

<b>Shakespeare v Mutual</b>
2011 NY Slip Op 31755(U)
June 17, 2011
Sup Ct, Nassau County
Docket Number: 018331/08
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 18

\_\_\_\_\_X

KIMBERLIANN SHAKESPEARE,

Plaintiff,

Index No.: 018331/08

Motion Sequence...01

-against-

Motion Date... 05/10/11

**XXX**

WASHINGTON MUTUAL,

Defendant.

\_\_\_\_\_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 and granting the Plaintiff leave to file a Note of Issue, is decided as provided herein.

The Plaintiff commenced the instant negligence action in September, 2008 by the filing of a summons and complaint. Issue was joined by the service of the Defendant's answer on or about November 10, 2008. The matter was certified ready for trial by Order of this Court (Marber, J.) dated January 22, 2010. The Note of Issue was to be filed within 90 days of said Order. It is undisputed that the Plaintiff failed to file the Note of Issue within

90 days of the date of said Order. On April 29, 2010, the case was marked dismissed by the Clerk of the Court due to the Plaintiff's failure to file the Note of Issue within 90 days of the date of the Certification Order.

On January 13, 2010, the parties' counsel appeared for a certification conference. Due to outstanding discovery, this Court (Marber, J.) issued an Order on said date providing for certain discovery to be completed by January 22, 2010 and that certain discovery be provided should the Plaintiff have surgery. At the conference, the parties' counsel signed a Certification Order that was to be held by the Court until January 22, 2010 to ensure compliance with the Court's January 13, 2010 Order. On January 22, 2010, the Court certified this action ready for trial and mailed a copy of the signed Order to the parties' counsel.

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 January 22, 2010 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 had not completed discovery and the Defendant's failure to have provided complete discovery prior to January 22, 2010 "did result in some of the confusion that resulted in plaintiff's inadvertent failure to file a timely Note of Issue". (See Affirmation of Steven J. Mines, dated February 28, 2011 at ¶ 5). Plaintiff's counsel states that between January 22, 2010 and January 26, 2010, it was agreed that the firm of DuBow, Smith & Marothy would "take over the handling of this matter as trial counsel". (*Id* at ¶ 8) Mr. Mines further states that at the time the file was transferred from Plaintiff's prior counsel, Jean Kestel, to DuBow, Smith & Marothy, he "was under the mistaken impression that a Note of Issue in the instant matter had been filed". (*Id* at ¶ 9) The Note of Issue was

not filed and the Plaintiff's counsel argues that the failure to file the Note of Issue resulted from "justifiable law office failure". (See Affirmation of Steven J. Mines, dated February 28, 2011 at ¶ 9).

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 the Plaintiff's counsel submits a copy of the Plaintiff's deposition testimony 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 nor prior counsel tending to explain how or why everyone purportedly inadvertently failed to file the Note of Issue. Indeed, the Plaintiff's counsel's affirmation in support is also silent on this issue other than the conclusory statements contained therein.

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, in opposition to the motion, argues that the explanation is "baseless" in that Plaintiff's counsel's law firm substituted for Jean Kestel only four (4) days after January 22, 2010, the date the Certification Order was signed by this Court. Additionally, the Defendant's counsel argues that the Plaintiff failed to appear for an Independent Medical Examination as required in the Court's January 13, 2010 Order and that this violation is not addressed by the Plaintiff's counsel. The Defendant's counsel asserts that the combined failure of the Plaintiff to appear for the IME with Plaintiff's counsel's failure to review his file for more than a year

to ascertain the status of the case evidences an intent to abandon this matter. Defendant's counsel also contends that the Plaintiff's counsel's "vague, conclusory and unsubstantiated claims of law office failure" should be rejected. Counsel for the Defendant also argues that the testimony of the Plaintiff at her Examination Before Trial, 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 Defendant relies on the testimony of its witness, John Stackhouse, who testified at an Examination Before Trial on January 13, 2010 that the Defendant was not involved in the maintenance, operation or repair of the ATM machine which the Plaintiff claims to have caused her injuries. The Defendant points to the fact that the Plaintiff commenced a new action on March 30, 2010 against NCR Corp., the entity the Defendant's witness identified as being responsible for the maintenance, operation or repair of the ATM machine. Thus, the Defendant contends that it has conclusively established that the operation and maintenance of the ATM was the obligation of NCR Corp. and the use of the Plaintiff's testimony from her Examination Before Trial without any additional affidavits is insufficient to establish a meritorious cause of action.

First, with respect to the "law office failure" argument, the Court finds that the Plaintiff's counsel 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 statement “At the time the file was transferred from the attorney of record to Dubow, Smith & Marothy your affirmant was under the mistaken impression that a Note of Issue in the instant matter had been filed by the attorney of record before the file was transferred”. This statement contradicts the Plaintiff’s counsel’s claim in his Reply Affirmation that he did not receive a copy of the Certification Order. How would Plaintiff’s counsel conclude that the Note of Issue was filed at the time the file was transferred if he never saw a copy of the Certification Order? The statement defies logic and casts doubt as to the credibility of the statements made by Plaintiff’s counsel. 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 use of the Plaintiff’s testimony at her Examination Before Trial alone, absent any additional probative affidavit, 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 Defendant shall submit a judgment on notice.

This decision constitutes the Order of the court.

DATED: Mineola, New York  
June 17, 2011



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Hon. Randy Sue Marber, J.S.C.  
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**ENTERED**  
JUN 21 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE