

Munoz v New York Presbyt. Hosp.

2010 NY Slip Op 33889(U)

June 2, 2010

Sup Ct, NY County

Docket Number: 112223/09

Judge: Alice Schlesinger

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6-4-10

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER

IA PART 16

Justice

Index Number : 112223/2009

MUNOZ, MARISOL

VS.

NY PRESBYTERIAN HOSPITAL

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

1 this motion to/for _____

PAPERS NUMBERED

notice of motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

by defendants Dr. Rosenwasser and Dr. Bass to dismiss is denied in accordance with the memorandum decision accompanying motion sequence 002.

FILED

JUN 04 2010

NEW YORK COUNTY CLERK'S OFFICE

JUN 02 2010

Dated: June 2, 2010

ALICE SCHLESINGER s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
MARISOL MUNOZ,

Plaintiff,

Index No. 112223/09

-against-

Motion Seq. Nos. 001 & 002

NEW YORK PRESBYTERIAN HOSPITAL,
MELVIN ROSENWASSER, M.D.,
RA'KERRY RAHMAN, M.D., DOUGLAS NOWAK, M.D.,
MAURIZIO MIGLIETTA, M.D.,
MICHAEL ARCARESE, M.D., MARY ELLEN BASS, M.D.,
and STEVEN D. MEED, M.D.,

Defendants.
-----X

SCHLESINGER, J.:

Plaintiff commenced this medical malpractice action by filing a summons and complaint on August 27, 2009. As the last date when the alleged malpractice occurred was June 19, 2007, the statute of limitations would have expired two and one-half years later, on December 19, 2009. Therefore, when this action was commenced, it was commenced timely.

Pursuant to the CPLR, plaintiff had 120 days from the date of commencement to serve the various defendants. With regard to two named defendants, specifically Dr. Melvin Rosenwasser and Dr. Mary Ellen Bass, service was allegedly made on them at their offices at 622 West 168th Street in New York City on September 9, 2009, by substituted service to Ms. Shirley Maragh, an employee of New York Presbyterian Hospital.

Issue was joined on behalf of these defendants and others on October 26, 2009, wherein the answer contained a defense of lack of personal jurisdiction vis-a-vis these two defendants. Following up on this defense, these two doctors moved on December 23, 2009, to dismiss the action against them with prejudice for lack of jurisdiction. In that motion, defendants pointed out that the affidavits of service showed an address of 522

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West 168th Street, not 622. Also, the moving papers contained affidavits from the two doctors indicating that they had never received notice of the action.

The plaintiff, presumably soon after receiving this motion, attempted to re-serve these doctors on January 11, 2010. This time the process server went to 622 West 168th Street to serve the papers and was referred to another address. In a second motion, this time brought by the plaintiff by Order to Show Cause, the process server indicates that this is the second time he went to the 622 address.¹ In this Order to Show Cause plaintiff is moving pursuant to CPLR §306-b to extend her time to serve the two moving doctors. Over the opposition of these doctors, I am granting plaintiff's motion. Section 306-b allows the Court to grant such a motion if the Court finds either that good cause exists for the granting of the motion, or if the Court finds that the interest of justice would be served. I find in this case that good cause does exist, and it would be in the interest of justice to allow additional time for service.

While I am not commending the plaintiff for having failed to note the jurisdictional defense asserted in the answer and for having failed to take steps to deal with that issue in a more timely way, still oftentimes defendants put in boiler plate defenses which are not meant to be taken seriously. Here, I do not believe that anything would be served by ordering a traverse hearing wherein the process server would provide sworn testimony confirming his affidavit and the two doctors would be forced to come in to testify that they did not receive notice. Such an exercise would accomplish little, as it could still be followed by a motion pursuant to CPLR §306-b if the plaintiff lost.

¹The original motion brought by the defense was set down for oral argument on May 12, 2010. At that time this Court directed the plaintiff to bring on this Order to Show Cause to ask for permission pursuant to Section 306-b to extend their time for service.

Moreover, the plaintiff here did attempt to remedy any defect which could have occurred either by the process server having gone to the wrong address in the first instance, or in his having made a mistake in writing 522 West 168th Street when he meant to write 622. Plaintiff did attempt to re-serve the doctors again on January 11. This is not a situation similar to the cases cited by the defense, such as *Johnson v. Concourse Village*, 69 AD3d 410 (1st Dep't 2010), *Posada v. Pelaez*, 37 AD3d 168 (1st Dep't 2007), or *Shelkowitz v. Rainess*, 57 AD3d 337 (1st Dep't 2008) wherein the plaintiffs neglected their obligations and waited far too long before they tried to remedy the service problem. Rather, it is more like the case of *Murphy v. Hoppenstein*, 279 AD2d 410 (1st Dep't 2001) where the Court found that extensions of time should be liberally granted whenever plaintiffs have been reasonably diligent in attempting service, regardless of the expiration of the statute of limitations after filing and before service. That is the situation here. I find that the plaintiff has been reasonably diligent, she has asserted a meritorious claim, and no discernable prejudice by the defendants has been shown.

Accordingly, it is hereby

ORDERED that the motion to dismiss by the defendants Dr. Melvin Rosenwasser and Dr. Mary Ellen Bass is denied; and it is further

ORDERED that the motion by the plaintiff to extend her time to serve is granted, and plaintiff shall have thirty (30) days from today, June 2, 2010, to serve Dr. Rosenwasser and Dr. Bass by service upon their counsel.

This decision constitutes the order of the Court.

Dated: June 2, 2010
 JUN 02 2010

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Alice Schlesinger
 J.S.C.
ALICE SCHLESINGER