To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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POLSIA BUETI as guardian of the person and property of ROCCO BUETI,

Plaintiff,

DECISION and ORDER

-against-

Index No. 64120/2015
Seq. #2 (December 21, 2015)
Sseq. #3 (January 8, 2016)

ROBERT TIMMERMANS, STEPHEN LOBO, GEORGE MAGUIRE, MICHELLE WALLACE, JANIS PASTENA, RACHELLE LODESCAR, HEENA RAJDEO, ERIK BENITEZ, AMY HUA, EDWARD GOLEMBE, WESTCHESTER HEART AND VASCULAR, WESTCHESTER MEDICAL CENTER ADVANCED PHYSICIAN SERVICES, P.C., and WESTCHESTER COUNTY HEALTH CARE CORPORATION d/b/a WESTCHESTER MEDICAL CENTER,

Defendants.

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Minihan, J.,

New York State Courts Electronic Filing ("NYSECF") Doc. Nos. 1 through 94 were read on this motion (seq #2) to dismiss brought pursuant to CPLR 3211 (a)(8) (NYSECF Doc. No. 31) by defendants STEPHEN LOBO, GEORGE MAGUIRE, RACHELLE LODESCAR, ERIK BENITEZ, AMY HUA and WESTCHESTER MEDICAL CENTER ADVANCED PHYSICIAN SERVICES, P.C. (hereinafter collectively referred to as "the moving defendants").

New York State Courts Electronic Filing ("NYSECF") Doc. Nos. 1 through 94 were read on this cross-motion (seq #3) for attorneys' fees, costs, disbursements and sanctions pursuant to 22 NYCRR 130-1.1 (NYSECF Doc. No. 45) brought by plaintiff.

Upon the foregoing papers, it is hereby ORDERED that the motion to dismiss the complaint (seq #2) brought pursuant to CPLR 3211 by the moving defendants is denied and the cross-motion for sanctions is denied (seq #3) and the cross-motion for fees, costs and disbursements is denied with leave to renew.

Plaintiff commenced this medical malpractice action on August 31, 2015 on behalf of Rocco Bueti to recover damages for personal injuries allegedly incurred by him between April 2014 through August 2014 while under the medical care of defendants. On September 10, 2015 plaintiff served a copy of the summons and complaint upon the moving defendants. From September 23, 2015 through October 23, 2015, varying defendants served and filed their answers. However, the moving defendants did not file answers. Rather, on December 21, 2015, the moving defendants sought to dismiss the complaint pursuant to CPLR 3211(a)(8) asserting that plaintiff had failed to obtain personal jurisdiction over them for failure to effect proper service. The moving defendants contend by way of affidavit of Ms. Thompsen that she was not the registered agent for the moving corporation nor was she authorized to accept service of process on behalf of the moving defendants and she did not represent that she was authorized at the time of service.

Plaintiff opposes the motion and contends that on December 23, 2015, December 28, 2015 and December 29, 2015, the plaintiff re-served each of the moving defendants and filed new affidavits of service resolving any issue that related to personal jurisdiction. Plaintiff contends that the first attempt at service was good since Ms. Thompsen accepted the summons and complaint representing that she was authorized to accept service on behalf of the moving defendants. However, plaintiff states that when it learned that Ms. Thompsen who accepted may not have been actually authorized it prudently re-served the summons and complaint prior to the expiration of the 120-day period set forth in the CPLR 308. According to plaintiff, counsel requested that the moving defendants withdraw the motion to dismiss however since he refused plaintiff was compelled to submit opposition papers and a cross-motion.

To that end, plaintiff cross-moves for attorneys fees, costs, disbursements and sanctions on the ground that the moving defendants' motion to dismiss for lack of jurisdiction is patently without merit and frivolous. Plaintiff contends that since she resolved the personal jurisdiction issue by properly serving the complaint within the 120-day time period in CPLR 308, that she timely informed movants' counsel and demonstrated proper timely service the moving defendants' subsequent failure to withdraw their frivolous motion, merits the imposition of sanctions and attorney's fees and costs. Plaintiff notes that the other defendants similarly filed a motion to dismiss claiming lack of personal jurisdiction however upon plaintiff's subsequent proper service, they withdrew their motion to dismiss causing plaintiff to withdraw its motion for sanctions against them.

The moving defendants oppose the cross-motion for sanctions and reply in further support of their motion to dismiss while also asking that the court deem the proposed answers timely served with the court. By way of reply, plaintiff argues that the moving defendants refuse to acknowledge the case law which permits them to perfect service within the 120-day time period so that a motion to dismiss would be deemed premature if made within the 120-day period. Plaintiff further replies that the moving defendants admit that their answers were not timely served as they request this court to deem them timely served.

Generally, evidence submitted for the first time in reply papers should be disregarded by the court (*see e.g. Adler v Suffolk County Water Auth.*, 306 AD2d 229, 230 [2d Dept 2003]), exceptions to the rule arise when the evidence submitted is in response to allegations raised for the first time in the opposition papers (*see David v Chong Sun Lee*, 106 AD3d 1044, 1045 [2d Dept 2013]; *Conte v Frelen Assoc., LLC*, 51 AD3d 620, 621 [2d Dept 2008]), and/or when the other party is given an opportunity to respond to the reply papers (*see Pennachio v Costco 255 Wholesale Corp.*, 119 AD3d 662 [2d Dept 2014]). Here, the moving defendants cavaerlerly request in their reply to plaintiff's cross-motion that the court should "in the interest of efficiency" deem the answers annexed at Exhibit "A" as timely served. This request has been improperly made for the first time in reply papers and none of the aforementioned exceptions apply. In any event, according to the NYSECF, it appears that the moving defendants filed answers on February 23, 2016 and that to date plaintiff has not sought a default judgment against the moving defendants.[1] Accordingly, the moving defendants' request to deem the answers timely filed is denied.

As to the moving defendants' motion to dismiss, the summons and complaint were filed on August 31, 2015. The process server's affidavits of service field on December 30, 2015 and January 4, 2016 constitute prima facie evidence of proper service pursuant to CPLR 308(2) on the moving defendants (*see Scarano v Scarano*, 63 AD3d 716 [2d Dept 2009]). While the affidavit of Ms. Thompsen dated December 16, 2015 in support of the moving defendants' motion contains essentially a denial of service, it refers to the first attempt at service and fails to swear to "specific facts to rebut the statements" in the process server's affidavits as related to the second process of service (*Scarano v Scarano*, 63 AD3d 716, 716 [2d Dept 2009]). As such, there is no issue of fact which would necessitate a hearing to determine whether the moving defendants were properly served (*see Indymac Fed. Bank FSB v Quattrochi*, 99 AD3d 763 [2d Dept 2012]; *Assoc. First Capital Corp. v Wiggins*, 75 AD3d 614, 615 [2d Dept 2010]). In any event, the moving defendants' motion to dismiss must be denied as it was made within the initial 120–day period provided for service in CPLR 306–b (*see Rink v Fulgenzi*, 231 AD2d 562 [2d Dept 1996]). Since the plaintiff had the absolute statutory right to effect valid service at any time within the 120–day period following the filing of the summons and complaint, dismissal of the complaint prior to the expiration of that period is improper (*see Gelbard v Northfield Sav. Bank*, 216 AD2d 267, 267–268 [2d Dept 1995]).

The issue then turns to whether the plaintiff is entitled to an award of costs and sanctions against the moving defendants since plaintiff demonstrated her right to effect service (CPLR 306-b), demonstrated proper service and requested that the moving defendants withdraw their motion

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[1]It appears that the moving parties filed answers in response to plaintiff's letter dated February 19, 2016 which advised that not only was the motion to dismiss premature; that the moving parties cannot dely their obligation to answer the complaint which was properly served within the 120-day time period. The plaintiff wrote "accordingly, in a last effort to avoid a motion for default, I am asking that you immediately appear and answer for tour clients or immediately indicate, without equivocation, your intention to do so. If not, the motion for default will be filed on or before February 23, 2016." The moving defendants filed their answers on February 23, 2016.

to dismiss in light of cured service and, upon the moving defendants refusal, plaintiff was compelled to file opposition papers.

A court, in its discretion, may award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct (22 NYCRR 130–1.1[a]). In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct. Conduct is frivolous if "(1) it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; or (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130–1.1[c][1], [2]).

> "Frivolous conduct shall include the making of a frivolous motion for costs or sanctions... In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" (22 NYCRR 130–1.1[c]).

An award of costs or the imposition of sanctions may be upon a motion or by the court *sua sponte*, after a reasonable opportunity to be heard. "The form of the hearing shall depend on the nature of the conduct and the circumstances of the case"(22 NYCRR 130–1.1[d]). In assessing whether to award costs or sanctions, the court must consider whether the attorney adhered to the standards of a reasonable attorney (*Principe v Assay Partners*, 154 Misc.2d 702 [Sup.Ct. New York County 1992]). Sanctions may be awarded against both a party and his or her attorney (*Precise Court Reporting, Inc. v Karten*, 6 AD3d 412 [2d Dept 2004]).

Here, plaintiff advised the moving defendants that service was cured and requested that the motion to dismiss be withdrawn before it filed its opposition on January 7, 2016. Plaintiff subsequently provided case law on point concerning the premature nature of the motion to dismiss in a letter dated February 19, 2016. Despite these attempts, and 3 days after plaintiff's February 19th letter, the moving defendants filed their 3-page reply ignoring plaintiff's cited case. In their reply, the moving defendants argue that the complaint should be dismissed without legal support and they fail to rebut plaintiff's legal authority. The reply also affirmatively fails to address the subsequent service of process. An unjustifiable refusal to discontinue a motion in the face of unrefuted case law and evidence showing that the motion was unfounded is frivolous conduct (*see eg., Moran v Regency Savings Bank, F.S.B.*, 20 AD3d 305 [1st Dept 2005]; *Nachbaur v American Transit Ins. Co.*, 300 AD2d 74 [1st Dept 2002])(the court imposed costs and sanctions in part because of the sanctioned attorney's failure to mention or reference adverse authority).

In light of the foregoing, plaintiff has established a basis for the court to consider the moving defendants' conduct as frivolous. In opposing the cross-motions for sanctions, defense counsel merely states "plaintiff has the audacity to claim the motion is frivolous and warrants

sanctions...it is plaintiff who is wasting everyone's time"(NYSECF Doc. No. 75, ¶4-5)..."having attempted re-service on movants, I offered to have all sides withdraw all pending motions and simply agree upon a deadline for movants to interpose answers without personal jurisdiction defenses. Plaintiff refused this reasonable offer" (NYSECF Doc. No. 75, ¶5). While ill-advised not to withdraw the motion to dismiss after the second service of process, the court in its discretion, is denying the cross- motion for sanctions. However, the cross-motion for costs, disbursements and fees is denied inasmuch as the plaintiff has not demonstrated on this record, entitlement to costs, fees or disbursements as it has not produced documentation or invoices for the court's review.

Accordingly, for the reasons stated herein, it is ORDERED that the moving defendants' motion to dismiss is DENIED and; it is further

ORDERED that the plaintiff's cross-motion for sanctions is DENIED and; it is further

ORDERED that the plaintiff's cross-motion for fees, costs and disbursements is DENIED with leave renew upon sufficient documentary evidence.

The foregoing constitutes the Decision and Order of the court.

Dated: White Plains, New York
May 12, 2016

HON. ANNE E. MINIHAN, AJSC

TO: Heidell, Pittoni, Murphy & Bach, LLP
81 Main Street/ Suite 112
White Plains, New York 10601

Meagher & Meagher, PC
111 Church Street
White Plains, New York 10601

Martin, Clearwater & Bell
220 East 42nd Street
New York, New York 10017