

McCormick v City of New York

2014 NY Slip Op 30255(U)

January 28, 2014

Supreme Court, New York County

Docket Number: 100325/2005

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SCANNED ON 1/30/2014
[* 1]
**SUPREME COURT OF THE STATE OF NEW YORK -
NEW YORK COUNTY**

PRESENT: KATHRYN E. FREED, J.S.C.
Justice

PART 5

MCCORMICK, KEVIN F.

INDEX NO. 100325/2005

MOTION DATE _____

- v -

CITY OF NEW YORK

MOTION SEQ. NO. 004

cal: # 37

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JAN 30 2014

**COUNTY CLERK'S OFFICE
NEW YORK**

**KATHRYN E. FREED
J.S.C.**

DATED: 1/28/2014

[Signature]
KATHRYN E. FREED, J.S.C.
JUDICIAL OFFICE SUPREME COURT

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 - PART 5

-----X
KEVIN F. McCORMICK,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

-----X
KATHRYN E. FREED, J.S.C.

DECISION/ORDER
Index No. 100325/05
Seq. No. 004

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	...1 (Ex. A)....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
NOTICE OF CROSS-MOTION2 (Exs. A-F)
REPLYING AFFIDAVITS.....	...3.(Exs. A-G)
MEMORANDUM OF LAW.....4.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER ON THIS MOTION AND CROSS-MOTION IS AS FOLLOWS:

Plaintiff Kevin F. McCormick moves for an order restoring the captioned action to the trial calendar. Defendant The City of New York (“the City”) cross-moves, pursuant to CPLR 3404, to dismiss the complaint based on plaintiff’s alleged failure to move in a timely fashion to restore the case to the trial calendar. After oral argument, a review of the papers presented, and all relevant statutes and case law, the Court **denies** plaintiff’s motion with leave to renew upon proper papers and **denies** the City’s cross-motion.

FILED

JAN 30 2014

Factual and Procedural Background

This case arises from an incident on October 14, 2003 in which plaintiff was allegedly injured when he slipped and fell on a pedestrian ramp at the corner of Washington and Rector Streets in Manhattan. Following a pre-trial conference on August 15, 2012, this Court (Silver, J.), inter alia, vacated the note of issue and struck the case from the trial calendar. The Court further ordered that, upon the completion of discovery, plaintiff may “move to restore the case to the trial calendar” and “may file a new note of issue and statement of readiness.”

On August 16, 2013, plaintiff moved to restore the case to the trial calendar and the City opposed the motion and cross-moved to dismiss the complaint pursuant to CPLR 3404.

Positions of the Parties

Plaintiff argues that the case should be restored to the trial calendar. Plaintiff’s counsel asserts that, as a result of plaintiff’s poor health, this case was “stricken from the [t]rial [c]alendar] by Order dated August 15, 2012. Counsel further maintains that plaintiff is “prepared to present for in camera review a medical expert opinion attesting to plaintiff’s present and anticipated ability to proceed at trial.”

The City opposes plaintiff’s motion to restore, asserting that, although plaintiff did not specify the section of the CPLR pursuant to which he moves to restore the case to the trial calendar, the proper section is CPLR 5015, which governs vacating defaults, and plaintiff failed to establish his right to relief pursuant to that section. The City also cross-moves to dismiss the complaint pursuant to CPLR 3404 because plaintiff did not move to restore the case to the trial calendar by the deadline of August 15, 2013, one year after Justice Silver marked the case off of the trial calendar.

In opposition to the City's motion to dismiss and in further support of his motion to restore, plaintiff's counsel asserts that, because he believed that Justice Silver's order was signed on August 21, 2012, the filing of plaintiff's motion to restore on August 16, 2013 was not untimely. Thus, asserts counsel, the "missed deadline" was an "excusable default" pursuant to CPLR 5015.

Conclusions of Law

Despite the contentions of the parties, plaintiff is not obligated to establish an excusable default pursuant to CPLR 5015 in order to bring the instant application. CPLR 5015, entitled "[r]elief from judgment or order", is inapplicable herein. The plaintiff is not seeking relief from an order or judgment granted upon default. As noted above, Justice Silver stated in his Order of August 15, 2012, that plaintiff may, "upon completion of all outstanding discovery...move to restore the case to the trial calendar" and "may file a new note of issue and statement of readiness." Justice Silver set no deadline for moving to restore or for filing a note of issue and neither his Order, nor any subsequent Order, deemed plaintiff in default. Although plaintiff seeks to restore the matter to the trial calendar, his motion contains no indication that all necessary discovery has been completed. Nor does the motion annex a note of issue and certificate of readiness. Therefore, the Court denies plaintiff's motion with leave to renew upon proper papers reflecting that the case is trial ready.

The City's cross-motion to dismiss the complaint pursuant to CPLR 3404 is denied. CPLR 3404 provides that:

A case in the supreme court or a county court marked "off" or struck from the calendar or unanswered on a clerk's calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.

Contrary to the City's argument, plaintiff's failure to move to restore the case to the trial calendar by August 15, 2013 does not warrant the dismissal of the action pursuant to this section. Rather, Justice Silver's Order vacating the note of issue and striking the case from the trial calendar reverted the matter to pre-note of issue status. See *Willis v City of New York*, 2014 N.Y. App. Div. LEXIS 209 (2d Dept, January 15, 2014); *Tejada v Dyal*, 83 AD3d 539 (1st Dept 2011); *Sellitto v Women's Health Care Specialists*, 58 AD3d 828 (2d Dept 2009); *Travis v Cuff*, 28 AD3d 749 (2d Dept 2006). Thus, "[the City's] avenues to dismiss this pre-note of issue case are limited to CPLR 3216 and 22 NYCRR 202.27. The latter is inapplicable to the facts herein, and [the City] failed to comply with the preconditions of the former." *Tejada, supra* at 540 (*citation omitted*).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiff Kevin F. McCormick is denied with leave to renew upon proper papers; and it is further,

ORDERED that the motion by defendant The City of New York is denied; and it is further,

ORDERED that this constitutes the decision and order of the Court.

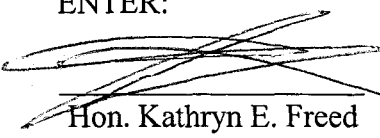
DATED: January 28, 2014


ENTER:

FILED

JAN 30 2014

4
COUNTY CLERK'S OFFICE
NEW YORK


Hon. Kathryn E. Freed
J.S.C.


KATHRYN E. FREED
J.S.C.