

Cruzado v Fischer

2010 NY Slip Op 33256(U)

November 15, 2010

Supreme Court, New York County

Docket Number: 115961/09

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

CRUZADO, MONICA
- v -
MURRAY FISCHER, M.D.

INDEX NO. 115961/09
MOTION DATE 10/15/10
MOTION SEQ. NO. 03
MOTION CAL. NO. _____

The following papers, numbered 1 to 12 were read on this motion to/for vacate default

	PAPERS NUMBERED
Notice of Motion/ <u>Order to Show Cause</u> — Affidavits — Exhibits ...	<u>1-11</u>
Answering Affidavits — Exhibits _____	<u>12</u>
Replying Affidavits _____	<u>13-18</u>

sur-reply: 19

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER**

FILED

NOV 22 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/15/10 _____ JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

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

-----X
MONICA CRUZADO,

Plaintiff,

Index No. 115961/09

-against-

MURRAY FISCHER, M.D.,

FILED

Decision and Order

NOV 22 2010
Defendant.

-----X
JOAN B. LOBIS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

In Motion Sequence Number 003, plaintiff moves by order to show cause, pursuant to C.P.L.R. Rule 5015(a), for an order vacating her default on Motion Sequence Number 002, which resulted in a dismissal of the complaint due to plaintiff's failure to serve defendant, and setting the matter down for a traverse hearing, or in the alternative, granting plaintiff an extension of time to re-serve the complaint pursuant to C.P.L.R. § 306-b. For the reasons discussed below, the motion is partially granted, in that the decision dismissing the complaint is vacated, and plaintiff shall be granted an extension of time to serve her complaint in the interest of justice.

In Motion Sequence Number 001, defendant moved to dismiss the complaint due to plaintiff's failure to properly serve him. Defendant alleged that service was not effectuated upon an employee at his place of business. Defendant admitted that the complaint was properly mailed to him. Plaintiff opposed the motion, but also cross-moved for an order granting her an extension of time to serve her complaint. The court denied both the motion and the cross-motion finding that defendant did not rebut the contents of plaintiff's affidavit of service and that service was thus proper. See Decision and Order dated June 6, 2010 (the "June Decision"). In Motion Sequence Number 002, defendant moved to renew and reargue the June Decision. Plaintiff failed to oppose

Motion Sequence Number 002. As a result, the court, although finding that it did not make an error of law, granted defendant's motion on default and the complaint was dismissed. See Decision and Order dated August 3, 2010 (the "August Decision"). Now, plaintiff moves to vacate his default on Motion Sequence Number 002 and requests a traverse hearing or an extension of time to serve defendant under C.P.L.R. § 306-b. Plaintiff's counsel asserts that an attorney in his firm was told by their calender clerk that defendant made a "dismissal motion." The attorney failed to appreciate that the "dismissal motion" was actually the motion for renewal and reargument (Motion Sequence Number 002). Thinking that the clerk was referring the original motion to dismiss (Motion Sequence Number 001), he informed the clerk that the motion was resolved in plaintiff's favor. Plaintiff contends that the June Decision was correct, but, in the event that court finds that service was not properly effectuated, plaintiff requests an extension of time to serve the complaint under C.P.L.R. § 306-b.

In opposition, defendant argues that plaintiff offered a "convoluted" explanation for the default and notes that she failed to attach an affidavit from a physician demonstrating a meritorious cause of action. Defendant further argues that even if the default were vacated, the August Decision was correct and the complaint was properly dismissed on lack of personal jurisdiction grounds. Defendant also contends that plaintiff's failure to demonstrate merit precludes her from an order granting a C.P.L.R. § 306-b extension for serving the complaint.

In reply, plaintiff annexes an affirmation from F. Robert Jordan, M.D., a board-certified surgeon. Dr. Jordan sets forth in a non-conclusory fashion that the surgery performed on plaintiff was improper and a departure from accepted medical practice. Plaintiff contends that a traverse

hearing would be “pointless and a waste of resources,” because even if defendant prevailed at the hearing, plaintiff would still be entitled to a C.P.L.R. § 306-b extension. Thus, plaintiff argues that the extension should be granted immediately.

Pursuant to a conference call with both parties, defendant was permitted to submit a sur-reply. In his sur-reply, defendant does not dispute plaintiff’s showing of merit. Instead, he argues that plaintiff’s expert affirmation was not presented in her initial motion papers and therefore cannot be considered by the court. The case, therefore, should remain dismissed.

“New York’s public policy strongly favors litigating matters on the merits.” Lamar v. City of New York, 68 A.D.3d 449 (1st Dep’t 2009). Under C.P.L.R. Rule 5015(a), “[a] party seeking to vacate a default is required to demonstrate both a reasonable excuse for the default and a meritorious cause of action[.]” Easton v. Associates Leasing, Inc., 24 A.D.3d 141, 143 (1st Dep’t 2005) (citation omitted). In medical malpractice cases, an affidavit from a medical expert is required to demonstrate merit. See, e.g., Rose v. Our Lady of Mercy Med. Ctr., 268 A.D.2d 225, 226 (1st Dep’t 2000); Fiore v. Galang, 64 N.Y.2d 999, 1000-01 (1985). Plaintiff’s default on the motion amounts to a law office failure and is excusable (see C.P.L.R. § 2005), especially since the default was “was inadvertent, unintentional and an isolated incident devoid of any pattern of dilatory behavior.” Spyropoulos v. Hirsh, 21 A.D.3d 818 (1st Dep’t 2005) (citations omitted). Plaintiff failed, however, to demonstrate a meritorious cause of action in her initial papers. It is well settled that a reply cannot be used to remedy deficiencies in a moving party’s prima facie showing. See Migdol v. City of New York, 291 A.D.2d 201 (1st Dep’t 2002). However, this rule gives way when the party opposing the motion is given the opportunity to submit a sur-reply. Valure v. Century 21 Grand, 35 A.D.3d 591, 592 (2d Dep’t 2006). Here, defendant was given an opportunity to address

Dr. Jordan's affirmation of merit, but failed to rebut it. Having demonstrated a reasonable excuse and a meritorious cause of action, the default judgment against plaintiff is vacated and the complaint is restored.

Turning to the issue of whether service was properly effected on defendant, although a traverse hearing may be warranted here, the court may forego the hearing and grant an extension of time to serve under C.P.L.R. § 306-b. See LoPresti v. Florio, 71 A.D.3d 574, 575 (1st Dep't 2010); In re Lopez v. Goord, 41 A.D.3d 992, 993 (3d Dep't 2007). Under Section 306-b, the court may extend the time to serve the complaint in the interest of justice. When considering a request for an extension in the interest of justice,

“the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant.”

Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 105-06 (2001). Here, the statute of limitations just recently expired in January 2010, the evidence of lack of service upon defendant is inconclusive, plaintiff requested an extension of time at the first sign that service may have been faulty, the case is meritorious, and defendant admits that he was timely mailed the complaint. These circumstances justify an extension of time to serve the complaint. See Spath v. Zack, 36 A.D.3d 410, 413-14 (1st Dep't 2007). Accordingly, it is hereby

ORDERED that plaintiff's motion to vacate her default on Motion Sequence Number 002 is granted; and it is further

ORDERED that the court vacates its prior order dated August 3, 2010, dismissing the complaint and grants plaintiff an extension of 120 days to serve her complaint upon defendant under the present index number (Index No. 115961/09); and it is further

ORDERED that the parties shall appear for a preliminary conference on March 8, 2011 at 9:30 a.m. unless they stipulate to an earlier time to appear.

Dated: November 15, 2010



JOAN B. LOBIS, J.S.C.

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