

Jones v Green

2007 NY Slip Op 32489(U)

August 3, 2007

Supreme Court, New York County

Docket Number: 0104206/2002

Judge: Eileen Bransten

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

PRESENT: **HON. EILEEN BRANSTEN**

PART 6

Index Number : 104206/2002 *Justice*

JONES, REGINA VANNOSTRAND

vs
GREEN, IVAN D.D.S.

Sequence Number : 009

RAC

INDEX NO. 104206/02
MOTION DATE 5-15-07
MOTION SEQ. NO. 09
MOTION CAL. NO. 06

The following papers, numbered 4 on this motion to/for restore action

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2, 3</u>
<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
AUG 13 2007
NEW YORK
COUNTY CLERKS OFFICE

Dated: 8-3-07

Eileen Bransten
HON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

-----X

REGINA VanNOSTRAND JONES and
DR. RONALD JONES,

Plaintiffs,

Index No.: 104206/02

Motion Date: 5/15/07

-against-

Motion Seq. No.: 09

IVAN GREEN, D.D.S., and
M. MARC LICHTUNG, D.D.S.,

Defendants.

-----X

PRESENT: EILEEN BRANSTEN, J.

Plaintiff Regina VanNostrand Jones (“Mrs. Jones”) moves to restore to the calendar her action for dental malpractice, which was commenced against defendants M. Marc Liechtung D.D.S. (sued as M. Marc Lichtung) (“Dr. Liechtung”) and Ivan Green D.D.S. (“Dr. Green”). Both defendants oppose this motion to restore.

Background

In March 2000, Mrs. Jones saw Dr. Green three times for dental work. Affirmation in Opposition submitted on behalf of Dr. Green (“Green Opp.”), Ex. A, at 1. Dr. Green cemented a bridge on her teeth and prepared laminate veneers, which he then bonded on March 29, 2000. *Id.*, at 2. He did not further treat Mrs. Jones.

Dr. Green sold his practice to Dr. Liechtung. He notified his patients that he would be leaving, informed them that Dr. Liechtung would take over the practice and told them that Dr. Liechtung was a capable dentist. *Id.*

In May 2001, Mrs. Jones began seeing Dr. Liechtung for dental care. Green Opp., Ex. A, at 2. She underwent treatment from him several times throughout 2001. *Id.*, at 2-3. He performed curettage (surgical scraping or cleaning by means of a curette) and a root canal on Mrs. Jones. *Id.*, at 3.

On February 28, 2002, Mrs. Jones commenced a dental malpractice action, claiming that defendants departed from accepted standards of dental care. Green Opp., Ex. A, at 4. Among other things, she claimed that Dr. Green failed to take impressions; failed to perform periodontal examinations and charting; failed to perform occlusal analysis and vitality testing; failed to adequately restore plaintiff's mouth; failed to provide adequate endodontic and/or surgical treatment; failed to adequately prepare for, fabricate and/or provide and install adequate dental prosthesis; and failed to obtain the plaintiff's informed consent. *Id.*

With respect to Dr. Liechtung, she claimed, among other things, that he failed to properly diagnose the condition of her mouth, teeth and supporting structure; failed to take sufficient radiographs of her mouth; failed to take impressions for diagnostic casts; failed to perform a periodontal examination; failed to perform an occlusal analysis; did not adequately install a prosthesis; and did not inform Mrs. Jones of the pain she might experience. *Id.*

In November 2003, the Court granted Mrs. Jones leave to serve an amended complaint adding a cause of action on behalf of her husband, Dr. Ronald Jones. Green Opp., Ex. A, at 5.

On March 4, 2004, defendants served a verified answer to the amended complaint and an amended demand for a bill of particulars. Green Opp., Ex. A, at 5.

On March 9, 2004, the Court ordered plaintiffs to amend their bill of particulars by March 24, 2004. Green Opp., Ex. A, at 5. When plaintiffs did not serve their amended bill of particulars, the Court again ordered them to do so on May 11, 2004, July 7, 2004, August 17, 2004, September 5, 2004, and October 5, 2004. *Id.*

Plaintiffs additionally failed to comply with defendants' disclosure demands made on May 6, 2004, October 3, 2004, and November 24, 2004. Green Opp., Ex. A, at 5.

In a Decision and Order dated March 7, 2005, the Court directed plaintiffs to serve a certificate of merit with respect to Dr. Green, to file the Note of Issue, and to fully comply with all outstanding disclosure within fourteen days of service of notice of entry of the determination. Green Opp., Ex. A, at 5. These materials were served by plaintiffs on March 16, 2005. *Id.*

Dr. Green subsequently moved for summary judgment dismissal of the complaint, claiming that he did not depart from good and accepted dental practice in treating Mrs. Jones and that his care and treatment did not proximately cause or contribute to her alleged injuries. Green Opp., Ex. A, at 5-6. Dr. Green and Dr. Liechtung also moved to dismiss the action, arguing that plaintiffs' continued and willful disregard of Court orders and failure to comply with disclosure requests required that the case be dismissed. *Id.* at 6.

In opposition to the motions to dismiss for failure to comply with disclosure orders and demands, plaintiffs generally stated that all materials had been served without addressing the particulars of defendants' allegations. Green Opp., Ex. A, at 8.

On July 18, 2005, Justice Bransten granted partial summary judgment to Dr. Green. The Court dismissed claims alleging negligent dental treatment because Dr. Green submitted expert testimony establishing entitlement to judgment as a matter of law and plaintiffs did not rebut the expert's assertions. Green Opp., Ex. A, at 9. The Court did not grant summary judgment on the informed-consent claim because Dr. Green did not establish that he properly advised Mrs. Jones of the alternatives and risks with regard to the dental procedure. *Id.* at 9, 10.

The Court next dismissed the action in its entirety pursuant to CPLR 3126(3), for repeated failure to comply with disclosure orders. Green Opp., Ex. A, at 10. The Court explained that "Plaintiffs' contumacious disregard of the Court's prior orders shows their disrespect for the Court and warrants dismissal of the case * * *. Over the past two years, plaintiffs have time and again willfully chosen not to comply with disclosure requests * * *. The Court's patience here has run out." *Id.*, at 12, 13.

On November 9, 2006, the Appellate Division, First Department unanimously affirmed the CPLR 3126 dismissal, explaining:

"The motion court providently exercised its discretion in dismissing the complaint because of plaintiffs' long continued pattern of noncompliance with

court orders and discovery demands (CPLR 3126), which gave rise to an inference of willful and contumacious conduct * * *. We note that plaintiffs failed to offer any excuse * * * much less a reasonable one * * * and their claim of inadvertence was not raised before the motion court.”

Green Opp., Ex. B, at 4.

Mrs. Jones now moves to restore her action to the calendar. In an unsworn letter, dated February 9, 2007, she asserts, among other things, that:

- she has new evidence of a “severe incurable illness related to the needle point puncture/sharp dental instrument injury, which [she] reported during the deposition of 2004, which was caused by Dr. Marc Liechtung” (but was not contained in the complaint, amended complaint, bill of particulars or amended bill of particulars).
- in August 2004, she was sick, and therefore, did not comply with court-ordered disclosure (despite the fact that she was represented by counsel since 2003).

Affidavit in Support (“Supp.”), Ex. A.

In support of her motion, Mrs. Jones submits unsworn letters from medical personnel. None of the letters indicate that either of the defendants departed from accepted dental practice or that Mrs. Jones’ action has any merit.

Both defendants oppose dismissal. First, they point out that this action was dismissed, the dismissal was affirmed by the Appellate Division, and the time to appeal the affirmance to the New York State Court of Appeals has lapsed. Thus, they contend that the “Appellate Division’s dismissal of the Complaint is binding and finally resolves this matter.” Green Opp., at ¶ 15; see also Affirmation in Opposition submitted on behalf of Dr. Liechtung

("Liechtung Opp."), at ¶ 3. Next, they submit that even if the conclusive nature of the dismissal could be overcome, Mrs. Jones has not demonstrated a reasonable excuse for non-compliance with the disclosure orders--since she was represented by counsel at the time her own illness is irrelevant--nor has she established that she has a meritorious cause of action for dental malpractice against them. Green Opp., at ¶¶ 22, 25, 26; Liechtung Opp., at ¶¶ 4, 7.

Analysis

This Court cannot restore the Jones' action. Plaintiffs had their day in court, were represented by counsel and had a full and fair opportunity to litigate the matter. Court Orders, however, repeatedly were not obeyed despite many chances for compliance. The action was dismissed, the decision was appealed and was affirmed by a unanimous Appellate Division. There is absolutely no basis for restoring the action more than two years after its dismissal.

At the outset, Mrs. Jones' submissions are all unsworn; thus, they have no evidentiary value whatsoever. *Cf., Marden v. Maurice Villency, Inc.*, 29 A.D.3d 402, 403 (1st Dept. 2006) (submissions that are not in admissible form have "no evidentiary value").

Additionally, even assuming that this Court could consider the fatally defective submissions--and it cannot--plaintiffs have not established a reasonable excuse for noncompliance with Court Orders and that their claims are meritorious.

The action was dismissed while the Joneses were represented by counsel. Thus, Mrs. Jones' physical condition was not a reasonable excuse for her attorney's noncompliance with multiple disclosure orders.

Plaintiffs, moreover, have not demonstrated that defendants departed from accepted dental practice as alleged in the complaint and bills of particulars. Even in the defective submissions, not a single medical or dental expert opines that there were any deviations from the relevant standard of care that caused Mrs. Jones' injuries. Thus, there has been no showing of a meritorious action.

In the end there is no legal basis to grant the relief sought.

Accordingly, it is

ORDERED that the motion to restore is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
August 3, 2007

ENTER


Hon. Eileen Bransten

FILED
AUG 13 2007
NEW YORK
COUNTY CLERK'S OFFICE