

Schrank v Lederman

2007 NY Slip Op 33953(U)

November 29, 2007

Supreme Court, Nassau County

Docket Number: 0903-06/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

LINDA SCHRANK and PHIL WEITZ,

Plaintiffs,

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 20903/06

- against -

Motion Sequence No. 003

GILBERT SEYMOUR LEDERMAN, M.D.,
RADIOSURGERY NEW YORK, LLC, GILBERT
LEDERMAN, M.D., P.C., STATEN ISLAND
UNIVERSITY HOSPITAL, JOHN R.
MANGIARDI, M.D., F.A.C.S., P.C. and
CABRINI MEDICAL CENTER,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant Cabrini Medical Center moves for an order pursuant to CPLR 5015

(a) (1) vacating the order dated April 16, 2007, and entered on April 30, 2007, granting a default judgment against the defendant Cabrini Medical Center, and permitting this defendant to serve a verified answer on the parties, in the form annexed to the moving papers as Exhibit 1. The plaintiffs oppose this motion. The underlying medical malpractice action is based on allegations of untimely diagnosis and inappropriate

treatment of an acoustic neuroma. The action was commenced by filing a summons and complaint on or about December 12, 2006. The plaintiffs moved on or about March 20, 2007 against this defendant and others for a default judgment based on their alleged failure to appear or answer. A default judgment was subsequently ordered by the Court.

CPLR 5015 (a) (1) provides:

The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry.

The attorney for the defendant Cabrini Medical Center states, in a supporting affirmation dated August 10, 2007, the reasonable excuse for this defendant's default is displayed in the supporting affidavit dated August 10, 2007, by Peter Buscemi, Senior Vice President of Finance and the Chief Financial Officer of the movant. The attorney and the affiant indicate this defendant was undergoing significant financial difficulties which prevented it from appearing in a timely manner. The affirmant states counsel for this defendant, at the time, declined to take on new matters as a result of which the movant was temporarily left without legal representation. Both the affirmant and the affiant assert, at the present time, this defendant is emerging from its difficulties, and is prepared to answer the plaintiff's allegations. The attorney for the defendant Cabrini Medical Center also points out less than two months have passed since the default was

entered, and no party will be prejudiced by permitting this defendant to interpose an appearance and answer. The attorney for the defendant Cabrini Medical Center states avers the supporting affirmation dated August 10, 2007, of Alan Sickles, M.D., the Senior Vice President of Medical Affairs and the Chief Medical Officer of the movant, demonstrates this defendant has a meritorious defense, to wit all of the diagnosis and decisions with respect to the appropriate course of treatment were made by the plaintiff's private physician, and the defendant Cabrini Medical Center's role in the plaintiff's treatment was limited to providing surgical facilities and routine preoperative and postoperative observation and care, none of which is addressed by this lawsuit.

The plaintiffs' attorney states, in an opposing affirmation dated September 3, 2007, this defendant relies essentially on an excuse akin to law office failure. The plaintiffs' attorney contends this excuse is not a reasonable one which warrants vacating the default judgment. The plaintiffs' attorney argues the facts of this matter are quite similar to the dental malpractice action in *Merwitz v. Dental Care Services, P.C.* (155 A.D.2d 748, 547 N.Y.S.2d 693 [3rd Dept., 1989]) where the Appellate Division affirmed the trial Court's denial of the defendants' motion to vacate the plaintiff's default judgment on the ground of the proffered excuse, to wit financial difficulties, as unreasonable under the circumstances. The plaintiffs' attorney asserts this defendant's default can be characterized as nothing less than wilful and contumacious based upon the circumstances of the defendant's actions following the plaintiffs' attempts at notice regarding the

lawsuit. The plaintiffs' attorney argues this defendant's excuse is belied by its conduct, to wit an intentional default, and the lack of a meritorious defense as shown in the conclusory affidavit of its Chief Medical Officer.

The defense attorney states, in a reply affirmation dated August 10, 2007, but dated stamped September 14, 2007, the plaintiffs' assertion this defendant's default was intentional or that it demonstrates a pattern is erroneous where the defendant simply lacked legal counsel due to circumstances beyond its control. The defense attorney notes this defendant would have needed an attorney to sign the pleadings, review the plaintiffs' complaint, and to draft an answer conforming to all applicable procedural rules. The defense attorney contends this defendant's default was not wilful nor intentional. The defense attorney points out this defendant clearly demonstrated a meritorious defense, and made the motion less than four months following the entry of the default judgment. The defense attorney maintains the defendant need not prove its defense to demonstrate it is meritorious, but only articulate a meritorious defense. The defense attorney argues the plaintiffs' reliance on *Merwitz v. Dental Care Services, P.C. (supra)* is misplaced since in that matter there was a 16 month delay by the defendant in moving to vacate preceded by the plaintiff's 11 month delay in moving for a default judgment, so the defendant there did not move to vacate until approximately two years and five months after being served with process. Here, the action commenced on or about December 12, 2006, and the default judgment was entered on April 20, 2007.

A party attempting to vacate a default judgment must establish both a reasonable excuse for the default and a meritorious defense. While the determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court....The court has discretion to accept law-office failure as a reasonable excuse, but "a pattern of willful default and neglect" should not be excused [citations omitted]

Roussodimou v. Zafiriadis, 238 A.D.2d 568, 568-569, 657 N.Y.S.2d 66 [2nd Dept., 1997].

Here, there is no plaintiffs' showing of prejudice nor a pattern of wilful default nor neglect. The Third Department found the defendants' excuse flawed and the conclusory allegations concerning plaintiff's dental treatment insufficient in *Merwitz v. Dental Care Services, P.C.* (*supra*, at 750). The circumstances in the earlier appellate determination by the Third Department can be distinguished from the those circumstances found in this litigation. This Court has carefully reviewed and considered all of the papers submitted by the papers, and this Court finds the defendant Cabrini Medical Center has presented a reasonable excuse and a factual showing of some meritorious defense to the plaintiffs' complaint. The defense presentations are sufficient to prompt this Court to prompt the exercise of the sound discretion to open this default judgment entered on April 30, 2007.

Accordingly, the motion is granted. So ordered.

Dated: **November 29, 2007**

ENTER:



J. S. ANTONINO I. BRANDVERN

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

DEC 03 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE