

Bolger v Schwertt

2015 NY Slip Op 32762(U)

November 10, 2015

Supreme Court, Nassau County

Docket Number: 601089/15

Judge: Daniel R. Palmieri

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This opinion is uncorrected and not selected for official publication.

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SHORT FORM ORDER

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

**P R E S E N T : HON. DANIEL PALMIERI
J.S.C.**

TRIAL/IAS PART 20

-----X
JOHN W. BOLGER,

Plaintiff,

Index No. 601089/15

-against-

Mot. Seq. #001

Mot. Seq. #002

**JOHN SCHWERTT, D.P.M., TERRY ROBERTSON,
D.P.M., NORRIS MORRISON, D.P.M., DAVID ZARET,
M.D., DOMINICK COLEMAN, M.D., SOUTH NASSAU
COMMUNITIES HOSPITAL, ORLIN & COHEN
ORTHOPEDIC ASSOCIATES, LLP, John does 1-5, M.D.
anesthesiologist at South Nassau Communities Hospital,**

Mot. Date: 8-31-15

Submit Date: 10-26-15

Defendants.

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The following papers were submitted on this motion:

Notice of Motion, dated 8-5-15 (Seq. #001).....1
Affirmation in Opposition, dated 10-1-15.....2
Notice of Motion, dated 10-12-15 (Seq. #002).....3
Reply, dated 10-21-15.....4
Reply Affirmation and Opposition, dated 10-21-15.....5
Affirmation in Opposition to Plaintiff's Reply
(Sur Reply to #4), dated 10-26-15.....6

The motion of defendant Coleman (Seq. 1) to dismiss this action pursuant to CPLR § 306-b is denied.

Plaintiff's cross motion (Seq. 2) to extend the time to serve defendant Coleman is granted.

Pursuant to CPLR §306-b, plaintiff's time to serve defendant Coleman is extended *nunc pro tunc* until the date of this Decision and Order and since said defendant already has the summons and complaint he is deemed served as of the date of this Decision and Order. Said defendant's time to move to dismiss pursuant to CPLR § 3211 (a) (8) shall commence as of the date of this Decision and Order.

This is an action for medical malpractice arising out of events beginning on or about September 2012.

A distillation of the motion papers indicates that the action was commenced on February 20, 2015. Service was attempted at the premises of codefendant South Nassau Communities Hospital (SNCH) which is listed in numerous internet sites (submitted by plaintiff) as the place of employment for defendant Coleman an anesthesiologist. Coleman is said to be a member of a practice group located in Melville, N.Y. Plaintiff first attempted service at SNCH on March 4, 2015, well within the time to make service pursuant to CPLR § 306-b, however service could not be made there and the process server was directed to the Melville location where service was made on July 15, 2015, after the expiration of the time to do so. No explanation is offered for the period between March 4, 2015 and July 15, 2015.

Coleman raised the defense of service and timeliness in his answer but has only moved here pursuant to CPLR § 306-b.

CPLR 306-b provides, in relevant part, that if service is not made upon a defendant within 120 days of commencement of the action, “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.”

When deciding whether to grant an extension of time to serve a summons and complaint in the interest of justice, “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 the 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 NY2d 95, 105-106 (2001); *Waggaman v Vernon*, 123 AD3d 1110 (2d Dept. 2014) and *Moundrakis v Dellis*, 96 AD3d 1026 (2d Dept. 2012).

While not passing upon the ultimate merits of plaintiffs' claims, it appears from the papers submitted on plaintiffs' motion that plaintiffs may have timely and meritorious causes of action. Moreover, it does not appear that defendants would suffer any prejudice if a brief extension of time to serve the summons and complaint were granted. Finally, by permitting the use of SNCH to be used as his place of employment on numerous web sites while not making himself amenable to service there Coleman contributed in a major way to the events raised in these motions.

In view of the foregoing, plaintiffs' motion is hereby granted and the time for service of the summons and complaint upon defendants is extended as aforesaid.

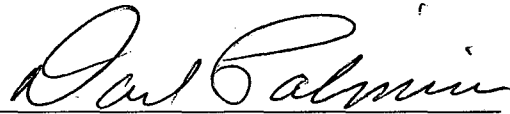
Since it has been mooted by this Decision Coleman's motion is denied.

As to new matter in a reply, see *Ritt v Lenox Hill Hospital*, 182 AD2d 560 (1st Dept. 1992) which prohibits the use thereof. A party may not submit a sur reply without Court permission and if one is permitted, may not raise arguments for the first time in a sur reply. CPLR §2214, *BRP Construction Group, LLC v. Greenwich Insurance Company*, 106 AD3d 680 (2d Dept. 2013); *Traders Co., v. AST Sportswear, Inc.*, 31 AD3d 276 (1st Dept. 2006). The Court permits the new matter in plaintiff's reply in the interest of justice because it is probative and relevant and defendant has been afforded the opportunity of a sur reply. The parties are cautioned that in the event of any future motions the Court will require strict compliance with the foregoing rules.

This shall constitute the Decision and Order of this Court.

ENTER:

DATED: November 10, 2015



HON. DANIEL PALMIERI
Supreme Court Justice

ENTERED

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