

**Prince-Barry v Center for Women's Reproductive
Care at Columbia Univ.**

2013 NY Slip Op 33520(U)

November 8, 2013

Supreme Court, New York County

Docket Number: 401193/12

Judge: Martin Shulman

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

PRESENT: HON. MARTIN SHULMAN, J S C
Justice

PART 1

Index Number : 401193/2012
PRINCE-BARRY, EMILEY
vs.
CENTER FOR WOMEN'S
SEQUENCE NUMBER : 004
CONFIRM/REJECT REFEREE REPORT

INDEX NO. 401193/12
MOTION DATE _____
MOTION SEQ. NO. 004

The following papers, numbered 1 to _____, were read on this motion to ~~not~~ confirm referee's report


Notice of Motion/ Order to Show Cause — Affidavits — Exhibits <u>A-m</u>	No(s) <u>1</u>
Answering Affidavits — Exhibits	No(s) <u>2</u>
Replying Affidavits _____	No(s) <u>3</u>

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED
NOV 14 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Nov. 8, 2013



HON. MARTIN SHULMAN, J S C, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
EMILEY PRINCE-BARRY,

Plaintiff,

Index No. 401193/12

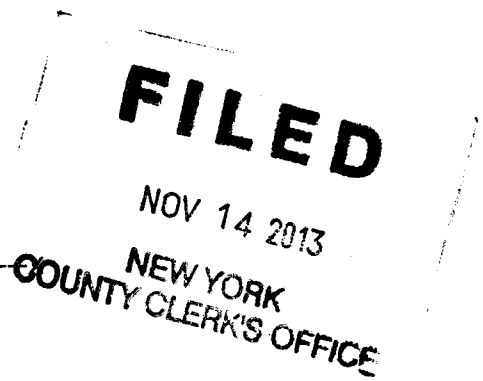
-against-

Decision & Order

CENTER FOR WOMEN'S REPRODUCTIVE
CARE AT COLUMBIA UNIVERSITY, NEW
YORK PRESBYTERIAN HOSPITAL,
COLUMBIA UNIVERSITY MEDICAL CENTER,
JEFFREY WANG, M.D., and MARK V.
SAUER, M.D.,

Seq. 001, 002 & 004

Defendants.



Hon. Martin Shulman:

Motion sequence number 004 is consolidated for disposition with prior motion sequences 001 and 002. This court previously issued an interim order dated March 15, 2013¹ (the "interim order") in connection with motion sequences 001 and 002, which: (1) denied plaintiff Emiley Prince-Barry's ("plaintiff") motion (seq. 001) for a default judgment against defendant Jeffrey Wang, M.D. ("Wang"); (2) referred the issue of whether Wang was properly served to a special referee to hear and report (seq. 001); and (3) held the final determination of the following in abeyance pending receipt of the special referee's report and recommendations: a) the issue of whether plaintiff would be given leave to renew her motion for a default judgment (seq. 001); b) Wang's cross motion for an order dismissing this action (seq. 001); and c) plaintiff's motion for an order pursuant to CPLR §306-b extending her time to serve Wang (seq. 002).

¹ The relevant factual background summarized in the interim order is incorporated herein and will not be repeated.

In motion sequence 004, Wang now moves to confirm the referee's report and recommendation rendered on the record on June 19, 2013 (Gammerman, J.H.O.), which found that service upon Wang was not properly effectuated and as a result this court lacks personal jurisdiction over him. Based upon the referee's findings, Wang's motion also seeks final determination of the issues previously held in abeyance in motion sequences 001 and 002 (i.e., granting his cross-motion to dismiss and denying plaintiff leave to renew her motion for a default judgment and an extension of time to serve Wang).

The portion of Wang's motion to confirm the special referee's report and recommendations is granted. Despite plaintiff's objections to the unconventional and at times terse manner in which the special referee conducted the traverse hearing, a review of the transcript of the proceedings (Exh. B to Motion, p. 3, lines 13-21) reveals that Wang testified upon examination by the referee that he does not and has not ever lived at 304 West 117th Street, Apt. 2-F, New York, New York, the address where plaintiff's process server's affidavit states that service was effectuated. Upon examination by plaintiff's counsel, Wang further testified that he has never been in that building. *Id.* at p. 4, lines 5-6.

As the trier of fact, the special referee apparently found Wang's testimony credible and concluded that he had not been served at his "actual place of business, dwelling place or usual place of abode" as CPLR §308(2) requires. Service having been determined to be improper, this court lacks personal jurisdiction over Wang and his cross-motion (seq. 001) to dismiss this action against him must be granted. As a

result, the issue of plaintiff's right to renew her default judgment motion against Wang is denied as moot.

Turning to the final determination of plaintiff's motion for an extension of time to serve Wang (seq. 002), as discussed in this court's interim order, CPLR §306-b provides that where a defendant is not served within 120 days of an action's commencement the court must dismiss the action without prejudice, or may extend the time for service "upon good cause shown or in the interest of justice." The legislature in promulgating this statute provided the courts with two bases upon which to extend a plaintiff's time to serve a defendant. *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 (2001). The first basis, upon good cause shown, requires a showing of "reasonable diligence" in attempting service. *Id.*

The second basis, in the interest of justice, does not mandate a showing of reasonable diligence, but does require "a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties." *Id.* at 105. The interest of justice ground is a broader standard which permits late service necessitated by "mistake, confusion, or oversight, so long as there is no prejudice to defendant." *Id.* (internal quotation marks and citation omitted). Among the factors which a court may consider in determining whether to exercise its discretion and grant an extension in the interest of justice are the plaintiff's diligence, the expiration of the statute of limitations, the merits of the action, the length of delay in service, how promptly plaintiff sought the extension of time to serve and whether the defendant will be prejudiced. *Id.* at 105-106. No single factor is controlling. *Id.* at 106. "Another specific factor that has been identified is whether the defendant 'had actual notice of

the claim and/or of the action.' (citations omitted).” *Broshears v 285 Driggs Ave. LLC*, 41 Misc3d 1203(A), 2013 WL 5357050, at *4 (Sup Ct, Kings County, 2013)

Here, plaintiff fails to establish good cause to warrant granting an extension of time to serve Wang. The only effort plaintiff made to determine where to serve Wang was to check a single web site, which listed an incorrect address. No other steps were taken to verify the accuracy of that address. As such, this court cannot find that plaintiff acted with reasonable diligence. See, e.g., *Greenpoint Mtge. Funding, Inc. v Congregation Chasiday Sq. of Boro Park*, 34 Misc3d 1220(A), 950 NYS2d 491 (Sup Ct, Kings County, 2012) (good cause not established where plaintiff attempted to serve defendant at the wrong address).

Nor does plaintiff establish that an extension of time is warranted in the interest of justice. Despite plaintiff's promptly having moved to extend her time to serve Wang² and despite the fact that the statute of limitations has now expired and any subsequently commenced action against Wang will be time barred, she fails to sufficiently establish the merits of her claim and that Wang will not be prejudiced by the extension.

Wang argues that plaintiff's failure to submit an expert's affidavit to establish the merits of her claim should preclude her request for an extension of time to effectuate service. See, e.g., *Saxon v Finkelstein*, 34 Misc3d 1206(A), 946 NYS2d 69 (Sup Ct, Kings County, 2012) (plaintiff granted an extension of time to effectuate service of process where, *inter alia*, she submitted a physician's affirmation attesting to case's

² Plaintiff brought her motion within two (2) weeks of learning via Wang's cross-motion in sequence 001 that he contested service.

merits). It is unnecessary for this court to address the merits of Wang's argument because, as this court previously observed in its interim order addressing plaintiff's default judgment motion, plaintiff relies upon a boilerplate complaint which, though verified by her, lacks any specific facts to establish her causes of action or even the injuries suffered. *See Beaton v Transit Facility Corp.*, 14 AD3d 637, 637 (2d Dept 2005) (conclusory statements alleging negligence which failed to set forth the facts constituting the alleged negligence were insufficient to support a default judgment).

Similarly, plaintiff's affidavit of merit in support of her default judgment motion fails to allege that Wang departed from accepted medical standards, seemingly asserting only a lack of informed consent claim. However, no facts are alleged demonstrating that a reasonable person in plaintiff's circumstances would not have consented to the treatment Wang rendered if advised of its risks, benefits and any alternatives. *See Public Health Law § 2805-d (1), (3); Anderson v Wiener*, 100 AD2d 919, 920 (2d Dept 1984). Plaintiff further fails to state that she would not have undergone any specific fertility treatment if properly informed or that she would have chosen any alternative treatment. Finally, plaintiff's supporting affidavit fails to detail the particular injuries she suffered.

With respect to prejudice, Wang contends he had no notice of this action until after plaintiff moved for a default judgment and co-defendants' counsel, as a courtesy, informed him of the action and motion. *See Wang Aff sworn to January 25, 2013*, at Exh. L to Motion. Plaintiff attempts to establish that Wang had notice of the action by virtue of his being united in interest with the co-defendants. However, Wang avers that he was no longer employed by co-defendant Trustees of Columbia University in the City

of New York (sued herein as Columbia University) at the time plaintiff purportedly effectuated service, nor did he still have attending privileges at co-defendant New York Presbyterian Hospital at that time. *Id.*

Among the factors to consider in assessing prejudice is whether the defendant had notice of the claim. For instance, in *Woods v M.B.D. Community Hous. Corp.*, 90 AD3d 430 (1st Dept 2011), a procedurally similar case, the plaintiff failed to sustain his burden at a traverse hearing. As in the instant case, *Woods* was timely commenced but the plaintiff's claim would be extinguished without an extension since the statute of limitations had expired. The plaintiff there was granted an extension of time to serve the defendant in the interest of justice where, unlike in the case at bar, merit was demonstrated by the plaintiff's deposition testimony and prejudice to the defendant was mitigated due to the fact that defendant or its insurer had been on notice of the incident surrounding plaintiff's personal injury for more than two years prior to the action's commencement, counsel had engaged in preliminary settlement negotiations, and plaintiff had provided his medical records and photographs of the accident area. *Id.* at 430-431. See also, *Nicodene v Byblos Rest., Inc.*, 98 AD3d 445 (1st Dept 2012); and *Broshears, supra* (prejudice inferred from lack of notice of claim).

By contrast, Wang had no such notice of plaintiff's claim or this action. Combined with plaintiff's failure to establish merit, this court concludes that Wang will be prejudiced if an extension of time is granted. This court has considered the parties' remaining arguments and finds them lacking in merit. For all of the foregoing reasons, it is

ORDERED that defendant Wang's motion (seq. 004) to confirm the Hon. Ira Gammerman's report and recommendations of June 19, 2013 is granted; and it is further

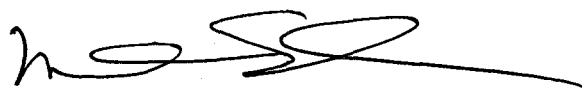
ORDERED that, upon confirmation of the referee's report and recommendations, defendant Jeffrey Wang, M.D.'s cross-motion to dismiss (seq. 001) is granted, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that, upon confirmation of the referee's report and recommendations and dismissal of the action as to defendant Wang, plaintiff's request to renew her motion for a default judgment against said defendant (seq. 001) is denied as moot;

ORDERED that plaintiff Emiley Prince-Barry's motion for an order extending her time to serve defendant Jeffrey Wang, M.D. (seq. 002) is denied.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for plaintiff and Wang.

Dated: New York, New York
November 8, 2013



Hon. Martin Shulman, J.S.C.