

Wallace v Desire

2014 NY Slip Op 31321(U)

May 14, 2014

Supreme Court, Suffolk County

Docket Number: 2011-37045

Judge: Jeffrey Arlen Spinner

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Part 21 of the Supreme Court of the State of New York in and for the County of Suffolk, at the Courthouse thereof in Riverhead, New York on the 14th day of May, 2014.

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

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<p>BARBARA WALLACE,</p> <p style="text-align: right;">Plaintiff</p> <p style="text-align: center;">- against -</p> <p>ANTHONETTE R. DESIRE and her Husband NATHANEAL DESIRE, JOHN DOE 1-3 as yet unknown to Plaintiff, but known to Defendants whom Plaintiff hired to care for Plaintiff, MATHERS HOSPITAL also known as JOHN T. MATHERS MEMORIAL HOSPITAL,</p> <p style="text-align: right;">Defendants</p>

INDEX NO.: 2011-37045

Mot. Seq. 004-MG
Original Return Date: March 19, 2014
Final Submit Date : April 23, 2014

**ORDER GRANTING JUDGMENT ON
DEFAULT AND DIRECTING
INQUEST ON DAMAGES**

The within matter comes before the Court upon the application of Defendants DR. ANTHONETTE R. DESIRE s/h/a ANTHONETTE R. DESIRE and DR. NATHANEAL DESIRE s/h/a HER HUSBAND NATHANEAL DESIRE, wherein they seek an Order dismissing Plaintiff's claims, granting a default judgment on their counterclaims and scheduling an inquest thereon. Plaintiff, through counsel, has interposed vehement but vacuous opposition thereto, lacking proof of service of same upon opposing counsel (which may account for the lack of a reply thereto by defense counsel) and has also filed what appears to be some sort of application for the appointment of a Guardian Ad Litem. In addition, Plaintiff has filed an additional Attorney Affirmation in support of her position, though without leave of Court and in direct derogation of the provisions of the CPLR.

The operative facts, briefly stated, are as follows: Plaintiff is 74 years of age, physically infirm and is purportedly afflicted with a plethora of ailments, none of which have been established by any competent evidence. The moving Defendants are both physicians by profession, who attended the same house of worship as Plaintiff. At some time prior to the commencement of this action, Plaintiff came under the care of Dr. Anthonette R. Desire and thereafter, they entered into certain financial arrangements, including the grant of a Power of Attorney from Plaintiff to Defendant together with the purchase of a residence in a senior citizen community in Toms River, New Jersey, allegedly for the use and benefit of Plaintiff. Thereafter and for reasons not made clear to the Court, the relationship between the parties

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deteriorated markedly and rather suddenly. Defendant promptly repudiated the Power of Attorney, attempted to quitclaim her interest in the realty to Plaintiff (which tender, incredibly, was refused by Plaintiff) and this action followed.

Plaintiff commenced this action by filing a Summons & Complaint on December 11, 2011, alleging fraud, misrepresentation, breach of contract, negligence and reckless conduct and thus demanding \$ 10,000,000.00 in unspecified money damages. The Complaint was duly verified by Plaintiff herself, who acknowledged the same before her attorney, who acted as a notary, presumably administering the appropriate oath. Issue was timely joined on January 20, 2012, with said Defendants answering and asserting nineteen Affirmative Defenses and one Counterclaim. Plaintiff defaulted by failing to interpose any Reply thereto, neither was there any disclosure had. Instead, Plaintiff, by application returnable April 24, 2013, sought leave to serve and file an Amended Complaint to add causes of action sounding in medical malpractice. After much colloquy and argument and the Court noting that the motion was made some sixteen months after issue was joined, the Court, on July 10, 2013 and over the vehement objections of Defendants, permitted Plaintiff to amend, only with the greatest reluctance and with the express proviso that Plaintiff serve and file the Amended Complaint not later than July 24, 2013 and further, that a Certificate of Merit as mandated by CPLR § 3012-a, be served and filed not later than August 9, 2013. Instead, Plaintiff, in derogation of the Court's express directives, on August 28, 2013, served, by mail, an Amended Complaint containing ten causes of action but *without* the required Certificate of Merit, which bore the handwritten notation that it had been filed on July 26, 2013. On September 23, 2013, Defendants interposed an Amended Verified Answer containing twenty one Affirmative Defenses and two Counterclaims, including one against Plaintiff's counsel for engaging in frivolous conduct in this litigation. Thereafter and on October 3, 2013, said Defendants filed, as of right, Amended versions thereof, pursuant to CPLR § 3025(a). Plaintiff's time to serve and file a Reply thereto expired on October 24, 2013 in accordance with CPLR § 3025(d). As of the date of this decision, Plaintiff has neither interposed any Reply whatsoever nor has she made application for an extension of time as permitted by the provisions of CPLR § 3025(b). It is critical to note here that each of Defendants' pleadings were duly verified. Equally important is that there were Compliance Conferences held before the Court, at which all counsel appeared, on October 2, 2013, November 3, 2013, January 8, 2014, March 26, 2014 and April 23, 2014. All of the issues, including that of Plaintiff's continuing and uncured default, were explored and though admonished *ad nauseum* by the Court, Plaintiff's counsel has stubbornly failed, without any believable reason, to move forward with the prosecution of this matter. Defendants' counsel now seeks a default judgment against both Plaintiff and her counsel together with an inquest wherein their damages, if any, may be ascertained and fixed by the Court.

In response to Defendants' application for default, Plaintiff has submitted initial opposing papers which do not bear any proof of service upon her adversaries. This may account for the surprising lack of any response thereto by Defendants. Moreover, Plaintiff has, without seeking leave of Court, gratuitously filed additional opposition papers which, if anything, serve to actually buttress Defendants' application rather than her opposition.

More disturbing is that Plaintiff has also filed a multiple page document styled as a Notice of Motion to Appoint Guardian Ad Litem. That document fails to comport with the requirements of CPLR § 2214 in that it does not specify the time and place of any hearing nor does it coherently set forth the relief

demanding by the applicant. Indeed, while it purports to request the appointment of a Guardian Ad Litem for Plaintiff, in reality it requests a Guardian Ad Litem "...for [VULNERABLE], an adult who is alleged to be the victim in this case." Incredibly, it goes further, stating verbatim that "A Guardian Ad Litem is necessary to interview the minor child without the consent or presence of the parents or grandparents of the child. By the child's mother's own admission, the child has been the subject of at least twelve inquiries by the Durham County Department of Social Services regarding possible abuse, neglect or dependency." Like Plaintiff's opposing papers, it is devoid of any proof of service as the same is mandated by the CPLR. That having been said and ignoring the very incoherence of Plaintiff's claimed Notice of Motion, the Court gleans therefrom that Plaintiff, it is said, is afflicted with dementia which effectively prevents her from participating in this matter in any meaningful way. In support of this claim, Plaintiff's counsel appends her own self-serving and unsupported Affirmation together with "medical evidence," the sum total thereof being uncertified copies of several non-consecutive pages of what appears to be a partial medical record, which is dated on or about February 11, 2011. This "evidence" upon which Plaintiff's counsel rests her claims of dementia actually pre-dates the commencement of this action by some ten months and, as of the date of this Order, it is not less than thirty nine months old. If Plaintiff's mental condition was in a state of sufficient deterioration such that she was unable to effectively participate in this action as of February 11, 2011, how is it that Plaintiff's counsel felt sufficiently comfortable with having Plaintiff execute the verification, which counsel acknowledged, on December 2, 2011?

An impartial review of this matter, as shown by the facts hereinabove set forth, amply demonstrates the continuing uncured default on the part of both Plaintiff and her counsel. This is particularly glaring when it is considered that the Court, over the strenuous objections of Defendants' counsel, afforded numerous lengthy continuances to Plaintiff's counsel so as to enable her to avoid the consequences of a default. Plaintiff's counsel, for whatever reason, has failed to utilize the extensions of time that were provided to her herein, instead electing to go by her own rules, as it were.

While it is the policy of our courts to resolve matters on the merits wherever possible and defaults are not the favored manner of resolution, it is incumbent upon the party opposing the default to show good cause for allowing the matter to go forward on the merits. Where, as here, Plaintiff has failed and neglected to take any substantial action in a period approaching two years and has declined to follow the express directives of the Court on multiple occasions, the Court is hard pressed to afford relief to such a party, *Tucker v. Rogers* 95 AD 2d 960 (3rd Dept. 1983).

The Court is necessarily guided by the provisions of the CPLR which govern pleading. It has been held that the failure of Plaintiff to serve and file the Certificate of Merit as mandated by CPLR § 3012-a is jurisdictional in nature and warrants dismissal of the Complaint, *Sisario v. Amsterdam Memorial Hospital* 146 AD 2d 837 (3rd Dept. 1989) and this failure alone would constitute sufficient cause to grant the present application. However, Plaintiff's counsel has failed, without any excuse or explanation whatsoever, to serve and file either the Certificate of Merit or a Reply and her time to do so has long since expired. To permit Plaintiff to continue prosecution of her claim, without requiring her to adhere to the most basic requirements of civil practice (to say nothing of courtesy to opposing counsel and the Court) would be both unfair and inequitable and would severely prejudice Defendants at this late juncture, *Citrin v. Royal Insurance Co.* 172 AD 2d 795 (2nd Dept. 1991). Even more disturbing is the fact that Plaintiff's counsel has, for whatever reason, chosen to systematically and continually disregard

this Court's many express directives, thus unnecessarily prolonging this litigation, increasing expenses incurred by Defendants, wasting the Court's time and further compelling defense counsel to prepare, serve and file a rather substantial motion for default. Regrettably, it is clear to this Court that the conduct of Plaintiff's counsel in the prosecution of this action is frivolous as the same contemplated by 22 NYCRR § 130-1.1, thus warranting imposition of appropriate sanctions. Inasmuch as no believable excuse has been advanced for the continuing default by Plaintiff and her counsel, the Court finds that Defendants' application for default and sanctions must be granted.

Accordingly, it is hereby

ORDERED that the application by the moving Defendants for the entry of judgment by default on their Counterclaims as against the Plaintiff and her counsel of record shall be and the same is hereby granted; and it is further

ORDERED that Plaintiff's Complaint and Amended Complaint shall be and the same are hereby stricken and dismissed, with prejudice, as to all Defendants; and it is further

ORDERED that the moving Defendants shall be and are hereby awarded judgment by default with respect to liability as against Plaintiff and her counsel of record; and it is further

ORDERED that this matter shall be set down for an inquest to determine and fix the damages, if any, sustained by the moving Defendants, if any, that may be recoverable from Plaintiff, together with an assessment of costs and/or attorney's fees upon Plaintiff's counsel for engaging in frivolous conduct pursuant to 22 NYCRR § 130-1.1; and it is further

ORDERED that the inquest in this matter is hereby scheduled for 2:30 p.m. on June 25, 2014, at the Supreme Court of the State of New York, Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead, New York, which shall not be adjourned except upon Order of the Court; and it is further

ORDERED that the moving Defendants' counsel shall serve and file a Note of Issue and a copy of this Order with Notice of Entry upon Plaintiff's counsel.

Dated: May 14, 2014
Riverhead, New York

ENTER:



JEFFREY ARLEN SPINNER, J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION

SCAN

DO NOT SCAN

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