

**Hili v Nassau Health Care Corp.**

2008 NY Slip Op 32084(U)

July 1, 2008

Supreme Court, Nassau County

Docket Number: 4752-07/

Judge: William R. LaMarca

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA  
Justice**

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**PATRICIA HILI and SALVATORE HILI,  
Plaintiffs,**

**Motion Sequence #1, #2  
Submitted April 8, 2008**

**-against-**

**INDEX NO: 14752/07**

**NASSAU HEALTH CARE CORPORATION,  
NASSAU UNIVERSITY MEDICAL CENTER  
and GABRIELA A. OLARU, M.D.,**

**Defendants.**

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**The following papers were read on these motions:**

<b>Notice of Motion.....</b>	<b>1</b>
<b>Notice of Cross-Motion.....</b>	<b>2</b>
<b>Affirmation in Opposition and Reply.....</b>	<b>3</b>
<b>Reply Affirmation.....</b>	<b>4</b>

Counsel for plaintiffs, PATRICIA HILI and SALVATORE HILI, moves for an order, pursuant to CPLR §306-b, extending the time to serve the summons and complaint upon the defendants, *nunc pro tunc*, and deeming the summons and complaint timely served upon the defendants. Defendants, NASSAU HEALTH CARE CORPORATION (hereinafter referred to as "NHCC") and NASSAU UNIVERSITY MEDICAL CENTER (hereinafter referred to as "NUMC"), oppose the motion and cross-move for an order, pursuant to CPLR §306-b, §214-a, and §3211 (a)(8), dismissing plaintiffs' complaint. The motion and cross-motion are determined as follows:

This is an action for medical malpractice. It is alleged that, on May 25, 2006, PATRICIA HILL, then age 62, underwent a hysteroscopy to determine the cause of her post-menopausal bleeding. The procedure was performed by defendant, GABRIELA OLARU, M.D. an attending physician, and Maiquel Carrasco, M.D., an employee of the hospital, at the NUMC. As seen from the operative report (Exhibit "A"), the physicians identified a polyp in the uterus as well as a small uterine perforation at the center of the uterus. It is plaintiff's position that the defendant doctors perforated her uterus. After the polyp was removed, the physicians noted that no bleeding was noted and they performed an endometrial ablation on Ms. HILL. Counsel for plaintiff states that said procedure is known as a thermoablation, a procedure generally used on premenopausal women, which is akin to cauterizing the lining of the uterus. Counsel states that due to a number of different factors, thermoablation was contraindicated for Ms. HILL and, according to a physicians's affidavit annexed to the moving papers, it was a departure from good and accepted medical care. Counsel relates that following the procedure, Ms. HILL developed pyometra, a severe infection of the uterus and, on June 7, 2005, two (2) weeks after the procedure, she returned to Dr, OLARU, who plaintiff alleges failed to properly treat the infection. Counsel states that, on June 14, 2006, still in severe pain, Ms. HILL consulted Dr. Andre Saad, who diagnosed her with a massive infection and, five (5) days later, performed a dilation and curettage that was converted to a total hysterectomy.

Counsel for plaintiffs states that, because of an oversight and law office failure, he failed to timely serve the summons and complaint, although same was timely filed with the Office of the County Clerk . Although counsel asserts that plaintiffs retained his office on July 13, 2006, that he immediately filed a Notice of Claim on NHCC, that Ms. HILL was

deposed at a 50-h hearing on April 11, 2007, and that he obtained Ms. HILL's medical records and submitted them to a gynecologist for assessment as to whether she had a meritorious cause of action, he acknowledges that, because of attorney turnover at his firm and the reassignment of files, service of the summons and complaint upon the defendants was not made within 120 days of said filing, as required by CPLR §306-b.

Counsel for plaintiffs relates that the summons and complaint was filed on August 21, 2007 and that the statute of limitations against the municipal defendants expired on August 26, 2007, one year and 90 days after the first surgery. With respect to defendant, Dr. OLARU, the statute of limitations will not expire until December 7, 2008, two years and six months from the date of the treatment. However, the summons and complaint, though timely filed was not timely served. Although counsel states that, upon discovery of this error, the defendants were served, but service on Dr. OLARU was made on January 17, 2008, 29 days after the expiration of the 120 day service period, and on NUMC and NHCC on January 14, 2008, 26 days after the 120 day service period expired.

In support of the motion to extend the time to serve the summons and complaint, pursuant to CPLR §306-b, counsel for plaintiff concedes that law office failure cannot form the basis for granting the relief "for good cause shown", however, he argues that the motion should be granted "in the interest of justice", the second branch of the statute. Counsel cites *Leader v Marone, Ponzini & Spencer*, 97 NY2d 95, 736 NYS2d 291, 761 NE2d 1018 (C.A. 2001), which explained that, unlike a request for an extension premised upon good cause, a plaintiff asking for an extension under the interest of justice branch of the statute is not required to make reasonably diligent efforts at service as a threshold matter. Rather the Court may consider any relevant factor in making its determination,

including the “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 the defendant”. Counsel for plaintiff urges that the Court exercise its discretion on behalf of the plaintiff based upon the above noted factors, and points out that if an extension of time is not granted to serve the summons and complaint, plaintiff will lose her right of action against the municipal defendants as the statute of limitations has expired. Additionally, counsel points out that plaintiff has a meritorious claim for medical malpractice and there will be no prejudice to the municipal defendants because plaintiff timely filed a Notice of Claim and submitted to a lengthy 50-h hearing. With respect to Dr. OLARU, counsel acknowledges that she may not have had actual notice of the claim, but that 11 months remain on the statute of limitations and her ability to defend the claim has not been compromised. Counsel states that the motion was promptly brought after the error was discovered and urges that the requested relief be granted.

In support of the cross-motion to dismiss, counsel for the municipal defendants points out that service should have been effectuated by December 19, 2007 and that CPLR 306-b clearly provides that if service is not made upon a defendant within the time provided, the Court, upon motion, shall dismiss the action. Counsel for the municipal defendants argues that counsel for plaintiff did not move expeditiously for an extension of time to serve the complaint and that it is not in the interest of justice to grant plaintiff an extension. She argues that the NHCC is prejudiced by the delay because Dr. K Bailey, the resident who was present at the surgery, is no longer employed by the hospital and will be more difficult to locate.

CPLR §306-b provides, in relevant part, that the Court shall “upon good cause shown or in the interest of justice extend the time for service”, two (2) separate standards upon which to base an application for an extension. (*Spath v Zack*, 36 AD3d 410, 829 NYS2d 19 [1<sup>st</sup> Dept. 2007]; *Mead v Singleman*, 24 AD3d 1142, 806 NYS2d 783 [3<sup>rd</sup> Dept. 2005]). To be entitled to an extension on the basis of good cause shown, a plaintiff must show, at the very least, reasonable diligence in attempting to effect proper service on the defendant. (*Leader v Maroney, Ponzini & Spencer, supra*; *Riccio v Ghulam*, 29 AD3d 558, 815 NYS2d 125 [2<sup>nd</sup> Dept. 2006]). Even if there is no good cause shown, an extension may be granted in the interest of justice. The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. It does not, however, require a showing of reasonable diligence in attempting to effect proper service on the defendant. (*de Vries v Metropolitan Transit Authority*, 11 AD3d 312, 783 NYS2d 540 [1<sup>st</sup> Dept. 2004]). Factors that might be considered include whether plaintiff has a meritorious cause of action, prejudice, if any, to the defendant, and the length of delay in moving for the extension. (*Leader v Maroney, Ponzini & Spencer, supra* at p. 105-106). No one fact is determinative and the calculus of the court’s decision is dependent on the competing interests of the litigants.

After a careful reading of the submissions herein, the Court finds that it would not be an improvident exercise of discretion to grant plaintiff a retroactive extension of time for service of process on the defendants herein. The Court finds that the municipal defendants had actual notice of the claim (*see, Rosenzweig v 600 North Street, LLC*, 35 AD3d 705, 826 NYS2d 680 [2<sup>nd</sup> Dept. 2006]; *Robles v Mirzakhmedov*, 34 AD3d 554, 824

NYS2d 406 [2<sup>nd</sup> Dept. 2006]), that it appears that plaintiff has a meritorious cause of action, and that defendants have not demonstrated any prejudice that would warrant denial of the motion. Accordingly, it is hereby

**ORDERED**, that plaintiffs' motion to extend the time to serve the defendants, pursuant to CPLR §306-b, is granted and the time to serve is retroactively extended to the date on which the defendants were served, i.e., January 17, 2008 with respect to Dr. OLARU, and January 14, 2008 with respect to NUMC and NHCC, and said service is deemed timely and proper; and it is further

**ORDERED**, that the cross-motion by defendants, NUMC and NHCC, to dismiss plaintiffs' complaint is, as a matter of discretion, denied; and it is further

**ORDERED**, that the parties shall appear for a Preliminary Conference on August 7, 2008, at 9:30 A.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: July 1, 2008

WILLIAM R. DEMARCA, J.S.C.

**ENTERED**

JUL 22 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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