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

PRESENT: Joan B. Lobis Justice

PART 6

Josh Margulies, Et Al.

- v -

Andrew Gardner, Et Al.

INDEX NO. 106648/06

MOTION DATE 2/7/12

MOTION SEQ. NO. 17

MOTION CAL. NO. _____

The following papers, numbered 1 to 67 were read on this motion to/for vacate default + judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...	1→41
Answering Affidavits — Exhibits	42-43; 44; 46→62; 63→65 & 45A
Replying Affidavits	66→67

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

APR 12 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/9/12

JOAN B. LOBIS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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JOSHUA MARGULIES and ELIZABETH MARGULIES, individually and as parents and natural guardians of BENJAMIN MARGULIES, an infant,

Plaintiffs,

Index No. 100648/06

-against-

Decision and Order

ANDREW GARDNER, JOEL MOSKOWITZ, CORINTHIAN OB/GYN, P.C., CECILIA SCHMIDT-SAROSI, OFFICES FOR FERTILITY AND REPRODUCTIVE MEDICINE, P.C., NYU HOSPITALS CENTER, GENZYME GENETIC and SHARONA COHEN,

Defendants.

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

In Motion Sequence Number 017, plaintiffs Joshua and Elizabeth Margulies move, by order to show cause, for an order vacating the default judgment entered against them on November 15, 2011. Defendants oppose the motion.

An explanation of this protracted litigation is warranted. Plaintiffs are the parents of a child, Benjamin Margulies, who was diagnosed with Tay-Sachs Disease fourteen (14) months after he was born and who died at the age of two years and ten months on November 27, 2006. In 2006, shortly before Benjamin died, plaintiffs commenced this action for the wrongful birth of Benjamin based on their allegations of defendants' negligence. At the time they commenced the action, plaintiffs were represented by Gair, Gair, Conason, Steigman & Mackauf ("Gair Gair"). The action was originally assigned to the Hon. Sheila Abdus-Salaam. Early in the litigation, Genzyme Corporation s/h/a Genzyme Genetic successfully moved for an order dismissing the complaint against it. See decision and order on Motion Sequence Number (hereinafter "Sequence") 002, dated

December 13, 2007. In the fall of 2007, Gair Gair successfully moved for an order permitting them to withdraw as plaintiffs' attorneys. See decision and order on Sequence 003, dated October 25, 2007. In 2008, defendant Sharona Cohen moved for summary judgment; this motion was denied. See decision and order on Sequence 004, dated June 2, 2008. At some point during this time period, plaintiffs, who had been proceeding pro se since Gair Gair withdrew in 2007, hired attorney Rudolph Silas, Esq.

In May 2009, the action was reassigned to the undersigned due to inventory changes. In Sequence 006, which was fully submitted in September 2009, plaintiffs sought leave to amend their complaint to add Benjamin's estate as a necessary party; add a cause of action for the conscious pain and suffering of Benjamin; and add a punitive damages claim. Sequence 006 was denied in its entirety in a decision and order dated December 4, 2009. During this time period, in a series of motions in a related action (Cohen v. Medical Malpractice Ins. Pool of N.Y.S., Index No. 114857/06), Ms. Cohen moved for a judgment declaring that her co-defendant Joel Moskowitz, M.D.'s medical malpractice insurance carrier was obligated to defend and indemnify her in this action, and the carrier moved for a judgment declaring that it was not obligated to defend or indemnify her. The insurance carrier's motion was granted, Ms. Cohen's motion was denied, and this separate action was dismissed. See decision and order on Sequence 003-007, dated April 5, 2010, on Cohen v. Medical Malpractice Ins. Pool of N.Y.S., Index No. 114857/06. Also overlapping this time period were five motions (Sequence 007-011) filed in this action by the various defendants seeking summary judgment, based on certain inconsistent statements made by plaintiffs in their unsuccessful attempt to amend their motion in Sequence 006. Defendants' respective motions for

summary judgment were denied. See decision and order on Sequence 007-011, dated May 28, 2010. Shortly thereafter, Ms. Cohen's attorneys successfully moved to be relieved as her counsel. See decision and order on Sequence 012, dated December 3, 2010. Ms. Cohen is currently proceeding pro se.

In the most recent motion practice (Sequence 013-016), defendants respectively moved for an order, pursuant to C.P.L.R. Rule 3212, dismissing plaintiffs' complaint with prejudice. Although plaintiffs submitted opposition papers to defendants' respective motions, Mr. Silas failed to appear for oral argument on the return date of November 15, 2011. Upon plaintiffs' default in appearing for oral argument, the court granted defendants' respective motions and directed them to settle an order on notice. See decision and order on Sequence 013-016, dated November 16, 2011. On or about November 23, 2011, counsel for defendant Dr. Moskowitz served a proposed order with notice of settlement, to be presented for signature on December 14, 2011. On December 19, 2011, plaintiffs filed the instant motion (Sequence 017), seeking an order staying any action on the proposed order regarding the disposition of Sequence 013-016 and vacating their default for having failed to appear on November 15, 2011.

In his affirmation in support of plaintiffs' motion, Mr. Silas sets forth that on November 15, 2011, he was returning from Jacksonville, Florida, where he had gone on a "family emergency to prevent [his] uncle and client, who is aged and infirmed [sic], from being rendered financially destitute due to certain unauthorized and fraudulent transactions against his bank accounts." Mr. Silas contends that previously, his uncle had been the victim of a theft of $85,750

from his bank account. Mr. Silas states that on November 10, 2011, his uncle telephoned him with concerns that his accounts had fraudulent activity on them again. Mr. Silas states that given the prior history regarding his uncle's bank accounts, he immediately arranged to travel to Jacksonville to resolve the issue and secure his uncle's accounts. He states that he departed for Jacksonville on November 12 (a Saturday), whereupon he went to his uncle's bank to investigate activity on an overdrawn account. Mr. Silas then states that while he was at the bank, he realized that he had left his cellular phone, which contained his calendar, at his sister's house in New York. He states that his sister was away from her house for the weekend. He states that after leaving the bank, he contacted his uncle's other bank to cancel a credit card on which there had been activity that appeared to be fraudulent. Mr. Silas maintains that by November 14 (Monday), he was still unable to reach his sister to determine when she would be returning home so that he could check his schedule, and that there was no one in his office who could assist him. He then continued dealing with his uncle's matters in Jacksonville.

Mr. Silas asserts that, relying on his memory, he believed that the return date for defendants' summary judgment motions was scheduled for Wednesday, November 16, 2011. He states that he confused the return date in this case with another longstanding matter that was actually scheduled for November 16, 2011. He states that he returned to New York on Tuesday, November 15, 2011, at 10:50 a.m., but he was still without his cellular phone and unaware of his actual scheduled appearance at 10:00 a.m.[1] that day. Mr. Silas states that it was not until 8:00 p.m. on November 15, when he retrieved his cellular phone, did he remember the scheduled return date for Sequence 013-016.

[1] The appearance was actually scheduled for 11:00 a.m.

Mr. Silas includes affidavits from his uncle and his sister in support of his explanation. His sister attests that her apartment is in the Bronx but that, during the weekend in question, she was at her fiancé's house in Brooklyn.

Mr. Silas avers that his failure to appear in court on November 15 was not willful but the result of the aforementioned circumstances, which he believes amount to a reasonable excuse. Mr. Silas further states that he had submitted a good faith, non-frivolous opposition to defendants' summary judgment motions. Plaintiffs also annex what is titled a "Certificate of Merit," signed by Mr. Silas, in which he sets forth that plaintiffs have reviewed the facts of the case, have consulted with at least two physicians who are licensed to practice medicine in the State of New York, and have concluded that there is a reasonable basis for the action.

Defendants vigorously oppose plaintiffs' motion. They argue that plaintiffs' excuse for not appearing on November 15, 2011, is not reasonable, especially in light of Mr. Silas' previous failures to appear for scheduled court conferences and late appearances at scheduled court conferences, which were the basis for their seeking sanctions in Sequence 013-016. Defendants also argue that plaintiffs have not sufficiently demonstrated that their action has merit because they failed to provide an affirmation or affidavit from a physician, a necessary step in vacating their default. Additionally, Dr. Moskowitz argues that there are a number of deficiencies in plaintiffs' instant order to show cause. First, he maintains that Mr. Silas did not serve him with a conformed copy of the order to show cause after I signed it because he omitted a handwritten paragraph. It was in this paragraph that Mr. Silas handwrote that he gave notice to defendants as to when he would be

presenting his order to show cause seeking a stay. Second, Dr. Moskowitz argues that the stay that I issued in conjunction with the order to show cause—staying any action to enter a judgment or enforce a judgment—was improper because (1) plaintiffs never attested to the "significant prejudice" that would befall them if the stay were not granted, and (2) plaintiffs never properly noticed defendants as to when the order to show cause would be presented. Third, Dr. Moskowitz argues that plaintiffs' application, as a whole, is improper and premature because there has yet to be an entered order or an executed judgment.

In reply, plaintiffs' attorney asks the court to take judicial notice of a prior expert's affirmation that was submitted in support of plaintiffs' motion to amend their complaint on Sequence 006, in which David F. Kronn, M.D., opined that defendants' failure to ensure that plaintiffs received prenatal testing for Tay-Sachs Disease was a proximate cause of Benjamin being born with Tay-Sachs Disease. Plaintiffs argue that this affirmation should suffice as having demonstrated the merits of their action. Mr. Silas concedes that he failed to appear for court conferences on October 23, 2008 and August 2, 2011, and that he appeared late on two occasions for court conferences, but argues that his conduct is dissimilar to cases in which New York courts have denied vacatur of a default based on a pattern of dilatory conduct. Mr. Silas does not deny that he failed to provide defendants with the requisite notice as to when he would be presenting the court with an order to show cause that was seeking a stay or that he served them with copies of the order to show cause that did not contain his statement that he provided defendants with the requisite notice.

The court will first address the deficiencies in the order to show cause. First, plaintiffs' motion is not premature, because they are looking to vacate their default in appearing on

the return date of November 15, 2011, and they were found in default in appearing for oral argument in this court's decision and order signed on November 16, 2011. Whether the order was or was not entered prior to plaintiffs bringing this motion is not significant because service of a copy of the order with notice of entry only starts the clock running on a party's one-year time limit within which to move to vacate a default under C.P.L.R. Rule 5015(a). There is no bar to a party seeking to vacate his default prior to entry of the order finding him in default.

Second, Dr. Moskowitz's remaining arguments about the procedural defects in the order to show cause are, in essence, arguments that plaintiffs sought a stay without complying with 22 N.Y.C.R.R. § 202.7(f), which sets forth:

> [a]ny application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain . . . an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by giving of notice. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application.

I note that my records reflect that the proposed order—noticed for signature on December 14, 2011— did not reach my chambers until December 19, 2011, or later. This is the same date that I signed plaintiffs' order to show cause. Even had plaintiffs not sought a stay, I would have reserved signature on the order finalizing the November 16, 2011 decision and order in the interest of judicial economy. While Mr. Silas' conduct with regard to presenting the order to show cause and serving his adversaries with the signed copy was certainly sloppy, and perhaps worthy of the imposition of costs or sanctions, it is not a reason to disregard the merits of plaintiffs' application.

Under C.P.L.R. Rule 5015(a), the court may relieve a party from a judgment or order, upon such terms as may be just, upon a showing of excusable default. In order to vacate a default in appearing before the court, a party must demonstrate a reasonable excuse for his or her default and facts indicating that his or her action (or defense) is meritorious. Rugieri v. Bannister, 7 N.Y.3d 742, 744 (2006).

Turning to whether plaintiffs have shown that their claim has merit, in medical malpractice cases, an affidavit or affirmation from a medical expert is required to demonstrate merit. See, e.g., Fiore v. Galang, 64 N.Y.2d 999, 1000-01 (1985); Rose v. Our Lady of Mercy Med. Ctr., 268 A.D.2d 225, 226 (1st Dep't 2000). Plaintiffs did not submit a proper affidavit or affirmation of merit with their moving papers. However, this is not a case where, prior to this motion, plaintiffs have never provided an affirmation from an expert. Rather, as to their only viable cause of action—wrongful birth—plaintiffs had previously provided an affirmation from a physician in conjunction with Sequence 006. Thus, the circumstances here are distinguishable from the cases in which there had been no prior showing of the action's merit. Cf. Walker v. City of N.Y., 46 A.D.3d 278 (1st Dep't 2007); Ramos v. Lapommeray, 135 A.D.2d 439 (1st Dep't 1987); Canter v. Mulnick, 93 A.D.2d 751 (1st Dep't 1983); Pell v. Button, 44 A.D.2d 549 (1st Dep't), appeal dismissed, 34 N.Y.2d 936 (1974).

As to plaintiffs' excuse, whether the movant has demonstrated a reasonable excuse is a matter within the discretion of trial court. Rodgers v. 66 E. Tremont Hgts. Hous. Dev. Fund Corp., 69 A.D.3d 510 (1st Dep't 2010) (citation omitted); Carroll v. Nostra Realty Corp., 54 A.D.3d 623 (1st Dep't 2008) (citation omitted). "[T]he Supreme Court has the discretion to accept law

office failure as a reasonable excuse (see CPLR 2005) where that claim is supported by a 'detailed and credible' explanation of the default or defaults at issue." Swensen v. MV Transp., Inc., 89 A.D.3d 924, 925 (2d Dep't 2011) (parenthetical citation in original), quoting Henry v. Kuveke, 9 A.D.3d 476, 479 (2d Dep't 2004). "Conclusory and perfunctory" claims of law office failure, however, should be rejected. Pichardo-Garcia v. Josephine's Spa Corp., 91 A.D.3d 413, 413-14 (1st Dep't 2012); Perez v. New York City Hous. Auth., 47 A.D.3d 505, 505-06 (1st Dep't 2008). Further, the court should reject claims of law office failure if the conduct is part of a willful, neglectful, or dilatory pattern. Youni Gems Corp. v. Bassco Creations Inc., 70 A.D.3d 454, 455 (1st Dep't 2010); Perez, 47 A.D.3d at 506; Santiago v. N.Y.C. Health & Hosps. Corp., 10 A.D.3d 393, 394 (2d Dep't 2004).

Mr. Silas' explanation for his failure to appear on the return date of defendants' motion essentially boils down to law office failure. Although the record establishes that Mr. Silas' failure to appear on November 15 was not an isolated event, based on the evidence presented, it cannot be said that Mr. Silas' conduct was intentional or willful. See Hageman v. Home Depot U.S.A., Inc., 25 A.D.3d 760, 761 (2d Dep't 2006); Gironda v. Katzen, 19 A.D.3d 644, 645 (2d Dep't 2005). That Mr. Silas' conduct was neither intentional nor willful is underscored by the fact that he did file opposition papers to the motions; the default only arose out of his failure to appear for oral argument. Further, "the relatively short period between default and the motion to vacate contrasts with any pattern of dilatory conduct or [plaintiffs'] intention to abandon [their case.]" Mutual Marine Office, Inc. v. Joy Constr. Corp., 39 A.D.3d 417, 419 (1st Dep't 2007). Thus, plaintiffs have proffered an explanation for their default to sufficient to constitute a reasonable excuse.

Accordingly, plaintiffs' motion to vacate their default shall be granted. Consequently, the court vacates the decision and order on Sequence 013-016, dated November 16, 2011, which granted defendants' respective motions on plaintiffs' default, and restores those motions. During oral argument on Sequence 017 on February 7, 2012, the court asked the parties whether they wanted to submit additional papers with respect to Sequence 013-016, and the parties declined to submit additional papers.

In Sequence 013, Dr. Moskowitz moves for an order, pursuant to C.P.L.R. Rule 3212, dismissing plaintiffs' complaint with prejudice for plaintiffs' failure to comply with a conditional order of preclusion dated May 31, 2011; pursuant to C.P.L.R. §§ 3101 and 3126, and Rule 3124, dismissing plaintiffs' complaint with prejudice, based upon plaintiffs' willful failure to comply with discovery demands and multiple court orders; and, pursuant to 22 N.Y.C.R.R. § 130-1.1, sanctioning plaintiffs' counsel for his conduct in the instant matter. Also in Sequence 013, Andrew Gardner, M.D. s/h/a Andrew Gardner and NYU Hospitals Center ("NYU") cross-move for relief similar to that which Dr. Moskowitz seeks. In Sequence 014, 015, and 016, Corinthian OB/GYN, P.C. ("Corinthian"), Cecilia Schmidt-Sarosi and Offices for Fertility and Reproductive Medicine, P.C.,[2] and Ms. Cohen, respectively, move for relief similar to that which Dr. Moskowitz seeks and adopt the arguments that he made in Sequence 013.

The discovery process has dragged in this matter; this is amply demonstrated in defendants' motions. From the court's review of the motions, there has been a confluence of issues

[2] Cecilia Schmidt-Sarosi and Offices for Fertility and Reproductive Medicine, P.C. submitted both a cross-motion on Sequence 013 and a separate motion on Sequence 015; both seek the same relief.

that have derailed the discovery period in this matter, including, but not limited to, the nature of the action and plaintiffs' attempts to expand their action beyond that which is permitted for an action sounding in wrongful birth; the number of parties named as defendants and the number of attorneys involved; plaintiffs having started the case being represented by Gair Gair, then proceeding pro se for a lengthy period, and now being represented by a second attorney; and plaintiffs having provided discovery that is inadequate, unresponsive, and/or late, or having failed to provide certain discovery at all. For instance, one of the longstanding issues in discovery in this matter has been plaintiffs' failure to comply with numerous demands and court orders to furnish each defendant with a bill of particulars that specifies the negligence alleged and that is particular to that defendant. A second issue has been plaintiffs' ongoing failure to furnish defendants with authorizations to obtain treatment records related to their son and their financial records, since this wrongful birth action is premised on special damages. See Bani-Esraili v. Lerman, 69 N.Y.2d 807, 808 (1987) (in a wrongful birth action, plaintiffs "may be compensated only in the amount that represents [their] legally cognizable injury, namely the increased financial obligation arising from the extraordinary medical treatment rendered [to] the child during minority."). Indeed, the period for exchanging paper discovery in this case has taken so much time that the depositions of the plaintiffs still have not been completed. Suffice it to say, it has been a frustrating process for all of the parties, and for the court, to marshal and organize discovery in this matter.

On May 31, 2011, after years of delay, the court issued a conditional order of preclusion. Within ten (10) days of the date of the order, plaintiffs were to provide defendants with:

> (1) responses to defendants' demands for: copies of all documents in connection with Mr. Margulies' bankruptcy filing in 2010, any

> prior bankruptcy filings by Mr. Margulies, and/or any bankruptcy filings by Ms. Margulies; copies of all divorce papers, filings, orders and/or agreements between Mr. and Ms. Margulies; authorizations to obtain the financial records for all checking and savings accounts held by Mr. Margulies, Ms. Margulies, or jointly, from March 2005 through July 2006 (or, the time that plaintiffs were residing in North Carolina); and authorizations to obtain the financial records for all checking and savings accounts held by held by Mr. Margulies, Ms. Margulies, or jointly, that were used to pay credit card bills or statements for credit cards used to pay for costs related to Benjamin;
>
> (2) copies of all separation & divorce agreements or decrees;
>
> (3) any outstanding discovery from a conference order dated March 15, 2011, including copies of tax returns for Camille & George Hlinko for years that plaintiffs are claiming "home care and babysitting" and "meals and lodging; copies of all correspondence between plaintiffs and Aetna Insurance Company relative to treatment for Benjamin (per June 15, 2010 order); authorizations to obtain Benjamin's records from all physicians and therapists who treated Benjamin in New York, all pharmacies in New York where plaintiffs filled Benjamin's prescriptions, all medical equipment or supply companies, all home health agencies, all social service agencies in New York, Benjamin's pediatrician, Dr. Wang, Craig Davis, a pediatric neurologist in North Carolina, Human Genetics, Jefferson Neurogenetics, and all physical therapists; and information concerning the way in which charitable donations were maintained for Benjamin.

The order set forth that plaintiffs' failure to provide the above within ten (10) days of the order would result in their being precluded from offering evidence of economic and special damages at the time of trial.

Defendants argue that plaintiffs failed to comply with the conditional order of discovery because they failed to provide copies of correspondence between plaintiffs and Aetna Insurance Company ("Aetna"); information concerning the way in which charitable donations were

maintained for Benjamin; copies of tax returns for Camille and George Hlinko (Ms. Margulies' parents); copies of documents with respect to their divorce; and authorizations for all physicians, therapists, pharmacies, medical equipment and supply companies, pediatricians, home health agencies, social service agencies, plaintiffs' employment records, Dr. Wang, and Craig Davis.

Plaintiffs argue that they complied with the conditional order of preclusion. As to the Aetna records, plaintiffs maintain that on June 12, 2008, they provided defendants with authorizations to obtain these records. Additionally, in response to this motion, they attach copies of some correspondence between Aetna and themselves that they maintain they only found a few days prior to opposing the motion while cleaning out a space in their home.[3] As to the information concerning the way in which charitable donations were maintained, plaintiffs maintain that on June 12, 2008, and June 26, 2008, they provided defendants with authorizations to obtain account information for the Pay-Pal account that plaintiffs set up for the purpose of receiving donations from people who wanted to support them in their struggle against Aetna. Additionally, plaintiffs argue that the issue regarding donations has been distorted; that at no time did they solicit donations to help with their son's care, rather, Ms. Margulies' brother established a website and a way to make donations; that the donations amounted to a little over $2,000; and that the donations were neither tax-deductible nor considered "charitable." As to the copies of tax returns for Camille and George Hlinko, plaintiffs maintain that on April 4, 2011, they provided defendants with IRS form 4506-EZ,

[3] Defendants ask the court to disregard plaintiffs' personal affidavit because it is not in proper form. But, the affidavit contains an attestation that it was made under penalties of perjury and attached is a notarized statement, dated October 10, 2011, that plaintiffs have read and know the contents of the affidavit and the truth thereof. Accordingly, the court will consider plaintiffs' affidavit.

authorizing each defendant to obtain the tax records for the Hlinkos from 2006 through 2009. As to any separation or divorce agreements or decrees, plaintiffs assert that they responded to that part of the order by stating that they had no such documents in their possession, and providing the index number for the divorce. As to the authorizations for HIPAA information, plaintiffs maintain that throughout the litigation, they provided defendants with authorizations for a number of entities and/or physicians, including Dr. Peter Weseley; Dr. Alan Dayan; Dr. Uri Shabato; Dr. Frank Roberto; Eckerd, Walgreen, and Duane Reade pharmacies; NYU Human Genetics; LIJ Medical Center; "Montefiore MC Weeler College," Montefiore Children's Hospital, and Montefiore H&L Moses Division; Franklin Hospital; St. Mary's Hospital for Children; Retinal Consultants and NYC Early Intervention Program; Jake Kreindler, Karin Ballaban, Dr. Cynthia Tifft, and Jefferson Neurogenetics; and Manatech. Plaintiffs assert that all physician, pharmacy, hospital, and therapy authorizations have been provided. They further maintain that they have not been able to identify treaters Dr. Wang or Craig Davis, which is why they have not provided authorizations as to them. They assert that authorizations for employment records were previously provided.

In reply, defendants first ask the court to reject plaintiffs' opposition as untimely, because, per the parties' stipulation, plaintiffs were to have served their opposition papers by first class mail no later than October 11, 2011, but instead, plaintiffs' attorney personally served the opposition papers on October 14, 2011.[4] The court notes that had plaintiffs served the papers by mail on October 11, 2011, it is likely that defendants would have received the papers a few days later.

[4] Ms. Cohen asserts that she found the papers on her front porch on October 17, 2011, though the date they arrived at her home is unclear. Since this incident, the parties have agreed that Ms. Cohen shall be served by mail in the same manner as the other defendants.

Thus, while plaintiffs' attorney failed to comply with his obligation to mail the papers no later than October 11, 2011, the delay attributable to plaintiffs' attorney's failure is de minimus. Moreover, defendants articulated no prejudice from the delay. Accordingly, the court will consider plaintiffs' opposition papers.

Defendants also argue that plaintiffs' responses are insufficient and that they have yet to fully comply with the May 31, 2011 conditional preclusion order. Specifically, defendants maintain that plaintiffs failed to provide any response to that branch of the conditional order which directed them to provide copies of all correspondence between themselves and Aetna, information concerning the way in which charitable donations were maintained for their son, and authorizations for Dr. Wang, Craig Davis, or all home health agencies or social service agencies in New York. Further, defendants maintain that to the extent plaintiffs did respond, their responses were piecemeal and convoluted.

I find that plaintiffs substantially complied with the conditional preclusion order so as to avoid preclusion. Even though defendants are entitled to copies of documents in plaintiffs' possession, it was appropriate for plaintiffs to provide them with authorizations to obtain copies of the documents themselves, as in the case of the tax returns for the Hlinkos and the records from Aetna. Further, aside from Dr. Wang and Craig Davis, defendants have not articulated the specific providers or entities for which authorizations remain outstanding. The harsh remedy of preclusion is not warranted. However, it was not responsive for plaintiffs to simply provide defendants with the index number to their divorce while asserting that they are not in possession of documents related

to their divorce; they must obtain copies of these documents from their divorce attorneys or the county clerk file and exchange them with defendants. Additionally, since on reply, defendants provided plaintiffs with direct references to medical records indicating that Dr. Wang is an ophthalmologist who treated Benjamin in New York and that Craig Davis is a physician at Duke University, plaintiffs shall provide defendants with authorizations for these physicians.

Defendants also argue that plaintiffs' case should be dismissed on the grounds that they repeatedly failed to comply with discovery demands and court orders. They argue that they have never received bills of particulars specific to each defendant individually, and that plaintiffs failed to comply with other discovery demands and orders. Plaintiffs' compliance with discovery demands and orders has been haphazard. However, plaintiffs have provided a lot of the discovery that defendants have sought, and it is unclear from defendants' papers—aside from that which is listed above and the bills of particulars—what else, exactly, remains outstanding. Plaintiffs' most egregious failure has been not providing defendants with appropriate bills of particulars. They argue that it is hard to differentiate between the defendants until the depositions have been conducted, but a careful review of the medical records by plaintiffs and their attorney should aid them in this endeavor, and it is a requirement for continuing the litigation. While I do not find plaintiffs' conduct willful or contumacious, it is time to rein in any outstanding discovery in this case.

Defendants seek sanctions under 22 N.Y.C.R.R. § 130-1.1, for Mr. Silas' frivolous conduct in failing to appear at court conferences, appearing late for court conferences, and for mailing papers to Dr. Moskowitz at improper addresses on more than one occasion.

Notwithstanding the third issue, defendants' request would be more appropriately brought not under 22 N.Y.C.R.R. § 130-1.1 but under 22 N.Y.C.R.R. § 130-2.1, which sets forth that the court, in its discretion, may impose financial sanctions and/or award costs upon any attorney who, without good cause, fails to appear at a time and place scheduled for an action or proceeding to be heard before a designated court. Mr. Silas' failure to timely appear or appear at all at conferences is the behavior of which defendants are complaining and there is support in the record for a successful motion under 22 N.Y.C.R.R. § 130-2.1. However, Mr. Silas' conduct does not fit into the categories for sanctions under Section 130-1.1, i.e., conduct that is completely without merit in law, that is undertaken primarily to delay or prolong the litigation or harass or malicious injure another, or that asserts false material factual statements. Accordingly, those branches of Sequence 013-016 seeking sanctions under Section 130-1.1 are denied, with leave to bring a motion for costs and/or sanctions under Section 130-2.1.

ORDERED that plaintiffs' motion (Sequence 017) is granted, their default is vacated, and the motions in Sequence 013-016 are reopened; and it is further

ORDERED that those branches of defendants' respective motions in Sequence 013-016 seeking summary judgment or dismissal of the action are denied, for the reasons set forth above; and it is further

ORDERED that within twenty (20) days of service of a copy of this order with notice of entry, plaintiffs shall furnish defendants with bills of particulars specific to the individual

defendants, copies of any agreements or decrees pertaining to their separation or divorce, and authorizations permitting defendants to obtain records from Dr. Wang and Craig Davis; and it is further

ORDERED that the parties shall appear on May 15, 2012, at 10:00 a.m., for a status conference, prepared to address any outstanding discovery not specifically addressed herein; and it is further

ORDERED that those branches of defendants' respective motions in Sequence 013-016 seeking sanctions under 22 N.Y.C.R.R. § 130-1.1 are denied without prejudice to defendants bringing a motion seeking costs or sanctions for Mr. Silas' failure to appear or his untimely appearances at a number of court conferences under 22 N.Y.C.R.R. § 130-2.1.

Dated: April 9, 2012

ENTER:

JOAN B. LOBIS, J.S.C.