

Martinez v Jesionowska
2005 NY Slip Op 30118(U)
October 4, 2005
Supreme Court, New York County
Docket Number: 0403256/2000
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Eileen Bransten
Justice

PART 6

Index Number : 403256/2000

MARTINEZ, MARIA

vs

JESIONOWSKA, M.D., HANNA

Sequence Number : 001

DISMISS ACTION

INDEX NO.

403256/00

MOTION DATE

8/2/05

MOTION SEQ. NO.

01

MOTION CAL. NO.

07

7

4

Motion to/for dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3

4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the accompanying memorandum decision.

FILED

OCT 13 2005

NEW YORK
SHERIFFS OFFICE

Dated: 10-4-05

Eileen Bransten
EILEEN BRANSTEN
J.S.C. J.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: PART SIX

-----X
MARIA MARTINEZ and ROBERT MARTINEZ,

Plaintiffs,

-against-

HANNA JESIONOWSKA, M.D.,
FREDRIC HARRIS, M.D., NICHOLAS
MENTUS, M.D., MARC GREENBERG, M.D.,
GEORGE BOCK, M.D., and BETH ISRAEL
MEDICAL CENTER,

Defendants.
-----X

PRESENT: EILEEN BRANSTEN, J.

Index No. 403256/00
Motion Date: 8/02/05
Motion Seq. No.: 001
Motion Cal. No.: 007

FILED
OCT 13 2005
NEW YORK
COUNTY CLERKS OFFICE

Pursuant to CPLR 3404, defendants Hanna Jesionowska, M.D. (“Dr. Jesionowska”), Fredric Harris, M.D. (“Dr. Harris”), Nicholas Mentus, M.D. (“Dr. Mentus”) and Beth Israel Medical Center (“Beth Israel”) move for dismissal of the case commenced by plaintiffs Maria Martinez (“Ms. Martinez”) and Robert Martinez (“Mr. Martinez”). Plaintiffs oppose the motion.

Background

In this medical malpractice action commenced on August 26, 1999 in Supreme Court, Queens County, plaintiffs allege that in 1997, defendants negligently treated Ms. Martinez. Affirmation in Support of Motion (“Aff.”), at ¶¶ 3,4. On December 8, 2000, plaintiffs filed the note of issue in Queens County. Aff., at ¶ 5.

In late 1999, defendants moved for change of venue, and on January 27, 2000, the motion was granted and the case was transferred to New York County. *Aff.*, at ¶ 4. Plaintiffs then moved to vacate the court's Order, arguing that defendant Marc Greenberg, M.D. ("Dr. Greenberg") resided in Queens County, and therefore, venue was proper there. *Aff.*, at ¶ 5. On January 22, 2001, however, plaintiffs discontinued the action as to Dr. Greenberg; therefore, he was no longer a party to the action and venue could not be based on his residence. *Id.* As a result, on January 29, 2001, Judge Arnold N. Price granted defendants' second motion for change of venue to New York County and the file was transferred to New York County. *Aff.*, at ¶ 5.

Defendants now move for dismissal of plaintiffs' action pursuant to CPLR 3404, arguing that there has been a four-year period of inactivity since plaintiffs filed the note of issue and that plaintiffs have made no effort to prosecute their case. *Aff.*, at ¶¶ 7-9. Additionally, Beth Israel claims that it is severely prejudiced by the delay because the hospital where Ms. Martinez was treated, Beth Israel, North Division, no longer exists; the building has been sold and leveled to the ground and the former employees have left to work at other hospitals around the city. *Affirmation in Support of Cross Motion*, at 2.

In response, plaintiffs contend that CPLR 3404 is inapplicable because the case has never been marked "off" the trial calendar or dismissed for failure to appear. *Affirmation in Opposition ("Opp.")*, at 1. Plaintiffs also argue that they were unaware that they were

required to purchase a new note of issue in New York County and that, during the delay, they were simply waiting for the court to assign them a trial date. *Opp.*, at 3.

Analysis

Pursuant to CPLR 3404, a “case in the supreme court *** marked ‘off’ or struck from the calendar or unanswered on a clerk’s calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute.” For purposes of this section, a case is “on” the trial calendar if the note of issue has been filed. *Johnson v. Sam Minskoff & Sons*, 287 A.D.2d 233, 235 (1st Dept. 2001). If plaintiff has not yet filed the note of issue, the court cannot dismiss the action under CPLR 3404. *Koutsoupakis v. City of New York*, 292 A.D.2d 191 (1st Dept. 2002); *Johnson v. Sam Minskoff & Sons*, 287 A.D.2d 233, 234 (1st Dept. 2001).

Here, plaintiffs filed the note of issue in Queens County on December 8, 2000. *Aff.*, at ¶ 5. The fact that they have not yet filed a note of issue in New York County attesting to essentially the same matters detailed in the Queens County note of issue – that discovery is complete and the case is ready for trial – does not excuse the severe delay here. Plaintiffs have allowed this case to languish for the past four years and provide no reasonable excuse for their delay. They were required to file a request for judicial intervention (RJI) in New York County to notify the County Clerk that their case required judicial attention. Their

failure to do so – allegedly because some unnamed individual in the County Clerk’s office did not properly inform them of court procedure – is inexcusable.

In *Amsterdam Leather Bag, Inc. v. New York Property Ins. Underwriting Assn.*, 240 A.D.2d 272 (1st Dept. 1997), under remarkably similar circumstances, the Appellate Division, First Department held that Supreme Court properly dismissed the action pursuant to CPLR 3404 because plaintiff did not show, among other things, a reasonable excuse for the five-year period of inactivity, a meritorious cause of action or a lack of intent to abandon the action. There, like here, Supreme Court had directed that the action be transferred to a different court. In *Amsterdam*, however, the case was never transferred due to clerical error. Nonetheless, the court held that plaintiff’s failure to determine why, for five years, the case did not go to trial warranted dismissal. *Id.*

Likewise, plaintiffs here were obliged to inquire sometime during the last four years as to why their case had not been scheduled for trial. Their failure to submit any evidence of such an inquiry can only indicate their intent to abandon their case.

Nonetheless, the Court will not prejudice the plaintiffs themselves for their attorneys’ complete lack of vigilance. Plaintiffs are directed to file the note of issue in New York County within ten days of this Decision and Order. Furthermore, because plaintiffs have completely failed to submit any evidence of the alleged malpractice and this Court has no information as to the seriousness of plaintiffs’ allegations or their probability of success,

plaintiffs are also directed to forward a written summary of the alleged negligence and copy of all of the pleadings and relevant papers, including the complaint, answers, bills of particulars and any motions for summary judgment, to the Court within **ten** days of this Decision and Order. Failure to comply with these directives will result in dismissal of plaintiffs' case without further motion.

Additionally, the parties are directed to appear on November 7, 2005 for trial. If the November 7, 2005 date does not work for any party, an alternative November 2005 date should be discussed by counsel as soon as possible and counsel is to inform the Court of the lack of feasibility of the scheduled date and propose an alternate trial date within 10 days of this Decision and Order. If on November 7, 2005, the **final** date for trial of this action, plaintiffs are not prepared to prosecute their case and proceed to trial, the case will be dismissed without further motion.

Accordingly, it is

ORDERED that defendants' motion to dismiss this action is denied; and it is further

ORDERED that plaintiffs are directed to file a note of issue in New York County within **ten** days of this Decision and Order; and it is further

ORDERED that plaintiffs are directed to forward a written summary of the alleged negligence and a copy of all of the pleadings and relevant papers, including the complaint, answers, bills of particulars and any motions for summary judgment, to the Court within **ten**

days of this Decision and Order. Failure to comply with these directives will result in dismissal of plaintiffs' case without further motion; and it is further

ORDERED that the parties are directed to appear on November 7, 2005 for trial. If the November 7, 2005 date does not work for any party, an alternative November 2005 date should be discussed by counsel as soon as possible and counsel is to inform the Court of the lack of feasibility of the scheduled date and propose an alternate trial date within 10 days of this Decision and Order. If on November 7, 2005, the final date for trial of this action, plaintiffs are not prepared to prosecute their case and proceed to trial, the case will be dismissed without further motion; and it is further

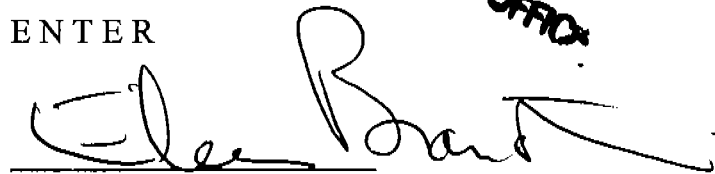
ORDERED that all parties are to appear for a pre-trial conference at 9:30 a.m. on October 25, 2005.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
October 4, 2005

FILED
OCT 13 2005
NEW YORK
COUNTY CLERK'S OFFICE

ENTER



Hon. Eileen Bransten