[* 1]
SCANNED ON 10/30/2009

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

PRESENT: ALICE SCHLESINGER Justice

IA PART 16

INDEX NO. 100066/07

MOTION DATE

MOTION SEQ. NO. 11

MOTION CAL. NO.

CORNEJO CUNEO

-v-

NY PRESBYTERIAN HOSPITAL

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.

FILED
SEP 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: SEP 29 2009

ALICE SCHLESINGER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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LORENZO CUNEO, as Guardian of the Personal Needs and Property Management of MEGAN CUNEO, an Incapacitated Person, and PETER CUNEO,

Plaintiffs,

-against-

Index No. 100066/04
Motion Seq. 011

NEW YORK PRESBYTERIAN HOSPITAL and ROBERT SOLOMON, M.D.,

Defendants.

SCHLESINGER, J.:

In April of this year, this Court presided over a lengthy trial in this medical malpractice action. In the action, plaintiff sought to recover damages for incapacitating injuries suffered by Megan Cuneo following the October 2, 2001 neurosurgery performed by defendant Dr. Robert Solomon at New York Presbyterian Hospital. At the conclusion of the trial on April 30, 2009, the jury was presented with five separate interrogatories relating to alleged departures by Dr. Solomon. On all five, the jury decided in favor of the defendant by a vote of 5 to 1, with the same juror #3 dissenting as to each question. Plaintiff was given thirty (30) days to move pursuant to CPLR §4404 to set aside the verdict.

This Court did not receive any motion from plaintiff until the instant motion brought on by Order to Show Cause was presented on July 15, 2009, approximately 75 days after the jury had rendered its verdict and 45 days after the deadline set for motions. In the motion, plaintiff asks this Court to set aside the verdict based on juror misconduct and to direct a new trial, or in the alternative, to hold an evidentiary hearing in connection with the

claims raised in the motion. Defendant vigorously opposes the motion on the merits and on the ground that it is untimely.

Plaintiff asserts that Juror #1, who served as the foreperson, failed to disclose relevant information during *voir dire* which, if disclosed, would have revealed a bias in favor of the defendant. Plaintiff had, in fact, challenged the juror for cause. Although the challenge proceedings were not stenographically recorded, the parties essentially agree that the basis of the challenge was the juror's profession as a lawyer. Even though lawyers as a group are not automatically disqualified from service, the Court questioned the juror in the Robing Room with counsel present to ascertain whether the juror held any bias based on his professional experience. The Court also asked the juror to elaborate upon the kind of law he practiced, for example, whether it involved litigation. Discerning no basis for disqualification, the Court denied the cause challenge. Plaintiff's counsel, with his concerns apparently mollified by the juror's responses, did not exercise a peremptory challenge, and the juror was seated in the first seat and later selected by his colleagues to serve as the foreperson. When the verdict was rendered, the foreperson voted in favor of the defendant on all five departure questions.

Plaintiff now moves, claiming (at ¶7) that counsel "recently discovered that Juror Number One failed to properly answer questions propounded upon *voir dire* and concealed answers to such questions designed to uncover bias, prejudice and/or partiality..." Counsel then enumerates five facts which he contends the juror should have disclosed. The first two, that the juror and the defendant had both attended Yale, and that the juror and the defense counsel had both worked for the Manhattan District Attorney, merit no discussion, as there is no evidence that paths had ever crossed. However, the other three allegations

merit discussion. Those relate to the juror's alleged "extensive courtroom experience," his defense of British American Tobacco, and his firm's representation of insurance companies.

The juror on his questionnaire (Exh A to the moving papers) revealed a significant amount about his legal experience. In response to Question 10 he confirmed that he was an attorney employed by Zeichner Ellman & Krause, LLP. In response to Question 1 he disclosed that he or someone close to him had testified in court; and in response to Question 15 he disclosed that he or someone close to him had been employed by a law office, a medical profession, a law enforcement or criminal justice agency, and a local municipality. The only box not checked in response to Question 15 was employment by an insurance company. In response to Question 16 the juror confirmed that he was "actively involved" in a civic, social, union, professional or other organization.

Plaintiff alleges, and defendant does not seriously dispute, that the juror's answers to questions posed by the Court implied that his litigation experience was not significant. Through investigations conducted after the verdict, plaintiff's counsel uncovered the juror's professional profile on his law firm's website which suggests extensive litigation experience. The profile confirms that the juror has, in fact, lectured at the City Bar and in other forums and has "presented CLE (Continuing Legal Education) programs on topics involving civil litigation, evidence, litigation management and management of in-house legal departments." (See Exh. C to moving papers). In addition, it appears that the juror has defended corporations, including British American Tobacco Industries, in actions involving services and/or products which have injured consumers. (Exh. G). Additionally, the juror's law firm has represented large insurance companies such as AIG and North Shore Risk

Management, which purportedly underwrites medical malpractice and health insurance policies. (Exh H).

Defendant does not dispute these factual assertions, but claims they fail to expose any bias or prejudice on the part of the juror. He notes as well that the juror's profile also lists *pro bono* activities on behalf of victims of domestic violence, suggesting that the juror does not harbor any prejudice against injured persons.

This motion raises serious issues which this Court has carefully considered. The right to a fair trial before an impartial jury is fundamental to our system of justice:

> It is a cardinal principle of our common law that trial jurors shall be entirely unbiased; and when bias is disclosed, even after verdict, the courts do not hesitate to set verdicts aside...

Knickerbocker v. Erie R. Co., 247 App. Div 495 (4th Dep't 1936), *citing, inter alia*, *Knice v. Hodges*, 119 Misc 1 (Sup. Ct., N.Y. Co 1922), *aff'd* 205 App. Div 871 (1st Dep't 1923). While many of the cases cited by plaintiff in his moving papers are older cases, the principle holds true today. Indeed, as recently as 2002 the First Department reversed the trial court and granted a motion to set aside a jury verdict when the juror's remarks revealed a prejudice against the plaintiff's case. *French v. Schiavo*, 300 AD2d 119 (1st Dep't 2002) (juror's statement that he did not believe in awards based "on potential" revealed a prejudice against plaintiff's claim for future damages).

A juror need not be charged with a "corrupt act", such as intentionally false statements or other misconduct to merit a new trial. Failure to disclose relevant information which might reveal a bias in itself constitutes conduct "prejudicial to the interests" of a party. *Knice*, 119 Misc at 2. For example, in *Knice* the verdict was set aside in a negligence

action where the juror had failed to disclose that his father had been injured in an accident, even though the nondisclosure was unintentional because the juror had not heard the question.

It is particularly important to insure an impartial jury in a case such as this where the verdict was not unanimous and plaintiff's counsel, armed with the additional information about the juror, may well have exercised a peremptory challenge. Whether or not the verdict would have been different is not dispositive.

> It cannot, of course, be said that another juror in the place of the one in question would have voted against the plaintiff. However, it is not necessary to speculate on this matter for if it is determined that the conduct of a juror in failing to disclose that which he is bound to disclose was prejudicial to either one of the parties to the suit, an application such as the one before the court should in the interest of substantial justice be granted.

Sheehan v Doyle, 152 NYS2d 931 (Sup. Ct., NY Co. 1956) (verdict set aside in personal injury action where juror failed to disclose his own personal injury action based on his misunderstanding of the question on *voir dire*).

Nevertheless, plaintiff's application must fail in this case. The juror did disclose his profession, and counsel was free to question him further about it. Further, it appears that all the answers written on the questionnaire were technically correct, revealing not only the name of his law firm but also suggesting his prior legal experience and involvement in bar association activity. With respect to question 15, the fact that the juror's law firm represents insurance companies did not require the juror to indicate that he or someone close to him was employed by an insurance company. At best, the juror downplayed the extent of his litigation experience, a fact which cannot be confirmed on the record.

In the cases cited by plaintiff in his moving papers, the type of information withheld by the juror was far more significant than the information claimed to be missing here. For example, in the cited cases the juror had a personal relationship to a party, or the juror or a family member had been involved in a lawsuit similar to the one being tried. In other words, the type of information would likely have led to the granting of a challenge for cause. Further, in most cases, there was active concealment or misleading information. While none of those factors is required to set aside the verdict, both are relevant. And this Court cannot find that Juror #1 in this case had any disqualifying information which he actively concealed or which demonstrated a hidden bias against the plaintiff.

What is more, and what is ultimately dispositive here, is that the application is untimely. As indicated above, plaintiff was given thirty days, until June 1, to move to set aside the verdict under CPLR §4404. He did not. Nor did he seek an extension. At oral argument, counsel pointed the Court to CPLR §5015(a)2, which empowers the Court to relieve a party from a judgment upon the ground of "newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under Section 4404."

Although CPLR §5015 does not specify a time limit, a reasonable time is implied. Siegel, D., New York Practice, §428 (4th ed. 2005). Nevertheless, the movant must demonstrate that he could not have discovered the evidence earlier "by the exercise of due diligence." *Schwartz v. Tessler*, 131 AD2d 335, 337 (1st Dep't 1987)(motion granted where information about the plaintiff's condition revealed during post-trial surgery could not have been ascertained earlier); *see also Grant v. Grant*, 37 AD3d 167 (1st Dep't 2007)(motion denied where movant failed to offer explanation for not having earlier presented

information apparently available at the time of trial). Counsel in the case at bar makes no attempt whatsoever to explain his delay in moving. What is more, the information uncovered is of the type that is readily available to someone with internet access and it was available immediately after the trial so as to allow for a timely motion.

Similarly, while the Court can exercise its discretion to excuse a delay under CPLR §4404 and extend the time limit set pursuant to CPLR §2004, it can only do so upon a showing of "an overriding and persuasive reason" or "good cause". *184 West 10th Street Corp. v. Marvits*, 18 Misc3d 46, 48 (App. Tm. 1st Dep't 2007), *aff'd* 59 AD3d 287 (1st Dep't 2009); *Barnes v. Oceanus Nav. Corp., Ltd.*, 21 AD3d 975, 977 (2nd Dep't 2005); *Tesciuba v. Cataldo*, 189 AD2d 655 (1st Dep't 1993) *lv denied* 82 NY2d 846; *Casey v. Slattery*, 213 AD2d 890 (3rd Dep't 1995). Again, moving counsel has not even addressed the issue, let alone persuaded the Court that an extension of time should be granted under the prevailing law. Thus, while the issue of an impartial juror is an important one and the motion is by no means frivolous, this Court cannot fairly overlook the untimeliness of the motion.

Accordingly, it is hereby

ORDERED that plaintiff's motion to set aside the jury's verdict in favor of the defendant is denied.

This constitutes the decision and order of this Court.

Dated: September 29, 2009

SEP 29 2009

J.S.C.
ALICE SCHLESINGER

FILED
SEP 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

[* 9]

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

PRESENT: ALICE SCHLESINGER Justice

PART 16

COSMO VENEZIALE,

- v -

THE BUILDERS GROUP,

INDEX NO. 112084/09

MOTION DATE

MOTION SEQ. NO. 001

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 is withdrawn as moot and the proceeding is discontinued.

FILED
SEP 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: SEP 29 2009

ALICE SCHLESINGER J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST