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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER Justice

IA PART 16

Index Number : 110630/2009
ESTATE OF ELMER SANZARI
vs.
NEW YORK VASCULAR ASSOCIATES
SEQUENCE NUMBER : 002
VACATE STAY/ORDER/JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is in all respects denied and the dismissal of this action shall stand.

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

Dated: November 13, 2012 NOV 13 2012

ALICE SCHLESINGER J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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ESTATE OF ELMER SANZARI and
PATRICIA SANZARI,

Plaintiff,

Index No. 110630/09
Motion Seq. No.002

-against-

NEW YORK VASCULAR ASSOCIATES,
DR. MARK ADELMAN, NEW YORK UNIVERSITY
MEDICAL CENTER, JONATHAN ROSENBERG, M.D.,
MR./MS. NIJHER, C.R.N.A., and DR. VOLJOV, M.D.,

Defendants.

SCHLESINGER, J.:

On December 22, 2010, this Court dismissed this medical malpractice action. The rationale for this dismissal, which was pursuant to 22 NYCRR §202.27(b) and CPLR §3126, was the plaintiff's failure to provide discovery and to appear at a duly scheduled status conference following an earlier decision of October 6, 2010 wherein I had granted defendants' motion to compel plaintiff to provide discovery. There, I specifically directed plaintiff's counsel to serve a Bill of Particulars by October 25, 2012. That was not done. I gave counsel several extensions of time to comply. Finally, I set a new deadline for compliance that was to be demonstrated at a discovery conference scheduled for December 22, 2010. However, no attorney appeared for the plaintiff on that date. No discovery or Bill of Particulars had been provided in the interim. No explanation was given regarding these defaults. All of the above gave rise to the December 22, 2010 dismissal.

Defense counsel served the judgment and order of dismissal on counsel for the plaintiff on March 16, 2011. On January 20, 2012 (more than one year after my December 22, 2010 decision but two months shy of a year from service), plaintiff's counsel brought the instant motion to vacate the default.

In a medical malpractice action, there are two essential prongs that a plaintiff has to meet before she can expect serious consideration of her motion to vacate a default leading to a dismissal; namely, a showing of excusable default together with a Certificate of Merit from a qualified physician. If those are met, then it is within the Court's discretion whether or not to grant the motion.

Here, one could find an excusable default predicated on confusion between the two attorneys for the plaintiff and, more significantly, on the health of moving counsel Jacqueline Cherveny Brown. Ms. Brown was involved in a serious automobile accident on March 23, 2010, which clearly affected and still affects her ability to fully represent Ms. Sanzari, the plaintiff here.

But as to the second prong, there is an absolute failure here to submit a timely, adequate Certificate of Merit from a qualified physician. There are a myriad of ways in which this prong has not been met. One could write extensively on the deficiencies. Rather, I will point out those that are most significant and describe the content of the two proffered documents that were submitted.

What must be noted in the first instance is that in Ms. Brown's moving papers, there was no Certificate of Merit included. This omission did not go unnoticed by

opposing counsel, who represents defendants New York Vascular Associates, Dr. Mark Adelman, NYU Hospital Center, s/h/a New York University Medical Center, and Dr. Jonathan Rosenberg.[1] Under the heading "Plaintiff has not made the requisite showing of merit", counsel points out that not only did Ms. Brown fail to submit an affidavit of merit, but she failed also in even noting the underlying facts and/or claims in the case.

Moving counsel responded to this problem, inappropriately in a Reply where no new facts are allowed to be offered, by submitting as Exhibit B to her papers a March 13, 2012 letter to a Dr. Malik signed by law clerk Rich Friedman thanking him for his verbal and written summary opinion after "reviewing the enclosed 13 pages" (an infinitesimal part of the decedent's hospital records). Also included as part of Exhibit B is a half-page statement from Dr. Adbul Malik. This statement, consisting of four numbered points and a bare signature, allegedly Dr. Malik's, very briefly discusses three issues involved in the case. One has to do with the size of the aneurysm, the second with the desirability of additional pre-operative tests, and the third addresses an alleged serious discrepancy between the "clamp time" documented in the operative report and the anesthesia record.

At oral argument, I remarked at the insufficiency of Dr. Malik's statement, noting among other things that it mentioned not one defendant and that it failed to

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[1] The remaining two defendants never appeared in this action, and plaintiff never moved for a default judgment against them.

deal in any way with standard of care. However, since it seemed clear that Ms. Brown was continuing to suffer from her injuries and also seemed to be unacquainted with medical malpractice claims and acknowledged as much by asking the Court to vacate the default so that another law firm could continue the action[2], I elected to give Ms. Brown one final opportunity to supplement her papers to show that the action had merit. Defense counsel would then have an opportunity to have the last word in a Sur-Reply.

In response, Ms. Brown submitted a sworn eighteen-paragraph affidavit from Dr. Reginald Abraham, who practices in California and pursuant to his CV has board certifications in surgery and thoracic sugary. He states that he reviewed "an extensive set of documents" (¶2) pertaining to Elmer Sanzari, the decedent, which he includes. They consist of 157 selected pages from the NYU Hospital Record, which according to defense counsel in Sur-Reply constitute only about 10% of the complete records.

However, more significantly, Dr. Abraham discusses informed consent in ¶¶5-7, concluding that since he did not see a document pertaining to consent, one must not exist. Thereafter, on July 27, 2012 with the Court's permission, defense counsel sent to the Court and opposing counsel such a consent form signed by Mr. Sanzari on September 26, 2006 for a surgical procedure of that date. Most of the remainder

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[2] In this regard, in Ms. Brown's original papers, she described herself as "Temporary Attorney for Plaintiff."

of Dr. Abraham's affidavit discusses a MRSA infection contracted by Mr. Sanzari, ultimately requiring surgery in late December 2006, that he was allegedly "set up" for due to his weakened post-operative state.

Finally, in ¶15, Dr. Abraham opines "upon information and belief" but not with a reasonable degree of medical or surgical certainty, that Dr. Adelman and the medical facility "and all other defendants" are responsible for the presence of the MRSA infection and the pain and suffering endured by the decedent as a result of the infection.

This statement does not distinguish between defendants. More significantly, it is completely conclusory and lacks any semblance of how this physician reached his opinion. Finally, there is no discussion of standard of care.

The motion to vacate the default is denied. Moving plaintiff has been given a multitude of opportunities here to revive this action, but all have failed. It clearly would be an abuse of discretion to vacate the dismissal when a meritorious claim has never been shown.

Accordingly, it is hereby

ORDERED that plaintiff's motion to vacate this Court's December 22, 2010 decision dismissing this action is in all respects denied.

Dated: November 13, 2012

J.S.C.

ALICE SCHLESINGER