SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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BETTY CHECO,

Plaintiff,

- v -

JOHN MWANDO, D.P.M., CENTRAL PARK AMBULATORY SURGERY, BIG APPLE FOOT & ANKLE CARE, HERALD SQUARE CHIROPRACTIC & SPORT, and JOHN MWANDO DPM, MD, LLC,

Defendants.

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INDEX NO. 805440/2020

MOTION DATE 02/23/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 64, 66, 86, 87, 88

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this action to recover damages for medical and podiatric malpractice, the plaintiff moves pursuant to CPLR 2221(d) for leave to reargue her opposition of the motion of the defendant Central Park Ambulatory Surgery (CPAS) pursuant to CPLR 306-b to dismiss the complaint against it for failure timely to serve it with process, which had been granted by order November 18, 2021 (Rakower, J.). That order, however, also had granted the plaintiff's cross motion pursuant to CPLR 306-b to extend her time to serve CPAS with process. CPAS opposes the instant reagument motion. The plaintiff's motion for leave to reargue is granted and, upon reargument, the order dated November 18, 2021 is modified by deleting the provision therein granting the motion of the defendant Central Park Ambulatory Surgery pursuant to CPLR 306-b to dismiss the complaint against it, and substituting therefor a provision denying that motion.

In the first instance, this court is competent to consider the instant motion. With certain exceptions not relevant here, CPLR 2221(a) provides that

> "[a] motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it."

Justice Rakower, who had determined the prior motions, has since retired from the bench. She thus is "unable" to consider the motion (*see Williams v Georgopoulos*, 184 AD3d 608, 609 [2d Dept 2020]).

Moreover, CPLR 2221(b) establishes an exception to that general rule where the Rules of the Chief Administrator of the Courts provide otherwise. Those Rules currently provide that "[a]ll motions," including those governed by CPLR 2221, "shall be returnable before the assigned judge" (22 NYCRR202.8[a]). Thus, "[b]y the adoption of the I[ndividual] A[ssignment] S[ystem], the CPLR 2221 requirement of referral of motions to a Judge who granted an order on a prior motion has been modified to provide for consistency with the mandate of the [IAS] that all motions in a case shall be addressed to the assigned Judge" (*Matter of New York State Urban Dev. Corp. [Fallsite, LLC]*, 85 AD3d 1723, 1724 [4th Dept 2011]; *see Matter of Quattrone v Erie 2-Chautauqua-Cattaraugus Bd. of Coop. Educ. Servs.*, 148 AD3d 1553, 1554 [4th Dept 2017]; *Billings v Berkshire Mut. Ins., Co.*, 133 AD2d 919, 919-920 [3d Dept 1987]). Because the action was reassigned to this court under the rules of the Individual Assignment System, it is thus is competent to consider and decide the pending motion even if Justice Rakower otherwise were able to hear the motion (*see Totaram v Gibson,* 179 AD3d 451, 452 [1st Dept 2020]; *Matter of Quattrone v Erie 2-Chautauqua-Cattaraugus Bd. of Coop. Educ. Servs.,* 148 AD3d at 1554; *C & N Camera & Elecs. v Public Serv. Mut. Ins. Co.*, 210 AD2d 132, 133 [1st Dept 1994]; *Billings v Berkshire Mut. Ins., Co.,* 133 AD2d at 920).

In the November 18, 2021 order, the court

> "ORDERED that the motion to dismiss is granted; however it is further
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> "ORDERED that the cross motion is granted to the extent that pursuant to CPLR section 306-b, Plaintiff is permitted a 60 day extension of time to serve the Summons and Complaint upon Central Park Ambulatory Care, PLLC, s/h/a Central Park Ambulatory Surgery."

As the Appellate Division, First Department, has explained,

> "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'"

(*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], quoting *Schneider v Solowey*, 141 AD2d 813, 813 [2d Dept 1988]). Here, the initial motion court misapprehended and misapplied CPLR 306-b. As relevant here, that statute 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 that defendant, *or* upon good cause shown or in the interest of justice, extend the time for service."

(emphasis added). The use of the disjunctive "or" in this phrase requires that, upon motion, a court cannot both grant a motion to dismiss for failure to serve process within 120 days of commencement and grant a motion or cross motion to extend the 120-day service period. It can only do one thing or the other.

> "In deciding such a motion, the express language of CPLR 306-b gives the court two options: dismiss the action without prejudice; or extend the time for service in the existing action. . . . In these circumstances, the court's options were limited to either dismissing the action outright, or extending the time for plaintiff to properly effect service"

(*Henneberry v Borstein*, 91 AD3d 493, 495 [1st Dept 2012]; *see Sottile v Islandia Home for Adults*, 278 AD2d 482, 484 [2d Dept 2000] ["The statute gives a court the option of extending the time to serve *instead of* dismissing the action"] [emphasis in original]). A court is only precluded from entertaining an application to extend the time for service pursuant to CPLR 306-b where the action has been dismissed by virtue of the entry of a judgment of dismissal (*see State of N.Y. Mortgage Agency v Braun*, 182 AD3d 63, 70 [2d Dept 2020]).

It is abundantly clear that, if the initial motion court intended to extend the plaintiff's time to serve process CPAS, it could not have intended also to grant a motion to dismiss the complaint. In any event, at the time that the plaintiff's initial cross motion was made, no

judgment dismissing the complaint against CPAS had been entered. The court also notes that, although CPAS has submitted a proposed judgment for entry, it has not been entered by the Clerk of the court. Moreover, within the 60-day period provided for in the November 18, 2021 order, the plaintiff properly served CPAS with copies of the summons and complaint. That service was timely and sufficient to obtain jurisdiction over CPAS.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to reargue her opposition to the motion of the defendant Central Park Ambulatory Surgery pursuant to CPLR 306-b to dismiss the complaint against it is granted and, upon reargument, the order dated November 18, 2021 is modified by deleting the provision therein granting the motion of the defendant Central Park Ambulatory Surgery pursuant to CPLR 306-b to dismiss the complaint against it, and substituting therefor a provision denying that motion.

This constitutes the Decision and Order of the court.

4/7/2022
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE