

Mack-Botwe v Baylis
2013 NY Slip Op 32763(U)
June 21, 2013
Sup Ct, Westchester County
Docket Number: 50503/12
Judge: Robert M. DiBella
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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

-----X
PATSY MACK-BOTWE,

Plaintiff,

-against-

**DECISION AND ORDER
Motion Seq. Nos. 001-006**

BARRY M. BAYLIS, M.D., BALASA L. PRASAD, M.D., MT. VERNON ANESTHESIA, ANESTHESIA GROUP AT MT. VERNON HOSPITAL, AARON E. ROTH, M.D., SRI CONJEEVARAM, M.D., MID WESTCHESTER SURGICAL ASSOCIATES, THE MOUNT VERNON HOSPITAL,

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Defendants.

-----X
DIBELLA, J.

The following papers were read and considered on these motions by defendants, *inter alia*, to dismiss the Complaint for plaintiff's failure to timely serve the Complaint after due demand:

- 1) Notice of Motion (seq. 001); Affirmation in Support of John Polinsky, Esq.; Exhibits A-H;
- 2) Notice of Cross Motion (seq. 004) and In Opposition to Defendant Balasa L. Prasad and Anesthesia Group of Mt. Vernon Hospital's Motion to Dismiss; Affirmation of Donald B. Rosenberg, Esq.; Affidavit of Merit; Exhibits A-F;
- 3) Affirmation in Opposition to Plaintiff's Cross Motion and in Further Support of Defendant's Motion of John Polinsky; Exhibit A;
- 4) Affirmation in Support of John Polinsky;
- 5) Notice of Motion (seq. 002); Affirmation in Support of Jennifer K. Vitale, Esq.; Exhibits A-J;
- 6) Notice of Cross Motion (seq. 005) and In Opposition to Defendant Aaron E. Roth, M.D.'s Motion to Dismiss; Affirmation of Donald B. Rosenberg, Esq.; Affidavit of Merit; Exhibits A-E;
- 7) Reply Affirmation in Support of Defendant Aaron E. Roth, M.D.'s Motion and In Opposition to Plaintiff's Cross Motion of David A. Mayeri, Esq.; Exhibits A-B; Affidavit of Aaron E. Roth, M.D.;
- 8) Plaintiff's Reply Affirmation in Support of Plaintiff's Cross Motion to Defendant Aaron E. Roth, M.D.'s Motion to Dismiss of Donald B. Rosenberg, Esq.;

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- 9) Notice of Motion (seq. 003); Affirmation of Deborah A. Dyckman, Esq.; Exhibits A–G; and
- 10) Notice of Cross Motion (seq. 006) and In Opposition to Defendant Barry M. Baylis, M.D., Sri Conjeeveram, M.D. and The Mt. Vernon Hospital's Motion to Dismiss; Affirmation of Donald B. Rosenberg, Esq.; Affidavit of Merit; Exhibits A–E.

In this medical malpractice action, defendants *inter alia* move, by separate motions, to dismiss the Complaint for plaintiff's failure to timely serve the Complaint following their demand thereof, pursuant to CPLR 3012(b), and for an order vacating the prior *ex parte* orders (Tolbert, J.) dated May 10, 2012 and August 21, 2012 granting extensions of time to serve process, pursuant to CPLR 2221(a). Plaintiff opposes the motions and cross-moves to compel defendants to accept her untimely complaint, pursuant to CPLR 3012(d). The motions are decided as set forth below.

Plaintiff alleges that she sustained personal injuries as a result of the medical malpractice and negligence of defendants in medical care, medical and anesthesia treatment, and hospital and surgical care rendered to plaintiff during a surgical hernia procedure performed on July 15, 2009 and during post-surgical care following the surgery through July 22, 2009.

Plaintiff commenced this medical malpractice action by filing the Summons with Notice with the Clerk's Office by electronic filing on January 13, 2012, nine days before the expiration of the Statute of Limitations. Plaintiff thereafter made two *ex parte* applications to the court (Tolbert, J.) for extensions of time in serving process, which were granted. Plaintiff's time to serve process was ultimately extended to December 19, 2012. Prior to that date, the defendants were all served with the Summons with Notice. On December

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21, 2012, counsel for defendants Balasa L. Prasad, M.D. and Anesthesia Group at Mt. Vernon Hospital filed a Notice of Appearance and Demand for a Complaint. Counsel for co-defendants Barry M. Baylis, M.D., Sri Conjeevaram, M.D. and Mt. Vernon Hospital also served an Amended Demand for Complaint on December 31, 2012. Counsel for co-defendant Aaron E. Roth, M.D. served his Demand for Complaint on December 14, 2012. Plaintiff served the complaint on January 29, 2013, approximately 19 days late, but prior to the return date of the within motions. Defendants Balasa L. Prasad and Anesthesia Group of Mt. Vernon Hospital filed their Answer on February 7, 2013. The other defendants have not yet answered. A preliminary conference in this matter was scheduled for February 13, 2013, but was adjourned. The next scheduled date for the preliminary conference is July 23, 2013.

Pursuant to CPLR 3012(b), when a summons is served without a complaint, a defendant may serve a written demand for the complaint within the time provided for an appearance and service of the complaint shall be made by plaintiff within 20 days after service of the demand. CPLR 3012(b) also provides that the court, upon motion, may dismiss the action if service of the complaint is not made as provided therein. Subsection (d) of CPLR 3012 provides that the court may extend a party's time to plead or compel acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for the delay.

To avoid dismissal for failure to timely serve a complaint, a plaintiff generally must demonstrate both a reasonable excuse for the delay in serving the complaint and a

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meritorious cause of action. See *Pristavec v. Galligan*, 32 AD3d 834 (2d Dep't 2006). "The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the Supreme Court." *Id.* at 834–35. In exercising its discretion, a court should consider all relevant factors, including the extent of the delay, the prejudice to the opposing party, and the lack of an intent to abandon the action. See *Aquilar v. Nassau Health Care Corp.*, 40 AD3d 788, 789 (2d Dep't 2007). In some cases, where the delay is minimal, a showing of a reasonable excuse and a meritorious defense is not required. See *Mills v. Niagara Mohawk Power Corp.*, 216 AD2d 828 (3d Dep't 1995).

Defendants all raise the same arguments in support of their motions to dismiss the complaint. They contend that plaintiff failed to timely serve the complaint following demand thereof. Defendant Aaron E. Roth, M.D. also makes an additional argument that plaintiff has failed to show a meritorious action as to him because the expert affidavit asserts departures from accepted medical practices from the anesthesiologist and does not allege any negligent acts by Dr. Roth, a general surgeon.

The court finds that, in this case, plaintiff's delay in serving the complaint was not prolonged or extensive, in that it was served approximately 19 days late. See, e.g., *Rait v. Bauer*, 121 AD2d 704 (2d Dep't 1986) (3 week delay); *Lehigh Val. R.R. Co. v. North Am. Van Lines*, 25 AD2d 923 (3d Dep't 1996) (12 day delay). Further, plaintiff has presented both a reasonable excuse for the delay and has demonstrated a meritorious claim. Plaintiff's counsel has indicated that the delay in serving the complaint in January 2013 resulted from his medical condition and certain procedures he was required to undergo.

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As to the showing of a meritorious claim, plaintiff has submitted an Affidavit of Merit from an anesthesiologist who indicates that, after review of certain medical records, it is his professional opinion that the anesthesiologist who performed the medical procedure departed from accepted medical standards and that the departure was the proximate cause of plaintiff's injuries. (See Affidavit of Merit ¶ 5). Moreover, defendants have not adequately demonstrated that they would suffer any significant prejudice from allowing the late service of plaintiff's complaint.

However, as to defendant Dr. Roth, plaintiff has not shown a potentially meritorious claim. See *Rose v. Our Lady of Mercy Med. Ctr.*, 268 AD2d 225 (1st Dep't 2000) (where the expert affidavit of merit established a meritorious claim against some defendants for certain surgeries, but it did not establish merit against one defendant doctor who was not mentioned in the expert affidavit). Dr. Roth is a general surgeon and undertook to perform a hernia repair for plaintiff. Although anesthesiology services were provided to plaintiff during the surgery, Dr. Roth did not participate in, direct, control or manage the anesthesiology services which were administered to plaintiff during the procedure. The expert witness in his report specifically lists the acts of the *anesthesiologist* as the negligent acts which caused plaintiff's injuries and fails to mention any acts by Dr. Roth which caused plaintiff's injuries. Affidavit of Merit ¶ 3-5.

Plaintiff's supporting cases are inopposite because the issue is not one of competency of the expert to testify, but a matter of the expert not saying anything about Dr. Roth's alleged malpractice by his acts. See, e.g., *Julien v. Physician's Hosp.*, 231

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AD2d 678 (2d Dep't 1996); *Bodensiek v. Schwatz*, 292 AD2d 411 (2d Dep't 2002). Plaintiff has also provided no support that defendant Dr. Roth was involved, especially in light of plaintiff's alleged extensive investigation conducted of the parties involved (which counsel cited as one reason for the two requested extensions of time to serve process).

Thus, in view of the short delay, the showing of a meritorious claim, a lack of prejudice, and based on the public policy in favor of resolving cases on the merits, the motions to dismiss by defendants Balasa L. Prasad, M.D. and Anesthesia Group at Mt. Vernon Hospital (seq. 001) and Barry M. Baylis, M.D., Sri Conjeevaram, M.D. and The Mount Vernon Hospital (seq. 003) are denied and plaintiff's cross motions to compel these defendants to accept her complaint (seqs. 004 and 006) are granted. *See, e.g., Aquilar*, 40 AD3d at 788; *Pristavec*, 32 AD3d at 834; *Klosterman v. Federal Express Co.*, 271 AD2d 492 (2d Dep't 2000); *Rait v. Bauer*, 121 AD2d 704 (2d Dep't 1986). As to defendant Dr. Roth, his motion to dismiss (seq. 002) is granted and plaintiff's cross motion as to him (seq. 005) is denied.

The court does not find defendants' reliance on *Egan v. Federated Department Stores*, 108 AD2d 718 (2d Dep't 1985) compelling, as in that case, there was a lengthy delay of over nine months in failing to serve the complaint after it was due and over four months after the original return date of defendant's motion to dismiss. Further, the plaintiff in that case failed to submit an affidavit of merit and thus did not demonstrate a meritorious claim.

Defendants also move to vacate the prior *ex parte* orders (Tolbert, J.) dated May 10,

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2012 and August 21, 2012, pursuant to CPLR 2221(a).

Pursuant to CPLR 2221(d), a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion and shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. A motion to reargue is left to the sound discretion of the court and “may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision.” *Carrillo v. PM Realty Group*, 16 AD3d 611 (2d Dep’t 2005). A motion to renew, pursuant to CPLR 2221(e), “shall be based upon new facts not offered on the prior motion that would change the prior determination” and “shall contain reasonable justification for the failure to present such facts on the prior motion.”

First, the court notes that, in contravention of CPLR 2221(d)(1) and (e)(1), defendants failed to specifically identify whether the motion was one for renewal or reargument.¹ If the motion is being made as to both renewal and reargument, CPLR (f) provides that the motion “shall identify separately and support separately each item of relief sought.”

Second, in any event, regardless of whether the motions are one for renewal and/or reargument, this portion of the motions is denied. Defendants have not shown that the court overlooked or misapprehended the facts or law in making the prior determinations,

¹ Nowhere in defendants’ motion papers are the denominations of the words “renew” or “reargue” used in the portion of the motions which seek vacatur under CPLR 2221(a).

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or that there are new facts that would change the prior determination.

Defendants contend that the previous *ex parte* orders should be vacated because plaintiff failed to show why service could not be effectuated upon the parties with the Summons with Notice.

A motion to extend the time for service of process pursuant to CPLR 306-b may be granted upon “good cause shown *or* in the interest of justice.” *Moundrakis v. Dellis*, 96 AD3d 1026 (2d Dep’t 2012) (emphasis added), *quoting Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 104–05 (2001). The plaintiff’s ability or inability to demonstrate reasonably diligent efforts in attempting to effect proper service of process upon the defendants relates to the “good cause” prong only. *See, e.g., Moundrakis*, 96 AD3d at 1027. However, in deciding whether to grant an extension of time for service of process under the “interest of justice” standard, “the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the potentially meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant.” *Id.* (internal quotations and citations omitted). Further, as stated in *Nicodene v. Byblos Rest., Inc.*, 98 AD3d 445 (1st Dep’t 2012), “[a]lthough defendants cite plaintiff’s lack of diligence in commencing this action, diligence or lack thereof is but one of several factors that may be considered by a court under an interest of justice analysis.”

In light of the stated reasons for the requests of extensions of time (i.e. plaintiff was

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awaiting a medical expert's report regarding liability of the prospective defendants), the fact that the Summons with Notice was filed only a few days before the expiration of the Statute of Limitations, the potentially meritorious nature of the cause of action, the promptness of plaintiff's request for the extensions of time, and the lack of demonstrated prejudice to the defendants, vacatur of the *ex parte* orders extending the time for service of process is not warranted and the portions of defendants' motions which seek vacatur of such orders are denied.

Accordingly, it is

Ordered that defendants Balasa L. Prasad, M.D. and Anesthesia Group at Mt. Vernon Hospital's motion (motion seq. no. 001) is denied in its entirety and plaintiff's cross motion (motion seq. no. 004) to compel these defendants to accept service of the complaint is granted; and it is further

Ordered that defendant Aaron E. Roth, M.D.'s motion (motion seq. no. 002) to dismiss the complaint is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant, and plaintiff's cross motion (motion seq. no. 005) to compel this defendant to accept service of the complaint is denied; and it is further

Ordered that the action is severed and continued against the remaining defendants; and it is further

Ordered that defendants Barry M. Baylis, M.D., Sri Conjeevaram, M.D. and The

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Mount Vernon Hospital's motion (motion seq. no. 003) is denied in its entirety and plaintiff's cross motion (motion seq. no. 006) to compel these defendants to accept service of the complaint is granted; and it is further

Ordered that defendants Barry M. Baylis, M.D., Sri Conjeevaram, M.D. and The Mount Vernon Hospital shall serve and file an Answer within 20 days; and it is further

Ordered that, as previously scheduled, counsel shall appear in the Preliminary Conference Part of the Westchester County Courthouse on July 23, 2013 at 9:30 AM.

This is the Decision and Order of the Court.

Dated: June 21, 2013
White Plains, New York


Hon. Robert DiBella, JSC

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