SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

LISA-ANNE BYERS,

Plaintiff,

Index No.: 17533/07
Motion Seq. No.: 03
Motion Date: 03/17/11
XXX

- against -

WINTHROP UNIVERSITY HOSPITAL, NASSAU SURGICAL ASSOCIATES P.C. and FRANK A. MONTELEONE, M.D.,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavits and Exhibits	1
Affirmation in Opposition and Exhibits	2
Affirmation in Opposition and Exhibits	3
Reply Affirmation and Exhibits	4
Sur-Reply Affirmation and Exhibits	5
Sur-Reply Affirmation	6

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR §§ 3216 and 2005, for an order restoring plaintiff's case to the court's calendar; and moves, pursuant to CPLR § 2004, for an order extending the time for plaintiff to serve and file her Note of Issue and Certificate of Readiness *nunc pro tunc*. Defendants oppose the motion.

The above captioned matter was an action for medical malpractice which was

commenced by the filing of a Summons and Verified Complaint on or about October 1, 2007. Defendant Winthrop University Hospital ("Winthrop") joined issue on or about October 20, 2007. Defendants Nassau Surgical Associates ("Nassau Surgical") and Frank A. Monteleone, M.D. ("Monteleone") joined issue on or about November 1, 2007.

On August 3, 2009, the law firm of H. Fitzmore Harris, P.C. filed a Consent to Change Attorney Form replacing Stafford Byers as plaintiff's counsel in the instant matter. On February 16, 2010, a Certification Conference was held in the matter. At said Certification Conference, plaintiff's attorney was represented by *per diem* counsel. The Court issued a Certification Order which directed plaintiff to file her Note of Issue and Certificate of Readiness within ninety (90) days. Said Order also informed plaintiff that if the Note of Issue was not filed within ninety (90) days the action would be dismissed. The ninety (90) days to file the Note of Issue and Certificate of Readiness expired on May 16, 2010. Plaintiff failed to file the Note of Issue and Certificate of Readiness by this date and, on May 18, 2010, the Clerk of the Court entered an Order dismissing plaintiff's action. On June 29, 2010, judgment was entered dismissing plaintiff's action. *See* Plaintiff's Affirmation in Support Exhibit H.

Plaintiff now moves to vacate her default and extend the time to file her Note of Issue. Plaintiff argues that the Court should enter an order vacating the judgment of dismissal for the following reasons: (1) plaintiff has a meritorious cause of action; (2) plaintiff has demonstrated a reasonable excuse for the failure to file her Note of Issue and Certificate of Readiness; (3) there is no prejudice to the defendants in extending the time; and (4) the failure to file the Note of Issue was not deliberate.

With respect to plaintiff's argument that there was a reasonable excuse for the default,

plaintiff's counsel submits that, at the end of February 2010, his then legal assistant, Caroline Ennis, suddenly resigned and discontinued her employment with counsel's office. Plaintiff's counsel states, "The sudden resignation of Caroline Ennis left my office in a precarious position of having to find her replacement as well as hiring and training the new employee in the operations of the office and familiarity with the numerous cases. Between March 1st and April 30th, 2010, we tried three different employees who did not work out and it was not until the end of April 2010, our office was able to hire a replacement for Caroline Ennis. Meanwhile, I later discovered that around March 3rd, 2010, the Per Diem attorney had mailed the Certification Order to our office. This was done at a time when our office was trying to find a replacement for Ms. Ennis. Under the circumstances, the mail was not properly filed and as a result, I was not aware that I had to file the note of issue and certificate of readiness by May 16, 2010."

In further support of plaintiff's argument that there was a reasonable excuse for the default, plaintiff's counsel adds, "[i]n addition to the support problems in the office, during the early part of May, 2010, my sister Pauline Harris was involved in a serious accident in Antigua, West Indies and suffered severe third Degree burns to both of her lower extremities. As a result, I had to travel to Antigua around the middle of May, to around the middle of June, 2010 in order to assist my sister. Thus, I was not present in New York around May 16, 2010, when the note of issue had to be filed and my office failed to file the note of issue as directed by the court."

In support of the argument that plaintiff has a meritorious cause of action, plaintiff offers the affidavit of Dr. Lawrence Roach, a board certified radiologist. *See* Plaintiff's Affirmation in Support Exhibit E. Dr. Roach reviewed plaintiff's relevant medical records from defendants Nassau Surgical, Monteleone and Winthrop, as well as plaintiff's medical records from Dr.

Lydia Valderama.

In opposition to the motion, defendant Winthrop argues that plaintiff has failed to establish a basis to vacate the Note of Issue and restore this matter to the trial calendar. Defendant Winthrop contends that plaintiff has failed to submit an Affidavit of Merit sufficient to establish a good and meritorious cause of action against defendant Winthrop and has failed to demonstrate a justifiable excuse for the default. With respect to the affidavit of Dr. Roach submitted by plaintiff to establish a good and meritorious cause of action against defendants, defendant Winthrop states that "[a] review of plaintiff's expert Affidavit, reveals that it fails to establish any departures on the part of Winthrop University Hospital with respect to the care and treatment provided to plaintiff. Plaintiff's expert Affidavit is devoid of any allegations of negligence or departures on the part of Winthrop University Hospital with respect to the care and treatment provided to the plaintiffs (*sic*). In fact, apart from acknowledging the review of the medical records of Winthrop University Hospital and the statement that the surgery at issue took place at Winthrop University Hospital, plaintiff's expert fails to make even a single reference to Winthrop University Hospital in his Affidavit. Plaintiff's expert Affidavit fails to allege any negligence on the part of Winthrop University Hospital, fails to allege any departure on the part of Winthrop University Hospital, fails to establish a standard of care applicable to Winthrop University Hospital, and finally, fails to establish that there were any departures from the accepted standard of care by the Hospital which proximately caused any of the injuries claimed in this case. In short, plaintiff's expert Affidavit fails entirely to establish a meritorious cause of action as to Winthrop University Hospital."

With respect to plaintiff's contention that there is a justifiable excuse for the default, defendant Winthrop argues that " [i]n the case at bar, counsel has alleged that the default was

essentially due to the sudden resignation of one employee, described as a legal assistant, and the resulting failure to properly file mail containing the Certification Order. In this regard, counsel did not allege that he was a solo practitioner, did not allege what the duties and responsibilities of this legal assistant entailed, and did not allege that this legal assistant was the only employee with familiarity with counsel's cases and the operation of counsel's office at the time. Counsel does not address at all his own responsibility for the supervision of his office staff or his own obligation to be vigilant and diligent with respect to time constraints imposed by court orders, particularly under the circumstances counsel asserts were existing in his office at the time in question during March and April, 2010. Counsel asserts that two months elapsed between March 1 and April 30, 2010, during which time the Certification Order was mailed to his office by *per diem* counsel who appeared for the Certification Conference and the Certification Order was apparently not properly filed because of support staff difficulties. For this reason, counsel claims that he was not aware that the Note of Issue was due by May 16, 2010. This amounts to conclusory and unsubstantiated claims of law office failure that does not rise to the level of a reasonable excuse."

Defendant Winthrop further argues that "[i]t is respectfully submitted in this day and age, with the availability of information and communication by email, fax and phone, there has been no justifiable excuse offered by counsel to reasonably explain the failure to take the steps necessary to insure that the Note of Issue was filed in compliance with the provisions of the Certification Order notwithstanding the fact that counsel was physically out of the country at the time."

Defendants Nassau Surgical and Monteleone also submitted opposition to plaintiff's motion. They argue that plaintiff failed to demonstrate a reasonable excuse for the default

because plaintiff's counsel was aware that the Certification Order required the Note of Issue to be filed by May 16, 2010. Defendants Nassau Surgical and Monteleone state, "plaintiff's excuses are less than compelling. In fact, in an attempt to make out a case of 'reasonable excuse' the plaintiff's counsel has become quite creative in manufacturing excuses and attempts to paint a picture, casting blame on the sudden resignation of an employee and the resulting failure to properly file the mail which allegedly contained the February 16, 2010 certification order."

Defendants Nassau Surgical and Monteleone allege that plaintiff's counsel was fully aware of the contents of the Certification Order and the requirement to file the Note of Issue because he had the Order in his possession on or before March 3, 2010. In support of this allegation, defendants Nassau Surgical and Monteleone submit that "at the certification conference of February 16, 2010, a stipulation was entered into by all parties wherein plaintiff agreed to provide fourteen authorizations to the defendants. Plaintiff's counsel H. Fitzmore Harris, forwarded these authorizations to all defendants in a response dated March 3, 2010 and signed said response pursuant to the court rules....Common sense dictates, then, to comply with the stipulation that accompanied the certification order and provide these authorizations to the defendants, the plaintiff's counsel H. Fitzmore Harris must have received and reviewed the certification order and stipulation on or before March 3, 2010 contrary to what he had affirmed under the penalties of perjury in paragraphs '16' and '17' of his affirmation. Consequently, plaintiff's counsel was thereby put on notice of the date the Note of Issue was required to be filed." *See* Defendants Nassau Surgical and Monteleone's Affirmation in Opposition Exhibit G.

With respect to the assertion by plaintiff's counsel that he was out of the country tending to his ill sister from around the middle of May to around the middle of June 2010, defendants

Nassau Surgical and Monteleone submit that "a review of plaintiff's (*sic*) affirmation, and, the affidavit of the family physician, Dr. Delrose Christian, reveals that he returned to New York around May 19, 2010. The plaintiff's counsel does not address what he was doing or why he did not attempt to file the Note of Issue or even more importantly, file a motion with the court to vacate the dismissal between May 19 and June 25, 2010. Moreover, a review of plaintiff counsel's affirmation and the physician's affidavit regarding his trip to Antigua, West Indies, do not even correspond. Rather, plaintiff's counsel claims he was out of the country from the middle of May through the middle of June whereas the physician's affidavit states that plaintiff's counsel was in Antigua, West Indies from May 2, 2010 to 'around the 19th of May, 2010' and then again on June 25, 2010 through August, 2010. Plaintiff's counsel fails to address what, if anything, he was doing with respect to his office during any of these time periods and fails to explain why he did not file the Note of Issue, attempt to file the Note of Issue, or even, move to vacate the Clerk's dismissal, or the defendants' judgment."

Defendants Nassau Surgical and Monteleone further argue that plaintiff has failed as a matter of law to establish that a meritorious claim exists against them. They submit that plaintiff has not established a meritorious cause of action with a proper affidavit of merit from a physician. They contend that "plaintiff's expert, Lawrence C. Roach, M.D., is not a board certified surgeon. Rather he is a radiologist. This affidavit of the plaintiff's expert does not mention whether he had any specific training or expertise in surgery. Moreover, the affidavit does not indicate that he has familiarized himself with the relevant literature or otherwise set forth how he was, or became, familiar with the applicable standards of care in the specialized area of surgery." They add that "[i]n the case at bar, the physician's affidavit does not even apply to the instant case. The claim in the instant case, according to the bill of particulars at

paragraph '3'...alleges that the 'defendant removed the wrong lymph node, plaintiff was administered general anesthesia against her will by the defendants when she specifically demanded local anesthesia.' Plaintiff's physician's affidavit of merit discusses everything, including alleged claim for misdiagnosis rather than address the case as it is currently plead (*sic*), namely, the removal of the wrong lymph nodes and how that claim has merit. The affidavit of merit does not address the issues framed by the plaintiff's pleadings and bill of particulars." *See* Defendants Nassau Surgical and Monteleone's Affirmation in Opposition Exhibit C. Defendants Nassau Surgical and Monteleone also contend that plaintiff's expert affidavit contains conclusory and unsubstantiated statements without reference to any medical records or testimony to support plaintiff's claim.

Defendants Nassau Surgical and Monteleone further submit that plaintiff's instant application was not made within a reasonable time and that they will be prejudiced if the Order of Dismissal is vacated. They contend that plaintiff has failed to demonstrate lack of prejudice to defendants and that a blanket assertion by plaintiff's counsel that there would be no prejudice to the defendants if the dismissal was vacated, is insufficient to show lack of prejudice. Defendants Nassau Surgical and Monteleone state, "the alleged negligence in this case took place almost six years ago on April 1, 2005. The record contains no information from which the Court could conclude that the defendant was not prejudiced by the inordinate passage of time."

In reply, plaintiff contends that "for the most part, the defendants' opposition is based on misconstruction of the operative facts; which misconstruction has misled them into misapplying the law, and as such, they have failed in their attempt to oppose the plaintiff's motion which should be granted." With respect to defendants Nassau Surgical and Monteleone contention that plaintiff's counsel was fully aware of the contents of the Certification Order based upon his

complying with the demand for authorizations on or before March 3, 2010, plaintiff's counsel states, "contrary to Jankowski's assertions plaintiff's counsel was not fully aware of the contents of the February 16, 2010 certification order, on or before March 3, 2010. While it is true that our office responded to the defendants' demand for authorizations by a response dated March 3, 2010, that response was to two previous demands from the law office of Santangelo & Slattery. One of the demands dated April 20, 2009 was served prior to our offices representing the plaintiff and the other demand dated September 9, 2009 was served on our office....Further, our office was working on providing the authorizations prior to the resignation of Caroline Ennis because we had to carry out investigations to assert the true identity of the medical providers and the extent of medical services rendered to the plaintiff. However, due to Ennis' resignation the responses were delayed and as soon as we could, the demands were duly provided to the defendants."

Plaintiff's counsel adds that his office checks the New York State Unified Court System website on a weekly basis for all cased listed under the name of H. Fitzmore Harris P.C. and/or Fitzmore Harris in order to determine the status of cases on the court's calendar. On April 19, 2010, such a check was carried out by plaintiff counsel's new legal assistant and there was no information listed for the instant case. *See* Plaintiff's Affirmation in Reply Exhibit C.

Plaintiff further submits that "[i]n his affidavit Dr. Roach demonstrated that he was clearly qualified to opine on the standards of care that defendants should have provided to plaintiff, and his affidavit clearly explained how defendants' departures from those standards contributed to plaintiff's injuries. Dr. Roach's affidavit further specified the acts and omissions constituting the medical malpractice and indicated the causal relationship thereof to the plaintiff's injuries. The opinions expressed in Dr. Roach's affidavit are based on his expertise as

a Diagnostic Radiologist of more than 45 years who has read and interpreted thousands of X-Ray and other diagnostic films from which he had made thousands of medical diagnoses for hundreds of medical professionals including physicians who subspecialize in the area of Surgical Oncology."

The reply affirmation further states "[t]he fact is that plaintiff (*sic*) counsel was and still is was (*sic*) a solo practitioner. The duties for receiving, opening and filing incoming mail was the responsibility of the legal assistant Caroline Ennis who was the only employee with familiarity with counsel's cases and the operation of counsel's office at the time."

Plaintiff additionally argues that "the only allusion to prejudice by the defendants is the passage of time. It is well established that the mere 'passage of time' is legally insufficient to establish prejudice."

Defendant Winthrop's sur-reply affirmation argues that "[i]n his reply, counsel fails entirely to rebut, refute or even address the opposition of the Hospital which establishes the failure of his expert to establish a meritorious cause of action against the Hospital. Counsel has not and cannot establish that this case has merit against the Hospital. The fact that plaintiff's expert has offered his opinions as to departures on the part of Dr. Monteleone only, renders the expert Affidavit insufficient as a matter of law to establish a meritorious cause of action against the Hospital."

It further adds that "[i]n response to defendants' arguments that counsel's excuse of law office failure was not reasonable or justified, among other things, counsel unfortunately again elected to accuse the defendants of deliberately publishing false statements in that a download from the New York Unified Court System-E Courts for April 20, 2010, failed to reveal any information regarding the instant case. What counsel failed to appreciate and failed to address in

his Sur-Reply (*sic*), is the fact that his office check of the New York State Unified Court System website did not track the **instant matter,** i.e., *Byers v. Winthrop Hospital*. His office checked the website, by his own admission, using his name or his firm name, but not by checking the status of his inventory of cases and in particular, by checking the status of the *Byers* case using the index number. If he had checked the status of this case, he would have learned that the Certification Conference was held on February 16, 2010. In a case where there has been a substitution of attorney, as in this case, (H. Fitzmore Harris, P.C. substituted for Stafford Byers), it was not reasonable, and obviously not prudent, for counsel to check on the status of this matter only by counsel's firm. Given the number of cases being handled by counsel, which does not appear to be voluminous to the extent evidenced by the April 20, 2010, download, how hard could it have been for counsel to check on the status of all of his cases by name to be sure that there were no impending deadlines and that all his cases were accounted for, particularly in view of the circumstances described by counsel in plaintiff's (*sic*) office at the time."

Defendants Nassau Surgical and Monteleone's sur-reply affirmation argues, "plaintiff's counsel has failed to demonstrate a reasonable excuse as he was placed on notice by at least four sources that the Note of Issue was due to be filed by May 17, 2010....Plaintiff's counsel's attempts at claiming that the defendants have misconstrued facts is simply just another disingenuous attempt to create a smoke screen to divert attention away from the real issue here, that being plaintiff's counsel's repetitive lack of diligence which was occurred throughout this litigation. ...Furthermore, the plaintiff's counsel fails to explain why he did not file a Note of Issue in a timely fashion when he would have also received a "Note of Issue Reminder" letter that is sent to all parties from the Administrative Judge Anthony Marano, J.S.C....This reminder correspondence was forwarded to all parties on or about May 3, 2010....Further, by plaintiff's

counsel's own admission, he was reviewing the mail and/or had hired a new legal assistant by this point in time. As a result, plaintiff's counsel was on notice by way of E-Courts, E-Law, the Note of Issue reminder letter, and, the certification conference order as to when to file the Note of Issue. Plaintiff's counsel failed to file said Note of Issue and has not provided a reasonable excuse despite being on notice by at least four sources of the required filing date....The plaintiff's counsel does not even address his own responsibility for the supervision of his office staff or his own obligation to be diligent with respect to time constraints imposed by court orders particularly under the circumstances that were existing in his office during the time in question during February, March and April, 2010."

Relief under CPLR § 3216(e) is available where the plaintiff can demonstrate a justifiable excuse for the default *and* a good and meritorious cause of action (emphasis added). *See Dominguez v. Jamaica Medical Center*, 72 A.D.3d 876, 898 N.Y.S.2d 869 (2d Dept. 2010); *Frazzetta v. P.C. Celano Contracting*, 54 A.D.3d 806, 864 N.Y.S.2d 482 (2d Dept. 2008); *Picot v. City of New York*, 50 A.D.3d 757, 855 N.Y.S.2d 237 (2d Dept. 2008); *Serby v. Long Island Jewish Medical Center*, 34 A.D.3d 441, 824 N.Y.S.2d 119 (2d Dept. 2006). The requirements are not alternative requirements and both requirements must be met in order to vacate dismissal and restore the case to the calendar.

With respect to the requirement that plaintiff must set forth a good and meritorious cause of action, since the instant matter is a medical malpractice claim, plaintiff must submit the affidavit of a physician attesting to a departure from good and accepted practice and stating the physician's opinion that the alleged departure was a competent producing cause of plaintiff's injuries. *See Shectman v. Wilson*, 68 A.D.3d 848, 890 N.Y.S.2d 117 (2d Dept. 2009) *citing Sweezey v. Montague Rehab & Pain Management, P.C.*, 59 A.D.3d 431, 872 N.Y.S.2d 199 (2d

Dept. 2009); *Murray v. Hirsch*, 58 A.D.3d 701, 871 N.Y.S.2d 673 (2d Dept. 2009), *lv den.*, 12 N.Y.3d 709, 881 N.Y.S.2d 18 (2009); *Shahid v. New York City Health & Hospitals Corp.*, 47 A.D.3d 800, 850 N.Y.S.2d 519 (2d Dept. 2008). *See also Ellis v. Eng*, 70 A.D.3d 887, 895 N.Y.S.2d 462 (2d Dept. 2010). General allegations of medical malpractice which are conclusory in nature and unsupported by competent evidence tending to establish the elements of medical malpractice do not suffice. *See Shectman v. Wilson, supra, citing Alvarez v. Prospect Hospital, supra*; *Shahid v. New York City Health & Hospitals Corp., supra. See also Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 754 N.Y.S.2d 195 (2002); *Romano v. Stanley*, 90 N.Y.2d 444, 661 N.Y.S.2d 589 (1997); *Amatulli by Amatulli v. Delhi Const. Corp.*, 77 N.Y.2d 525, 569 N.Y.S.2d 337 (1991). Plaintiff's expert must set forth the medically accepted standards of care or protocol and explain how they were departed from. *See Geffner v. North Shore University Hosp.*, 57 A.D.3d 839, 871 N.Y.S.2d 617 (2d Dept. 2008), *citing Mustello v. Berg*, 44 A.D.3d 1018, 845 N.Y.S.2d 86 (2d Dept. 2007), *lv den.*, 10 N.Y.3d 711, 860 N.Y.S.2d 483 (2008); *Behar v. Coren*, 21 A.D.3d 1045, 803 N.Y.S.2d 629 (2d Dept. 2005), *lv den.*, 6 N.Y.3d 705, 812 N.Y.S.2d 34 (2006); *LaMarque v. North Shore University Hosp.*, 227 A.D.2d 594, 643 N.Y.S.2d 221 (2d Dept. 1996).

An expert's affidavit which lacks evidentiary support in the record or is contradicted thereby is not sufficient to show a meritorious cause of action. *See Micciola v. Sacchi*, 36 A.D.3d 869, 828 N.Y.S.2d 572 (2d Dept. 2007), *citing Schroder v. Sunnyside Corp.*, 297 A.D.2d 369, 747 N.Y.S.2d 26 (2d Dept. 2002), *lv dism.*, 100 N.Y.2d 553, 763 N.Y.S.2d 807 (2003), *citing Fhima v. Maimonides Medical Center*, 269 A.D.2d 559, 703 N.Y.S.2d 743 (2d Dept. 2000).

"While it is true that a medical expert need not be a specialist in a particular field in

order to testify regarding accepted practices in that field . . . the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable (quotations omitted)." *Shectman v. Wilson, supra* at 849-850 *quoting Behar v. Cohen, supra quoting Postlethwaite v. United Health Services Hospitals, Inc.*, 5 A.D.3d 892, 773 N.Y.S.2d 480 (3d Dept. 2004). "Thus, where a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered (citations omitted)." *Shectman v. Wilson, supra* at 850.

The expert affidavit of Dr. Roach is submitted by plaintiff in support of her argument that she has a meritorious cause of action. *See* Plaintiff's Affirmation in Support Exhibit E. As indicated in said affidavit, Dr. Roach is "Board Certified in the field of Radiology and Radiotheraphy." Dr. Roach states that "[t]he opinions expressed in this affidavit are based upon my expertise as a Diagnostic Radiologist of more than 45 years who has read and interpreted thousands of X-Ray and other diagnostic films from which I have made thousands of medical diagnosis for hundreds of medical professionals including physicians who specialize in the area of Surgical Oncology." While Dr. Roach's area of expertise is clearly radiology and the making of diagnosis from reading and interpreting X-Rays and diagnostic films, his affidavit fails to mention whether he had any specific training or expertise in surgery. Nowhere in Dr. Roach's affidavit does it indicate that he "possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable." *See Shectman v. Wilson, supra.* Nowhere in the affidavit does it indicate that Dr. Roach had familiarized himself with the relevant literature or otherwise set forth how he was, or became, familiar with the applicable standards of care in the specialized area of surgery. Additionally, as argued by

defendants Nassau Surgical and Monteleone, Dr. Roach's affidavit did not specifically refer to any evidence to support the claim that defendants Nassau Surgical and Monteleone failed to follow proper procedure. It fails to refer to which portion of the records or testimony reveals such facts or supports any claimed departures regarding the surgical procedure and the removal of the wrong lymph node. There is no testimony or supporting documentation setting forth how or why the alleged wrong lymph node was removed.

Furthermore, nowhere in Dr. Roach's affidavit is there any mention of defendant Winthrop with respect to the allegations against it. The only mention of defendant Winthrop is that Dr. Roach reviewed the medical records from defendant Winthrop and that plaintiff's surgery took place there. Said affidavit is devoid of any allegations of negligence or departures on the part of defendant Winthrop with respect to the care and treatment provided to plaintiff. Said affidavit also fails to set forth a causal connection between any alleged breach of the standard of care and the injuries sustained by plaintiff.

The Court therefore finds that plaintiff's expert affidavit fails to establish a meritorious cause of action against defendants Nassau Surgical, Monteleone and Winthrop.

As previously stated, the requirements set forth in CPLR § 3216(e) are not alternative requirements and both requirements must be met in order to vacate dismissal and restore the case to the calendar. Consequently, by failing to establish a meritorious cause of action, plaintiff has not met her burden to have the dismissal of the instant action vacated. However, the Court will also address plaintiff's argument that there was a justifiable excuse for the delay. While the Court appreciates the fact that plaintiff's counsel is a sole practitioner (a point that was not raised by plaintiff's counsel until his reply papers) and sympathizes with the tragic and unfortunate circumstances involving his family, the Court does not find that plaintiff's counsel

set forth a justifiable excuse for the delay. It was alleged that the *per diem* attorney who handled the matter for plaintiff mailed the copy of the Certification Order on or about March 3, 2010, but that plaintiff's counsel's legal assistant suddenly resigned at the end of February, 2010 and therefore the mail was not properly filed and plaintiff's counsel was not aware that he had to file the Note of Issue and Certificate of Readiness by May 16, 2010. However, the Certification Conference took place on February 16, 2010 and plaintiff's counsel claims that his legal assistant did not resign until the end of February (the actual date of her resignation was never revealed by plaintiff's counsel). The Court questions why plaintiff's counsel failed to inquire, either of the *per diem* attorney or the court, as to what had transpired at the February 16, 2010 Certification Conference, especially given the fact that his legal assistant, Ms. Ennis, was still in his employ at the time? Additionally, plaintiff's counsel never indicated that Ms. Ennis was the only employee in his practice and, when referring to said practice used the words "we" and "our." Plaintiff's counsel goes on to further state that between March 1- April 30, 2010 "*we* tried three different employees who did not work out and it was not until the end of April 2010, *our* office was able to hire a replacement for Caroline Ennis (emphasis added)." It is interesting to note that, during the two months that plaintiff's counsel was allegedly training a new legal assistant, the Certification Order for the instant matter was never found, properly filed, nor apparently was there any inquiry into the status of plaintiff's case. It is even more difficult for the Court to understand why there was no inquiry made into the status of plaintiff's case when the authorizations requested by defendants were mailed on or about March 3, 2010? Clearly someone in plaintiff's counsel's office was dealing with the instant matter after the February 16, 2010 Certification Conference, but failed to actually check on the status of the case. As argued by defendants, it would have been quite easy for plaintiff's counsel to look up the status of the

case on the New York State Unified Court System's website. Additionally, it would have been reasonable for plaintiff's counsel to look up the status of the case by using the case index number or parties' names since plaintiff's counsel was the second attorney of record for plaintiff. Plaintiff's counsel, himself, admitted that his law office knew how to use the Unified Court System's website, but the Court finds that they failed to make a reasonable and prudent search with respect to the instant matter.

Additionally, as noted by defendants Nassau Surgical and Monteleone, a "Note of Issue Reminder" letter that is sent to all parties from the Administrative Judge Anthony Marano, J.S.C. was forwarded to all parties on or about May 3, 2010. At this point and time, plaintiff's counsel allegedly had hired a replacement for his legal assistant whom supposedly had been trained in the operations of the office. Said letter gave plaintiff's counsel approximately two weeks notice with respect to the Note of Issue deadline.

Furthermore, according to the letter from plaintiff's counsel's sister's physician, plaintiff's counsel "was present in Antigua to assist his sister from the 02nd of May 2010 until around the 19th of May 2010; and again form the 25th of June 2010 to the 12th of August 2010." *See* Plaintiff's Affirmation in Support Exhibit G. Therefore, plaintiff was presumably back in New York from mid-May, 2010 to the end of June, 2010, at which time the Court would expect that it would be reasonable and prudent for plaintiff's counsel to ascertain the status of all of his cases prior to leaving the country again. Also, as previously indicated, at this time, plaintiff's counsel had a legal assistant who was helping him run his law practice.

The Court additionally notes that it took plaintiff's counsel approximately ten (10) months since the dismissal of plaintiff's action to file the instant motion to vacate said dismissal. While there is no explanation in the moving papers as to why there was such a long

period of time to file said motion, the Court queries, what did plaintiff's counsel believe the status of plaintiff's case was during those ten months? If the February 16, 2010 Certification Conference and the March 3, 2010 mailing of the authorizations were the last time plaintiff's counsel affirmatively dealt with the instant matter, how was it possible that over a year passed before plaintiff's counsel did anything further on said case?

Furthermore, the Court notes that the majority of cases listed by plaintiff's counsel in support of the argument that law office failure was deemed a reasonable excuse, *i.e Low Surgical & Medical Supply, Inc. v. Mcafee*, 15 A.D.3d 547, 789 N.Y.S.2d 896 (2d Dept. 2005); *Chery v. Anthony*, 156 A.D.2d 414, 548 N.Y.S.2d 535 (2d Dept. 1989); *Barnes v. Utility Lines, Inc.*, 12 A.D.2d 524, 207 N.Y.S.2d 735 (2d Dept. 1960) involved situations when the attorney him/herself was ill or incapacitated.

Therefore, while not necessitated by the statute requirements, the Court finds that in addition to failing to set forth a meritorious cause of action, plaintiff also failed to set forth a reasonable excuse for the default.

Accordingly, plaintiff's motion is hereby **DENIED** .

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
June 24, 2011