

**Webb v Younger**

2017 NY Slip Op 33422(U)

April 26, 2017

Supreme Court, Nassau County

Docket Number: Index No. 605579/2016

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT – STATE OF NEW YORK  
TRIAL TERM, PART 8 NASSAU COUNTY**

**PRESENT:**

***Honorable Karen V. Murphy***  
**Justice of the Supreme Court**

\_\_\_\_\_  
**RONALD WEBB,**

**Plaintiff,**

**-against-**

**JOSEPH YOUNGER, M.D., JACKIE P.  
ORFANOS, M.D., MERCY MEDICAL CENTER,  
CATHOLIC HEALTH SERVICES**

**Defendants.**  
\_\_\_\_\_

**Index No.** 605579/2016  
**Motion Submitted:** 03/13/17  
**Motion Sequence:** 001,002,003,004

The following papers read on this motion:

Notice of Motion/Order to Show Cause..... **XXXX**  
Answering Papers..... **XXX**  
Reply.....  
Briefs: Plaintiff's/Petitioner's.....  
Defendant's/Respondent's.....

Each of the defendants named in this action moves this Court for an Order pursuant to CPLR § 3012 (b) dismissing the action for failure to timely serve a complaint (Motion Sequences 1, 2, and 3).

Plaintiff opposes the requested relief and cross-moves for an Order pursuant to CPLR § 3012 (d) to extend the time to serve the complaint (Motion Sequence 4). Defendants oppose the relief requested by plaintiff.

Plaintiff commenced this medical malpractice action on July 22, 2016, appearing *pro se*. At that time, plaintiff filed a summons with notice. Plaintiff personally served each of the defendants with the summons with notice on November 9, 2016. Plaintiff is

now represented by counsel in this action and with respect to the instant motion sequences.

CPLR § 3012 (b) provides in pertinent part that, “[i]f the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand. . . . If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision.”

Each of the defendants filed notices of appearance and demands for a complaint on November 16 and 18, 2016. Accordingly, the notices and demands were timely interposed (CPLR § 3012 [b]).

No complaint was served upon any of the defendants within the time period provided by the statute. It was not until each of the defendants made their respective motions to dismiss this action that plaintiff responded by cross-motion seeking an extension of the time to serve the verified complaint annexed to the cross-motion as Exhibit 7.

This Court must now determine whether plaintiff has both demonstrated a reasonable excuse for the delay and made a *prima facie* showing of legal merit (*Grace v. Follini*, 80 AD3d 560 [2d Dept 2011]; *Egan v. Federated Department Stores, Inc.*, 108 AD2d 718 [2d Dept 1985]). “When exercising its discretion in this regard, a court should consider all relevant factors, including the extent of the delay, the prejudice to the opposing party, and the lack of an intent to abandon the action” (*Aquilar v. Nassau Health Care Corp.*, 40 Ad3d 788, 789 [2d Dept 2007]).

Plaintiff’s motion seeking an extension of time to serve the verified complaint was presented to this Court as an Order to Show Cause on February 21, 2017, only approximately two months after the outside date that the complaint should have been served on defendants. Thus, the Court does not find the delay to be inordinately long. Also, plaintiff has apparently retained counsel, thereby evincing an intent to prosecute this action, not abandon it. Moreover, in opposing plaintiff’s motion, none of the defendants allege that they have been prejudiced by plaintiff’s failure to timely serve the demanded complaint, or that they would be prejudiced by an extension to serve it.

The Court finds that plaintiff’s excuse for having failed to timely serve the complaint in response to the demands is reasonable. In his affidavit submitted in support of his motion, he states that, due to the cataract surgery performed on his eyes by Dr. Younger, he is “permanently legally blind. . .” and that he “was unable to see the date and

understand the substance of the material” contained in the papers served by the defendants.

In support of his position that this action has legal merit, plaintiff submits the affirmation of Peter L. Schwartz, M.D., an ophthalmologist. Dr. Schwartz’s affirmation does not refer to Jackie P. Orfanos, M.D., nor does it mention the other named defendants: Mercy Medical Center and Catholic Health Services. Although Dr. Schwartz states that Dr. Younger departed from good and acceptable standards of medical practice related to his treatment of plaintiff’s cataracts, Dr. Schwartz does not affirm that any of the other defendants departed from good and acceptable standards of medical practice related to plaintiff’s care.

The proposed verified complaint annexed to plaintiff’s motion papers does not make any allegations against Jackie P. Orfanos, M.D., although Dr. Orfanos is named in the caption. Plaintiff’s counsel’s affirmation also fails to refer to Dr. Orfanos.

Accordingly, as to Dr. Orfanos, her motion to dismiss this action is granted (Motion Sequence 2), and plaintiff’s motion as it pertains to Dr. Orfanos is denied, as plaintiff has failed to demonstrate legal merit. The Nassau County Clerk is directed to enter judgment accordingly upon presentation of this Order, and the caption is hereby amended to delete the name of Jackie P. Orfanos, M.D.

The first cause of action alleged in the proposed complaint is for medical malpractice, and the second cause of action sounds in lack of informed consent. It appears that the second cause of action is alleged against “defendant,” whereas the first cause of action names defendants Mercy Medical Center (Mercy) and Catholic Health Services (CHS) as alleged participants in the claimed malpractice. Thus, it does not appear that any allegations are made against Mercy or CHS in the second cause of action.

In any event and as noted, Dr. Schwartz does not state that Mercy or CHS departed from good and accepted medical practice. Counsel’s affirmation also fails to refer to Mercy or to CHS.

Accordingly, as to defendants Mercy and CHS, their motion to dismiss the complaint is granted (Motion Sequence 1), and plaintiff’s motion as it pertains to these defendants is denied, as plaintiff has failed to demonstrate legal merit. The Nassau County Clerk is directed to enter judgment accordingly upon presentation of this Order, and the caption is hereby amended to delete the names of Mercy Medical Center and Catholic Health Services.

As to Joseph Younger, M.D., the Court finds that plaintiff has demonstrated both a reasonable excuse for the delay and legal merit in the context of the instant motion seeking an extension of time to serve a complaint. The Court finds the affirmation of Dr.

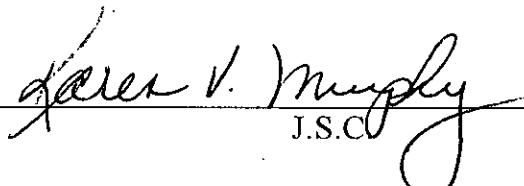
Schwartz sufficient to outline the alleged departures from good and accepted medical practice, specifically as to the failure to refer plaintiff to a retinal specialist prior to the surgery, based on the diagnosed posterior vitreous detachment, and the failure to immediately refer plaintiff to a retinal specialist after the second cataract surgery, based on a diagnosed retinal hemorrhage.

Accordingly, Dr. Younger's motion to dismiss this action is denied (Motion Sequence 3).

Plaintiff's motion seeking an extension of time to serve a complaint is granted on the condition that plaintiff serves a complaint in accordance with this Decision and Order, within twenty (20) days of the date of entry hereof (*CPLR § 3012 [d]*). Failure to serve the complaint as directed shall result in dismissal of this action as against Dr. Younger (Motion Sequence 4).

The foregoing constitutes the Order of this Court.

Dated: April 26, 2017  
Mineola, NY

  
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J.S.C.

**ENTERED**

APR 27 2017

NASSAU COUNTY  
COUNTY CLERK'S OFFICE