Castro v Pfizer Inc.
2016 NY Slip Op 33089(U)
October 31, 2016
Supreme Court, Kings County
Docket Number: 18077/14
Judge: Martin M. Solomon

At an IAS Term, Part 38 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 31st day of October, 2016.

PRESENT:

HON. MARTIN M. SOLOMON,
Justice.

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SOBEIDA CASTRO,

Plaintiff,

- against -

Index No. 18077/14

PFIZER INC., MYLAN INC., NEWARK BETH ISRAEL MEDICAL CENTER, SAINT BARNABAS HEALTH CARE SYSTEMS, JOHN DOE PHYSICIAN PRACTICE (NAME IS FICTITIOUS), SHAILJA SHAH, M.D., JENNIFER LAROSA, M.D., AND PATRICK HINFEY, M.D.,

Defendants.

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The following papers numbered 1 to 22 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3 5-11 12-14 19-20
Opposing Affidavits (Affirmations)	15, 16 21
Reply Affidavits (Affirmations)	17 22
Affidavit (Affirmation)	
Memoranda of Law	4 18

Upon the foregoing papers in this action by plaintiff Sobeida Castro (plaintiff) against defendants Pfizer Inc. (Pfizer), Mylan Inc. (Mylan), Newark Beth Israel Medical Center (Newark Beth Israel), Barnabas Health, Inc. s/h/a Saint Barnabas Health Care Systems

(Barnabus), John Doe Physician Practice (named as a fictitious entity), Shailja Shah, M.D. (Dr. Shah), Jennifer LaRosa, M.D. (Dr. LaRosa), and Patrick Hinfey, M.D.(Dr. Hinfey) (collectively, defendants), alleging, among other things, claims of medical malpractice, negligence, strict products liability, a failure to warn, and breach of warranty, and seeking to recover damages for personal injuries, Mylan moves, under motion sequence number two, for an order: (1) pursuant to CPLR 3211 (a) (7), dismissing plaintiff's amended verified complaint as against it based upon the ground that the amended verified complaint fails to state a claim upon which relief can be granted, and (2) pursuant to CPLR 3211 (a) (8), based upon the ground that the court lacks personal jurisdiction over it. Newark Beth Israel, Barnabas, Dr. Shah, Dr. LaRosa, and Dr. Hinfey (collectively, the Medical Provider defendants) move, under motion sequence number three, for an order dismissing this action as against them with prejudice: (1) pursuant to CPLR 3211 (a) (8) and CPLR 313, for lack of proper service upon Dr. Hinfey, Dr. LaRosa, and Dr. Shah, (2) pursuant to CPLR 3211 (a) (8), 301, 302, and 306-b, for lack of personal jurisdiction, (3) pursuant to CPLR 3211 (a) (2), for lack of subject matter jurisdiction, (4) pursuant to CPLR 3211 (a) (5), based upon the expiration of the applicable statute of limitations, and/or (5) pursuant to CPLR 3212 (b) based upon the ground that there are no triable issues of fact. Plaintiff cross-moves, under motion sequence number four, for an order: (1) pursuant to CPLR 3215 (a) and (b), directing that a default judgment be entered against Mylan in her favor or, in the alternative, setting this matter down for an inquest against Mylan and assessing damages in a sum certain or for

a sum which can, by computation, be made certain, and awarding costs, attorneys' fees and sanctions against Mylan, (2) pursuant to N.J.S.A. 2A:53A-26-29, extending her time to serve and file an affidavit of merit with respect to her medical malpractice claims, and, upon the granting of this extension, deeming the letter of merit that was served upon the attorneys for defendants by facsimile and mail on June 22, 2015 to be timely served within 60 days after the answer and deeming the affidavit of merit served upon the attorneys for defendants on August 11, 2014 to be timely served, and (3) pursuant to CPLR 3025 (b), allowing her to file a second supplemental summons and a second amended complaint to, among other things, add Mylan Pharmaceuticals, Inc. and John Doe M.D. I and John Doe M.D. II as defendants. Plaintiff cross-moves, under motion sequence number five, for an order: (1) pursuant to CPLR 306-b, extending the time to serve her summons with notice and her complaint upon Dr. Shah, Dr. LaRosa, and Dr. Hinfey if the court finds that service upon them was not proper, or, in the alternative (2) deeming her summons with notice that was served upon Dr. Hinfey, Dr. LaRosa, and Dr. Shah, with the attached proof of follow-up mailing, to be served, and the complaint requested by and served upon Dr. Hinfey, Dr. LaRosa, and Dr. Shah's counsel to be served, and setting a date for an answer to be served.

FACTS AND PROCEDURAL BACKGROUND

On January 1, 2013, plaintiff was taken to the emergency room of Newark Beth Israel, which is a member hospital of Barnabus, after being involved in a motor vehicle accident. Plaintiff alleges that Dr. Hinfey, Dr. LaRosa, and Dr. Shah were the physicians who treated

her while she was at the emergency room, and that these physicians were employees of Newark Beth Israel. She also alleges that Dr. Hinfey, Dr. LaRosa, and Dr. Shah were members of a practice which she has designated by the fictitious name, John Doe Physician Practice. Plaintiff asserts that while she was at the emergency room on January 1, 2013, the anti-convulsant drug, Dilantin Kapseals (Dilantin), was administered to her by Dr. Hinfey, Dr. LaRosa, and Dr. Shah and she was given a prescription for Dilantin when she was discharged to her home in Brooklyn, New York on January 2, 2013. This prescription directed her to take 100 mg. of Dilantin by mouth three times a day for seven days.

Plaintiff filled this prescription on January 4, 2013 at the Rite-Care Pharmacy at 677 4th Avenue in Brooklyn, New York, and (as reflected by the pill bottle) received Phenytoin Sodium (Phenytoin), the generic equivalent of Dilantin. She then took Phenytoin, as prescribed to her. She claims that as a result of taking Phenytoin, she developed extreme tiredness and weakness, skin pain, red or purple skin rashes that spread within hours to days, blisters on her skin, shedding of her skin and the mucous membranes of her mouth, nose, eyes, and genitals, joint pain and soreness, trauma to her toes and fingers, vision deficits, patches, and discoloration of her face and body. She claims that this required a traumatic 27-day hospitalization, that she suffered psychological distress, and that she underwent an approximately eight-month treatment for sloughing of the stomach lining and gastric disturbances. She also alleges that she suffered permanent visual disturbance, resulting in severe discomfort and dryness of the eyes, photophobia, the inability to close her eyes to

sleep, and gross skin discoloration. She asserts that Pfizer was the manufacturer of Dilantin, and Mylan was the manufacturer of Phenytoin.

On December 31, 2014, plaintiff filed a summons with notice in this action against defendants. Thereafter, demands for the complaint were served, and plaintiff filed a supplemental summons and verified complaint dated May 8, 2015. In May 2015, plaintiff served a supplemental summons and amended complaint as of right pursuant to CPLR 3025 (a).

Plaintiff's amended complaint alleges 13 causes of action. The first cause of action sets forth factual allegations only. The second cause of action alleges a claim of strict products liability against Pfizer. The third cause of action alleges a claim of strict products liability-failure to warn against Pfizer. The fourth cause of action alleges a claim of strict products liability against Mylan. The fifth cause of action alleges a claim of strict products liability-failure to warn against Mylan. The sixth cause of action alleges a claim of medical malpractice against all defendants. The seventh cause of action alleges a claim of negligence against all defendants. The eighth cause of action alleges a claim of negligence per se against all defendants. The ninth cause of action alleges a claim of misdiagnosis by Dr. Shah, Dr. Larosa, and Dr. Hinfey. The tenth cause of action alleges a claim of negligent hiring and training and supervision of Dr. Hinfey, Dr. LaRosa, and Dr. Shah by Newark Beth Israel and Barnabus. The eleventh cause of action alleges a claim for extreme emotional distress. The twelfth cause of action alleges a failure to inform against all defendants. The

thirteenth cause of action alleges a claim of breach of warranty against Pfizer and Mylan. On June 18, 2015, the Medical Provider defendants served their answer to plaintiff's amended complaint. On June 22, 2015, Pfizer served its answer to plaintiff's amended complaint. Mylan has not interposed an answer to plaintiff's complaint.

On July 1, 2015, Mylan filed its instant motion. On August 11, 2015, the Medical Provider defendants filed their instant motion. On September 18, 2015 and January 5, 2016, plaintiff filed her instant cross motions.

DISCUSSION

Default Judgment

Plaintiff, in her cross motion, seeks a default judgment against Mylan based upon its failure to timely answer or move in responding to her complaint. "On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing" (*Green Tree Servicing, LLC v Cary*, 106 AD3d 691, 692 [2d Dept 2013] [internal quotation marks omitted]; *see also Dupps v Betancourt*, 99 AD3d 855, 855 [2d Dept 2012]; *King v King*, 99 AD3d 672, 672 [2d Dept 2012]).

Here, plaintiff filed her summons with notice on December 31, 2014, and on May 18, 2015, Mylan served a demand for the complaint on plaintiff's attorney. On May 21, 2015, plaintiff served her complaint on Mylan, and on May 27, 2015, served her supplemental

summons and amended complaint as of right pursuant to CPLR 3025 (a) upon Mylan's attorney. Where a complaint is not served initially with the summons, but later pursuant to a demand and is served by mail, the defendant's time to appear via an answer or a motion to dismiss under CPLR 3211 is 25 days from such service (*see* CPLR 3012 [b]; CPLR 2103 [b] [2]). Thus, Mylan's time to answer or move to dismiss plaintiff's amended complaint was 25 days from May 27, 2015, i.e., June 21, 2015.

As noted above, on July 1, 2015, Mylan filed its motion to dismiss. Pursuant to CPLR 3211 (e), a motion to dismiss may be made "[a]t any time before service of the responsive pleading is required." Thus, Mylan's motion to dismiss was not timely made. "A motion to dismiss pursuant to CPLR 3211 will extend the time in which a defendant may serve a responsive pleading only if the motion is made before that pleading was originally due and will not operate to relieve a party's default in pleading" (*Wenz v Smith*, 100 AD2d 585, 586 [2d Dept 1984]; *see also Ultimate One Distrib. Corp. v 2900 Stillwell Ave., LLC*, 140 AD3d 1054, 1055[2d Dept 2016]). There was no stipulation entered into by plaintiff to extend the time for Mylan to answer the amended complaint.

Thus, plaintiff has submitted proof of service of the summons and amended complaint, proof of the facts constituting the claim by way of her verified amended complaint, and proof of Mylan's default in answering or appearing. However, a defendant may defeat a plaintiff's motion for the entry of a default judgment based on its failure to appear or timely serve an answer where it demonstrates "a reasonable excuse for the default

and a potentially meritorious defense" (*Josovich v Ceylan*, 133 AD3d 570, 571 [2d Dept 2015]; *see also U.S. Bank N.A. v Alba*, 130 AD3d 715, 716 [2d Dept 2015]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 60 [2d Dept 2013]; *Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 708 [2d Dept 2013]; *King*, 99 AD3d at 672; *Wassertheil v Elburg, LLC*, 94 AD3d 753, 753 [2d Dept 2012]).

Here, Mylan asserts that it has a meritiorious defense (as discussed below). It also asserts that it had reasonable excuse for the delay in that it believed that plaintiff was waiving any objection to its late motion to dismiss. It further asserts that plaintiff did, in fact, waive such objection. Moreover, public policy favors resolving cases on their merits, and thus a court has discretion to deny a default judgment motion where a defendant demonstrates (1) a potentially meritorious defense and (2) a short, unintentional delay in appearing that caused the plaintiff no prejudice (*see Jennings v Queens Tribune Publs., LLC*, 101 AD3d 1086, 1087 [2d Dept 2012]; *Vinny Petulla Contr. Corp. v Ranieri*, 94 AD3d 751, 752 [2d Dept 2012]; *Zeccola & Selinger, LLC v Horowitz*, 88 AD3d 992, 993 [2d Dept 2011]; *Hense v Baxter*, 79 AD3d 814, 815 [2d Dept 2010]).

Specifically, Mylan explains that before the time to respond to plaintiff's complaint expired, it had asked plaintiff for a short extension, but after the passage of a few days, plaintiff made clear that she would not give it an extension unless it waived its jurisdictional defense. Mylan points out that as a result, on June 19, 2015, it filed an order to show cause, under motion sequence number one, seeking an order granting it an extension to July 22,

2015 to answer or move in response to plaintiff's amended complaint. The court signed that order to show cause and calendared it for July 2, 2015. Plaintiff opposed the order to show cause, but conceded that "any extension of time . . . should be short." Before the order to show cause was heard, Mylan filed its instant motion to dismiss on July 1, 2015, and served plaintiff by mail that same day. At the order to show cause hearing on July 2, 2015, plaintiff's counsel accepted, without objection, a courtesy copy of Mylan's motion to dismiss. When the order to show cause was called, Mylan informed the court that it had already filed the motion to dismiss, and plaintiff raised no concerns to the court or Mylan regarding the timeliness of the motion. Believing that plaintiff would not oppose its motion to dismiss on timeliness grounds, Mylan then withdrew its order to show cause.

Notably, over a month later and just a few days before the August 13, 2015 hearing date on Mylan's motion to dismiss, plaintiff informed Mylan that she would seek a continuance. When the motion was called, plaintiff requested a continuance, without mentioning any timeliness objection with respect to plaintiff's motion, and the court granted plaintiff a two-month continuance. When plaintiff filed her opposition to Mylan's motion to dismiss, she filed her cross motion and a combined affirmation in support of her cross motion and in opposition to Mylan's motion. In her cross motion, plaintiff first raised the issue of the timeliness of Mylan's motion to dismiss and seeks a default judgment against Mylan based upon Mylan's untimely filing of its motion to dismiss. Plaintiff also seeks, in her cross motion, leave to file a second amended complaint, which, if granted, would

supersede her amended complaint to which she claims Mylan did not timely interpose an answer, and permission to file a late affidavit of merit.

It is well established that where a plaintiff retains an answer without objection, this constitutes a waiver of its late service and the default by the defendant, and the plaintiff is not entitled to enter a default judgment (*see Glass v Captain Hulbert House, LLC*, 103 AD3d 607, 608 [2d Dept 2013]). While here, Mylan has appeared by a motion under CPLR 3211 in lieu of an answer, plaintiff has similarly waived the late service of Mylan's motion to dismiss by accepting the hand-delivery of the motion to dismiss, proceeding to litigate the motion by requesting and obtaining a two-month continuance from the court, and then responding substantively to the motion.

In any event, even if not construed as an actual waiver, Mylan's belief that plaintiff was waiving her objection which resulted in its withdrawal of its motion for an extension of time constitutes a reasonable excuse for its default. It also demonstrates that Mylan's failure to submit a timely response to plaintiff's complaint was not willful (*see* CPLR 2005; *Josovich*, 133 AD3d at 571; *Thompson v County of Suffolk*, 61 AD3d 962, 963 [2d Dept 2009]; *Valure v Century 21 Grand*, 35 AD3d 591, 592 [2d Dept 2006]; *Whitfield v State of New York*, 28 AD3d 541, 542 [2d Dept 2006]; *Friedman v Crystal Ball Group, Inc.*, 28 AD3d 514, 515 [2d Dept 2006]). Mylan has also shown that it has a meritorious defense. Moreover, plaintiff has failed to show any prejudice from the short delay in Mylan's filing of its motion to dismiss, and "public policy favors the resolution of cases on the merits"

(*Westchester Med. Ctr. v Hartford Cas. Ins. Co.*, 58 AD3d 832, 833 [2d Dept 2009]; *see also Arias v First Presbyt. Church in Jamaica*, 97 AD3d 712, 712 [2d Dept 2012]).

Plaintiff argues that since Mylan withdrew its earlier motion to extend its time to respond to her complaint, its request to excuse its default, which is not set forth in its instant notice of motion, is not properly before the court and the court cannot excuse its default. This argument is rejected since the court has the discretionary authority, sua sponte, to extend the time to plead or move to dismiss, or to compel acceptance of a pleading untimely served (*see Mufalli v Ford Motor Co.*, 105 AD2d 642, 643 [1st Dept 1984]). Thus, while no formal application for such an extension by Mylan remains pending, the court has the discretionary authority to grant such relief sua sponte. Indeed, CPLR 2004 provides that "[e]xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown," and a request for an extension may be made even after a default in answering the complaint (*see EHS Quickstops Corp. v GRJH, Inc.*, 112 AD3d 577, 578 [2d Dept 2013]; *Darlind Constr., Inc. v Prism Solar Tech., Inc.*, 109 AD3d 783, 783 [2d Dept 2013]). Therefore, inasmuch as plaintiff has not been prejudiced by the short delay in Mylan's moving to dismiss her complaint, and in light of the lack of willfulness on the part of Mylan, a reasonable excuse for its default, the existence of a meritorious defense, and the public policy favoring the resolution of cases on the merits, plaintiff's cross motion, insofar as it seeks leave to enter a default judgment against Mylan, must be denied (*see* CPLR 2004, 2005, 3012

[d]; *Meekins v Turner Towers Tenants Corp.*, 132 AD3d 963, 963 [2d Dept 2015]; *Hutchinson v New York City Health & Hosps. Corp.*, 118 AD3d 945, 945 [2d Dept 2014]; *Klein v Yeshiva M'kor Chaim*, 116 AD3d 672, 672 [2d Dept 2014]; *EHS Quickstops Corp.*, 112 AD3d at 578; *Darlind Constr., Inc.*, 109 AD3d at 783; *Arias v First Presbyt. Church in Jamaica*, 97 AD3d 712, 712 [2d Dept 2012]; *Covaci v Whitestone Constr. Corp.*, 78 AD3d 1108, 1108 [2d Dept 2010]; *Klughaupt v Hi-Tower Contrs., Inc.*, 64 AD3d 545, 546 [2d Dept 2009]; *Finkelstein v Sunshine*, 47 AD3d 882, 882 [2d Dept 2008]; *Sitigus Foods Corp. v 72-02 N. Blvd. Realty Corp.*, 293 AD2d 597, 597 [2d Dept 2002]; *Buderwitz v Cunningham*, 101 AD2d 821, 822-823 [2d Dept 1984]).

Personal Jurisdiction over Mylan

Mylan argues that the court lacks general personal jurisdiction over it under CPLR 301 because it is not "at home" in New York since it is a corporation duly organized under the laws of Pennsylvania, and has its principal place of business in Pennsylvania. General jurisdiction allows a court to adjudicate "any and all" claims against a defendant, regardless of whether the claims are connected to the forum state (*see Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 919 [2011]; *Brown v Lockheed Martin Corp.*, 814 F3d 619, 624 [2d Cir 2016]). CPLR 301, New York's general jurisdiction statute, provides that a New York court "may exercise jurisdiction over persons . . . as might have been exercised heretofore."

Plaintiff argues that the court may exercise personal jurisdiction over Mylan because it is registered to do business in New York and has appointed an agent for service of process in New York. Business Corporation Law § 1304 (a) provides that "[a] foreign corporation may apply for authority to do business in this state," and that "[a]n application, entitled "Application for authority of .... (name of corporation) under section 1304 of the Business Corporation Law", shall be signed and delivered to the department of state . . ." Plaintiff has submitted a copy of Mylan's Application for Authority by it under Business Corporation Law § 1304, which was filed by Joseph Helser with the State of New York Department of State on August 17, 2011. This application sets forth that the county within this state in which the office of Mylan is to be located is New York and that the Secretary of State is designated as Mylan's agent upon whom process against it may be served and that the address to which the Secretary of State shall mail a copy of any process accepted on its behalf is Corporation Service Company, 80 State Street, Albany, NY 12207-2543. This application attaches the consent of the State Tax Commission, dated August 9, 2011, which states that pursuant to Business Corporation Law § 1304, the Commissioner of Taxation and Finance consents to the Application of Authority for Mylan.

It is well settled that "'[w]here a foreign corporation has expressly appointed the New York Secretary of State (or some other person within the state) as its agent for service of process, the plaintiff's cause of action need not have arisen out of any business conducted by the foreign corporation in New York'" (*Aybar v Aybar*, 2016 NY Slip Op 31139[U], *7 [Sup

Ct, Queens County 2016], quoting Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C301:6 [c], at 21). It has long been held that "a corporation's authorization to do business in the State and concomitant designation of the Secretary of State as its agent for service of process is consent to personal jurisdiction" (*Corporate Jet Support, Inc. v Lobosco Ins. Group, L.L.C.*, 2015 NY Slip Op 32438[U], *1 [Sup Ct, NY County 2015]; *see also Doubet LLC v Trustees of Columbia Univ. in the City of N.Y.*, 99 AD3d 433, 434-435 [1st Dept 2012]; *Augsbury Corp. v Petrokey Corp.*, 97 AD2d 173, 175-176 [3d Dept 1983]).

Mylan does not dispute plaintiff's showing that it is authorized to do business in the State of New York and that it has designated the Secretary of State as its agent for service of process. Mylan argues, however, that there has been a change in law due to the holding in *Daimler AG v Bauman* (571 US __, 134 S Ct 746, 760 [2014]), and that based on this holding, the court cannot exercise general personal jurisdiction over it under CPLR 301, as a corporation not "at home" in New York, because to do so would deprive it of due process. It contends that after *Daimler*, the mere fact of being registered to do business is insufficient to confer general jurisdiction over it in New York, which is a state that is neither its state of incorporation or its principal place of business.

The court rejects Mylan's argument. Although the holding in *Daimler* "narrows the reach of New York courts in terms of its exercise of general jurisdiction over foreign entities, it does not . . . change the law with the respect to personal jurisdiction based on consent"

(*Corporate Jet Support, Inc.*, 2015 NY Slip Op 32438[U], *2). While there is some federal authority to the contrary (*see e.g. Bonkowski v HP Hood LLC*, 15-CV-4956 [RRM] [PK], 2016 WL 4536868, *2 [ED NY Aug. 30, 2016]; *Chatwal Hotels & Resorts LLC v Dollywood Co.*, 90 F Supp 3d 97, 105 [SD NY 2015]; *Wright v Maersk Line, Ltd.*, No. 99 Civ. 11282 [LMM], 2000 WL 744370, *1 [SD NY 2000]), this court agrees with those recent state and federal court decisions which have considered the reach of *Daimler's* holding and held that general jurisdiction based on consent through registration and appointment survives *Daimler's* holding (*see The Rockefeller Univ. v Ligand Pharm.*, 581 F Supp 2d 461, 467 [SD NY 2008]; *Serov v Kerzner Intl. Resorts, Inc.*, 52 Misc 3d 1214[A], 2016 NY Slip Op 51150[U], *2-3 [Sup Ct, NY County 2016]; *Aybar*, 2016 NY Slip Op 31139[U], *8; *Corporate Jet Support, Inc.*, 2015 NY Slip Op 32438[U], *1; *Bailen v Air & Liquid Systems Corp.*, 2014 NY Slip Op 32079[U], *4 [Sup Ct, NY County 2014]; *Beach v Citigroup Alternative Investments LLC*, No. 12 Civ. 7717 [PKC], 2014 WL 904650, *6 [SD NY Mar. 7, 2014]).

It is well established that "New York's assertion of personal jurisdiction over foreign entities that are registered to do business in the State is consistent with due process" (*Corporate Jet Support, Inc.*, 2015 NY Slip Op 32438[U], *1). "Nearly a century ago, the Supreme Court concluded that a statute requiring a foreign corporation to consent to jurisdiction by appointing an agent for service does 'not deprive the defendant of due process of law even if it took the defendant by surprise'" (*id.*, quoting *Perm. Fire Ins. Co. v Gold*

Issue Mining & Milling Co., 243 US 93, 95 [1917]). Indeed, the argument that due process has been violated by the finding of personal jurisdiction solely on the basis of its registration to do business has been rejected; "the privilege of doing business in New York is accompanied by an automatic basis for personal jurisdiction" (*Augsbury*, 97 AD2d at 176; *see also Serov*, 2016 NY Slip Op 51150[U], *2-3; *Corporate Jet Support, Inc.*, 2015 NY Slip Op 32438[U], *1; *Steuben Foods, Inc. v Oystar Group*, No. 10-CV-780S, 2013 WL 2105894, *3 [WD NY May 14, 2013]).

"'When . . . the basis for jurisdiction is the voluntary compliance with a state's registration statute, which has long and unambiguously been interpreted as constituting consent to general jurisdiction in that state's courts, the corporation can have no uncertainty as to the jurisdictional consequences of its actions'" (*see Aybar*, 2016 NY Slip Op 31139[U], *8, quoting *Acorda Therapeutics, Inc. v Mylan Pharm. Inc.*, 78 F Supp 3d 572, 591 [D Del 2015], *affd on other grounds*, 2016 WL 1077048 [Mar. 18, 2016]). "In New York, foreign corporations have been on notice since 1916 that registration to conduct business in this state amounts to consent to general jurisdiction here, and they can always cancel their registration if their business interests lead them to do so" (*see Aybar*, 2016 NY Slip Op 31139[U], *8; *see also Serov*, 2016 NY Slip Op 51150[U], *2-3).

The court concludes that Mylan's unrevoked authorization to do business and its designation of a registered agent for service of process amount to consent to personal jurisdiction in New York. Thus, since Mylan has consented to personal jurisdiction in New

York, its motion, insofar as it seeks to dismiss plaintiff's action against it based upon a lack of personal jurisdiction, pursuant to CPLR 3211 (a) (8), must be denied.

Preemption

Mylan, in its motion to dismiss, asserts that it does not sell any pharmaceutical products, but is a holding company of several operating companies, including Mylan Pharmaceuticals, Inc. which sells pharmaceutical products. It further asserts while Pfizer sells Dilantin, its affiliate, Mylan Pharmaceuticals, Inc., sells only the generic version of Dilantin, which is Phenytoin. It notes that on December 28, 1998, the U.S. Food and Drug Administration (FDA), in an approval letter concerning ANDA 40-298, approved Mylan Pharmaceuticals, Inc.'s abbreviated new drug application (ANDA) to market a generic equivalent of Dilantin and concluded that Mylan Pharmaceuticals, Inc.'s Phenytoin was bioequivalent to Dilantin. Mylan asserts that even if it sold generic Phenytoin itself, under the governing United States Supreme Court precedents of *PLIVA, Inc. v Mensing* (564 US 604 [2011]) and *Mutual Pharm. Co., Inc. v Bartlett* (133 S Ct 2466, 2473 [2013]), federal law preempts all of plaintiff's personal injury claims against it, which all arise under state law. It contends that as a result, plaintiff has failed to state a viable cause of action against it and dismissal of her claims against it must be granted pursuant to CPLR 3211 (a) (7).

In examining this U.S. Supreme Court precedent with respect to preemption, the court notes that in *Mensing* (565 US at 610), the plaintiffs therein brought failure to warn claims under state law against several generic manufacturers of the drug, metoclopramide, arguing

that the generic manufacturers violated state tort laws by failing to change the labels for metroclopramide to adequately warn of the risk of tardive dyskinesia, a severe neurological disorder. The U.S. Supreme Court held that the plaintiff's failure to warn claims under state law were preempted by federal law because "it was impossible for the [generic m]anufacturers to comply with both their state-law duty to change the label [so as to label the drug in a way that renders it reasonably safe] and their federal law duty to keep the label the same [as the label of the brand-name drug]" (*id.* at 618).

In *Bartlett* (133 S Ct at 2478), the U.S Supreme Court reiterated these preemption principles and further held that federal law preempted a state law design defect claim against a generic manufacturer of sulindac because the federal regulations prohibited the manufacturer from altering the design of the generic drug or changing its labeling. Indeed, in *Bartlett* (133 S Ct at 2475), the U.S. Supreme Court held that generic drug manufacturers do not have the option of redesigning a generic drug because, under federal law, "were [the generic manufacturer] to change the composition of its [generic drug], the altered chemical would be a new drug that would require its own [new drug application] to be marketed in interstate commerce." It concluded that "it was impossible for [the generic drug manufacturer] to comply with both its state-law duty to strengthen the warnings on sulindac's label and its federal-law duty not to alter sulindac's label" (*id.* at 2473). It also rejected the contention that the generic drug manufacturer should be required to cease selling its generic

drug, holding that a generic drug manufacturer "is not required to cease acting altogether in order to avoid liability" (*id.* at 2477).

Thus, under the U.S. Supreme Court's holdings in *Mensing* and *Bartlett*, federal law preempts any state law claim requiring a generic manufacturer to redesign its drug or change its labeling. Following *Mensing* and *Bartlett*, federal circuit courts have dismissed state law tort claims against generic drug manufacturers for failure to warn, design defect, and breach of express warranty as preempted by federal law (*see e.g. Johnson v Teva Pharm. USA, Inc.*, 758 F3d 605, 612-613 [5th Cir 2014]; *Eckhardt v Qualitest Pharm., Inc.*, 751 F3d 674, 679-680 [5th Cir 2014]; *In re Fosamax [Alendronate Sodium] Products Liab. Litig. [No. II]*, 751 F3d 150, 164-165 [3d Cir 2014]; *Drager v PLIVA USA, Inc.*, 741 F3d 470, 476-479 [4th Cir 2014]; *Strayhorn v Wyeth Pharm., Inc.*, 737 F3d 378, 396-397 [6th Cir 2013]; *Schrock v Wyeth, Inc.*, 727 F3d 1273, 1288-1289 [10th Cir 2013]; *Smith v Wyeth, Inc.*, 657 F3d 420, 423 [6th Cir 2011], *cert denied* 132 S Ct 2103 [2012]).

Indeed, while there is no reported New York state court decision[1] which has considered the preemption of strict liability claims based upon failure to warn and design defects, as espoused by *Mensing* and *Bartlett*, the federal district courts of New York have similarly found that claims for failure to warn, design defect, negligence, and breach of warranty against generic drug manufacturers are preempted (*see Bowdrie v Sun Pharm. Indus. Ltd.*, 909 F Supp 2d 179, 188-190 [ED NY 2012]; *In re Pamidronate Products Liab. Litig.*, 842 F Supp 2d 479, 484 [ED NY 2012]). Indeed, *Bowdrie* (909 F Supp 2d at 182) involved Phenytoin, the same generic drug at issue here. Moreover, federal district courts outside of New York have granted motions to dismiss claims against Mylan (the same defendant in this action) brought by plaintiffs who ingested the generic drug, Phenytoin, on the basis that strict products liability claims under state law were preempted by federal law (*see Hendricks v Pharmacia Corp.*, 2:12-CV-00613, 2014 WL 2515478, *8-9 [SD Ohio June 4, 2014], report and recommendation adopted, 2:12-CV-613, 2014 WL 4961550 [SD Ohio

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[1]In *Feinberg v Colgate Palmolive Co.*, 34 Misc 3d 1243[A], 2012 NY Slip Op 50515[U], *9 [Sup Ct, NY County 2012], the Supreme Court, New York County, observed that in *Mensing* (564 US at 618), the U.S. Supreme Court found that "the FDA's federal labeling requirement preempted the plaintiffs' state law claims against the manufacturers of the generic drug because it would have been impossible for the manufacturers to change their warning labels without violating the federal requirement that the warning on a generic drug must match the warning on the brand name version." However, the Supreme Court, New York County, in *Feinberg* (2012 NY Slip Op 50515[U], *9), distinguished *Mensing* since the issue there did not involve a generic drug, but the labeling of cosmetic talc which did not have any federal regulations in effect at the time the plaintiff's claim arose, and, therefore, the preemption principle set forth in *Mensing* was found to be inapplicable.

Oct. 2, 2014]; *Tillman v Woldenberg Vil., Inc.*, CIV.A. 13-4731, 2013 WL 6198864, *4 [ED La Nov. 27, 2013]; *Frazier v Mylan Inc.*, 911 F Supp 2d 1285, 1291 [ND Ga 2012]; *Moore v Mylan Inc.*, 840 F Supp 2d 1337, 1348-1349 [ND Ga 2012]).

Here, plaintiff's fifth cause of action against Mylan for failure to warn alleges that Mylan manufactured Phenytoin and placed it into the stream of commerce in a defective and unreasonably dangerous condition, and that the foreseeable risks exceeded the benefits associated with the design and/or formulation of Phenytoin. She further alleges that Mylan's drug, Phenytoin, was defective due to an inadequate warning and/or inadequate clinical trials and reporting regarding the results. She also alleges that Phenytoin was defective due to inadequate post-marketing warnings or instructions because after Mylan knew or should have known of the risk of injury from the administration of Phenytoin, it failed to provide adequate warnings to the medical community in general and to plaintiff's physician in particular, and continued to promote the administration of Phenytoin as safe and effective. She claims that the allegedly defective warnings and labeling on Phenytoin's container were a substantial factor in bringing about her injuries.

Plaintiff's fifth cause of action for failure to warn is "squarely preempted by Mensing"since plaintiff is alleging that Mylan's drug was defective due to an inadequate warning (*In re Pamidronate Prod. Liab. Litig.*, 842 F Supp 2d at 484). Furthermore, while plaintiff claims that Mylan should have changed the labeling of its Phenytoin to provide different warnings about Phenytoin's alleged adverse side effects, this would run counter to

the finding in *Mensing* that federal drug regulations require generic drug labels to "be the same at all times as the corresponding brand-name drug labels" (*Mensing*, 564 US at 618). A generic drug manufacturer would violate federal law if it independently changed the drug's label to satisfy a duty under state law (*id.*). Thus, plaintiff's failure to warn claims based on the labeling of Phenytoin are preempted (*see id.*).

Insofar as plaintiff bases her failure to warn claim on allegations of inadequate post-market warning, this claim is also preempted. In *Mensing* (564 US at 615), the U.S Supreme Court specifically found that federal law does not permit generic manufacturers to issue additional warnings to prescribing physicians and other healthcare professionals through Dear Doctor letters since such substantial new warning information which they would contain would not be consistent with the drug's approved labeling. The federal "duty of sameness" precludes generic manufacturers from unilaterally warning "consumers, doctors or pharmacists" (*Lashley v Pfizer, Inc.*, 750 F3d 470, 474 [5th Cir 2014]).

Insofar as plaintiff's claim alleges inadequate testing and inadequate reporting, it is also preempted by federal law. A claim based upon "any alleged failure by [the generic drug manufacturer] to conduct adequate premarket testing or post-market observation of its drug" is preempted (*Drager*, 741 F3d at 477; *see also Morris v PLIVA, Inc.*, 713 F3d 774, 778 [5th Cir 2013]). Consequently, inasmuch as plaintiff's failure to warn claim is preempted in its entirety, her fifth cause of action must be dismissed (*see* CPLR 3211 [a] [7]).

Plaintiff's twelfth cause of action for failure to inform against all defendants alleges that Mylan placed Phenytoin "in the stream of commerce without proper warning and in an inherently dangerous condition," and that she suffered a physical injury to her body as a proximate result of this omission and failure by it. This allegation, while denominated as a "failure to inform," is, in substance, a failure to warn claim, and, as such, it is preempted (*see Mensing*, 564 US at 620; *In re Pamidronate Products Liab. Litig.*, 842 F Supp 2d at 485). Therefore, plaintiff's twelfth cause of action must be dismissed as against Mylan (*see* CPLR 3211 [a] [7]).

Plaintiff, in her thirteenth cause of action for breach of warranty, alleges that Mylan manufactured, sold, distributed, and delivered Phenytoin to various retailers, including Rite-Care Pharmacy and also distributed it to the emergency room at Barnabas and Newark Beth Israel. She further alleges that Mylan expressly warranted that Phenytoin was safe for use in every respect, that it was fit for the use for which it was intended, that it had been manufactured safely, and that it was good, safe, and proper to use, and that Mylan impliedly warranted that Phenytoin was of merchantable quality and was safe for use. Plaintiff claims that she was caused to sustain injuries as a result of a breach of these warranties.

Plaintiff's thirteenth cause of action insofar as it is based on the breach of an express warranty "is in essence a failure to warn claim" (*In re Pamidronate Products Liab. Litig.*, 842 F Supp 2d at 485; *see also Bowdrie*, 909 F Supp 2d at 182). Since plaintiff alleges that Mylan expressly warranted that Phenytoin was safe for use in every respect, that it was fit for

the use for which it was intended, that it had been manufactured safely, and that it was good, safe, and proper to use, and that she sustained injuries from Mylan's breach of this warranty, her claim suggests that Mylan should have unilaterally changed omitted, or strengthened the labeling of these allegedly inaccurate statements. Since federal law forbids a generic drug manufacturer from doing so, plaintiff's breach of express warranty claim is preempted pursuant to *Mensing* (*see In re Pamidronate Products Liab. Litig.*, 842 F Supp 2d at 485; *Morris*, 713 F3d at 778).

With respect to plaintiff's thirteenth cause of action insofar as it is based on the breach of an implied warranty, since plaintiff alleges that Mylan impliedly warranted that Phenytoin was of merchantable quality and was safe for use and Mylan breached this warranty, it is founded on the argument that Dilantin should have been designed differently, and, therefore, necessarily alleges that Mylan should have changed its design to make it safe and fit for its intended use. Thus, pursuant to the "federal duty of sameness," Mylan was prohibited by federal law from changing the design of Phenytoin (*see Mensing*, 564 US at 615). Consequently, plaintiffs' breach of implied warranty claim is preempted (*see In re Pamidronate Products Liab. Litig.*, 842 F Supp 2d at 485). Dismissal of plaintiff's thirteenth cause of action is, therefore, mandated (*see* CPLR 3211 [a] [7]).

Plaintiff's eighth cause of action for negligence per se alleges that defendants failed to use ordinary or reasonable care to avoid injury to her. Insofar as this claim may be asserted as against Mylan, plaintiff alleges that due to its negligence, she was not made aware

of the side effects and adverse effects of Phenytoin. A claim of negligence per se against a generic drug manufacturer based upon a failure to warn of alleged side effects has been held to be preempted by federal law (*see Hendricks*, 2014 WL 2515478, *8). Thus, dismissal of plaintiff's eighth cause of action is required (*see* CPLR 3211 [a] [7]).

Plaintiff's fourth cause of action for strict liability alleges that Dilantin was dangerously defective in design and formulation and also defective due to inadequate warning. With respect to her claim of inadequate warning, this claim (as previously discussed with respect to plaintiff's fifth cause of action) is preempted by federal law since federal law expressly prohibits generic manufacturers from altering the labels and, therefore, strengthening the warnings (*see Mensing*, 564 US at 618). Insofar as plaintiff alleges that Mylan had a duty to make changes to Phenytoin's design in order to make it safer, such changes (as discussed above) are prohibited by federal law (*see Bartlett*, 133 S Ct at 2475; *Hendricks*, 2014 WL 2515478, *9; *Frazier*, 911 F Supp 2d at 1292). Specifically, since "the FDCA requires a generic drug to have the same active ingredients, route of administration, dosage form, strength, and labeling as the brand-name drug on which it is based," plaintiff's state-law claim that Mylan should have designed Phenyton's composition or labeling differently conflicts with those federal requirements (*see Bartlett*, 133 S Ct at 2475). Consequently, since Mylan could not change Phenytoin's design under federal law, plaintiff's design defect claim is preempted (*see id.*). Dismissal of plaintiff's fourth cause of action must, therefore, be granted (*see* CPLR 3211 [a] [7]).

Plaintiff's sixth cause of action for medical malpractice, seventh cause of action for negligence, ninth cause of action for misdiagnosis, tenth cause of action for negligent hiring, training, and supervision, and eleventh cause of action for extreme emotional distress contain allegations only against the health care provider defendants. Thus, these causes of action do not state any claim as against Mylan and must be dismissed as against it (*see* CPLR 3211 [a] [7]).

Personal Jurisdiction Over the Medical Provider Defendants

The Medical Provider defendants, in their motion, seek dismissal of this action as against them based upon a lack of personal jurisdiction over them. In their answer to plaintiff's amended complaint, they raised a lack of personal jurisdiction as their twelfth affirmative defense.

The Medical Provider defendants contend that the court does not have general jurisdiction over them pursuant to CPLR 301. Dr. Hinfey, Dr. LaRosa, and Dr. Shah have submitted sworn affidavits, in which they assert that they are solely New Jersey residents and maintain no mailing addresses or phone numbers in New York and have no offices or other places of business in New York. Dr. Hinley and Dr. LaRosa are both physicians duly licensed to practice medicine in the State of New Jersey, and Dr. Shah is currently applying for a medical license in New Jersey. They each further attest that they were employed by Newark Beth Israel, which is located at 201 Lyons Avenue, in Newark, New Jersey at the time of plaintiff's treatment there on January 1 through 2, 2013. They also all attest that they

never treated plaintiff in New York, and that after January 2, 2013, when plaintiff was discharged from Newark Beth Israel, they had no further contact with her by way of follow-up appointments, emails, or phone calls, or by way of issuing any prescriptions for medications or diagnostic tests.

Newark Beth Israel and Barnabus are incorporated in New Jersey and their principal places of business are in New Jersey. Newark Beth Israel has submitted the sworn affidavit of Leroy Boone, Jr. (Mr. Boone), who is its assistant vice-president in charges of support services and director of risk management and safety, and Barnabus has submitted the sworn affidavit of David Mebane, Esq. (Mr. Mebane), its senior vice-president and general counsel. Mr. Boone attests that Newark Beth Israel is a non-profit corporation organized and existing under the laws of New Jersey, and that it does not own or operate any medical facility in New York and is licensed to operate only within New Jersey. Mr. Mebane attests that Barnabus was incorporated in New Jersey and operates a health care network solely in New Jersey, which includes, among other things, seven acute care hospital, including Newark Beth Israel. Mr. Boone and Mr. Mebane attest that Newark Beth Israel and Barnabas do not transact business in New York, do not maintain a telephone or telefax number in New York, own no real property in New York, and do not have a New York mailing address. They further attest that Newark Beth Israel and Barnabus do not pay any taxes in New York and have never appointed an agent for the purpose of accepting service of process in New York.

Since Newark Beth Israel and Barnabus are not incorporated in New York and do not have their principal places of business in New York, there is no basis for general jurisdiction over them pursuant to CPLR 301 (*see Daimler AG*, 134 S Ct at 760; *D&R Global Selections, S.L. v Bodega Olegario Falcon*, 128 AD3d 486, 487 [1st Dept 2015], *lv granted* 26 NY3d 914 [2015]; *Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014]). "A foreign corporation is amenable to suit in New York courts under CPLR 301 [only] if it has engaged in such a continuous and systematic course of doing business here that a finding of its presence in this jurisdiction is warranted" (*Fernandez v DaimlerChrysler, A.G.*, __ AD3d __, 2016 NY Slip Op 06679, *2 [2d Dept Oct. 12, 2016] [internal quotation marks omitted]). Plaintiff has not alleged that there was any continuous and systematic course of doing business in New York by Barnabus or Newark Beth Israel or any activities by them in New York that could subject them to jurisdiction under CPLR 301 (*see Magdalena*, 123 AD3d at 601). Similarly, no jurisdiction lies pursuant to CPLR 301 over Dr. Hinfey, Dr. LaRosa, and Dr. Shah who reside and are domiciled in New Jersey (*see id.*).

Plaintiff contends that there is a basis for long arm jurisdiction over the Medical Provider defendants pursuant to CPLR 302 (a) (1), which allows a court to exercise personal jurisdiction over any non-domiciliary, who, in person or through an agent, "transacts any business within the state or contracts anywhere to supply goods or services in the state." However, in order to find that a non-domiciliary is transacting business within the meaning of CPLR 302 (a) (1), "there [must be] a substantial relationship between the transaction and

the claim asserted" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007] [internal quotation marks omitted]).

Plaintiff argues that she was seen in the emergency room, including discharge planning to go home to New York with the prescription for Dilantin to be filled and administered in New York, that she filled the prescription and took Dilantin in New York, and that her symptoms and injury occurred in New York. She argues that this constitutes sufficient contacts with New York to invoke personal jurisdiction over the Medical Provider defendants under CPLR 302 (a) (1).

This argument must be rejected. New York courts will not "extend long-arm jurisdiction under CPLR 302 (a) (1) to cover out-of-state medical centers [or it physicians employed there] where the contacts with New York were limited or the injury occurred outside New York" (*Paterno v Laser Spine Inst.*, 24 NY3d 370, 380 [2014]; *see also O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 201-202 [1st Dept 2003]; *Hermann v Sharon Hosp.*, 135 AD2d 682, 683 [2d Dept 1987]).

Here, the Medical Provider defendants did not solicit plaintiff to come to New Jersey, and they conduct no business in New York, own no real property in New York, have no offices in New York, and do not treat patients in New York. Plaintiff went to Newark Beth Israel in New Jersey by ambulance following a car accident, she was treated only in New Jersey, and after being discharged, she had no additional contacts with the Medical Provider defendants. It is well settled that "[t]he incidental provision of a drug, as part of a course of

treatment rendered in another State, cannot be said to fall within the contemplation of the statute so as to confer personal jurisdiction over the physician" (*Etra v Matta*, 61 NY2d 455, 459 [1984]). Indeed, even where out-of-state physicians "call[ ] prescriptions into local pharmacies in [a] plaintiff's home city [in New York], which he then fill[s]," this is not a sufficient contact to confer personal jurisdiction (*see Paterno*, 24 NY3d at 374). Thus, the prescription of Dilantin to plaintiff, a New York resident, by a physician in New Jersey is an insufficient jurisdictional predicate for long-arm jurisdiction arising under CPLR 302 (a) (1) (*see Etra*, 61 NY2d at 459). Consequently, the court finds that under these circumstances, there are insufficient contacts with New York to confer personal jurisdiction over the Medical Provider defendants pursuant to CPLR 302 (a) (1) (*see Paterno*, 24 NY3d at 380; *Jackson v Sanchez-Pena*, 104 AD3d 574, 575 [1st Dept 2013]).

Plaintiff also attempts to argue that the Medical Provider defendants committed a tortious act in New Jersey which caused injury to her in New York. Plaintiff, however, cannot establish a basis for personal jurisdiction over the Medical Provider defendants under CPLR 302 (a) (3), which provides that New York courts have personal jurisdiction over a non-domiciliary who "commits a tortious act without the state causing injury to person or property within the state" (CPLR 302 [a] [3]). It is well established that "the situs of the injury in medical malpractice cases is the location of the original event which caused the injury, and not where a party experiences the consequences of such injury" (*Paterno*, 24 NY3d at 381; *see also Jackson*, 104 AD3d at 575; *O'Brien*, 305 AD2d at 202; *Hermann*, 135

AD2d at 683). Here, plaintiff's alleged injury occurred in New Jersey, where she was prescribed Dilantin, which is basis for her medical malpractice and other claims.

Thus, there is no basis to exercise personal jurisdiction over the Medical Provider defendants in New York. Consequently, plaintiff's amended complaint as against the Medical Provider defendants must be dismissed based upon a lack of personal jurisdiction over them (*see* CPLR 3211 [a] [8]; *Paterno*, 24 NY3d at 381; *Jackson*, 104 AD3d at 574).

Remaining Branches of the Medical Provider Defendants' Motion and Plaintiff's Cross Motion With Respect to the Medical Provider Defendants

Dr. Hinfey, Dr. LaRosa, and Dr. Shah, in their motion, also assert that they did not receive a follow-up mailing as required under CPLR 308 (2). They assert that the court lacks personal jurisdiction over them and that plaintiff's complaint as against them must be dismissed pursuant to CPLR 3211 (a) (8). Plaintiff asserts that after serving the summons with notice upon Dr. Hinfey, Dr. LaRosa, and Dr. Shah by leaving them with a person of suitable age and discretion at Newark Beth Israel on April 28, 2015, it was mailed to them at their place of business in New Jersey, as evidenced by certificates of mailing from the United States Postal Service stamped on May 13, 2015 from Sylvia Clarke to Dr. Hinfey, Dr. LaRosa, and Dr. Shah, which have been submitted to the court. No proof of service had been filed with the clerk of the court.

"CPLR 308 (2) permits personal service on a natural person by delivering a copy of the summons within this state to a person of suitable age and discretion at the actual place

of business of the person to be served and, within 20 days thereafter, mailing a copy of the summons to the actual place of business in a specified manner" (*Kearney v Neurosurgeons of New York*, 31 AD3d 390, 391 [2d Dept 2006]). CPLR 313 permits service of "the summons without the state, in the same manner as service is made within the state." "CPLR 308 (2) requires strict compliance and the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made" (*Samuel v Brooklyn Hosp. Ctr.*, 88 AD3d 979, 980 [2d Dept 2011], *lv denied* 19 NY3d 810 [2012]).

Plaintiff admits that the follow-up mailing was not made within 120 days of the commencement of the action as required by CPLR 306-b. Thus, Dr. Hinfey, Dr. LaRosa, and Dr. Shah have demonstrated that plaintiff failed to strictly comply with the delivery and mailing requirements of CPLR 308 (2) (*see Qing Dong v Chen Mao Kao*, 115 AD3d 839, 840 [2d Dept 2014]). Consequently, service of process upon Dr. Hinfey, Dr. LaRosa, and Dr. Shah was defective and could not confer personal jurisdiction over them (*see Monzon v Chiaramonte*, 140 AD3d 1126, 1129 [2d Dept 2016]; *Washington Mut. Bank v Murphy*, 127 AD3d 1167, 1174 [2d Dept 2015]). While plaintiff, in her cross motion, seeks an extension of time to serve the summons and complaint upon Dr. Hinfey, Dr. LaRosa, and Dr. Shah pursuant to CPLR 306-b, she has not established that good cause exists to extend the time for service (*Khodeeva v Chi Chung Yip*, 84 AD3d 1030, 1030-1032 [2d Dept 2011]).

In any event, in view of the finding that this action must be dismissed against Dr. Hinfey, Dr. LaRosa, and Dr. Shah due to the absence of any basis for personal jurisdiction

over them under CPLR 301 or 302 (as discussed above), the Medical Provider defendants' motion insofar as it seeks to dismiss this action as against Dr. Hinfey, Dr. LaRosa, and Dr. Shah for failure to properly effectuate service of process over them pursuant to CPLR 308 (2) and plaintiff's cross motion, pursuant to CPLR 306 (b), to extend their time to serve the summons with notice and complaint upon Dr. Hinfey, Dr. LaRosa, and Dr. Shah or, in the alternative, to deem service of the summons with notice and follow-up mailing to be timely served upon them, are rendered moot.

Furthermore, inasmuch as this action is being dismissed as against the Medical Provider defendants on the basis of lack of personal jurisdiction, it is unnecessary to reach the Medical Providers' remaining grounds (i.e., lack of subject matter jurisdiction, failure to state a cause of action, the statute of limitations, and the absence of triable issues of fact) for dismissal of plaintiff's action against them.[2]

Leave to Amend the Amended Complaint

Plaintiff, in her motion, seeks leave, pursuant to CPLR 3025 (b), to file a second supplemental summons and a second amended complaint to add Mylan Pharmaceuticals Inc. and John Doe I M.D. and John Doe II M.D. as defendants. She requests that these claims be deemed to relate back to the date that her claims were asserted against the other defendants

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[2]Among other things, Dr. Hinfey, Dr. LaRosa, and Dr. Shah assert that they did not prescribe Dilantin to plaintiff and that they were not involved with her discharge. They contend that they, therefore, did not commit the medical malpractice which is the basis of plaintiff's complaint against them. The court need not reach this issue since it is dismissing this action against them based upon a lack of personal jurisdiction over Dr. Hinfey, Dr. LaRosa, and Dr. Shah in New York.

since otherwise her medical malpractice claims (which accrued in January 2013) as against John Doe I M.D. and John Doe II M.D. would now be untimely. She argues that her claims against these additional proposed defendants arose out of the same occurrence as her claim against the other defendants. She contends that Mylan and Mylan Pharmaceuticals Inc. are united in interest, and that John Doe M.D. I and John Doe II M.D. are united in interest with the Dr. Hinfey, Dr. LaRosa, and Dr. Shah.

"[A]lthough leave to amend a pleading is freely granted, where the proposed amendment is palpably insufficient or patently devoid of merit, leave to amend should be denied" (*Darby Group Cos., Inc. v Wulforst Acquisition, LLC*, 130 AD3d 866, 867 [2d Dept 2015]; *see also* CPLR 3025 [b]; *Ciminello v Sullivan*, 120 AD3d 1176, 1177 [2d Dept 2014]; *Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615, 615 [1st Dept 2014]; *Finkelstein v Lincoln Nat. Corp.*, 107 AD3d 759, 761 [2d Dept 2013]; *Ramos v Baker*, 91 AD3d 930, 932 [2d Dept 2012]).

Here, plaintiff's proposed claims as against Mylan Pharmaceuticals Inc. are preempted by federal law, and, therefore, are palpably insufficient. As to John Doe M.D. I and John Doe M.D. II, plaintiff alleges that they are unidentified physicians employed at Newark Beth Israel in New Jersey who are licensed to practice medicine in New Jersey and treated her in New Jersey. In her reply papers, plaintiff asserts that one of these John Doe defendants is now known to be Dr. Perryman, who wrote the prescription for Phenytoin, but she does not assert that Dr. Perryman has any connection to New York. Thus, plaintiff has not shown that

there would be any basis for her to obtain personal jurisdiction in New York over John Doe M.D. I and John Doe M.D. II, rendering plaintiff's proposed claims against them are palpably insufficient. In addition, plaintiff's medical malpractice claim as against John Doe M.D. I and John Doe M.D. II is time-barred and she has failed to satisfy her burden of demonstrating the applicability of the relation-back doctrine (*see Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615, 616 [1st Dept 2014]; *Soto v Bronx-Lebanon Hosp. Ctr.*, 93 AD3d 481, 481 [1st Dept 2012]; *Alvarado v Beth Israel Med. Ctr.*, 60 AD3d 981, 982-983 [2d Dept 2009]). Consequently, plaintiff's cross motion, insofar as she seek leave to amend her first amended complaint, must be denied.

Affidavit of Merit

Plaintiff, citing to New Jersey law, asserts that since Dr. Hinfey, Dr. LaRosa, and Dr. Shah, as physicians, and Newark Beth Israel and Barnabas, as health care facilities, are "licensed persons" as defined by NJ Stat Ann 2A:53A-26 (f) and (j), she was required to serve a timely affidavit of merit upon them pursuant to NJ Stat Ann 2A:53A-27, which provides as follows:

> "In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment

> practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause."

NJ Stat Ann 2A:53A-29 provides that "[i]f the plaintiff fails to provide an affidavit or a statement in lieu thereof, pursuant to section 2 or 3 of this act [N.J.S.A. § 2A:53A-27 or 2A:53A-28], it shall be deemed a failure to state a cause of action." Plaintiff asserts that she served a "letter of merit" upon defendants' attorneys by facsimile and mail on June 22, 2015, and on August 11, 2014, she served an affidavit of merit upon defendants' attorneys. This affidavit of merit, dated August 8, 2015, by Dr. Juan Cortes (Dr. Cortes), a physician licensed to practice medicine in the State of New York who maintains a medical practice in New York in general medicine and family practice, states that after evaluation and CT scans following a motor vehicle accident, plaintiff was given Dilantin at Newark Beth Israel, and that she had a severe reaction to the Dilantin, leading to Steven Johnson Syndrome for which she was hospitalized for three weeks in New York Methodist Hospital. Dr. Cortes further asserts that plaintiff was discharged from Newark Beth Israel in New Jersey with a prescription for Dilantin, and sets forth that "there seems to be a reasonable probability that the discharge planning should have include patient teaching, monitoring for adverse or undesired effects, contraindications and follow-up." He opines, within a reasonable degree of medical certainty, that "the Steven Johnson Syndrome was caused by the Dilantin administration."

Plaintiff contends that while this affidavit of merit was not timely served under New Jersey law, the court should grant her an extension to serve it or deem it timely served. Since

Dr. Hinfey, Dr. LaRosa, Dr. Shah, Newark Beth Israel, and Barnabus have been dismissed from this action and this requirement of an affidavit of merit does not apply to Pfizer, plaintiff's cross motion for this relief has been rendered moot.

CONCLUSION

Accordingly, Mylan's motion, under motion sequence number two, is granted insofar as it seeks an order dismissing plaintiff's amended verified complaint as against it based upon the ground that the amended verified complaint is preempted by federal law, and, therefore, pursuant to CPLR 3211 (a) (7), fails to state a claim upon which relief can be granted. The Medical Provider defendants' motion, under motion sequence number three, is granted insofar as it seeks an order dismissing plaintiff's action as against them based upon a lack of personal jurisdiction over them. Plaintiff's cross motion, under motion sequence number four, is denied insofar as it seeks an order granting her a default judgment against Mylan and allowing her to file a second supplemental summons and a second amended complaint, and is denied as moot insofar as it seeks an order extending her time to serve and file an affidavit of merit with respect to her medical malpractice claims. Plaintiff's cross motion, under motion sequence number five, for an order, pursuant to CPLR 306-b, extending the time to serve her summons with notice and complaint upon Dr. Hinfey, Dr. LaRosa, and Dr. Shah or, in the alternative, deeming service of the summons with notice and

follow-up mailing to be timely, is denied as moot. The action is severed accordingly.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

JUDGE MARTIN SOLOMON

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