v New York Eye and Ear Infirmary*, 5 Misc.3d 1027(A) (Sup. Ct., NY Co. 2004), defendants further urge the Court to dismiss the action because plaintiff has failed to present a reasonable excuse for the default and an affidavit of merit from a medical expert. Emphasizing that she did serve a corrected Certificate of Merit shortly before defendants's motion was made, plaintiff asserts that the typographical error should not be viewed as a default. She adds that, in any event, she has established grounds to vacate any default by demonstrating that the error is excusable and the action meritorious

This Court agrees that the typographical error does not rise to the level of a default. Rather, it is a correctable irregularity which has, in fact, been corrected. See CPLR §1201. But even if the error were viewed as a default, this Court finds that the default should be vacated pursuant to the above-cited cases based on plaintiff's showing of excusable neglect and a meritorious cause of action.

The typographical error may properly be considered excusable law office failure. "[A] plaintiff should not be deprived of the important right to have his or her case decided on the merits because of law office failure, where ... the complaint has merit and the other party cannot show prejudice." *Kaufman v. Bauer*, 36 A.D.3d 481, 483 (1<sup>st</sup> Dep't 2007), quoting *Tenax v New York Tel. Co.*, 280 A.D.2d 294, 296 (1<sup>st</sup> Dep't 2001); citing *Andrenas v Eschew Constr. Corp.*, 277 A.D.2d 28, 29 (1<sup>st</sup> Dep't 2000); *Salzano v Mastrantonio*, 267 AD2d 5 (1<sup>st</sup> Dep't 1999). Defendants here do not claim any prejudice, as they knew from the allegations in the complaint that plaintiff was alleging that defendants had departed from accepted standards of medical care in their treatment of plaintiff, which included "liposuction of the hips, abdomen, inner and outer thighs and abdominoplasty". (Complaint at ¶ 13).

As to the showing of merit, while plaintiff did not provide an affidavit from a medical expert, she did submit an opinion from a medical expert in the form of a letter written and signed by Dr. Donald R. Weisman, along with a photograph of plaintiff taken by the doctor. The letter, dated October 10, 2005, was obtained by plaintiff's counsel about a year before the action was commenced in keeping with the above-quoted requirement in CPLR §3012-a that counsel confirm the merits of a malpractice claim before filing suit by consulting a knowledgeable physician. In the letter, Dr. Weisman

\* 5 ]

indicates that he reviewed the various surgical and medical records pertaining to the treatment which defendants provided to plaintiff and also examined the plaintiff. The doctor concludes with the following opinion: "It goes without saying that the elongated, jagged, deeply indented scar which I have depicted in the enclosed photograph and which appears to have resulted in the creation of a second misaligned umbilicus, is a completely unacceptable disfigurement. The departure from accepted medical practice is egregious and undeniable." This Court finds that the detailed letter from Dr. Weisman constitutes a showing of merit sufficient to excuse plaintiff's technical noncompliance with the statute which has since been corrected.

Accordingly, the Court denies the defendants' motion to dismiss based on a defective Certificate of Merit and grants plaintiff's cross-motion for leave to file a corrected Certificate of Merit *nunc pro tunc*.

#### The Rules Governing the Notice of Medical Malpractice

Section 202.56 of the Uniform Rules of Trial Courts requires that within sixty days of joinder of issue, the plaintiff in a medical malpractice action must file a Notice of Medical Malpractice. The Notice must contain the name and address of each party, the defendant's medical specialty, and the substance of the medical malpractice claim. According to CPLR §3406, the Notice of Medical Malpractice must be filed within 60 of joinder of issue. Uniform Rules of Trial Courts §202.56, subd. (a)(3), allows a later filing "only by leave of the court on motion and for good cause shown ... on such conditions as may be just, including the assessment of costs."

Defendants urge dismissal of this action on the ground that plaintiff did not serve the Notice of Medical Malpractice until April 10, 2007, nearly one year after joinder of

issue, and that she failed to seek leave of court for the late filing or proffer an explanation constituting good cause for the delay. Plaintiff admits she filed her Notice of Medical Malpractice late, but now asks the Court to consider the Notice timely filed *nunc pro tunc*. Suggesting law office failure as a cause for the delay, plaintiff argues that the delay is excusable and has not prejudiced the defendants in any way. Defendants do not respond to these assertions in any way.

In *Tewari v. Tsoutsouras*, 75 N.Y.2d 1, 11 (1989), the Court of Appeals concluded that "the Legislature has not authorized the imposition of the sanction of dismissal for noncompliance with the statutory notice requirement of CPLR 3406(a)" absent a direct violation of an explicit court order. Further, CPLR 2004 authorizes the court to grant an extension of time for filing a notice "upon such terms as may be just and upon good cause shown." 75 NY2d at 8. *Tewari* directly applies here to allow the late filing of the Notice, particular where defendants make no claim of prejudice. Therefore, defendants's motion to dismiss this action based on the late filing of the Notice of Medical Malpractice is denied, and plaintiff's cross-motion to have the Notice deemed timely filed is granted. The Court in its discretion denies plaintiff's request for sanctions, raised for the first time in her reply papers.

Accordingly, it is hereby

ORDERED that defendants's motion to dismiss is denied and the plaintiff's cross-motion is granted to the extent provided herein.

This constitutes the decision and order of this Court.

Dated: November 1, 2007  
NOV 01 2007

*Alice Schlesinger*  
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J.S.C.  
ALICE SCHLESINGER  
NEW YORK COUNTY CLERK'S OFFICE  
NOV 08 2007  
FILED