

Dunetz v Melamed

2010 NY Slip Op 32682(U)

September 21, 2010

Sup Ct, Nassau County

Docket Number: 019580/06

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 20

_____ X

GLORIA L. DUNETZ and BERNARD DUNETZ,

Plaintiff,

Index No.: 019580/06

Motion Sequence...02

-against-

Motion Date... 07/22/10

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MARK A. MELAMED, M.D., WILLIAM H.
BOOCKVAR, M.D. and SOUTH SHORE
OPHTHALMOLOGY, P.C.,

Defendants.

_____ X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the foregoing papers, the Plaintiff's motion for an order vacating the dismissal of the action, restoring the matter to the trial calender and scheduling a compliance conference for a date certain, is decided as provided herein.

The Plaintiff commenced the instant medical malpractice action by the filing of a summons and complaint and a certificate of merit on November 27, 2006. Issue was joined by the service of the Defendants' respective answers on or about December 13, 2006. The matter was certified ready for trial on February 23, 2009. The Note of Issue was to be

filed by May 24, 2009. It is undisputed that the Plaintiff failed to file the Note of Issue by that date. On June 26, 2009, the case was marked dismissed by the Clerk of the Court due to the Plaintiff's failure to file the Note of Issue by May 24, 2009.

The parties certified this action ready for trial on February 23, 2009 at a certification conference. CPLR § 3216 (a) provides that the court on its own motion or a motion by a party may dismiss an action for failure to prosecute by the plaintiff. *Chase v. Scavuzzo*, 87 N.Y.2d 228 (1995). The statute provides that the plaintiff must be served with a ninety (90) day notice to prosecute the action. An order of the court, entered into at a certification conference, is sufficient to meet the ninety (90) day requirement when all parties sign the order. *Betty v. City of New York*, 12 A.D.3d 472 (2nd Dept. 2004); *Vinkour v. Jamaica Hospital*, 2 A.D.3d 518 (2nd Dept. 2003). Here, the parties entered into a certification order on February 23, 2009 which was signed by all parties. Said Order states in the first paragraph that "This matter is hereby certified for trial and plaintiff(s) is directed to file a Note of Issue within 90 days. If plaintiff does not file a Note of Issue within 90 days this action is dismissed without further order of the court. (CPLR 3216)". The Court finds that this certification order shall be deemed a ninety (90) day notice.

The Plaintiff did not move to extend the time to file the Note of Issue or to vacate the ninety (90) day notice prior to the expiration of the ninety (90) day period. *Santiago v. Grenadier Realty Corp.*, 13 A.D.3d 606 (2nd Dept. 2004).

In order to vacate a default, the defaulting party must demonstrate that they had

a reasonable excuse for the delay, that they have a meritorious cause of action, that the default was not willful and that the non-defaulting party will not be prejudiced. *Lichtman v. Sears, Roebuck & Co.*, 236 A.D.2d 373 (2nd Dept. 1997).

The Plaintiff's counsel states in support of the motion that, at the time the case was certified ready for trial, the parties entered into a side stipulation indicating that the Defendants' depositions were to be conducted on or before April 3, 2009. The Court did not "So Order" said stipulation as the case had already been certified ready for trial. Plaintiff's counsel contends that due to a delay in conducting the Plaintiff's Examination Before Trial, the Defendants' depositions were not conducted and to date, have yet to be conducted. Counsel for the Plaintiff, quite contradictorily, states that he inadvertently failed to file the Note of Issue "due to the fact that defendants never submitted to depositions and discovery in this matter was therefore incomplete". See Plaintiff's Attorney's Affirmation in Support attached to the Plaintiff's Notice of Motion, dated April 30, 2010, at ¶ 5.

The Plaintiff's counsel submits that the excuse for not having filed the Note of Issue in a timely manner was "law office failure". The Plaintiff's counsel offers no further explanation as to what caused the alleged "law office failure". While there is an Affidavit of Merit by the Plaintiff which seeks to establish that there is a meritorious cause of action, there is no affidavit offered of any member of the Plaintiff's counsel's firm tending to explain how or why the firm purportedly inadvertently failed to file the Note of Issue. Indeed, the Plaintiff's counsel's affirmation in support is also silent on this issue.

Regarding the Plaintiff's attempt to use the "law office failure" excuse as the basis to excuse the Plaintiff's failure to have filed the Note of Issue, Defendant's counsel argues that the explanation is "perfunctory" and that the mere reciting of those "buzz words" should not be sufficient. Counsel for Defendants also argues that the affidavit of the Plaintiff, GLORIA DUNETZ, in and of itself is insufficient to establish a meritorious cause of action, another element the Plaintiff must establish in order to vacate the dismissal. In that regard, the Defendants rely on *Amodeo v. Radler*, 59 N.Y.2d 1001 (1983) and *Ellis v. Urs*, 121 A.D.2d 361 (2nd Dept. 1986). In *Amodeo*, a case involving the issue of whether the Plaintiff established an excusable default and a meritorious cause of action, the Court of Appeals affirmed a finding by the Appellate Division that the Plaintiff was required to submit an affidavit from a medical expert to establish a meritorious cause of action. Likewise, in *Ellis*, the Appellate Division, Second Department, ruled that in opposition to a motion to dismiss the complaint for want of prosecution, the Plaintiff failed to submit an affidavit of merit from a medical expert. In holding that the failure to timely submit an expert affidavit was fatal, the Court reasoned that, "expert medical opinion evidence was required to demonstrate merit because the plaintiff's medical malpractice claim is predicated upon matters not within the ordinary experience of laymen...neither the affidavit of the plaintiff, who does not allege to be a medical expert...nor the verified complaint sufficed to establish the merit of his claim". *Ellis, supra* at 362.

In his Reply Affirmation, the Plaintiff's counsel states that the facts contained within the affirmation in support, namely that the Certification order could not be complied with due to the impossibility of scheduling depositions of the Defendants, is sufficiently detailed to enable the Court, in its discretion, to find that the Plaintiff's failure to comply was reasonable. Counsel for the Plaintiff also attempts to distinguish the cases relied upon by the Defendants to support his argument that an expert medical affidavit is not required to prove a meritorious cause of action in a medical malpractice action. The Court does not find persuasive the Plaintiff's counsel's interpretation of the applicable case law on this issue.

First, with respect to the "law office failure" argument, the Court finds that the Plaintiff failed to adequately explain his failure to timely file a Note of Issue. It is inadequate to make a conclusory assertion that the Plaintiff's counsel's firm failed to file a Note of Issue due to law office failure without any further explanation. "Although the court has the discretion to accept law office failure as a reasonable excuse, a claim of law office failure should be supported by a detailed and credible explanation of the default at issue". *Lugauer v. Forest City Ratner Co.*, 44 A.D.3d 829 (2d Dept. 2007). Here, the papers submitted by the Plaintiff's counsel are completely devoid of any explanation other than the "impossibility of scheduling the defendants' depositions." Contrary to the Plaintiff's counsel's assertions, this explanation would suggest that the failure to file the Note of Issue was intentional and not inadvertent. In any event, the Court finds that the Plaintiff's excuse of law office failure is conclusory and perfunctory and does not constitute a reasonable excuse.

Second, the Plaintiff also failed to establish a meritorious cause of action. The conclusory allegations contained in the Plaintiff's complaint and Bill of Particulars are insufficient to show a meritorious cause of action. Further, the Plaintiff's affidavit alone, absent an expert's affidavit, for the reasons set forth above, is insufficient to establish a meritorious cause of action.

Additionally, the Plaintiffs' counsel fails to explain why he waited approximately eleven (11) months to move to vacate the dismissal.

Accordingly, it is hereby

ORDERED, that the Plaintiff's motion to vacate the dismissal is **DENIED**;
and it is further

ORDERED, that the Defendants shall submit a judgment on notice.

This decision constitutes the Order of the court.

DATED: Mineola, New York
September 21, 2010



Hon. Randy Sue Marber, J.S.C.
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ENTERED

SEP 23 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE