SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

GARY STAHL, as administrator of the Estate of JEANNE ELAINE STAHL, deceased, GARY STAHL, and SETH STAHL, Individually and JUSTIN STAHL, and BRIAN STAHL, infants by their father and natural guardian GARY STAHL.

Plaintiffs.

- against -

Sequence No.: 003
Index No.: 007737/06

BARBARA MANDELL, M.D., BARBARA MANDELL, M.D., F.A.C.P., LLC., SARAH KATZ, P.A., SOUTH NASSAU COMMUNITIES HOSPITAL, VICTOR DLUGASH, M.D., ARTHUR H. FISHER, M.D. and ENDOCRINOLOGY AND DIABETES ASSOCIATES OF LONG ISLAND, P.C.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Motion pursuant to CPLR 3212 by Arthur H. Fisher, M.D. and Endocrinology and Diabetes Associates of Long Island, P.C. for summary judgment dismissing the complaint is denied as hereinafter provided.

Plaintiffs commenced this action seeking damages for medical malpractice, lack of informed consent, loss of parental services and wrongful death. According to the supplemental bill of particulars dated May 1, 2008, defendant Arthur S. Fisher, M.D. and Endocrinology and Diabetes Associates of Long Island, P.C. were negligent in, *inter alia*,

> "failing to timely and properly treat atrial fibrillation; failing to cardiovert; failing to timely prevent a stroke; failing to timely and properly administer Heparin therapy * * * failing to timely and properly administer TPA;" etc.

In short, plaintiffs contend that Dr. Fisher failed to properly manage decedent Jeanne Elaine Stahl's thyroid condition; to properly administer the necessary medications including PTU, iodine and beta blockers.[1]

According to the record, Dr. Fisher performed an endocrinology consultation at the request of decedent's attending physician, defendant Victor Dlugash, M.D. at approximately 7:30 a.m. on the morning of December 30, 2005 at South Nassau Communities Hospital after she was brought to the emergency room by ambulance at 2:35 a.m. that day with complaints of altered mental status, lethargy and decreased appetite. He found that the patient was suffering from severe hyperthyroidism and began a course of treatment. Dr. Fisher again saw the decedent on the morning of December 31, 2005 in the coronary care unit where he observed, *inter alia*, little movement on her right side. He contacted Dr. Dlugash who, after performing an examination, requested a neurology consultation. When Dr. Fisher saw the patient on January 1, 2006, she was on a ventilator. He continued to see her daily from January 3 through January 6, 2006, when she was pronounced brain dead and life support was discontinued.

Pursuant to the order of this court dated December 6, 2007, this matter was certified ready for trial. Plaintiffs were directed to file a note of issue within 120 days of that date and motions for summary judgment were to be filed within 60 days of the filing of the note of issue. Since the note of issue was filed on April 4, 2008, plaintiffs contend that the instant motion for summary judgment dated June 26, 2008 is untimely and must be denied. The defendant Dr. Fisher made no attempt prior to this motion to obtain an order extending his time to move for summary judgment. It is uncontroverted that movants did not file their summary judgment motion within the requisite sixty-day deadline specified in the certification order, and instead now contend that good cause exists for the fifteen-day delay. Purportedly the depositions of critical party witnesses, i.e., Nurse Pamela Prunty and Nurse Ingrid Bloomfield, employees of South Nassau Communities Hospital, remained outstanding on the June 9, 2008 summary judgment motion deadline and allegedly the movants "wanted to make certain that Nurse Bloomfield's testimony did not raise new issues of fact regarding Dr. Fisher prior to defendants submitting the within motion."[2]

CPLR 3212(a) provides that the court may set a date after which no motion for summary judgment may be made, such date being no earlier than 30 days after the filing of the note of issue. Under the holding of Brill v. City of New York, 2 N.Y.3d 648, 651 [2004], which applies to cases such as this, where movant makes a motion for summary judgment after the expiration of a court ordered deadline which is shorter than the 120-day deadline set forth in CPLR 3212(a) (Mizell v. Eastman & Bixby Redevelopment Co., LLC, 34 A.D.3d 770, 771 [2nd Dept. 2006]),

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[1]According to the preliminary conference stipulation and order of January 24, 2007, the most serious injury alleged is the "failure to appreciate plaintiff decedent's thyroid dysfunction, resulting in stroke and death."

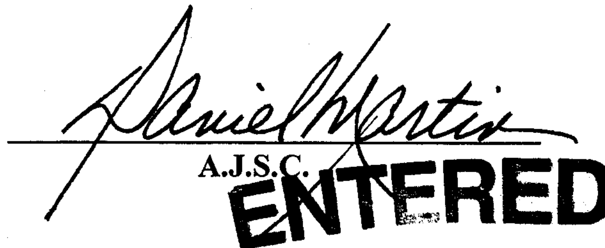
[2]The depositions did not take place until June 12, 2008 and June 26, 2008 respectively. After defendants purportedly determined that the testimony did not impact the motion, the motion was filed on June 26, 2008.

a late summary judgment motion will not be entertained on the merits unless the lateness is excused for good cause shown which requires that a satisfactory explanation for the untimeliness be set forth. "No excuse at all or a perfunctory excuse, cannot be 'good cause.' " Brill v. City of New York, *supra* at p. 652. Good cause must be laid out in the motion papers and not in reply. Cabibel v. XYZ Associates, L.P., 36 A.D.3d 498 [1st Dept. 2007]. Parties may no longer rely on the merits of their case to extricate themselves from failing to show good cause. First Union Auto Finance, Inc. v. Donat, 16 A.D.3d 372, 373 [2nd Dept. 2005]. In the absence of a good cause showing, a late summary judgment motion may not be considered, even if it appears to have merit and the delay has not prejudiced the adversary. McNally v. Beva Cab Corp., 45 A.D.3d 820, 821 [2nd Dept. 2007]; Rivera v. Toruno, 19 A.D.3d 473, 474 [2nd Dept. 2005]. Statutory time frames, like court ordered time frames, are not options. They are requirements to be taken seriously by the parties. Miceli v. State Farm Mut. Auto. Ins. Co., 3 N.Y.3d 725, 726 [2004].

Although moving defendants maintain that Nurses Prunty and Bloomfield were "party witnesses and medical personnel offering pertinent testimony regarding the care and treatment of the decedent on December 31, 2005," defendants point to nothing in the testimony adducted at their depositions that was so essential to the grounds on which their motion is predicated, that the motion could not have been made prior to the depositions. While significant discovery may, in certain circumstances, constitute good cause for the delay in making a motion for summary judgment (Czernicki v. Lawniczak, 25 A.D.3d 581, 581-582 [2nd Dept. 2006]), testimony by Nurse Ingrid Bloomfield that Dr. Fisher was present in the coronary care unit at 12:50 p.m. on December 31, 2005 and, therefore, may not be considered to have abandoned the decedent, did not provide the evidentiary basis for defendants' summary judgment motion (Anderson v. Kantares, 51 A.D.3d 954 [2nd Dept. 2008]; Espejo v. Hiro Real Estate Co., 19 A.D.3d 360 [2nd Dept. 2005]), which is based primarily on the contentions, *inter alia*, that Dr. Fisher administered timely and appropriate dosages of thyroid medications; ordered timely and appropriate tests and cultures to evaluate the patient's status; properly examined and evaluated her condition. Since his involvement in the case was as an endocrinology consultant, defendants maintain that he acted appropriately in deferring to other specialties for those conditions outside his purview. The conclusory supposition that the nurses' testimony may have raised issues of fact *vis a vis* Dr. Fisher's performance on the date in question does not constitute good cause for defendants' delay in making the motion. Notwithstanding the claimed integral involvement of the deponent nurses in the care of the decedent during her confinement at South Nassau Communities Hospital, nothing in the testimony proffered by defendants constitutes an evidentiary basis for their summary judgment motion nor have defendants established that they could not have made the motion prior to the depositions.

Accordingly, defendants' attempt to fall within the good cause provision of CPLR 3212(a) having proved unavailing, their motion for summary judgment dismissing the complaint as to said defendants is denied.

So Ordered.



A.J.S.C.

Dated: December 24, 2008

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NASSAU COUNTY
COUNTY CLERK'S OFFICE