

Montero v City of New York

2011 NY Slip Op 30597(U)

March 14, 2011

Supreme Court, New York County

Docket Number: 109743/05

Judge: Barbara Jaffe

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

JAFFE BARBARA JAFFE

PART 5

PRESENT

J.S.C. —

Index Number : 114706/2007

MONTERO, CARLOS

vs
CITY OF NEW YORK

Sequence Number : 001

RESTORE ACTION TO CALENDAR

CAL # 68

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for vacate and restore

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAR 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/14/11

MAR 14 2011

BJ
BARBARA JAFFE

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
COUNTY OF NEW YORK : PART 5

-----X
CARLOS MONTERO, an infant under the age of 18 By his
mother and natural guardian, LILLIAN PICHARDO, and
LILLIAN PICHARDO, individually,

Plaintiffs,

-against-

CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT, DAVID SALVADOR, and CITIWIDE
AUTO LEASING,

Defendants.

-----X
BARBARA JAFFE, J.:

For plaintiff:
Henry W. Davoli, Jr., Esq.
The Law Office of Henry W. Davoli, Jr., PLLC
342 North Ling Beach Road
Rockville Centre, New York 11570
516-992-8082

Index No. 109743/05

Argued: 1/25/11
Mot. Seq. No.: 001
Cal. No.: 68

DECISION AND ORDER

FILED

MAR 15 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

For City:
Peter C. Lucas, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., 4th Fl.
New York, NY 10007
212-442-6851

By notice of motion dated August 6, 2010, plaintiffs move pursuant to CPLR 5015 for an order vacating the dismissal of their complaint and restoring the action to the calendar.

Defendant City opposes.

On January 24, 2007, the infant plaintiff was allegedly injured in a motor vehicle accident caused by defendants, and is currently incarcerated in an unrelated matter. At a compliance conference held on March 9, 2009, the parties agreed that the matter would be adjourned to May 11, 2010 for plaintiffs' counsel to learn the infant plaintiff's release date. On May 11, 2010, plaintiffs' counsel failed to appear and it was ordered that counsel appear on May 25, 2010 or the action would be dismissed. On May 25, 2010, plaintiffs' counsel again failed to appear and the

action was dismissed. (Affirmation of Henry W. Davoli, Jr., Esq., dated Aug. 6, 2010 [Davoli Aff.]).

Plaintiffs' counsel submits the affirmation of the attorney, of counsel, who failed to appear for the conferences. He states that he was unaware of the May 11 conference due to a breakdown in communication between his office and the assignment clerk, that he was unaware of the May 11 order and thus failed to forward it to plaintiffs' counsel's office, and that he failed to appear on May 25, 2010 because he was unaware that a conference had been scheduled for that date and he did not follow up on the May 11 appearance. (Affirmation of Rawle E. Briggs, Esq., dated Aug. 6, 2010). Plaintiffs' counsel argues that his failure to appear was inadvertent and the result of law office failure, that discovery is complete except for the infant plaintiff's independent medical examination (IME), that plaintiffs did not intend to abandon the action, and that defendants will be not prejudiced if the action is restored. (Davoli Aff.).

City argues that plaintiffs' motion should be denied as their excuse for their two defaults is insufficient and as it is bereft of proof of a meritorious claim. (Affirmation of Peter C. Lucas, ACC, dated Oct. 4, 2010). City submits the infant plaintiff's 50-h hearing testimony and the transcript of an examination before trial of a City witness to demonstrate that plaintiffs have no valid claim against City. (*Id.*, Exhs. C, D).

In reply, plaintiffs argue that they offered a reasonable excuse for their default, that they have a valid claim, and that their difficulty in locating the infant plaintiff and obtaining an affidavit of merit from him due to his incarceration ought not penalize them. They seek to vacate the dismissal in the interests of justice. (Reply Affirmation, dated Nov. 17, 2010).

Pursuant to 22 NYCRR 202.27(b), the court may dismiss an action based on a party's

failure to appear at a court conference. In order to restore a dismissed action, the moving party must demonstrate both a reasonable excuse for his or her default and a meritorious cause of action. (*Cato v City of New York*, 70 AD3d 471 [1st Dept 2010]; *Campos v New York City Health & Hosps. Corp.*, 307 AD2d 785 [1st Dept 2003]).

Here, plaintiffs' failure to submit an affidavit of merit or any other proof establishing that they have a meritorious claim requires the denial of their motion. (*See eg Chiaramonte v Coppola*, 915 NYS2d 560 [1st Dept 2011] [trial court improperly granted motion to vacate default judgment, entered pursuant to 22 NYCRR 202.27 based on plaintiff's non-appearance at status conference, as plaintiff failed to show meritorious cause of action]; *Wild v Target Corp.*, 74 AD3d 799 [2d Dept 2010] [plaintiffs failed to demonstrate meritorious claim]; *Frangione v Daniels*, 44 AD3d 708 [2d Dept 2007] [motion to vacate default and restore action properly denied absent showing of meritorious claim]; *DeRosario v New York City Health & Hosps. Corp.*, 22 AD3d 270 [1st Dept 2005] [motion properly denied on ground that plaintiff failed to show meritorious cause of action]).

Counsel's contention that he was unable to obtain an affidavit of merit from the infant plaintiff due to difficulty in locating him is fatally conclusory absent any indication as to what, if any, efforts were made to obtain it. (*See eg Romanoff v St. Vincent's Hosp. and Med. Ctr. of New York*, 97 AD2d 382 [1st Dept 1983] [reason for delay was unsupported by statement of efforts made to locate information]; *Inc. Village of Thomaston v Biener*, 84 AD2d 781 [2d Dept 1981] [vacatur of dismissal of complaint not warranted; plaintiff asserted delay was caused by inability to locate document but did not submit affidavit setting forth efforts made to locate it]).

Moreover, in light of counsel's alleged inability to locate the infant plaintiff, it is unclear

how an IME can even be scheduled. (*See eg Le Jeunne v Baker*, 182 AD2d 969 [3d Dept 1992] [motion to vacate dismissal based on plaintiff's failure to proceed to trial properly denied; while counsel claimed that he had difficulty reaching plaintiff who lived in another country, he did not provide details of efforts made to secure plaintiff's appearance, and there was no indication as to when plaintiff would be ready for trial]; *Carmen v West Hudson Hosp.*, 129 AD2d 868 [3d Dept 1987] [vacatur of dismissal of complaint for failure to prosecute should have been denied; counsel's unsuccessful attempt to contact plaintiff was unacceptable excuse for delay and no affidavit of merit was submitted]).

I thus decline to vacate the dismissal and restore the action in the interests of justice. (*See Eisenstein v Rose*, 135 AD2d 369 [1st Dept 1987] [court should not have vacated default in interest of justice absent meritorious claim and reasonable excuse]; *Oversby v Linde Div. of Union Carbide Corp.*, 121 AD2d 373 [2d Dept 1986] [plaintiff's failure to establish meritorious claim prevented court from vacating default in interest of justice]; *Nieves on Behalf of Nieves v 331 E. 109th St. Corp.*, 112 AD2d 59 [1st Dept 1985], *appeal withdrawn* 66 NY2d 1036 [discretionary relief must be denied where insufficient affidavits of merit are submitted]).

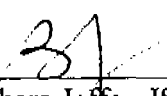
For all of these reasons, it is hereby

ORDERED, that plaintiffs' motion to vacate the dismissal of their complaint and to restore the action is denied.

FILED
MAR 15 2011
 NEW YORK
 COUNTY CLERK'S OFFICE

DATED: March 14, 2011
 New York, New York

MAR 14 2011

ENTER:


 Barbara Jaffe, JSC
BARBARA JAFFE
 J.S.C.