

Fleming v Visiting Nurse Serv.

2013 NY Slip Op 31633(U)

July 19, 2013

Sup Ct, New York County

Docket Number: 402669/12

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LoBis
Justice

PART 6

Index Number : 402669/2012
FLEMING, JANE
vs.
VISITING NURSE SERVICE
SEQUENCE NUMBER : 003
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE 5-28-13
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to (for) default judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-5
Answering Affidavits — Exhibits _____ | No(s). 6-7
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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JUL 23 2013
NEW YORK
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THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: 7/19/13

Joan B. LoBis, J.S.C.
JOAN B. LOBIS

- 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

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
Jane Fleming,

Plaintiff,

Index No. 402669/12

-against-

Decision and Order

Visiting Nurse Service, Stephanie Rose Witt, Hospital for Special Surgery, Federico P. Girardi, M.D., David Helfet, M.D., Vanessa Calderon, M.D., Pamela Charney, M.D., and New York Presbyterian Hospital,

Defendants.

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

This medical malpractice action arises out of complications, including bedsores, following surgery performed on Jane Fleming on October 13, 2010. In motion sequence number 2, Defendant Stephanie Rose Witt moves to dismiss the complaint under Rule 3211(a)(8) of the Civil Practice Law and Rules on grounds that this Court lacks personal jurisdiction over her. Plaintiff Jane Fleming cross-moves under Sections 2004 and 3012(d) of the Civil Practice Law and Rules to extend the time in which to serve process on Defendant Witt. In motion sequence number 3, Plaintiff moves under Section 3215 of the Civil Practice Law and Rules for a default judgment against Defendant Witt for failing to answer the complaint. Lastly, in motion sequence number 4, Plaintiff moves for an extension of time under Sections 2004 and 3012(d) of the Civil Practice Law and Rules to extend the time in which to serve process on Defendant Vanessa Calderon, M.D. These motions have been consolidated for purposes of this decision and order. For the following reasons, the motions are denied.

Plaintiff Jane Fleming was operated on by orthopedic surgeon, Dr. Federico Girardi,

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on October 13, 2010, at the Hospital for Special Surgery. She received post-operative treatment from Defendant Visiting Nurse Service (VNS) and its employees, including Stephanie Witt. Witt last treated Fleming in December 2010, and Dr. Calderon, who provided subsequent medical care to Fleming at New York Presbyterian Hospital, last treated her in March 2011.

In August 2012, Plaintiff sued, alleging medical malpractice and lack of informed consent. On September 6, 2012, Plaintiff attempted to serve process on Defendant Witt at the offices of VNS. Several defendants subsequently filed answers, but neither Witt nor Calderon have appeared in the action.¹ In March of this year, a paralegal in the office of counsel for Plaintiff wrote to Defendant Witt in care of VNS's address, enclosing another copy of the summons and complaint, and requesting that Defendant Witt transmit the papers to her "liability insurance company to interpose an immediate answer."

After receiving correspondence from Plaintiff's counsel's office, VNS advised Plaintiff's counsel that Witt had not worked at VNS since June 1, 2011. Nevertheless, on May 20, 2013, in motion sequence number 3, Plaintiff moved for default judgment against Defendant Witt in reliance on the alleged September 2012 service of Witt at VNS's office. Defendant Witt opposed the motion under Section 3215(f) of the Civil Practice Law and Rules, claiming that Plaintiff had failed to make a proper showing that the summons and complaint had been served. In support of her claim that service was improper, Defendant Witt offered the affidavit of counsel for her former employer, VNS, showing that Defendant Witt had not worked for that company since June 2011.

¹This Court previously consolidated Index No. 805020/2013 with this action, in an decision and order dated May 24, 2013.

Notwithstanding the filing of Plaintiff's motion for default judgment against Defendant Witt, Plaintiff then served a demand for discovery and inspection on VNS seeking a last known address for Witt, which VNS provided on May 28, 2013.

Meanwhile, Defendant Witt moved to dismiss the Plaintiff's complaint for lack of personal jurisdiction, relying on the same basis for opposing Plaintiff's motion for default judgment, claiming that Fleming had served her at VNS's office more than one year after Witt had left that employment. In response to Defendant Witt's motion to dismiss for lack of personal jurisdiction, on May 29, 2013, Plaintiff cross-moved under Sections 2004 and 3012(d) of the Civil Practice Law and Rules for an extension of time in which to serve process on Defendant Witt, which Witt opposed. In a reply, Plaintiff related that she had served process on Witt personally on June 4, 2013.

Lastly, on the same day that Plaintiff served process on Defendant Witt in person, Plaintiff also sent a demand for discovery and inspection to Defendant, New York Presbyterian Hospital, requesting a last known address for Defendant Calderon. Plaintiff now moves for an extension of time in which to serve Defendant Calderon. Plaintiff claims that she was unable to serve Dr. Calderon because Dr. Calderon's former employer "has refused to accept service on" Dr. Calderon's behalf. Plaintiff's reliance on serving whom she thought was Calderon's "agent," she claims, provides a reasonable excuse for the delay in serving Dr. Calderon. The motion is unopposed.

Section 308 of the Civil Practice Law and Rules governs personal service upon natural persons. Under that section, personal service is made in pertinent part by delivering the summons to

a “person of suitable age and discretion at the actual place of business, dwelling place . . . and by either mailing the summons to the person to be served” at his place of business or residence. Id. Section 2004 of the Civil Practice Law and Rules allows this Court to “extend the time fixed by any statute, rule or order for doing any act . . . whether the application for extension is made before or after the expiration of the time fixed.” Section 3012(d) in turn permits this Court to “extend the time to appear or plead, or compel the acceptance of a pleading untimely served,” where the movant shows a reasonable excuse for any delay or default.

The parties’ motions are denied. Defendant Witt’s motion to dismiss Plaintiff’s complaint for lack of jurisdiction based on the September 2012 attempted service of process is moot, since in the course of litigating the motion, as Plaintiff’s reply relates, Plaintiff recently served Defendant Witt. The validity of that recent service is not before this Court; accordingly, Defendant Witt’s motion is dismissed without prejudice to any separate claim that Defendant Witt might have arising out of the June 2013 service of process. Furthermore, this Court finds that Plaintiff’s motion for default judgment against Defendant Witt for failing to file an answer previously lacks merits. Plaintiff has failed to show that the September 2012 service on Defendant Witt was proper.

Lastly, this Court denies Plaintiff’s motion for an extension of time in which to serve Defendant Calderon. The record shows that Plaintiff only recently sought Defendant Calderon’s last known address from her employer during the events of this action. The record is uncontroverted that Dr. Calderon treated Plaintiff as recently as March 2011. Plaintiff fails to show how she has “fail[ed] to timely serve” Dr. Calderon in this action. Nor does her delay in seeking a last known address in reliance on the doctor’s relationship with the hospital at the time of the events in this case present

“reasonable excuse” for any delay. Under these circumstances, therefore, Plaintiff’s request for an extension based on a reasonable excuse for delay has not been shown. Accordingly, it is

ORDERED that Defendant Witt’s motion to dismiss is denied, it is further

ORDERED that Plaintiff’s motion for default judgment against Defendant Witt is denied, and it is further

ORDERED that Plaintiff’s motion to extend time to serve Defendant Calderon is denied.

Dated: July 19, 2013

ENTER:



JOAN B. LOBIS, J.S.C.

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SOUTHERN DISTRICT OF NEW YORK