

Gutierrez v Albert Einstein Col. of Medicine
2014 NY Slip Op 30758(U)
February 14, 2014
Sup Ct, Bronx County
Docket Number: 304939/12
Judge: Douglas E. McKeon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

-----X

MILDRED GUITERREZ MELISE and RICARDO MELISE,

Plaintiffs,

- against -

INDEX NO. 304939/12

ALBERT EINSTEIN COLLEGE OF MEDICINE,
et al.,

DECISION/ORDER

Defendants.

-----X

HON. DOUGLAS E. MCKEON

On June 5, 2012, plaintiffs commenced this medical malpractice action by filing a summons with notice with the Bronx County Clerk's Office. In December 2012 defendants Montefiore Medical Center and Susan Bellinson filed a notice of appearance and demanded service of a complaint. Those defendants subsequently received a verified complaint that was notarized on January 22, 2013.

Montefiore and Bellinson seek dismissal of the action as against them on the grounds that plaintiffs failed to serve them with the summons with notice within 120 days of the action's commencement (see CPLR 306-b), and that plaintiffs failed to serve the complaint within 20 days of the demand for the complaint (see CPLR 3012). The moving defendants, among other things, note that the action was commenced on June 5, 2012 and plaintiffs therefore had until October 3, 2012 to effect service of that process (see CPLR 306-b), yet plaintiffs did not serve the moving defendants until

approximately December 6, 2012.¹ The moving defendants also note that no affidavit of service has been filed with the court or provided to them.

Plaintiffs oppose the motion, and cross-move to extend the time within which to serve the summons with notice on the moving defendants and for a default judgment against Albert Einstein College of Medicine. With respect to their request for an extension of time to serve the summons with notice, plaintiffs assert that they "retained a licensed New York State process server who it appears may have made a number errors in serving the defendants based on the allegations made by the [moving defendants]." Plaintiffs also assert that they "have tried to obtain an affidavit of service from the process server who has repeatedly failed to provide a copy. In addition, the process server has also [] failed to file a copy of an affidavit of service." Pointing to the purported efforts to serve the moving defendants, as well as the expiration of the statute of limitations, plaintiffs contend that an extension is warranted under either the "good cause" or "interest of justice" standard in CPLR 306-b.

CPLR 306-b states that "[s]ervice of the ... summons with notice ... shall be made within one hundred twenty days after the filing of the ... summons with notice If service is not made upon a defendant within the time period provided in this section, the court, upon motion, *shall* dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" (emphasis supplied). Here, it is undisputed that service of the summons with notice was made on the moving defendants approximately 60 days after the 120-day period

¹Apparently none of the other defendants was served with the summons with notice.

expired. Therefore, the burden lies with plaintiffs to demonstrate either good cause for an extension of time to effect service, or that such an extension is warranted in the interest of justice.

Plaintiffs are not entitled to an extension under the good cause standard. A good cause extension requires a showing of reasonable diligence in attempting to effect service upon a defendant (*Henneberry v Borstein*, 91 AD3d 493, 496 [2012]). Plaintiffs have offered no evidence in admissible form, such as an affidavit from their process server,² demonstrating the efforts made to effect service of the summons with notice on the moving defendants. Thus, no showing of reasonable diligence was made.

Moreover, plaintiffs have failed to demonstrate that an extension should be afforded in the interest of justice. In determining a request for an interest of justice extension, 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 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 (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]).

Here, a couple of factors weigh in plaintiffs' favor: the expiration of the statute of limitations and the relatively modest length of delay in service of the summons with notice. But other factors weigh in favor of the moving defendants: the lack of diligence

²The court notes that plaintiffs neither identified the process server nor submitted any documentation evincing that they hired a process server.

on plaintiffs' part to effect timely service,³ the absence of *any* showing by plaintiffs of a meritorious cause of action against the moving defendants, and the lack of promptness of plaintiffs' request for an extension of time -- plaintiffs requested the extension approximately eight months after the 120-day period expired. On balance, the court finds that the interest of justice does not warrant an extension. While the court is sensitive to the policy favoring the resolution of actions on their merits, the court is also mindful of the need to prevent non-meritorious medical malpractice claims from burdening medical service providing defendants and the court system.⁴

In light of the court's conclusion that dismissal of the action as against the moving defendants is warranted under CPLR 306-b, the court need not and does not pass upon the moving defendants' alternate contention that the action should be dismissed based on plaintiffs' failure to serve timely the complaint (see CPLR 3012[b]).

That branch of plaintiffs' cross motion that seeks a default judgment against defendant Albert Einstein College of Medicine is denied without prejudice because there is no indication in plaintiffs' papers that the cross motion was served on that defendant. The court notes, however, that if plaintiffs elect to make a new motion against Albert Einstein College of Medicine for a default judgment, that motion should

³In addition to the lack of diligence on plaintiffs' part to effect service within the 120-day period of CPLR 306-b, plaintiffs only sought the extension after the moving defendants sought dismissal of the action (see Siegel, NY Practice § 63 [Connors 5th ed] ["The extension can be granted even after the expiration of the 120 days. The plaintiff's request for the extension can also take the form of a cross-motion made in opposition to the defendant's motion to dismiss for lack of timely service. But a plaintiff does well to seek the extension within the 120 days. Doing so may itself serve as some indication of diligence."]).

⁴The latter policy is reflected, among other places, in CPLR 3012-a (certificate of merit requirement).

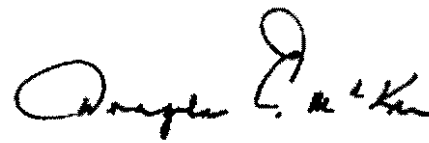
be supported by proper papers (see CPLR 3215[f]), including an affidavit of merit.

Accordingly, it is hereby ordered that the motion of defendants Montefiore Medical Center and Susan Bellinson for dismissal of the action is granted, and the clerk is directed to enter judgment dismissing the action as against them; and it is further,

Ordered that the cross motion of plaintiffs is denied in its entirety.

This constitutes the decision and order of the court.

Dated: February 14, 2014

A handwritten signature in cursive script, appearing to read "Douglas E. McKeon", written over a horizontal line.

DOUGLAS E. MCKEON, J.S.C.