

<b>Hobbins v North Star Orthopedics, P.L.L.C.</b>
2015 NY Slip Op 32688(U)
January 21, 2015
Supreme Court, Kings County
Docket Number: 2934/11
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

Index No.:2934/11  
Motion Date: 10-20-14

-----X  
VERNA HOBBSINS,

Plaintiff,

-against-

**DECISION/ORDER**

NORTH STAR ORTHOPEDICS, P.L.L.C., and PAUL  
ACKERMAN, M.D., "JOHN DOE # 1 through #6 being  
unknown named defendants,

Defendants.

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The following papers numbered 1 to 13 were read on these motions:

Papers:	Numbered
<b><u>Plaintiff's Motion to Renew and Reargue:</u></b>	
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits.....	1
Answering Affirmations/Affidavits/Exhibits.....	2
Reply Affirmations/Affidavits/Exhibits.....	
<b><u>Defendant Ackerman's Motion to Vacate and Restore:</u></b>	
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits.....	3
Answering Affirmations/Affidavits/Exhibits.....	4
Reply Affirmations/Affidavits/Exhibits.....	5
<b><u>Defendant Ackerman's Motion to Dismiss:</u></b>	
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits.....	6
Answering Affirmations/Affidavits/Exhibits.....	7
Reply Affirmations/Affidavits/Exhibits.....	8
<b><u>Defendant Ackerman's Motion to Confirm:</u></b>	
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits.....	9

Answering Affirmations/Affidavits/Exhibits.....	10
Reply Affirmations/Affidavits/Exhibits.....	11

**Plaintiff's Motion Pursuant to CPLR 306-b:**

Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits.....	12
Answering Affirmations/Affidavits/Exhibits.....	13
Reply Affirmations/Affidavits/Exhibits.....	

Upon the foregoing papers the motions are decided as follows:

In this medical malpractice action arising out of an occurrence that took place on July 9, 2008, five motions are before the Court, all of which are consolidated for disposition.

Plaintiff's motion to renew and reargue dated June 28, 2012 is **DENIED** in part and **GRANTED** in part. Contrary to plaintiff's contention, plaintiff's entire complaint was alleged upon information and belief. Indeed, the introductory paragraph states: "Plaintiff, by and through her attorneys G. WESLEY SIMPSON, P. C., as and for a Verified Complaint, complaining against the defendants, allege that upon **information and belief** as follows:" (*emphasis added*). A complaint alleged solely upon "information and belief" is insufficient to support the entry of a default judgment (*see, Henriquez v. Purins*, 245 A.D.2d 337, 338, 666 N.Y.S.2d 190, 191; *Zelnik v. Bidermann*, 242 A.D.2d 227, 662 N.Y.S.2d 19). Accordingly, plaintiff's motion to reargue is **DENIED** in its entirety.

Plaintiff's motion to renew her motion for a default judgment against defendant NORTH STAR ORTHOPEDICS, P.L.L.C. is **GRANTED** and upon renewal, the motion is **GRANTED** on default. By submitting the sworn affidavit of the plaintiff which sets forth the facts constituting the claim, plaintiff cured the defect the Court referred to in its decision and order dated May 28, 2012.

Plaintiff's motion to renew her motion for a default judgment against defendant PAUL ACKERMAN, M.D. is DENIED as moot as it has been determined that he was not properly served with the summon and complaint (*see infra*).

Defendant Ackerman's motion dated November 12, 2013, to vacate so much of this Court's order dated August 14, 2013 which marked off his motion to dismiss and to restore the motion to the motion calendar is **GRANTED**. To the extent that defendant Ackerman was required to establish a reasonable excuse for failing to appear in Court on August 14, 2013 and that there is merit to the motion, such a showing was made.

Defendant ACKERMAN's motion dated September 21, 2012 to dismiss the complaint insofar as asserted against him on the ground that he was not properly served with the summons and complaint and his motion dated March 23, 2014 for an order, *inter alia*, confirming the report of Special Referee Maxine Archer's are **GRANTED** to the following extent:

As a general rule, courts will not disturb the findings of a referee as long as they are substantially supported by the record and the referee has clearly defined the issues and resolved matters of credibility ( *see Last Time Beverage Corp. v. F & V Distribution Co., LLC*, 98 A.D.3d 947, 950, 951 N.Y.S.2d 77, 80; *Stone v. Stone*, 229 A.D.2d 388, 644 N.Y.S.2d 648; *Kaplan v. Einy*, 209 A.D.2d 248, 251, 618 N.Y.S.2d 777). Further, a referee's credibility determinations are entitled to great weight because, as the trier of fact, he or she has the opportunity to see and hear the witnesses and to observe their demeanor ( *see Galasso, Langione & Botter, LLP v. Galasso*, 89 A.D.3d 897, 898, 933 N.Y.S.2d 73). Here, Special Referee Archer's findings are substantially supported by the record and she has clearly defined the issues and resolved matters of credibility. For these reasons, there is no basis to reject her finding that defendant

ACKERMAN was not properly served with the summons and complaint. Her report is therefore confirmed and the Court hereby finds that defendant ACKERMAN was not properly served with the summons and complaint.

Plaintiff's motion dated March 16, 2013 for an order pursuant to CPLR 306-b extending her time to serve the summons and complaint, in the interest of justice, is **GRANTED**.

Pursuant to CPLR 306-b, where service is not made within 120 days of the commencement of an action, the court may, "upon good cause shown or in the interest of justice, extend the time for service." The Court of Appeals has made clear that these are two distinct standards and that, while "good cause" requires a showing of reasonable diligence, "the interest of justice" has a broader scope, which can encompass late service due to "mistake, confusion or oversight, so long as there is no prejudice to the defendant" (*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105, 736 N.Y.S.2d 291, 761 N.E.2d 1018 [*internal quotation marks omitted*]; see *Bumpus v. New York City Tr. Auth.*, 66 A.D.3d 26, 31-32, 883 N.Y.S.2d 99).

In determining whether an extension of time is warranted in the interest of justice, a court may consider many factors, including "diligence, or lack thereof, ... 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" (*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d at 105-106, 736 N.Y.S.2d 291, 761 N.E.2d 1018; see *Thompson v. City of New York*, 89 A.D.3d 1011, 1012, 933 N.Y.S.2d 701; *DiBuono v. Abbey, LLC*, 71 A.D.3d 720, 720, 895 N.Y.S.2d 726; *Bumpus v. New York City Tr. Auth.*, 66 A.D.3d at 32, 883 N.Y.S.2d 99; see also *Bahadur v. New York State Dept. of Correctional Servs.*, 88 A.D.3d 629, 630, 930 N.Y.S.2d 631).

Here, the plaintiff exercised diligence by timely filing and twice attempting to serve defendant ACKERMAN with the summons and complaint within the 120-day period following the filing of the summons and complaint, although those attempts to serve the defendant were ultimately deemed defective (*Thompson v. City of New York*, 89 A.D.3d 1011, 1012, 933 N.Y.S.2d 701, 702; see *DiBuono v. Abbey, LLC*, 71 A.D.3d at 720, 895 N.Y.S.2d 726; *Earle v. Valente*, 302 A.D.2d 353, 354, 754 N.Y.S.2d 364).

If the Court were to decide not to grant an extension of time for the plaintiff to serve the summons and complaint, the statute of limitations would in all likelihood bar plaintiff's claims against the defendant (see *Thompson v. City of New York*, 89 A.D.3d at 1012, 933 N.Y.S.2d at 702 - 703; *DiBuono v. Abbey, LLC*, 71 A.D.3d at 720, 895 N.Y.S.2d 726; *Beauge v. New York City Tr. Auth.*, 282 A.D.2d 416, 722 N.Y.S.2d 402; *Scarabaggio v. Olympia & York Estates Co.*, 278 A.D.2d 476, 718 N.Y.S.2d 392, *affd. sub nom. Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 736 N.Y.S.2d 291, 761 N.E.2d 1018)<sup>1</sup>.

As to whether plaintiff demonstrated a meritorious nature of the cause of action, the Court notes that plaintiff's counsel annexed to the complaint a "Certificate of Merit" in which he attested to the fact that prior to the commencement of the action, he had consulted with at least one physician licensed by the State of New York about the potential merit to plaintiff's claims and that based on such consultation, he formed the opinion that there was a reasonable basis to commence the action.

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<sup>1</sup>The Court notes that plaintiff alleged in her complaint that she continued treating with defendant Ackerman after the surgery of July 9, 2008. From the record before the Court, it can not be determined exactly when the Statute of Limitations expired.

Plaintiff's counsel also demonstrated that he made a motion for an extension of time to serve defendant ACKERMAN several months after service upon defendant ACKERMAN was put into question by defendant ACKERMAN's motion to dismiss dated September 21, 2012 and long before Special Referee determined that service upon defendant ACKERMAN was improper.

Most importantly, defendant has not demonstrated that he would be prejudiced in any meaningful way if he had to litigate this matter on the merits ( *see DiBuono v. Abbey, LLC*, 71 A.D.3d at 720, 895 N.Y.S.2d 726; *Wilson v. City of New York*, \_\_A.D.3d\_\_, 988 N.Y.S.2d 650, 652 ).

In sum, after considering the relevant factors, the Court finds that plaintiff's motion for an extension of time to effect service upon defendant ACKERMAN is warranted in the interests of justice.

For all of the above reasons, it is hereby

**ORDERED** that plaintiff's motion to reargue is **DENIED** in its entirety; it is further **ORDERED** that plaintiff's motion to renew her motion for a default judgment against defendant NORTH STAR ORTHOPEDICS, P.L.L.C. is **GRANTED** and upon renewal, the motion is **GRANTED** on default; and it is further

**ORDERED** that an inquest on damages against defendant NORTH STAR ORTHOPEDICS, P.L.L.C. shall take place at the time of trial; it is further

**ORDERED** that plaintiff's motion to renew her motion for a default judgment against defendant PAUL ACKERMAN, M.D. is **DENIED** as moot; it is further

**ORDERED** that defendant ACKERMAN's motion to vacate so much of this Court's

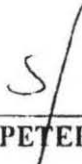
order dated August 14, 2013 which marked off his motion to dismiss off calendar and to restore the motion to the calendar is **GRANTED**; it is further

**ORDERED** that defendant ACKERMAN's motion to dismiss the action as against him on the ground that he was not properly served with the summons and complaint and his motion for an order confirming the report of Special Referee Maxine Archer's are **GRANTED** solely to the extent that the report of Special Referee Maxine Archer is hereby confirmed and the Court finds that service upon defendant ACKERMAN was improper; and it is

**ORDERED** that plaintiff's motion for an order pursuant to CPLR 306-b extending her time to serve the summons and complaint upon defendant ACKERMAN in the interest of justice is **GRANTED** and plaintiff is hereby granted an additional 60 days to effect service upon defendant ACKERMAN from the date of service of this order.

This constitutes the decision and order of the Court.

Dated: January 21, 2015

 HON. PETER P. SWEENEY, J.S.C.  
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PETER P. SWEENEY, A.J.S.C.