

<b>Barahona v Marcus</b>
2021 NY Slip Op 32950(U)
December 21, 2021
Supreme Court, New York County
Docket Number: Index No. 805277/2014
Judge: Debra A. James
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DEBRA JAMES

PART 59

*Justice*

-----X

DEBORA BARAHONA, as Administrator of the Estate of  
DAMIAN FORTUNE, deceased, in her capacity as Guardian  
of DAYMIA ELIZABETH FORTUNE,

Plaintiffs,

- v -

SERGIU MARCUS, SERGIU MARCUS, M.D., P.C., LONG  
ISLAND AMBULATORY SURGERY CENTER, L.L.C.,  
LONG ISLAND EYE SURGICAL CARE,  
P.C., LINDENHURST EYE PHYSICIANS AND SURGEONS,  
P.C., ANTHONY T. PACIA, MD, BROOKHAVEN  
ANESTHESIA ASSOCIATES, L.L.P., SCOTT HORN,  
SCOTT HORN, M.D., P.C., and THE NEW YORK EYE AND  
EAR INFIRMARY,

Defendants.

-----X

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 294, 295, 296, 297,  
298, 299, 300

were read on this motion to/for

EXTEND - TIME

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant Long Island Ambulatory  
Surgery Center, LLC to stay the date of commencement of the jury  
trial of January 20, 2022, set forth in the Order dated October  
24, 2021 (Kaplan, J.), pending the resolution of the appeal  
before the Appellate Division, First Department, of the Order  
dated April 29, 2020 and entered on May 13, 2020 (Madden, J.,  
Sup Ct, NY Co), that denied defendant New York Eye and Ear  
Infirmary's motion for summary judgment dismissing the complaint

against such defendant, until sometime in May 2022, is DENIED;  
and it is further

ORDERED that trial counsel for each party shall appear in person at 60 Centre Street, New York, New York, Room 300 for the continued Pre-Trial Conference on January 13, 2022, 10:30 AM, with jury selection to commence at such courthouse on January 20, 2022, 9:30 AM.

#### DECISION

By Order dated October 25, 2021 (Kaplan, J.) ("Trial Scheduling Order"), the jury trial of this action, to commence on January 20, 2022 was assigned to the undersigned. The herein motion to stay such Order, which is ex parte, has been made returnable to the undersigned pursuant to CPLR Rule 2221(a)(2).

Moving defendant Long Island Ambulatory Surgery Center, LLC seeks an order modifying the Trial Scheduling Order to stay the jury trial pending resolution of the appeal pending before the Appellate Division, First Department, of the Decision and Order dated April 20, 2020 of the Supreme Court, New York County (Madden, J.) that resolved multiple motions for summary judgment brought by various defendants herein ("Summary Judgment Order").

By Notice of Appeal dated June 2, 2020, defendants Anthony T. Pacia, MD and Brookhaven Associates, LLC, filed an appeal from such Summary Judgment Order (NYSCEF Doc No 265) before the Appellate Division, First Department. By Notice of Appeal dated

June 10, 2020, defendant Long Island Ambulatory Surgery Center, LLC, filed an appeal from such Summary Judgment Order (NYSCEF Doc No 1 [Appellate Division, First Department, Index No. 2020-40637]) filed an appeal from such. By Stipulations dated October 25, 2021, attorneys for all parties, agreed to adjourn such appeals from such Summary Judgment Order from the December 2021 Term to the February 2022 Term of the Appellate Division, First Department (NYSCEF Docs No 29 and 30 [Appellate Division, First Department, Index No. 2020-40637]) .

A review of governing law shows that the discretionary, as well as automatic, stay provisions of CPLR 5519 apply only to stays of "proceedings to enforce the judgment or order appealed from pending the appeal". See Tax Equity Now NY LLC v City of New York, 173 AD3d 464, 465 (1<sup>st</sup> Dept 2019). Therefore, CPLR 5519 does apply to moving defendant's motion, which does not seek to stay the enforcement of any judgment, but only to stay a trial date.

The court declines to exercise its discretionary powers pursuant to CPLR 2201 to stay the trial date pending resolution of the appeals of the Summary Judgment Order, as under the

foregoing procedural facts, such a disturbance of the status quo is not warranted. See Schwartz v New York City Housing Authority, 219 AD2d 47, 48 (2d Dept 1996).

*Debra A. James*

20211221164324DJAMES25E022BAC0B6433B8EEFDEED746F087A

12/21/2021  
DATE

DEBRA JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE