[* 1]

SHORT FORM ORDER

INDEX No. 04-11999

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 2-3-12
ADJ. DATE 11-8-12
Mot. Seq. # 023 - MotD

ADAM J. GRILL, as Administrator of the Estate of RICHARD GRILL, and ADAM J. GRILL, Individually,

Plaintiff,

- against -

LONG ISLAND JEWISH MEDICAL CENTER, JOSEPH RAMEK, M.D., JOANN UGENTI, M.D., PAULA SCHWARTZ, M.D., NIRMALA SHEVDE, M.D., DAVID MYCOFF, M.D., MAY LIM, M.D., EUGENE S. BONAPACE, M.D., ROBERT TEPPER, M.D., CHRISTOPHER J. PALESTRO, M.D., FACNP, RONDOLFO NUNEZ, M.D., JIA TONE, M.D., LEONARD ROSSOFF, M.D., SANFORD M. RATNER and CAROL SINGER, M.D.,

Defendants.

KILGANNON & KILGANNON, LLP
Attorney for Plaintiffs
1551 Kellum Place
Mineola, New York 11501

MARTIN, CLEARWATER & BELL LLP
Attorney for Defendants Long Island Jewish and Doctors Lim, Palestro, Rossoff and Singer
220 East 42nd Street
New York, New York 10017

BARTLETT, MCDONOUGH, BASTONE & MONAGHAN, LLP
Attorney for Defendants Doctors Bonapace, Tepper and Ratner
300 Old Country Road, Suite 301
Mineola, New York 11501

FUMUSO, KELLY, DEVERNA, SNYDER SWART & FARRELL, LLP
Attorney for Defendant Mykoff, s/h/a Mycoff
110 Marcus Boulevard., Suite 500
Hauppauge, New York 11788

KRAL, CLERKIN, REDMOND, RYAN, PERRY & VAN ETTEN, LLP
Attorney for Defendants Doctors Ramek, Ugenti, Schwartz and Shevde
538 Broadhollow Road
Melville, New York 11747

Upon the following papers numbered 1 to 37 read on this motion to renew, reargue and vacate ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 10 - 15, 16 - 26, 27 - 30, 31 - 32 ; Replying Affidavits and supporting papers 33 - 37 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an order pursuant to CPLR 2221 granting leave to renew and/or reargue the defendants' prior motions to dismiss (# 018, # 019, # 020, # 021) pursuant to CPLR 3126 (3) which were granted by order of this Court dated January 23, 2012, or, in the alternative, for an order pursuant to CPLR 5015 vacating said prior order, is granted to the extent of granting leave to renew and, upon renewal, the Court adheres to its original determination, and is otherwise denied.

This is a medical malpractice action which seeks damages for personal injuries to, and the alleged wrongful death of, the decedent Richard Grill. The plaintiff, Adam J. Grill, as Administrator of the Estate of Richard Grill and individually, commenced this action on May 21, 2004. On or about March 14, 2005, the original attorney for the plaintiff was relieved by order of the Court, and the plaintiff obtained a second law firm to prosecute this action. By order dated June 7, 2010 the undersigned discharged the second law firm as attorney of record, and stayed the matter for thirty days for the plaintiff to obtain new counsel or appear pro se at the next conference date scheduled for July 22, 2010. The plaintiff appeared pro se at the scheduled conference, and he indicated his intent to retain an attorney in this action. The Court directed the plaintiff to obtain counsel by the next conference date scheduled for July 29, 2010, or provide the Court with the business cards of all attorneys that he met with to demonstrate his good faith effort to comply with the Court's directive. At the conference held on July 29, 2010, the plaintiff again appeared pro se and submitted a number of business cards from attorneys. The defendants allege, and the plaintiff does not dispute, that a number of those cards were from attorneys within the same law firm, and that one was from the plaintiff's previous counsel.

On or about September 2010, the defendants moved to compel the plaintiffs to provide discovery, to dismiss the complaint, and to disqualify the plaintiff from appearing pro se on behalf of the Estate of Richard Grill. By order dated February 8, 2011 the undersigned granted the defendants' motions, and issued a conditional order directing the plaintiffs to obtain new counsel within thirty days. If the plaintiffs failed to do so, the defendants were permitted to renew their prior motions to dismiss the complaint.

In May 2011, the defendants renewed their prior motions pursuant to CPLR 2221 to dismiss the complaint pursuant to CPLR 3126 (3) on the ground that the plaintiff has failed to comply with the Court's orders to retain counsel, and to complete discovery. By order dated January 23, 2012, the undersigned dismissed the complaint with prejudice finding that the plaintiff's failure to obtain counsel was willful and contumacious, and that "[t]he parties appeared at compliance conferences on July, 22, 2010 and July 29, 2010, wherein plaintiff reported his inability to retain representation and that he had not obtained a copy of his legal file from prior counsel. Prior to the next scheduled conference on October 28, 2010, defendants submitted the instant motions. In opposition, plaintiff concedes that he has failed to retain new counsel."

The plaintiff now brings this motion, through an newly retained attorney, to renew and/or reargue the defendants' prior motions, or to vacate the order dismissing the complaint. In support of the motion,

the plaintiff submits the affirmation of his attorney, his affidavit, a copy of the order dated January 23, 2012, a copy of a "Notice of Affidavit in Opposition" regarding the prior motions to dismiss, and an affirmation of merit from Henry Michael Rinder, M.D. (Dr. Rinder). Initially, the Court notes that Dr. Rinder is licensed to practice medicine in Connecticut, and that an affidavit is required in these matters (CPLR 2106). However, the error is not fatal and Dr. Rinder's affidavit, submitted in the plaintiff's reply, will be considered herein (***Brightly v Dong Liu***, 77 AD3d 874, 910 NYS2d 114 [2d Dept 2010]; ***Arkin v Resnick***, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]).

To the extent that the plaintiff seeks leave to reargue, the moving papers fail to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in reaching its determination (*see* ***Saccomagno v City of New York***, 29 AD3d 979, 814 NYS2d 880 [2d Dept 2006]; ***Gellert & Rodner v Gem Community Mgt.***, 20 AD3d 388, 797 NYS2d 316 [2d Dept 2005]; ***McGill v Goldman***, 261 AD2d 593, 691 NYS2d 75 [2d Dept 1999]; ***Foley v Roche***, 68 AD2d 558, 418 NYS2d 588 [1st Dept 1979]).

That branch of the plaintiff's motion which constitutes a motion for leave to renew must be based on new or additional facts "not offered on the prior motion that would change the prior determination" and "shall contain a reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]; *see* ***Ramirez v Khan***, 60 AD3d 748, 874 NYS2d 257 [2d Dept 2009]; ***Lardo v Rivlab Transp. Corp.***, 46 AD3d 759, 848 NYS2d 337 [2d Dept 2007]). While a court may grant renewal upon facts known at the time of the original motion, leave to renew should be denied when the moving party fails to offer a reasonable excuse for not submitting such new facts on the prior motion (*see* ***Sobin v Tylutki***, 59 AD3d 701, 873 NYS2d 743 [2d Dept 2009]; ***Boakye-Yiadom v Roosevelt Union Free School Dist.***, 57 AD3d 929, 871 NYS2d 314 [2d Dept 2008]; ***Worrell v Parkway Estates, LLC***, 43 AD3d 436, 840 NYS2d 817 [2d Dept 2007]; ***Gohrig v Porcelli***, 17 AD3d 314, 791 NYS2d 835 [2d Dept 2005]; ***Hart v City of New York***, 5 AD3d 438, 772 NYS2d 574 [2d Dept 2004], *lv denied* 3 NY3d 601, 782 NYS2d 404 [2004]), as it is "not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" or who failed to assert a legal theory due to a mistaken "assumption that what was submitted was adequate" (***Matter of Weinberg***, 132 AD2d 190, 210, 522 NYS2d 511 [1st Dept 1987], *lv dismissed* 71 NY2d 994, 529 NYS2d 277 [1988]; *see* ***Castillo v 711 Group, Inc.***, 55 AD3d 773, 866 NYS2d 321 [2d Dept 2008]; ***Hlenski v City of New York***, 51 AD3d 974, 858 NYS2d 789 [2d Dept 2008]; ***Hart v City of New York***, *supra*).

Here, the Court notes that its order dated January 23, 2012 indicates that the prior motions to dismiss (# 018, # 019, # 020, # 021) were unopposed by the plaintiff. In his affirmation in support of this motion, the attorney for the plaintiffs contends that the plaintiff submitted opposition papers which were not considered by the Court in rendering its decision. He notes that the plaintiff submitted an affidavit in opposition erroneously labeled a "Notice of Affidavit in Opposition," that the Court rejected the affidavit because a filing fee was not paid, and that an affidavit in opposition does not require a filing fee. A review of the computerized records maintained by the Court reveals the truth of these contentions.

The requirement that a motion for leave to renew, based upon newly discovered facts, is a flexible one, and a court may, in its discretion, grant renewal upon facts known to the moving party at

the time of the original motion (***Petsako v Zweig***, 8 AD3d 355, 777 NYS2d 765 [2d Dept 2004]; ***Sorto v South Nassau Community Hosp.***, 273 AD2d 373, 710 NYS2d 910 [2d Dept 2000]; ***Gadson v New York City Hous. Auth.***, 263 AD2d 464, 691 NYS2d 914 [2d Dept 1999]). The Court finds that the plaintiff has submitted new or additional facts and a reasonable justification for the failure to present such facts on the prior motion. Accordingly, the plaintiff's motion to renew is granted.

In his affirmation herein, the plaintiff swears that he made a concerted effort to obtain counsel before this action was dismissed. He states that in every filing and at every appearance he expressed his fervent desire and intent to retain competent counsel, that the process of finding representation was not a simple one, and that "[s]ome law firms declined taking this case in favor of referring the case to another larger firm ... [or] were discouraged by the two (2) charging liens ..." In his affidavit in opposition to the prior motions to dismiss, the plaintiff essentially swears to the same facts as above. In addition, he avows that "[m]any prospect (*sic*) laws firms have been contacted to potentially take over prosecution of this case. The release of any information on the identity of the firms contacted, the exact number of firms contacted ... is subject to privileged communication."

The Court finds that the plaintiff's affidavits are conclusory and self-serving, and they do not contain evidence that he acted in good faith in attempting to obtain counsel to prosecute this action and to proceed with discovery. Accordingly, the Court adheres to its prior determination and denies the plaintiff's renewed motion.

To the extent that the plaintiff is entitled to seek to vacate the order dated January 23, 2012, the Court finds that the plaintiff has failed to establish his right to such relief. A court may relieve a party from a judgment or order entered against it if said party demonstrates "excusable default" and moves for vacatur within one year of after service of a copy of said judgment or order (CPLR 5015 [a] [1]). Case authorities have held that excusable default within the contemplation of the statute requires a showing of a reasonable excuse for the movant's default and a meritorious claim or defense *(see* ***Bank of New York v Segui***, 42 AD3d 555, 840 NYS2d 408 [2d Dept 2007]). The determination of what constitutes a reasonable excuse is left to the sound discretion of the court (***Khanal v Sheldon***, 74 AD3d 894, 904 NYS2d 543 [2d Dept 2010]; ***Scarlett v McCarthy***, 2 AD3d 623, 768 NYS2d 342 [2d Dept 2003]; ***Darrell v Yurchuk***, 174 AD2d 557, 572 NYS2d 643 [2d Dept 1991]). Here, the subject order was not determined on the plaintiff's default in appearing or opposing the motions to dismiss. Nonetheless, the Court will consider this branch of the plaintiff's motion. Assuming for the sake of argument that the plaintiff has shown that he had a reasonable excuse for his "default," the Court finds that he has failed to establish that he has a meritorious claim.

In his affidavit of merit, Dr. Rinder states that the decedent was diagnosed with myelofibrosis, which requires that a patient's uric acid levels be closely monitored, and that "the records indicate that the defendants departed from the accepted standard of care when they failed to test [the decedent's] uric acid level." He opines that "[h]ad uric acid testing been done and demonstrated hyperuricema, the standard would have been to treat [the decedent] with hydration and Allopurinol ..." Dr. Rinder further states that "my review of the records also indicated that [the decedent] had a very low platelet count (less than 20,000/uL) and began bleeding prior to his arrival in Long Island Jewish Medical Center ..." He opines that "[i]t is the standard of care with regard to myelofibrosis patients who suffer from bleeding

and low platelet counts to urgently (within 2-6 hours) receive platelet transfusions," and that "these defendants" departed from that standard of care.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Wexelbaum v Jean***, 80 AD3d 756, 915 NYS2d 161 [2d Dept 2011]; ***Geffner v North Shore Univ. Hosp.***, 57 AD3d 839, 871 NYS2d 617 [2d Dept 2008]; ***Perez v St. John's Episcopal Hosp. S. Shore***, 19 AD3d 389, 796 NYS2d 399 [2d Dept 2005]; ***Williams v Sahay***, 12 AD3d 366, 783 NYS2d 664 [2d Dept 2004]; ***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503 [2nd Dept 1998], *app denied* 92 NY2d 818, 685 NYS2d 420 [1999]). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see* ***Alicea v Ligouri***, 54 AD3d 784, 864 NYS2d 462 [2d Dept 2008]; ***Lyons v McCauley***, 252 AD2d 516, 675 NYS2d 375 [2d Dept 1998]; ***Prete v Rafla-Demetrious,*** 224 AD2d 674, 638 NYS2d 700 [2d Dept 1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see* ***Mosberg v Elahi***, 80 NY2d 941, 590 NYS2d 866 [1992]; ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Sushchenko v Dyker Emergency Physicians Serv., P.C.***, 86 AD3d 638, 929 NYS2d 492 [2d Dept 2011]; ***Dunn v Khan***, 62 AD3d 828, 880 NYS2d 653 [2d Dept 2009]; ***Lyons v McCauley,*** 252 AD2d 516, 517, 675 NYS2d 375 [2d Dept 1998], *app denied* 92 NY2d 814, 681 NYS2d 475 [1999]).

Here, Dr. Rinder's affidavit fails to indicate which medical records he reviewed in rendering his expert opinion, and it does not include any support for his conclusory statements regarding the level at which a low platelet count would require platelet transfusions. In addition, his opinion that the failure to conduct uric acid testing was a departure is speculative, as he does not indicate that the decedent was ever diagnosed with hyperuricema which would have been treated differently if said testing had been conducted. More importantly, Dr. Rinder's affidavit does not contain an opinion that the alleged departures were a competent producing cause of the decedent's injuries (***Thapt v Lutheran Med. Ctr.***, 89 AD3d 837, 932 NYS2d 346 [2d Dept 2011]; ***Arkin v Resnick***, 68 AD3d 692, 890 NYS2d 95 [2d Dept 2009]; ***Rappaport v North Shore Univ. Hosp.***, 60 AD3d 1029, 876 NYS2d 125 [2d Dept 2009]). Absent an affidavit of merit in which every element of medical malpractice, including proximate cause, is established the Court is constrained to deny the motion to vacate the subject order (*see* ***Salch v Paratore***, 60 NY2d 851, 470 NYS2d 138 [1983]; ***Stukas v Streiter***, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011]; ***Iazzetta v Vicenzi***, 243 AD2d 540, 663 NYS2d 109 [2d Dept 1997]; ***Schiraldi v Brooklyn Cumberland Hosp.***, 70 AD2d 911, 417 NYS2d 297 [2d Dept 1979]).

Accordingly, the plaintiff's motion is granted to the extent of granting leave to renew and, upon renewal, the Court adheres to its original determination, and is otherwise denied.

Dated: 1/25/13

A.J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**