

<b>Krembs v NYU Langone Hosps.</b>
2021 NY Slip Op 31250(U)
March 24, 2021
Supreme Court, New York County
Docket Number: 805375/2012
Judge: Eileen A. Rakower
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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY**

**PRESENT: Hon. EILEEN A. RAKOWER**

**PART 6**

*Justice*

**SUSAN KREMBS,**

**Plaintiff,**

- against -

INDEX NO. 805375/2012  
MOTION DATE  
MOTION SEQ. NO. 7  
MOTION CAL. NO.

**NYU LANGONE HOSPITALS; ANDREAS N. NEOPHYTIDES, ANDREAS N. NEOPHYTIDES, M.D., P.C., A FICTITIOUS NAME INTENDED TO REPRESENT THE PROFESSIONAL ENTITY UNDER WHICH ANDREAS N. NEOPHYTIDES PRACTICES MEDICINE; NEUROLOGICAL CONSULTANTS OF NEW YORK, P.C.; MICHAEL L. SMITH; MICHAEL L. SMITH, M.D., P.C., A FICTITIOUS NAME INTENDED TO REPRESENT THE PROFESSIONAL ENTITY UNDER WHICH MICHAEL L. SMITH PRACTICES MEDICINE; ROBERT E. ELLIOTT; ROBERT E. ELLIOTT, M.D., P.C., A FICTITIOUS NAME INTENDED TO REPRESENT THE PROFESSIONAL ENTITY UNDER WHICH ROBERT E. ELLIOTT PRACTICES MEDICINE; STEPHEN P. KALHORN; BAXTER INTERNATIONAL INC. AND BAXTER HEALTH CARE CORPORATION,**

**DECISION AND ORDER**

**Defendants.**

The following papers, numbered 1 to \_\_\_\_ were read on this motion for/to  
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...  
Answer – Affidavits – Exhibits \_\_\_\_\_  
Replying Affidavits

**PAPERS NUMBERED**  
█  
█  
█  
█

**Cross-Motion:    Yes    X No**

Plaintiff Susan Krembs (“Plaintiff”) moves for an Order pursuant to CPLR 306-b, extending the time for Plaintiff to file and serve Plaintiff’s Supplemental Summons, Amended Verified Complaint and Certificate of Merit upon NYU School of Medicine; and deeming filing and service of Plaintiff’s Supplemental Summons, Amended Verified Complaint and Certificate of Merit upon Defendants NYU Langone Hospitals Center (“NYU Langone”), Stephen Paul Kalhorn, M.D. (Dr. Kalhorn), s/h/a Stephen P. Kalhorn; Andreas N. Neophytides, M.D. (“Dr. Neophytides”), s/h/a Andreas N. Neophytides and Andreas N. Neophytides, M.D., P.C., a fictitious name intended to represent the professional entity under which

Andreas Neophytides practices medicine; Michael Louis Smith, M.D. (“Dr. Smith”), s/h/a Michael L. Smith, and Michael L. Smith, M.D., P.C. a fictitious name intended to represent the professional entity under which Michael L. Smith practices medicine; Neurology Consultants of New York, P.C., and Robert E. Elliott, M.D. (“Dr. Elliot”), s/h/a Robert E. Elliott, and Robert E. Elliott, M.D., P.C., a fictitious name intended to represent the professional entity under which Robert E. Elliott practices medicine (collectively, “Defendants”). Defendants oppose.

### Factual Background

Plaintiff commenced this action against Defendants by the filing of a Summons and Complaint on or about December 20, 2012. The action involves medical malpractice claims. Plaintiff presented to NYU Langone Hospitals on June 23, 2010 with back pain. Plaintiff alleges that Defendants failed to take an adequate medical history and failed to observe and advise Plaintiff of pain management and other pain alleviating techniques prior to performing surgery. Plaintiff alleges that Dr. Smith negligently assessed her condition as necessitating surgery which resulted in nerve damage.

On or about September 9, 2013, Plaintiff filed Verified Bill of Particulars as to each Defendant. Plaintiff alleged that NYU Langone was responsible for the negligence of all Defendants who were its agents, servants or employees, either in actual fact or by virtue of ostensible agency theories. Dr. Smith was deposed on March 10, 2017. Dr. Smith testified that he was an employee of NYU School of Medicine.

On June 28, 2018, Plaintiff filed Motion Sequence 4 seeking, *inter alia*, leave to Amend the Summons and Complaint to add NYU School of Medicine as a Defendant as Dr. Smith’s employer. This Court issued a Decision on November 21, 2017 and issued an Amended Decision on December 6, 2017, granting Plaintiff’s motion. On December 6, 2017, Plaintiff filed the Amended Decision with Notice of Entry.

### Legal Standard

CPLR 306-b provides that:

Service of the summons and complaint. . . shall be made within one hundred twenty days after the commencement

of the action or proceeding . . . If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to the defendant, or upon good cause shown or in the interest of justice, extend the time for service.

A “good cause” extension requires a showing of reasonable diligence in trying to effect proper service upon a defendant. *Henneberry v. Borstein*, 91 A.D.3d 493, 496 [1st Dept 2012]. Good cause has been found where “the plaintiff’s failure to timely serve process is a result of circumstances beyond its control.” *Bumpus v. New York City Tr. Auth.*, 66 A.D.3d 26, 32 [1st Dept 2009]. The “good cause” extension, however, does not include conduct that is considered to be “law office failure.” *Henneberry*, 91 A.D.3d at 496.

An extension “in the interest of justice” is broader and more flexible than a “good cause” extension and can include law office failures as long as there is no prejudice to the defendant. *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105 [2001] (“CPLR 306-b provides for an additional and broader standard, i.e., the ‘interest of justice,’ to accommodate late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant”). A court “may consider [plaintiff’s] diligence, or lack thereof, along with any other relevant factor . . . including 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.” *Henneberry*, 91 A.D.3d at 496, *citing Leader*, 97 N.Y.2d at 105-106.

### Discussion

Here, Plaintiff has failed to show that she established good cause for the requested extension or that the extension to serve NYU School of Medicine with Amended Summons and Complaint is warranted in the interest of justice. It has been more than three years since the court granted Plaintiff leave to serve NYU School of Medicine with the Amended Summons and Complaint. Plaintiff fails to show “reasonable diligence in trying to effect proper service upon defendant” or that “plaintiff’s failure to timely serve process is a result of circumstances beyond its control.” *Henneberry*, 91 A.D.3d at 496. Plaintiff states that “any failure to serve [NYU] School of Medicine was not an affirmative revocation of Plaintiff’s relief to add a party, but rather misunderstanding and oversight (‘law office failure’), which unfortunately was not identified.”

Plaintiff also failed to show lack of prejudice to NYU School of Medicine by granting the instant motion. The statute of limitations has long run in this action.

Wherefore, it is hereby

ORDERED that Plaintiff's motion is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

**Dated: March 24, 2021**

ENTER:   
J.S.C.

**HON. EILEEN A. RAKOWER**

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**Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION**