SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 37
NASSAU COUNTY

DAVID COLLADO, an infant under the age of eighteen years by his mother and natural guardian, RAQUEL DELOSANTOS,

Plaintiff(s),

-against-

THE HEMPSTEAD UNION FREE SCHOOL DISTRICT,

Defendant(s)

MOTION DATE: 10/23/08
INDEX NO.: 13715/03
SEQ. NO. 3

The motion brought by the Plaintiffs, in the above captioned action, for leave, pursuant to Rule 2221(d) & (e) of the CPLR, to renew and reargue the motion of the Defendant herein which resulted in an order of this court dated June 10, 2008 and the motion of the Plaintiffs which resulted in an order of this Court dated September 5, 2008 is determined as set forth herein below.

Initially, the Defendant opposes the instant motion for the Plaintiffs' non-compliance with subdivision (f) of Rule 2221 of CPLR.

Rule 2221(f) of the CPLR provides:

> "A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the Court may adhere to the determination on the original motion or may alter that determination."

It is axiomatic that Rule 2221(f) of the CPLR, as well as the CPLR itself, is purely procedural and subordinate to an achievement of the just result.

Accordingly, in the exercise of this court's inherent discretionary authority, this Court herewith deems the instant motion a bifurcated motion for leave to reargue, pursuant to Rule 2221(d) of the CPLR, and for leave to renew, pursuant to Rule 2221(e) of the CPLR.

By motion returnable on May 8, 2008, the Defendant moved, pursuant to Rule 3216(a) of the CPLR to dismiss the instant action. This motion and its prayed for relief was granted by the hereinabove referred to June 10, 2008, short form order of this court wherein the Court found:

> "No excuse is even proffered for the extensive delay and the plaintiff's opposition papers are devoid of an Affidavit of Merits."

The pertinent facts, which were recited in this Court's June 10, 2008, short form order are as follows:

On June 11, 2002 at approximately 8:30 a.m. the infant Plaintiff and his friends were engaged in a spirited game of "tag" prior to class at the Defendant's Fulton Avenue Elementary School. One unspecified child was chasing the infant Plaintiff and "when he caught up to me he, like, was supposed to tag me softly, but then he pushed me and I fell into the fence and cut my ear" (see plaintiffs' Exhibit F, September 11, 2003 municipal hearing, p. 27, L2).

The Plaintiffs subsequently filed a notice of claim on June 27, 2002 and on August 20, 2002 the Defendant demanded a municipal hearing pursuant to General Municipal Law § 50-h. On September 9, 2003 the Plaintiffs filed a Summons and Complaint. Two days later the belated municipal hearing was conducted. On February 23, 2004, the parties stipulated to extend the defendant's time in which to respond to the complaint. Ultimately, on March 22, 2004 issue was

joined and counsel for the Defendant served a request for a Bill of Particulars and combined demands. Following the Plaintiffs' failure to timely comply with the Defendant's request for a Bill of Particular and combined demands, on October 23, 2007 counsel for the Defendant served a ninety (90) day notice on the Plaintiffs' counsel, however, counsel for the Plaintiff had relocated their office. A second notice was therefore forwarded to the new address on November 6, 2007.

On January 31, 2008 the Plaintiffs served a Bill of Particulars and requested a Preliminary Conference. the Preliminary Conference was conducted on March 4, 2008. On April 16, 2008 the Plaintiffs' attorney responded to the Defendant's September 16, 2003 and March 22, 2004 requests for medical authorizations.

Thereafter, the Plaintiffs filed a motion, pursuant to Rule 2221(d) and (e) of the CPLR, for leave to renew and reargue the Defendant's hereinabove described motion which resulted in this Court's June 10, 2008 short form order. The Plaintiffs' aforesaid motion was denied by a short form order of this court, dated September 5, 2008, wherein the Court stated:

> "No new previously unavailable facts which were not offered on the original motion and which would have altered the prior determination have been proffered. Nor has the Plaintiff demonstrated that the Court overlooked or misapprehended any material fact or controlling principle of law."

For all of the reasons set forth herein below, the Court was in error in reaching the hereinabove set forth conclusions in its June 10 ,2008 and September 5, 2008 short form orders herein.

Leave to Reargue

Rule 2221(d) of the CPLR provides:

> "A motion for leave to reargue:
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> * * *
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> 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion but shall not include any matters of fact not offered on the prior motion . . . ."

CPLR Section 2005. Excusable delay or default, provides:

> "upon an application satisfying the requirements of subdivision (d) of section 3012 or subdivision (a) of rule 5015, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure."

Rule 5015. Relief from judgment or order, provides:

> "(a) on motion. The court which rendered a judgment or order may relief 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:
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> 1. excusable default . . . ."

There is no dispute that, from November 6, 2007 to date, counsel for the Plaintiffs has not filed a Note of Issue or moved to strike the Defendant's November 6, 2007 90-day notice.

In the interim:

On January 31, 2008, counsel for the Plaintiffs served and filed a Request for a Preliminary Conference;

on January 31, 2008, counsel for the Plaintiffs served counsel for the Defendant with a Bill of Particulars;

on March 4, 2008, counsel for the Plaintiffs appeared and participated in the Preliminary

Conference held with the Court; and

on April 16, 2008, counsel for the Plaintiffs served counsel for the Defendant with authorizations to obtain the infant Plaintiff's medical records.

Still extant are oral depositions before trial of all parties and independent medical examinations of the infant Plaintiff.

Counsel for the Plaintiffs proffer that, while their failure to file a Note of Issue or move to strike the Defendant's 90 day notice was a mistake, their mistake was premised upon the hereinabove outlined ongoing discovery and that their omission was a harmless mistake that did not prejudice the Defendant and their clients have a meritorious cause of action.

Addressing each of the bases for Plaintiffs' counsel's omissions, this court finds that with the exception of oral depositions and independent medical examinations discovery is now complete. Furthermore, the Plaintiffs have provided the Defendant with a heretofore served sworn Notice of Claim and submitted to a General Municipal Law Section 50-h Hearing both of which provided to the Defendant and memorialized for the Defendant how the Plaintiffs claimed the accident, which is the subject matter of the instant action, took place and the alleged injuries of the infant Plaintiff.

Accordingly, this court finds and determines that Plaintiffs' counsel's mistakes and omissions herein have not prejudiced the Defendant in its defense of the instant action.

Based upon the Affidavit of Raquel Delosantos, the mother of the infant Plaintiff, dated July 31, 2008, the Verified Bill of Particulars, dated January 31, 2008, the General Municipal Law 50-h Hearing conducted September 11, 2003 and the Plaintiffs' Notice of Claim dated June 26, 2002, this Court herewith finds and determines that the Plaintiffs have presented, *prima facie,*

a meritorious claim in negligence against the Defendant.

It is specifically the Plaintiffs' hereinabove described prosecution of the instant action, notwithstanding Plaintiffs' counsel's failure to file a Note of Issue or move to strike the Defendant's 90 day notice, and *prima facie* meritorious claim that this Court overlooked in rendering its June 10, 2008 and September 5, 2008 short form orders herein. furthermore, "the Court has discretion to accept law office failure as a reasonable excuse (citations omitted)" (*Rockland Transit Mix, Inc. v Rockland Enterprises, Inc.*, 28 AD3d 630 [2nd Dept. 2006]).

Leave to Renew

Rule 2221(e) of the CPLR provides:

> "A motion for leave to renew:
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> * * *
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> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination . . . ; and
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> 3. shall contain reasonable justification for the failure to present such facts on the prior motion."

In this Court's June 10, 2008 short form order the Court stated: ". . . the Plaintiffs' opposition papers are devoid of an Affidavit of Merits." On reflection, this could be construed as an invitation to the Plaintiff to, on subsequent motion practice, submit such an Affidavit for the Court's consideration. This the Plaintiff has done by the submission of the July 31, 2008 Affidavit of Raquel Delosantos annexed to the Plaintiffs' motion to renew and reargue which was denied by this Court's short form order dated September 5, 2008.

Having found hereinabove that the Court overlooked the aforesaid Affidavit of Raquel Delosantos, the said Affidavit is herewith deemed "new facts not offered on the prior motion."

Furthermore, Plaintiffs' counsel's explanation that their reason for not including said

Affidavit of Raquel Delosantos in their opposition to the Defendant's original motion to dismiss was their submission thereto of the sworn General Municipal Law 50-h Hearing transcript, photographs of the accident scene and the sworn and verified Notice of Claim is herewith found and determined to be a "reasonable justification for the failure to present such facts on the prior motion."

Based upon all of the above, this Court determines that the Plaintiffs herein should not suffer for the hereinabove described mistakes, omissions and procrastination of their counsel and that such should not deprive them of their day in Court. *See, Joo Tae Kim v 158 Plaza Corp.*, 35 AD3d (2nd Dept. 2006).

Accordingly the Plaintiffs' motion to renew and reargue their motion which resulted in a short form order of this Court dated September 5, 2008 and renew and reargue the motion of the Defendant which resulted in a short form order of this Court dated June 10, 2008 is granted and upon renewal and reargument the said short form orders of this Court are herewith vacated and upon reconsideration, based on all of the hereinabove set forth findings and determinations of this court, the Defendant's motion for an order of this court, pursuant to Rule 3216 of the CPLR, dismissing the Plaintiff's Complaint is denied.

It is the order of this Court that all parties herein, the Defendant by a person with personal knowledge of the incident which is the subject matter of the instant action, appear and submit to oral depositions before trial.

The herewith Court-ordered oral depositions before trial of all parties are to be conducted at the Courthouse, Special Term Part thereof (lower level) commencing with the deposition of the Defendant at 9:30 A.M. on 26 January 2009 and continuing day to day until completed.

There shall be no adjournment of these Court-ordered oral depositions before trial.

It is the further order of this court that the infant Plaintiff submit to independent medical examinations by physicians designated by the Defendant.

It is the further order of this Court that the Defendant, within thirty (30) days of the completion of the hereinabove Court-ordered depositions, serve upon Plaintiffs' counsel the identity and contact information of its designated physicians and that the infant Plaintiff submit to these Court-ordered independent medical examinations within thirty (30) days of the said designation of the physicians by the Defendant.

There shall be no adjournment of the hereinabove Court-ordered independent medical examinations of the infant Plaintiff.

The Plaintiffs are directed to serve and file their Note of Issue, in the instant action, within thirty (30) days of completion of the Court-ordered oral depositions and independent medical examinations.

It is the order of this court that counsel for the Plaintiffs serve upon counsel for the Defendant a copy of this order together with Notice of Entry thereof within ten (10) days of the date hereof.

Dated: December 23, 2008

A.J.S.C.

ENTERED
JAN 02 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE