

SUAU

**SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 5  
NASSAU COUNTY**

\_\_\_\_\_  
**JEFFREY DEPRIMA,**

**Plaintiff,**

**INDEX NO.: 18393/08**

**-against-**

**MOTION DATE: 8/2/10**

**PHILIP R. SPADAFORA, F.A.C.P., M.D., IRWIN  
INGWER, M.D., ISLAND MEDICAL GROUP OF  
PLAINVIEW, WINTHROP UNIVERSITY  
HOSPITAL, NORTH SHORE UNIVERSITY  
HOSPITAL, NORTH SHORE LONG ISLAND  
JEWISH HEALTH SYSTEMS, KARRIM  
GENOVESE, KOTHADRGAM ROSHAN, SUMIT  
MITTLE, M.D., CARDIOVASCULAR MED.  
ASSOCIATES, KAREN SCHORN, M.D., ASHOK  
ASWANI, M.D., LOREM M. FISHMAN, M.D.,  
ANDREW E. SAMA, M.D., JONATHAN KAPLAN,  
M.D., NEW YORK HOSPITAL QUEENS,  
VINCENT MACALUSO and "JOHN DOES 1-50",**

**MOTION SEQ. NO.: 004**

**Defendants.**

**The following papers read on this motion (numbered 1):**

**Notice of Motion.....1**

The Court automatically adjourns all motions that are submitted, without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission.

The motion by defendant LOREN M. FISHMAN, M.D. s/h/a LOREM M. FISHMAN, M.D. ("FISHMAN") to dismiss pursuant to CPLR §3211(a)(8) and CPLR §3215(c) is hereby determined as follows.

This is an action for medical malpractice arising out of medical care administered to plaintiff from April 2006 through and including October 2007. Defendant FISHMAN moves to dismiss on grounds (i) that plaintiff failed to take proceedings for the entry of a default judgment within one year of default, and consequently, the complaint must be dismissed as abandoned pursuant to **CPLR §3215(c)**; or alternatively (ii) that there is no jurisdiction over FISHMAN because the summons and complaint were not properly served pursuant to **CPLR §308(4)**.

If the Court determines that defendant FISHMAN was improperly served, the Court lacks jurisdiction over FISHMAN and, accordingly, it is rendered powerless to make any further determination on the merits, namely, FISHMAN's alternative ground for dismissal, that plaintiff failed to take proceedings for the entry of a default judgment within one year of default.

FISHMAN argues that plaintiff failed to effectuate proper service upon her. In support, FISHMAN attaches plaintiff's proof of service attesting to service upon LOREM M. FISHMAN pursuant to **CPLR §308(4)** ("Proof of Service"). The Court notes that the purported affidavit is not sworn by the process server before a notary public, and as a result, is not in proper affidavit form. **CPLR §306(d)**. Even if the Court were to consider said Proof of Service, the Court finds it wholly insufficient. According to the Proof of Service, the Summons and Verified Complaint were affixed to the door at 148-09 Northern Blvd., Ste 1k, Flushing, New York 11354 (the "Premises") on December 9, 2008. Although the form used by the process server states that the Premises was the "defendant's actual place of business - dwelling place - usual place of abode - within the state," the process server never made the designation called for by the form.

The Proof of Service, on its face, raises two issues regarding proper service: (1) has plaintiff satisfied the prior "due diligence" requirement of **CPLR §308(4)**; and (2) were the summons and complaint affixed at the proper address?

**CPLR §308(4)** provides that, where service cannot be made pursuant to **CPLR §308(1) or (2)** "with due diligence," the summons and complaint may be affixed to the door of either "the actual place of business, dwelling place or usual place of abode" of a defendant, followed by a subsequent mailing. The due diligence requirement must be strictly observed, given the reduced likelihood that "nail and mail" service will actually be received. **Gurevitch v. Goodman**, 269 AD2d 355. See **Krisilas v. Mount Sinai Hospital**, 63 AD3d 887; **McSorley v. Spear**, 50 AD3d 652; **O'Connell v. Post**, 27 AD3d 630. Here, there is no indication on the Proof of Service that the process server made any

prior attempts at personal service before resorting to nail and mail service pursuant to CPLR §308(4).

The Court does not, however, rest its determination herein solely upon the apparent lack of diligence. Equally troubling to the Court is whether or not the summons was affixed at the proper address. The Proof of Service shows no attempt to ascertain whether the address where the summons and complaint were affixed was FISHMAN's actual place of business, actual dwelling place or usual place of abode. The Court notes that the address of the Premises, although difficult to read, designates a suite number, which suggests that the Premises is a place of business. Nevertheless, the Proof of Service indicates that an additional mailing of "same" was mailed to the Premises, described as defendant's "last known residence". Affixation to the door of defendant's last known residence, as opposed to defendant's dwelling place, usual place of abode or actual place of business, is ineffective to satisfy the requirements of CPLR §308(4). Further, the Court notes that the process server failed to indicate that he spoke to anyone to confirm FISHMAN's military status.

FISHMAN also argues that plaintiff failed to file the Proof of Service with the County Clerk within twenty days of service. CPLR §308(4). Attached to the Affidavit is a blank sheet of paper indicating receipt by the County Clerk on January 8, 2009, which is more than 20 days after the summons and verified complaint were purportedly affixed to the Premises or mailed to FISHMAN. In any event, the Court finds that a blank sheet of paper containing the County Clerk 'received' stamp is insufficient proof to demonstrate that the Proof of Service itself was ever filed with the County Clerk.

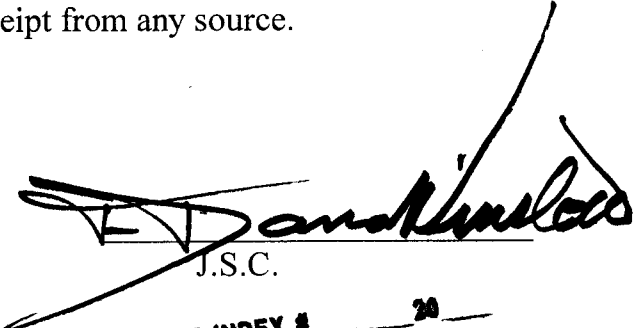
Here, the Proof of Service, on its face, reveals more than one significant defect in service and accordingly, the Court concludes it never acquired jurisdiction over FISHMAN.

On the basis of the foregoing, it is

ORDERED, that FISHMAN's motion to dismiss the complaint as to her pursuant to CPLR §3211(a)(8) is **granted**. FISHMAN shall serve a copy of this Order upon all parties, with Notice of Entry, forthwith upon receipt from any source.

This constitutes the Order of the Court.

Dated: September 10, 2010

  
J.S.C.

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FILED  
OCT 06 2010  
COUNTY CLERK OF  
NASSAU COUNTY