

**Khalil v Szekley**

2009 NY Slip Op 33039(U)

November 9, 2009

Supreme Court, New York County

Docket Number: 104278/09

Judge: Joan B. Lobis

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

JOAN B. LOBIS

PRESENT: \_\_\_\_\_

PART 6

Index Number : 104278/2009

KHALIL, SANDY

vs

SZEKLEY, M.D. JOSEPH

Sequence Number : 001

EXTEND TIME

INDEX NO. \_\_\_\_\_

MOTION DATE 10/26/09

MOTION SEQ. NO. \_\_\_\_\_

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-7

XMOT 8-12

13-14; 15

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION AND ORDER

FILED

NOV 13 2009

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/9/09

[Signature] J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
SANDY KHALIL, an infant by her mother and natural  
Guardian, AYSHA KHALIL, and AYSHA KHALIL,  
Individually,

Plaintiffs,

Index No. 104278/09

-against-

**Decision and Order**

JOSEPH SZEKLEY, M.D., DR. HARATZ, GINA  
BROWN, M.D., DR. RYNTZ, LALITHA  
SHOBAVARN, LPN, MARK A. ROSING, M.D.,  
TIMOTHY EDWARD RYNTZ, M.D., DR. "JOHN/JANE  
DOE", NEW YORK PRESBYTERIAN HOSPITAL, and  
THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Defendants.

**FILED**  
NOV 13 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
JOAN B. LOBIS, J.S.C.:

Plaintiffs move for an order, pursuant to C.P.L.R. §§ 306-b and 2004, extending their time for service of the summons and complaint on defendants Lalitha Shobavarn, LPN; Joseph Szekley, M.D.; Dr. Haratz; and, Timothy Edward Ryntz, M.D.. Plaintiffs also seek permission to allow an alternative form of service on these defendants, pursuant to C.P.L.R. § 308(5). According to the cross motion, all but defendant Shobavarn have been duly served and answers have been served on behalf of defendants Szekley, Ryntz and Haratz. Therefore, the motion is moot, except with respect to defendant Shobavarn. Defendants cross-move to dismiss the complaint as to defendant Shobavarn for failure to obtain personal jurisdiction over her. Defendants also seek to dismiss the claims of plaintiff Aysha Khalil, pursuant to C.P.L.R. §§ 3211 and 214-a, on the ground that the statute of limitations has expired as to her derivative claims.

Plaintiffs commenced this medical malpractice action by the filing of a summons and verified complaint on March 27, 2009. The complaint alleges that the infant plaintiff, Sandy Khalil,

suffered injuries as a result of defendants' failure to provide adequate and appropriate pre-natal care to plaintiff Aysha Khalil, and their failure to perform a timely cesarean section at the time of delivery, which was on June 17, 1999. Service was effected on The New York and Presbyterian Hospital (the "Hospital"), and the Hospital served an answer. The process server employed by plaintiffs' counsel attempted to effect service of process on the other named defendants by serving the Hospital. Documents prepared by the process server reflect that service was attempted on April 24, 2009, but that the Risk Management department of the Hospital refused to accept service on behalf of the individually-named defendants, asserting that they were no longer employed by the Hospital, and refused to provide any information as to current addresses for the individual defendants.

According to the motion, in late May, plaintiffs' counsel was advised by the process server of the circumstances. Plaintiffs' counsel affirms that she personally conducted a search for the named defendants, using various databases, and made telephone calls to various hospitals and medical offices. Service was ultimately effected on all but defendant Lalitha Shobavarn.

Section 306-b of the C.P.L.R., as amended effective November 21, 2001, provides that service of the summons and complaint is to be made within 120 days after its filing. If, however, service is not made upon a defendant within this time period, "the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service." This motion was filed on July 24, 2009, within the statutory

120-day period to effect service.<sup>1</sup> Even if a court finds that a plaintiff is not diligent in initially attempting service within the 120-day period, an extension for the purpose of effecting proper service may still be permitted. Matthews v. St. Vincent's Hosp. & Med. Ctr. of New York, 303 A.D.2d 327 (1st Dep't 2003). Plaintiffs have demonstrated their diligence in attempting to effect service. Defendants cannot claim prejudice, since the motion was made within the 120-day period to effect service.

Plaintiffs ask this court to order that service on defendant Shobavarn be made by having the Hospital accept service on her behalf, pursuant to C.P.L.R. § 308(5), which allows the court to have a plaintiff effect service "in such manner as the court, . . . directs, if service is impracticable" under §§ 308(1), 308(2) or 308(4). The Hospital objects to accepting service on behalf of defendant Shobavarn, who, the Hospital states, retired in January 2005. Since she retired, the Hospital is no longer her actual place of business; therefore, personal service cannot be effected under C.P.L.R. § 308(2) by delivering the summons and complaint to the Hospital. Balendran by Balendran v. North Shore Medical Group, P.C., 251 A.D.2d 522, 523 (2d Dep't 1998). The court denies plaintiffs' request that the Hospital be compelled to accept service on behalf of defendant Shobavarn, since she is no longer employed there. Borges v. Entra America, Inc., 2005 WL 1355144 at \*1 (Civ. Ct. N.Y. Co. 2005). Rather, the court will grant plaintiffs' alternative request for relief, as set forth in their reply papers, that the Hospital be directed to provide plaintiffs with Lalitha Shobavarn's last known address and contact information, so that plaintiffs may attempt service. The

---

<sup>1</sup> The original return date was August 20, 2009. The motion was adjourned four times in the Submissions Part, and was fully submitted on October 26, 2009.

Hospital is directed to provide plaintiffs' counsel with the last known address within thirty (30) days from the date of this decision and order. Plaintiffs shall then have sixty (60) days from that date to effect service. Contrary to defendants' contention, under the circumstances here, where plaintiff has been diligent in attempting service, the fact that the statute of limitations has expired as to the infant's claims before service can be effected on defendant Shobavarn is not a bar to proceeding against her. Cf., Crystal v. Lisnow, 56 A.D.3d 713, 713-14 (2d Dep't 2008); Estey-Dorsa v. Chavez, 27 A.D.3d 277 (1st Dep't 2006).

The cross motion is granted with respect to the request to dismiss the derivative claim brought on behalf of the infant-plaintiff's mother. The mother is not entitled to the benefit of the ten year toll for infancy under C.P.L.R. § 208. Ann Mary J. v. City of New York, Health and Hospitals Corp., 204 A.D.2d 690, 692 (2d Dep't 1994). Accordingly, the claim brought by plaintiff Aysha Khalil is severed and dismissed; the caption of this matter is deemed amended to omit the name Aysha Khalil as a plaintiff.

The motion and cross motion are decided in accordance with the foregoing. All other requests for relief are denied. The parties are directed to appear for a preliminary conference on March 9, 2010 at 9:30 a.m. This constitutes the decision and order of the court.

Dated: November 9, 2009

**FILED**  
NOV 13 2009  
NEW YORK-4-  
COUNTY CLERK'S OFFICE

JOAN B. LOBIS, J.S.C.