

Kamara v Ambert

2009 NY Slip Op 32268(U)

September 30, 2009

Supreme Court, New York County

Docket Number: 121883/97

Judge: Eileen A. Rakower

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

PRESENT: **HON. EILEEN A. RAKOWER**

PART 5

Justice

Index Number : 121883/1997

KAMARA, SIDIKIE

VS.

AMBERT, RAFHAEL

SEQUENCE NUMBER : 002

RESTORE ACTION TO CALENDAR

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1
2
3

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
 OCT 02 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

**DECIDED IN ACCORDANCE WITH
 ACCOMPANYING DECISION / ORDER**

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

Dated: 9/30/09



HON. EILEEN A. RAKOWER

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 5

-----X

SIDIKIE KAMARA,

Index No.
121883/97

Plaintiffs,

DECISION
and ORDER

- against -

RAPHAEL AMBERT a/k/a "RAY AMBERT," DAN
McCAFFERY, RY MANAGEMENT, RUPPERT
TOWERS HOUSING COMPANY, and THE CITY
OF NEW YORK,

Mot. Seq.

FILED
OCT. 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

-----X

EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action to recover for personal injuries sustained as the result of incidents which occurred on November 22, 1996 and July 17, 1997 at the premises of 1623 3rd Avenue, in New York, New York. In the former incident, Plaintiff alleges that an assault and battery occurred on Plaintiff as a result of the negligence of the above named defendants. In the latter incident, Plaintiff alleges that he was unlawfully assaulted and battered by New York City Police Officers.

Presently before the court is a motion by Plaintiff to have the instant matter restored to the court's calendar after it was dismissed on October 22, 2007 by J.H.O. Ira Gammerman, based upon Plaintiff's failure to obtain medical records and a medical report from his expert. J.H.O. Gammerman urged the parties to proceed on the issue of liability, but Plaintiff would not consent to a bifurcated trial. Plaintiff submits an affirmation in support of his motion to restore. Annexed to the motion as exhibits are copies of the pleadings; Plaintiff's note of issue, which was filed on January 19, 2007; redacted internal office notes, which chronicle Plaintiff's counsel's contacts with Plaintiff regarding the case subsequent to J.H.O. Gammerman's dismissal, as well as counsel's attempts to procure the medical records and expert report from the doctor after the dismissal; Plaintiff's affidavit of merit; an affirmation from Dr. Steve K. Lee, Plaintiff's expert; and the medical records and expert report which were not available at the time of trial.

Defendants Ambert, McCaffery, Ry Management, and Ruppert Towers Housing Company (“Building Defendants”) submit an affirmation in opposition. The Building Defendants argue that the motion to restore the action to the calendar should be denied for a number of reasons. First, the Building Defendants state that Plaintiff was offered the opportunity to bifurcate the trial in order to first try the matter on the issue of liability (due to Plaintiff’s inability to procure the medical records) by Judge Gammerman, but that Plaintiff refused this offer. The Building Defendants also argue that Plaintiff fails to demonstrate that he has a meritorious cause of action, as well as a reasonable excuse for his delay in bringing the instant motion to restore. Finally, the Building Defendants state that restoration of the action would “severely prejudice” them, due to the fact that Dr. Irving Liebman, the orthopedic surgeon who examined Plaintiff at the Building Defendants’ request, “is incapable of testifying either live or by video due to a chronic and disabling illness.”

Plaintiff submits a reply affirmation in further support of his motion, wherein he disputes the Building Defendants’ assertion of prejudice, stating that the Building Defendants provide no evidence that Dr. Liebman is unable to testify at trial, other than the say-so of their attorney’s affirmation in opposition to the motion. In addition, Plaintiff states that he is willing to submit to another physical examination if Dr. Liebman is in fact unable to testify at trial.

CPLR 3404 provides that

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. The clerk shall make an appropriate entry without the necessity of an order.

However, a court may in the exercise of its discretion restore the action to the calendar where the movant demonstrates: (1) a meritorious cause of action, (2) a reasonable excuse for the delay; (3) a lack of prejudice to the opposing party; and (4) a lack of intent to abandon the action (*Muhammed v. Manhattan Payment Ctr., Inc.*, 251 A.D.2d 228, 229 [1st Dept. 1998]).

The court finds that Plaintiffs are not entitled to vacatur of the administrative dismissal of their action. While Plaintiff’s affidavit of merit adequately establishes the

meritoriousness of Plaintiff's action (*see Rosado v. New York City Hous. Auth.*, 183 A.D.2d 640, 642 [1st Dept. 1992] (“[P]laintiff's affidavit of merit contained evidentiary facts capable of being established at trial by a person competent to attest to the meritorious nature of the action and therefore, sufficiently demonstrated a substantial possibility of success in the action.”)); and the evidence of contacts between Plaintiff and his counsel demonstrates a lack of intent to abandon the action (*see Peterson v. City of New York*, 286 A.D.2d 287, 289 [1st Dept. 2001]) (“[S]ince plaintiffs are able to show at least some activity during the year after the case was marked off, we are loath to find an abandonment.”), Plaintiff fails to satisfy the other two elements for vacatur.

Plaintiff cites *Curtin v. Grand Union Co.*, 124 A.D.2d 918 [3rd Dept. 1986] in support of the proposition that he had a reasonable excuse for his failure to timely move to restore this matter to the trial calendar. However, the facts in the case at bar are distinguishable. In *Curtain*, the plaintiff moved to have her action restored to the trial calendar. With respect to her proffered reasonable excuse, the plaintiff showed that she retained an expert to examine a blouse similar to the one which allegedly caught fire and injured the plaintiff, but that she had encountered difficulty in receiving the expert's report. The Third Department held that plaintiff proffered a reasonable excuse for the delay where “she documented her attempts to obtain the report and also provided the expert's preliminary report...” (*id.* at 919).

Here, by contrast, Plaintiff's counsel states that counsel makes repeated calls to Plaintiff's treating physician, and asserts that counsel did not receive calls back. Nevertheless, the first of these calls is on March 26, 2008 (five months after the dismissal). It is not until January 29, 2009 - more than one year after dismissal - that there is any record which explicitly refers to the sought-after medical records. Thus, unlike the plaintiff in *Curtain*, the court is unable to conclude that Plaintiff has made diligent efforts to procure the expert report and other documents from Dr. Lee, such that Plaintiff has a reasonable excuse for his delay in moving to restore the action to the trial calendar.

Finally, Plaintiff fails to show that the Building Defendants would not be prejudiced by restoration to the trial. While Plaintiffs and the Building Defendants dispute whether or not Dr. Liebman is permanently unable to testify at trial, it is undisputed that Dr. Liebman, the medical expert who performed an independent examination of plaintiff, is presently unavailable. Were the trial to commence shortly upon restoration by order of this court, the Building Defendants would be required to

request a further delay, or retain a new expert to conduct another examination of Plaintiff.

Wherefore it is hereby

ORDERED that plaintiff's motion to restore is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: September 30, 2009



EILEEN A. RAKOWER, J.S.C.

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