

SCAN

AMENDED SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

GARY DAVIS, as Executrix of the Estate of
WILLIAM GRAHAM, Deceased and as Executor of
the Estate of GEORGIA GRAHAM, Deceased,

Plaintiff(s),

- against -

CARDIOVASCULAR CONSULTANTS OF LONG
ISLAND, P.C., ALAN B. COHEN, M.D., BRUCE M.
DECTER, M.D., DAVID A. HESS, M.D., THE
INTERVENTIONAL HEART GROUP, RICHARD A.
SHLOFMITZ, M.D., and THEOFANIS TSAMTSIOURUS, MD.,

Defendant(s).

TRIAL/IAS PART 9

INDEX NO. 15626/04

MOTION SEQUENCE
NO. 1 & 2

MOTION SUBMISSION
DATE: August 12, 2008

The following papers read on this motion:

Notice of Motion	XX
Affirmation in Opposition	X
Affirmation	X
Reply Affirmation	X

Upon the foregoing papers, the motion by plaintiffs for an Order pursuant to CPLR 22004, extending Plaintiff's time to file a Note of Issue and amending the caption to reflect that William Graham and Georgia Graham are deceased and Gary Davis has been named Executor of both Estates and the cross motion by the defendants Cardiovascular Consultants of Long Island, PC, Alan B. Cohen, MD, Bruce M. Decter MD and David A. Hess, MC for an Order dismissing this case with costs, for the unreasonable failure on the part of the plaintiffs to prosecute (CPLR §3126), are both determined as hereinafter provided:

In its entirety, the Court's Order dated November 1, 2007 sets forth:

"Pursuant to correspondence dated October 31, 2007, wherein counsel for the respective parties agreed that all discovery and pre-trial motions are complete; that this matter cannot be settled in its present posture; and that counsel are prepared for trial, the Court, sua sponte, directs the plaintiff to serve and file a Note of Issue within ninety (90) days. If the plaintiff does not file a Note of Issue within 90 days, this action is deemed dismissed without

further Order of the Court pursuant to CPLR §3216."

The plaintiffs did not file a Note of Issue within 90 days of the Court's November 1, 2007 Certification Order.

Of significance to the instant application, the caption of said November 1, 2007 Certification Order states:

"

GARY DAVIS, as Executrix of the Estate of
WILLIAM GRAHAM, Deceased and as Executor of
the Estate of GEORGIA GRAHAM, Deceased,

Plaintiff(s),

- against -

CARDIOVASCULAR CONSULTANTS OF LONG ISLAND, P.C.,
ALAN B. COHEN, MD, BRUCE M. DECTER, MD, DAVID A.
HESS, MD, THE INTERVENTIONAL HEART GROUP, RICHARD
A. SHLOFMITZ, MD and THEOFANIS TSAMTSIOURUS, MD.,

Defendant(s).

TRIAL/IAS PART 11

INDEX NO. 15626/04

"

By stipulation dated August 29, 2007, signed by counsel for the respective parties and so-ordered by the Court, the parties stipulated to amend the caption and substitute a party. Said stipulation provided:

"WHEREAS, WILLIAM GRAHAM and GEORGIA GRAHAM by and through their attorneys, Law Offices of JEFFREY S. LISABETH, commenced the instant medical malpractice action in the Supreme Court of the State of New York, County of Nassau entitled WILLIAM GRAHAM and GEORGIA GRAHAM, Plaintiff(s), against CARDIOVASCULAR CONSULTANTS OF LONG ISLAND, P.C., ALAN B. COHEN, M.C., BRUCE M. DECTER, M.D., DAVID A. HESS, M.D., THE INTERVENTIONAL HEART GROUP, RICHARD A. SHLOFMITZ, M.D., and THEOFANIS TSAMTSIOURUS, M.D., Defendant(s), under Index Number 01562504;

WHEREAS, the Plaintiff, WILLIAM GRAHAM, died on March 29, 2006 (see attached exhibit 1; Certificate of Death William Graham);

WHEREAS, the Plaintiff, GEORGIA GRAHAM, died on April 4, 2007 (see attached exhibit 2; Certificate of Death Georgia Graham);

WHEREAS, GARY DAVIS, the son of the Plaintiff-Decedent, GEORGIA GRAHAM, petitioned the Surrogate's Court of the State of New York, County of Nassau, under Case Number 346758, to be appointed the fiduciary of his mother's Estate and to be granted Letters Testamentary;

WHEREAS, GARY DAVIS, was appointed the fiduciary of the Plaintiff-Decedent's Estate and was granted Letters Testamentary by the Honorable John B. Riordan, Judge of the Surrogate's Court for the County of Nassau, on or about June 15, 2007 (see attached Exhibit 3);

WHEREAS, GARY DAVIS, the step-son of the Plaintiff- Decedent, WILLIAM GRAHAM, petitioned the Surrogate's Court of the State of New York, County of Nassau, under Case Number 344429, to be appointed the Successor Executor of his father's Estate and to be granted Successor Letters Testamentary;

WHEREAS, GARY DAVIS, was appointed the Successor Executor of the Plaintiff-Decedent's Estate and was granted Successor Letters Testamentary by the Honorable John B. Riordan, Judge of the Surrogate's Court for the County of Nassau, on or about August 28, 2007 (see attached Exhibit 4 and Exhibit 5);

IT IS THEREFORE STIPULATED, CONSENTED AND AGREED, by and between the Law Offices of JEFFREY S. LISABETH, attorneys for the Plaintiff-Decedent in the above-captioned matter, and KANTERMAN, O'LEARY AND SOSCIA, LLP and BOWER, SANGER AND LAWRENCE ESQS., attorneys for the Defendant in the above-captioned matter that the title of the instant action is hereby amended to read as follows:

GARY DAVIS, as Executor of the Estate of WILLIAM GRAHAM, Deceased, and as Executor of the Estate of GEORGIA GRAHAM, Deceased,

Plaintiff,

- against -

CARDIOVASCULAR CONSULTANTS OF LONG ISLAND, P.C., ALAN B. COHEN, MD., BRUCE M. DECTER, M.D., DAVID A. HESS, M.D., THE INTERVENTIONAL HEART GROUP, RICHARD A. SHLOFMITZ, M.D., and THEOFANIS TSIAMTSIOURUS, M.D.,

Defendant(s).

X

The Clerk of the Court is hereby notified to amend its records accordingly,

IT IS THEREFORE STIPULATED, CONSENTED AND AGREED, that this faxed stipulation is as good as the original

Dated: Mineola, New York
August 29, 2007

s/ _____
Law Offices of JEFFREY S. LISABETH
By: Jeffrey S. Lisabeth, Esq.
Attorney for Plaintiff(s), GRAHAM
54 Willis Avenue
Mineola, New York 11501
(516) 877-1233

s/ _____
KENTERMAN, O'LEARY, AND SOSCIA, LLP
Attorneys for Defendants
CARDIOVASCULAR CONSULTANTS, COHEN,
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88-14 Surphin Boulevard
Jamaica, New York 11435
(718) 657-5757

s/ _____
BOWER, SANGER AND LAWRENCE, ESQS.
Attorneys for Defendant
THE INTERVENTIONAL HEART GROUP
RICHARD A. SHLOFMITZ, MD., AND
THEOFANIS TSIAMTSIOURUS, M.D.
261 Madison Avenue
12th Floor
New York, NY 10016
1-212-599-0900

SO ORDERED:

s/ _____
Honorable Roy S. Mahon"

In support of the instant application, the plaintiffs through plaintiffs' counsel sets forth:

"4. The summons and complaint were served in or about November, 2004. The defendant's appeared subsequently by way of interposing their answers with demands shortly thereafter.

5. During discovery both plaintiff's died, Mr. Graham on March 29, 2006 and Mrs. Graham on April 4, 2007. Annexed hereto as Exhibits "A" and "B" are copies of the death certificates for both plaintiff's, respectively. Letters testamentary naming Gary Davis ad Executor of both Estates is annexed hereto as Exhibit "C".

6. During the interim plaintiff sought to amend the caption to reflect that both plaintiff's are deceased and the appointment of an Executor, Gary Davis. Plaintiff circulated a Stipulation to that effect and had eventually received back from all parties a Stipulation to be "so ordered" by the Court allowing an amendment to the caption to reflect the demise of the plaintiff's and the

appointment of the Executor, Gary Davis. The Stipulation was submitted to the Court for its approval. Affirming treated this matter as temporarily stayed until the Court approved the proposed amended caption, reflected in a Stipulation annexed hereto as Exhibit "D". As the Court can see, all parties agreed to the amendment. The parties were waiting for the "so ordered" Stipulation to be returned.

7. Unfortunately, it has recently come to the attention of your affirmant that the Court did approve the Stipulation to amend the caption. The Stipulation was signed by the Honorable Roy S. Mahon and faced to affirmant's office. It seems that someone from affirmant's office inadvertently took the facsimile received back from the court from the fax machine, and faxed it to the parties, but then filed it in affirmant's file without advising an attorney that it was received. Annexed hereto as Exhibit "E" is a copy of the "so ordered" Stipulation.

8. Until a few days ago, this office was under the impression that this matter was still stayed while awaiting return of a "so ordered" Stipulation before the formality of amending the caption and then filing the Note of Issue, operating under the assumption that the Note of Issue and Certificate of Readiness could not be filed. It is respectfully submitted that only a few months have passed since the deadline to file the Note of Issue has expired. No party herein can or would be prejudiced from amending the caption or the filing the Note of Issue and Certificate of Readiness."

In examining an application to file a late Note of Issue, the Court in **Wechler v First Unum Life Insurance Company**, 295 AD2d 340, 742 NYS2d 668 (Second Dept., 2002) stated:

"The plaintiff was required to demonstrate a justifiable excuse for his failure to timely file a note of issue and that his action has merit (*see Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 655 NYS2d 848, 678 NE2d 460; *Raffa v Cook*, 289 AD2d 385, 735 NYS2d 398; *Lopez v Imperial Delivery Serv.*, 282 AD2d 190, 725 NYS2d 57). The court may accept law office failure that is not willful or deliberate as a reasonable excuse (*see, Reyes v Ross*, 289 AD2d 554, 735 NYS2d 198; *Flomenhaft v Baron*, 281 AD2d 389, 721 NYS2d 381). However, conclusory and unsubstantiated assertions of law office failure are insufficient (*see Werbin v Lociero*, 287 AD2d 617, 732 NYS2d 37), and a pattern of willful default and neglect will not be excused (*see Wynne v Wagner*, 262 AD3d 556, 693 NYS2d 60; *Campenni v Ridgecroft Estates Owners*, 261 AD2d 496, 690 NYS2d 599)."


Wechler v First Unum Life Insurance Company, supra at 669

Upon review of the foregoing, the verified complaint and the deposition transcript of Georgia Graham, the plaintiffs have established a basis for the requested relief (see, **Wechler v First Unum Life Insurance Company**, supra). As such, the plaintiff's application for an Order pursuant to CPLR 22004, extending Plaintiff's time to file a Note of Issue and amending the caption to reflect that William Graham and Georgia Graham are deceased and Gary Davis has been named Executor of both Estates, is **granted**. The defendants Cardiovascular Consultants of Long Island PC, Alan B. Cohen, MD, Bruce M. Decter, MD and

David A Hess, MD's application for an Order dismissing this case with costs, for the unreasonable failure on the part of the plaintiffs to prosecute (CPLR §3126), is denied.

SO ORDERED.

DATED: 10/29/2008


..... J.S.C.

ENTERED

NOV 12 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**